[ANNOTATIONS INCLUDE 168 N. C.]

NORTH CAROLINA REPORTS

VOL. 62

CASES IN EQUITY ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM JUNE TERM, 1866
TO JANUARY TERM, 1868
INCLUSIVE

BY S. F. PHILLIPS

ANNOTATED BY
WALTER CLARK
(2 ANNO. ED.)

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1866

PATRICK H. WINSTON, Ex'r., etc. v. EDWARD WEBB and others.

1. Where a residue in a will was given to John, Elizabeth, Edward, and Robert, "four children of L. S. and P. E. Webb," and John died in the lifetime of the testatrix: *Held*, that his share did not survive to the other residuary legatees, but was undisposed of, and went to the next of kin.
2. Distinction between the cases, where there is a lapse of a share in a residue given "to the children of a certain person, to be equally divided between them" *as a class*, and where there is such a lapse in residue given to be equally divided among such children, *nominatim*, stated by BATTLE, J.

ORIGINAL BILL, filed at Spring Term, 1866, of BERTIE, to obtain instructions upon the residuary clause in the will of Elizabeth Spellings, deceased.

The clause in question was: "All the balance of my estate of every kind I give to John Webb, Elizabeth Webb, Edward Webb and Robert Webb, four children of L. S. and P. E. Webb."

Of the residuary legatees John died before the testatrix, unmarried.

The other residuary legatees, and the next of kin of the testatrix became parties to the cause, and at the said term it was, by consent, set for hearing upon bills and answers, and transmitted (2) to this court.

Winston, for the complainant.

No counsel in this court for the defendants.

BATTLE, J. If a residuary fund be given by will "to the children of a certain person, to be equally divided between them," *as a class,*

and one of them die in the lifetime of the testator, his share will lapse for the benefit of the other residuary legatees. *Viner v. Francis,* 2 Cox, 190. But if such a fund be given to the children, *nominatim,* or to the six or any other number of children, to be equally divided between them, and one of the children die before the testator, his or her share will lapse, but will not fall into the residue for the benefit of the other children, whose shares, it is said, can not be enlarged by such an event. *Johnson v. Johnson,* 38 N. C., 426; *Owen v. Owen,* 1 Atk., 494; *Page v. Page,* 2 Peer Wms., 489; *Ackroyd v. Smithson,* 1 Bro. C. C., 503. These cases show that the lapsed residuary share is undisposed of by the will, and must be distributed among the next of kin. In *Allison v. Allison,* 56 N. C., 236, a contrary doctrine was laid down, as it had also been in England by SIR JOSEPH JEKYLL, the Master of the Rolls, in *Hunt v. Berkeley,* decided in 1731. But *Hunt v. Berkeley* was afterwards expressly referred to and overruled by the cases of *Owen v. Owen* and *Page v. Page,* and the ruling in the latter cases is now considered the settled doctrine in England. In like manner we must hold that the part of the decision in *Allison v. Allison,* 56 N. C., 236, which relates to the residuary share of one of the children, that lapsed by his death in the life of the testator, can not be sustained. In the case which is now before us the death of one of the children and residuary legatees, in the lifetime of the testatrix, caused the (3) lapse of the share intended for him, and, upon the authority of the English cases and of *Johnson v. Johnson,* 38 N. C., 426, we hold that it does not go to the other residuary legatees, but to the defendant, Ann Rebecca Scott, who is the sole next of kin of the testatrix. There may be a decree for an account and settlement in accordance with this opinion, the costs to be paid out of the funds in the hands of the executor.

PER CURIAM. Decree Accordingly.

Cited: Hastings v. Earp, post 7; *Twitty v. Martin,* 90 N. C., 646; *Battle v. Lewis,* 148 N. C., 150.

L. L. CLEMENTS v. HENRY MITCHELL and others.

1. The rule, that entries in the books of a firm are evidence against all of the parties, is true only of those made whilst the firm is doing business; therefore, entries so made by a partner who is winding up the partnership under a transfer to him for that purpose, are not, *per se,* evidence for him against a copartner.
2. A partner, who undertakes to wind up the firm-business, stands in the place of an executor, and therefore can establish disbursements only by vouchers properly authenticated.

CLEMENTS *v.* MITCHELL.

ORIGINAL BILL, praying the settlement of two partnerships, partially heard by this court at December Term, 1860, and now coming up for further directions.

A sufficient statement of the fact will be found, 59 N. C., 171-72.

Moore and *Donnell,* for the complainant.
Winston, for the defendant, Mitchell.

PEARSON, C. J. The commissioner reports that, in settling the business of the firm of Clements & Waldo, Clements paid out more than he had collected, by the sum of $9,148.66, and he says, "this amount is copied from the ledger of Waldo & Clements, and its existence (4) there is about the only proof of its correctness."

The defendant excepts to this item in the report, on the ground that there was no evidence to support it. The exception must be allowed.

Whilst a firm is doing business, its books are evidence against any and all of the co-partners, and it makes no difference when the entries are made. That principle, however, has no application to this case, in which the firm had stopped doing business, and all of its effects had been transferred to Clements, who was to settle up its affairs. The account kept by him does not set out the dealings of the firm, or contain a memorial of *its* actings or doings, but is merely a memorandum kept by Clements to show *his* receipts and disbursements. The fact that he made use of the ledger of the firm, instead of getting a book of his own, makes no sort of difference, although it seems to have misled the commissioner.

A partner who undertakes to wind up the affairs of the firm, stands in the position of an executor or administrator, and for that reason books kept by him of his collections and disbursements are not evidence for him, and he must show the amount of disbursements by the production of vouchers properly authenticated.

We find among the papers a bundle, said to contain vouchers. It was not, however, opened or acted upon by the commissioner, and we can have nothing to do with it.

As the other exceptions were not insisted upon, there will be a reference to reform the account, and show what remains due by Mitchell to Clements; allowing Waldo's interest in the one firm to extinguish his liabilities in the other.

PER CURIAM. Ordered accordingly.

(5)

WILLIAM HASTINGS, Executor, etc. v. JOHN EARP, and others.

A testator gave to his wife money, slaves, etc., and afterwards, by a residuary clause, directed "that the balance of *his* property *be sold*, and the money arising therefrom be equally divided amongst all the legatees named in this will, except the Masons:" *Held*,

1. That the residuary clause included such articles in the lapsed legacy as are the subjects of sales at auction, but not such articles (either lapsed or otherwise undisposed of), as are not subjects of such sales.
2. That persons referred to in other parts of the will only as "children of," etc., are included in such residuary clause equally with persons *actually* named in such parts.
3. That the division directed by the residuary clause is a division *per capita*.
4. That the word "legatees" in the residuary clause included the wife, and that her share in the residue having lapsed does not go to the other residuary legatees, but is undisposed of, and goes to the next of kin.
5. A bequest, that certain chattels "in the possession of my son John shall be divided between his children that may be living at his death," does not, by implication, confer a life estate upon John, but such interest for life falls into the residue.

ORIGINAL BILL, filed to Fall Term, 1864, of JOHNSTON, in order to obtain instructions upon a will. At the same term the cause was set for hearing, and transferred to this Court.

The opinion contains a sufficient reference to the facts.

No counsel in this court for the complainant.

Haywood and *Rogers*, for the defendant.

BATTLE, J. The will of the testator consists of only five short dispositive clauses, yet the plaintiff's counsel suggests several difficulties which have arisen as to the proper construction of it, upon which he asks our advice and direction:

1. In the first clause of the will the testator gives his wife
(6) twenty dollars in money and several personal chattels, absolutely, and three negro slaves, to wit: Tom, Frank and Dilly, for life, making no other disposition of these specifically. In the fifth clause he says: "It is my desire that the balance of my property be sold, and the money arising therefrom be equally divided amongst all of the legatees named in the will, except the Masons." The testator's wife died in his lifetime, and it is asked, do the money, personal chattels and negroes fall within the residue, to be sold for division as prescribed in the residuary clause? The answer is, there is nothing restrictive in that clause to prevent it from embracing all the articles, except the money. This is established by many cases, and among others by *Jones v. Perry*, 38 N. C., 200.

2. The testator died possessed of money, notes, bonds, and other evidences of debts, which are not disposed of by the will, unless they

are included within the terms of the residuary clause, and it is asked again, do they pass by it, or do they go to the next of kin as personalty undisposed of? It is settled by several cases that, as they are not the subject of sale by auction, they can not pass by such a clause. See *Pippin v. Ellison,* 34 N. C., 61; *Scales v. Scales,* 59 N. C., 163. The money, then, including the lapsed legacy of $20, together with the notes, bonds and other evidences of debt, must be distributed amongst the next of kin of the testator.

3. The four children of the testator's deceased daughter, Nancy Pully, have legacies given to each of them by name in the third clause of the will, while the children of his son, John, are mentioned as legatees in the second clause *as a class,* by the description of children. The questions are, do the children of John take at all under the residuary clause; and if they do, is the division to be *per capita* among the Pully and the John Earp children, or do the latter take only one share as a class? It is settled that John Earp's children do take as legatees, and take *per capita* with their cousins, the Pully children. See (7) *Tucker v. Tucker,* 40 N. C., 82.

4. The residuary clause directs an equal division "amongst all the legatees named in the will except the Masons"; and a question arises, whether the testator's wife, who died in his lifetime, and his son, John, who took but a life estate in certain lands and slaves and a small sum of money, are to be regarded as legatees, entitled each to a share of the residue? We can see nothing to exclude them. Another question is then presented, as to what is to become of the wife's share of this residue, which lapsed by her death in the testator's lifetime. For the reasons given by us in the case of *Winston v. Webb, ante,* 1, the wife's share of the residue can not go to the other residuary legatees, but must go to the next of kin of the testator. The consequence is that the residue must be equally divided, *per capita,* amongst John Earp, his children and the Pully children, reserving a share for the wife, which, having lapsed, is to be distributed according to law among the next of kin.

In the second clause of the will, the testator lends to his son, John, for life, three negroes which he had put into his possession, and at his death to be equally divided between his and his sister Nancy Pully's children, adding "the increase from the above named negroes, since they have been in possession of my son, John, I wish to be divided between his children that may be living at his death." The counsel for some of the defendants suggests a doubt as to the proper construction of the clause. The question put is, does the increase belong to John for life by implication, or is it undisposed of in that clause, so as to go into the residue mentioned in the last clause? We answer that John

can not take it, because personal chattels are never so taken, by implication, under a will. *White v. Green,* 36 N. C., 45. It follows (8) that it must fall into the residue, to be disposed of in the manner which we have hereinbefore declared.

Let a decree be drawn in accordance with this opinion, directing such accounts as may be needed, etc.

PER CURIAM. Decree accordingly.

Cited: Vaughan v. Murfreesboro, 96 N. C., 320.

THOMAS J. GRANDY v. EDMUND G. SAWYER, Adm'r., and others.

A testator provided as follows: "I lend unto my beloved wife, Mary G. Sawyer, all of my real and personal estate, to have and to hold the same during her natural life, and at her death I give the same to be equally divided between the heirs of my beloved wife, Mary G. Sawyer, and my heirs at law:" *Held,* upon the death of the wife, that:

1. The rule of distribution *per stirpes* governs as well the division between the "heirs" of the wife, and "heirs at law" of the testator, as that of the portion given to the latter class, among themselves.
2. Technical words, in the absence of explanation upon the face of a will, will be taken in a technical sense.
3. A word repeated in the same clause of a will must, at each repetition, have the same meaning attached to it.
4. Where a direction is given for the equal division of a fund among several named persons, and "the heirs" of another person, and it appears that by "heirs" is meant *children,* such division must be *per capita;* but when the word "heirs" must include not only children, but grandchildren, etc., then the division must be *per stirpes.*

ORIGINAL BILL, filed at Spring Term, 1866, of CAMDEN, praying for a settlement of the estate of Malachi G. Sawyer, deceased. The complainant was sole heir and next of kin of the widow of the deceased, and the defendants, other than the administrator, were the heirs and next of kin of the deceased. Answers were filled at the first term, (9) and a report ordered and made. The cause was then, by consent, set for hearing and transferred to this court.

No further statement is necessary.

Hinton and *Winston,* for the complainant.
Smith, for the defendants.

BATTLE, J. The pleadings present for construction the following clause in the will of Malachi G. Sawyer: "I lend unto my beloved wife, Mary G. Sawyer, all of my real and personal estate, to have and to hold the same during her natural life, and at her death, I give the same to

be equally divided between the heirs of my beloved wife, Mary G. Sawyer, and my heirs-at-law."

Two questions are raised: First, Whether the testator's widow took a life estate only in all the property, real and personal, of the testator, or a life estate in one-half of the property, and an absolute estate in the other half by virtue of the rule in Shelly's case; secondly, If she took a life estate only in the whole property, then, whether the persons answering to the descriptions, "heirs of the widow," and "heirs of the testator," take *per stirpes,* or *per capita.*

We deem it unnecessary to decide the first question, because we are clearly of opinion that the division between the heirs of the testator and those of his widow must be *per stirpes,* which will cause the devolution of the property to be the same as if the widow were to take one-half absolutely.

Assuming then that the widow took a life estate only in the land and personalty, we must inquire how the division of the remainder is to be made between the devisees and legatees thereof. There is nothing in the will to show that the words "heirs-at-law," as applied to the testator, were not used in their technical sense, and therefore we are bound to take them in that sense, and to hold that all of the brothers of the testator who were living at his death, together with the children of his deceased sister, took the part given to them, both realty and personalty, *per stirpes.* For this *Rogers v. Brickhouse,* (10) 58 N. C., 301, is a direct authority.

This rule being established for the division among the "heirs-at-law" of the testator, we must also apply it to the division between them as a class, and the "heirs" of the widow. We can not find any authority for a construction which will, under the same clause of a will, cause a division partly *per stirpes* and partly *per capita* among the objects of the testator's bounty. On the contrary, we find it laid down in *Lockhart v. Lockhart,* 56 N. C., 205, that even where there are different clauses of a will, if the testator use words in one clause which describe the devisees or legatees as a *class,* and again refers to them by the same words, they must be taken as a class in the second clause. That principle is decisive of the present case, and the division between the heirs of the testator's widow and his own heirs-at-law must be *per stirpes.*

Where a direction is given in a will for the equal division of a fund among several named persons and "the heirs" of another, and it appears that by "heirs" is meant children, as in *Ward v. Stowe,* 17 N. C., 509, and *Harris v. Philpot,* 40 N. C., 324, such division must be *per capita;* but when the phrase, "heirs of," etc., must include not only children, but grandchildren as representatives of deceased children, then the division among all the devisees and legatees must be *per stirpes.*

In this case the decree will direct a division, by which the only heir and next of kin of Mary G. Sawyer shall have one-half of the remainder of the testator's property, and his own heirs-at-law and next of kin shall have the other half, to be divided among themselves *per stirpes.*

The costs of the suit must be paid out of the estate.

PER CURIAM. Decree accordingly.

Cited: Cooper v. Cannon, post, 84.

(11)

WILLIE BUNTING v. JOHN R. HARRIS, Ex'r., etc.

Where a testator used the following expression: "I give and bequeath unto my wife Sarah, all of the property that I possess at the time of my death, consisting of *all my real estate of all kinds,* and all my money, notes and accounts, after paying all my just debts;" "My father and mother are to have the land lying on the southeast side of the Reedy branch, of the tract of land where they now live, and the stock, household and kitchen furniture, at that place;" and mentioned no other things in his will, although he died in possession of fifteen or more slaves, and of horses, cattle, crops, etc. *Held,* that the wife was constituted *universal legatee,* except in regard to what was expressly given to the father and mother.

By PEARSON, C. J., *arguendo:*

(1) The wirds used in different wills are so different, and the circumstances of testators, in regard to property and the objects of bounty, are so various, that it is almost impossible to find one case upon such subjects that ought to govern another.

(2) In doubtful questions of constructions, something must be yielded to the contemporaneous action of the parties concerned.

ORIGINAL BILL, for a residue alleged to be undisposed of, filed at Spring Term, 1861, of NASH. Subsequently a demurrer was filed by the defendant, and at Fall Term, 1862, the cause was set down for argument and removed to this court.

The bill stated that the complainant was the father of the testator, B. B. Bunting, late of Nash County, who died in 1847, without issue, leaving a widow; and that the defendant was the executor of that widow, and, as such, also of the testator. After giving an extract from the testator's will, and stating that he died in possession, among other things, of certain slaves, some of which the widow sold to pay the testator's debts, and others she retained until her death, in September, 1860, when they came into the hands of the defendant; the bill further stated

(12) that the complainant had been advised that the slaves did not pass under the will, but were to be divided between the widow and himself, under the statute of limitations; and there was a prayer for an account for distribution, and for other relief.

The following is the dispositive portion of the will referred to: "I give and bequeath unto my wife, Sarah, all the property that I possess at this time, or may possess at the time of my death—consisting of all my real estate of all kinds, and all my money, notes and accounts, after paying all my just debts; and my wife, Sarah, is to settle all my business if it is her wish, without an administrator. My father and mother are to have the land lying on the southeast side of the Reedy Branch of the tract of land where he now lives, and the stock, household and kitchen furniture at that place; and not to be dispossessed of it during either of their lives, and at both of their deaths, that part of my estate is to be divided between my brother and sister Susan, share and share alike. In witness whereof," etc.

Moore, for the complainant.
Batchelor, for the defendant.

PEARSON, C. J. The bill is very meagre in its statements, and, on that account, the court has been much embarrassed.

We are informed that the testator died without children, leaving him surviving a wife, father and mother, brother and sister. (14) We are also informed that, at the time of his death, the testator owned some fifteen or twenty slaves; but we are not informed whether he owned any land (except the tract devised to his father and mother), or whether he owned any horses, cattle, hogs, crops on hand, etc. There is nothing to authorize the court to assume that he did not own any land except the tract devised to his father and mother, and that he was cultivating the land of his wife, with negroes, horses, etc., acquired *"jure mariti."*

We are also informed that, by his will, he bequeathed and devised as follows: "I give and bequeath to my wife, Sarah, all the property that I possess at this time, or may possess at the time of my death, consisting of all my real estate of all kinds, and all my money, notes and accounts, after paying all my just debts." "My father and mother are to have the land lying on the southeast side of the Reedy Branch, of the tract where he now lives, and the stock and household and kitchen furniture at that place."

The notion that this man intended to give to his wife lands, notes and accounts, *subject to the payment of his debts,* and to his father and mother the tract of land on which they lived, "and the stock, household and kitchen furniture at that place"; and that he died intestate in respect to fifteen or twenty slaves, and to horses, cattle, hogs, crops, etc., is so contrary to the ordinary course of things that every one will exclaim: There must be some mistake about it! Such could not have been his intention! Either the draftsman of the will has, in the former of the

clauses above cited, used the word *consisting* instead of the word *including,* or else the word *real* to signify *corporeal property,* to wit: negroes, horses, farming utensils, crops, etc., as contradistinguished from things *incorporeal,* to wit: money, notes, accounts, etc. We think, by its proper construction, the will makes the wife of the testator his "universal
(15) legatee," except in respect to the tract of land and small articles given to his father and mother; and that the legacy to his wife includes the slaves, horses, crops, etc., that the testator owned at the time of his death. What other sense can be given here to the words, "My real estate of all kinds, and my money, notes and accounts," than—*My corporeal estate of all kinds,* and my money, notes and accounts?

This, we are satisfied, was the meaning of the testator, and in looking at *the cases* we are gratified to find that there is nothing to force us to the conclusion that this man died intestate as to his slaves, horses, cattle, etc., which being present, and so forcing themselves on the attention, are the primary subjects for the payment of debts, and the first things ordinarily disposed of by will. *Fraser v. Alexander,* 17 N. C., 348, and *Clark v. Hyman,* 12 N. C., 382, were cited on the argument by the counsel for the defendant as governing this case. In *Fraser v. Alexander,* there is an express direction to sell the negroes at private sale; that case has no application. In *Clark v. Hyman,* the conclusion is, that land is not included in the description, "because *heirs-at-law* are not to be disinherited, unless the testator's intention to do so is clear." In the present case the *strain* is to exclude from the general words slaves, horses, cattle, etc., which constitute the primary fund for the payment of debts, and are the subjects most ordinarily disposed of in wills. So also here, the cases are altogether different; and the construction of this will can not be controlled by the construction put upon that.

Indeed, words used in different wills are so different, and the circumstances of testators in regard to property and the objects of bounty are so various, that it is almost impossible to find one case that ought to govern another. Each must stand on its own peculiar circumstances, and in doubtful questions of construction something must be
(16) yielded to the contemporaneous action of the parties concerned; as, in this case, an acquiescence for many years in the construction, by which it was taken for granted that the testator had given his whole estate, including land, choses in action, negroes, horses, etc. (except the small legacy to his father and mother), to his wife, subject to the payment of his debts.

The bill must be

PER CURIAM. Dismissed.

J. C. S. McDOWELL'S Adm'r., and others, v. JOHN A. MAULTSBY.

A bill had been filed to obtain a discovery in aid of a plea of usury, and the defendant demurred thereto; afterwards, the Act of 1865-'6, c. 24, repealing the former act upon usury, and the Act of 1865-'6, c. 43, upon the subject of evidence, was passed: *Held*, that the bill should be dismissed with costs.

ORIGINAL BILL, for a discovery in aid of a defense at law upon the plea of usury, filed to Spring Term, 1861, of COLUMBUS. At Spring Term, 1862, the cause was set down for argument upon bill and demurrer, and transferred to this court.

No statement of the contents of the pleading is necessary.

Strange, for the complainants.
Person and *Leitch,* for the defendant.

BATTLE, J. This is a bill for a discovery to aid the defense on a plea of usury to a suit at law upon a bond for the payment of money. The defendant demurred to the bill, and assigned as causes therefor that the discovery would expose him, first, to a forfeiture of the land upon which the suit at law is brought, and, secondly, to a penalty (17) of double the amount loaned. In reply, the counsel for the complainants admitting that the demurrer would be good but for a late Act of 1865-66, ch. 24, which repeals the act concerning "Usury" in the Rev. Code, ch. 114, and takes away both the forfeiture and the penalty, insists that the grounds of the demurrer are thereby removed. On the contrary, the counsel for the defendant contends that, supposing that were so, which he does not admit, another late act has made the bill for the discovery unnecessary, by giving the complainants a right to examine the defendant as a witness upon the trial of the suit at law. Laws 1865-66, ch. 43.

We are of opinion that the demurrer was good when it was put in, and ought to have been sustained; and that if the late acts, referred to by the counsel respectively, have any effect upon the case at all, it is to render the discovery sought by the bill unnecessary, because the plaintiffs have a much better remedy by the power given to them of examining the defendant on the trial at law.

The demurrer must be sustained, and the bill

PER CURIAM. Dismissed with costs.

(18)

DAVID COBB and others v. ELISHA CROMWELL.

A contract gave to the parties "the right to determine what work is necessary to be done, for the purpose of enlarging, etc., the said canal, etc.; and he or they shall be fully empowered to do the said work or have the same done, and the said parties shall bear and pay the reasonable expense and the burden of the said work, in the following proportions," etc.: *Held*,

1. That the parties were bound thereby, *not* to do the work or have it done, but to pay a ratable part of such expenses as one or more of them may incur.
2. That, supposing the parties had undertaken to do the work, the court could not enforce a specific performance, because there is no mode of which the court can avail itself for determining what work is *necessary;* that question being, by the contract, left to the decision of some one or more of the parties.

ORIGINAL BILL, seeking a specific performance, etc., filed to Spring Term, 1866, of EDGECOMBE. At the same term a demurrer was filed, and the cause set down for argument, and removed to this court.

The bill alleged that the parties are the owners of a canal for draining their respective lands; and that, for the purpose of keeping up or improving the same, they (either personally, or as represented by persons whose covenants bound them), agreed, among other things, as follows: "4th. Any one or more of the said parties shall have the right to determine what work is necessary to be done, for the purpose of enlarging, deepening, cleaning out or repairing the said canal, or bridging the same where a public road crosses it; and he or they shall be fully empowered to do the said work or have the same done, and the said parties shall bear and pay the reasonable expense, and the burden of the said work, in the following proportions," etc.

After other statements, not necessary to be repeated, the bill contains the following: "Your orators further show unto your Honor that the advantage derived by the defendant to his lands from the said canal is equal to the advantage derived by any one of your orators,
(19) and much greater than those derived by most of them; that the said canal now requires cleaning out, and other improvements and reparations contemplated by the parties to the contracts aforesaid, to the value of at least fourteen hundred dollars, which your orators aver are necessary, and which they are desirous to have done; and your orators charge and aver that it will be very onerous upon them to do, or have done, all the necessary work upon said canal, as the outlay will be, if not beyond their means, certainly very embarrassing and inconvenient; and their remedy at law, to recover from the defendant his proportion of said outlay, will compel them first to expend a large amount for his benefit, which they are not prepared to do; and your

orators therefore aver that such remedy at law is totally inadequate; but if the defendant is compelled to bear his proportion of the burden assumed by the said Henry S. Lloyd (of whom defendant was an assignee), by performing his part of the work, then the canal can be put and kept in proper condition, to the mutual benefit of all the parties interested."

The prayer was for a specific performance of the above contract, "your orators hereby offering to perform the same on their part," and for other relief.

Biggs, for the complainants.
J. L. Bridgers, for the defendant.

PEARSON, C. J. Passing by the question, whether the defendant, as assignee, is bound by the covenant, we are of opinion that the complainants are not entitled to a decree, on two grounds:

1. By the terms of the contract no one of the parties undertakes *to do the work or to have it done.* The legal effect of the instrument is to bind the parties to pay a ratable part of the expenses that any one or more of them may incur in doing what work may, in his or their judgment, be necessary. This is the true construction, and (20) the court can not compel a party to do that which he has not undertaken to do.

2. Suppose the parties had undertaken to do the work, a specific performance by a decree would be impracticable, because there is no mode of which the court can avail itself, for ascertaining what work is necessary. Any one of the parties has the right to determine what work is necessary, and is fully empowered to do it, or have it done. This mode of deciding the question, viz.: by one or more of the parties, is the only one provided by the instrument, and as they have seen proper to adopt it, any other is excluded. This puts it out of the power of the court to direct an inquiry as to what work is necessary. The mode agreed upon by the parties contemplated that one or more of them shall, in the first instance, have the work done, and then call upon the others for contribution in money. Such are the terms of the contract, and it is not in the power of the court to alter them, although it may be onerous to some of the parties to incur the expense of having the whole work done. Indeed, a readiness to do the work themselves, or to have it done, is the only check provided in the instrument upon the exercise of their discretion in respect to the work necessary, in order to make the canal answer the purpose for which it was intended. The court has no power to remove this check.

Again, there is a general allegation that the work necessary to be done would require an outlay of $1,400; but there is no allegation that

any one or more of the parties have determined what *particular work* is necessary to be done; for instance, how much wider the canal should be, and at what places; how much deeper, etc., etc. Such an agreement would seem to be a necessary preliminary to raising the questions which we have been considering.

PER CURIAM. Bill dismissed.

(21)

MATILDA BROUGHTON and others v. WILLIAM F. ASKEW.

A question having been made, whether one who, upon a purchase of a slave at a sale by a master, had paid cash instead of giving bond, as required by the order of sale, could not be compelled to comply with that order; it was *held* that, inasmuch as one incident to the relief sought would be to give an option to the defendant to have the biddings opened again, the intervening abolition of slavery rendered it unnecessary to decide the question.

At Spring Term, 1860, of WAKE, the petitioners had obtained an order directing the Master to sell certain slaves upon a credit of six months. At the sale upon the 1st of May, 1860, the defendant having inquired about it, was told by the deputy of the Master who conducted the sale, that he would be allowed to pay cash for any purchase he might make. Thereupon he purchased one of the slaves, and paid the amount in cash. At Fall Term, 1860, the Master reported that this sale had been made for cash.

At Fall Term, 1862, an order was made, which, after reciting that the defendant had bid off one of the slaves in question, and that he had not complied with the terms of the sale by executing a bond with surety as provided by the decree—directed the defendant to appear at the next term and show cause why he should not complete his purchase, according to the terms of the decree.

At Fall Term, 1863, Askew filed an affidavit, stating what had occurred (as above) at the sale, and that this had afterwards been made known to the Master, and approved of by him.

At Spring Term, 1864, it was ordered that the rule against Askew should be discharged, and thereupon the petitioners appealed to the Supreme Court. The case was argued at June Term, 1864, of this court, and retained under advisement.

(22) *K. P.* and *R. H. Battle* and *Phillips,* for the petitioners.
Winston, Sr., and *R. G. Lewis,* for the defendant.

PEARSON, C. J. The emancipation of slaves makes it unnecessary to decide whether the petitioners have a right to require Askew to execute a note for the purchase money, or whether he has complied with the

terms of sale by his payment of the money. For it is certain that he made his bid under the impression that the payment of the money would be a compliance with the terms of sale; and, if he was under a mistake, he is entitled to permission to withdraw his bid. The effect of this is to open the biddings and leave the slave unsold. This brings the matter within the principle of *Kidd v. Morrison, post,* 31.

The order to show cause is dismissed without prejudice; the parties each to pay their own costs.

PER CURIAM. Decree accordingly.

(23)

FANNIE E. MITCHENER v. THOMAS H. ATKINSON, and others.

1. The fact, that a widow elects to take under a will, does not constitute her a *purchaser* as regards the legacies therein.
2. The distinction between *dower* in England, etc., and the same right in North Carolina, stated by PEARSON, C. J., in reference to the above doctrine.
3. A widow who takes under a will in North Carolina is barred of dower in the lands included in such will because of her *election*, and not under an idea that she has received a consideration therefor.
4. The following words: "I give to my beloved wife, etc., the sum of $20,000, to be paid, etc., in eight annual installments, the first to be due twelve months after the date of my death, and to be paid as follows, to wit: one note of hand on E. S., for the sum of $1,000, and one on same for $500, each of them bearing interest at 7 per cent, the balance of said installment to be paid in money at any time when my said wife may desire; the remaining installments to be paid annually thereafter from the proceeds arising from the sales of the produce of my farm": *Held,* to create a general pecuniary legacy, so far, that it does not fail upon a failure of the fund to which it is referred, but is to be paid out of the general assets.

ORIGINAL BILL, for the payment of a legacy, etc., filed to Spring Term, 1866, of JOHNSTON. Upon the coming in of the answers at the same term, the cause was set for hearing and transferred to this court.

The testator had died in 1860, leaving a large estate in lands, slaves, bank stock, etc., which he divided between his widow, the complainant, and his two children, who, together with their guardian, were the defendants. The abolition of slavery, and other loss of property incident to the conclusion of the late war, had given importance to the question as to how the legacies to the complainant were to be raised. The testator bequeathed most of his land to his son, and gave to his children, and two or three other legatees, several small legacies, general, specific and residuary. To this statement the opinion of the court renders it necessary to add only that, after making provision for his wife during her lifetime or widowhood, out of his lands and slaves, (24)

he directed as follows: "I give to my beloved wife, Fanny E. Mitchener, as her own right and property, the sum of $20,000, to be paid by my executor, or the guardian of my children as the case may be, in eight annual installments, the first to be due twelve months after the date of my death, and to be paid as follows, to wit: one note of hand upon Elkanah M. Secor, for the sum of $1,000, and one on the same for $500, each of them bearing interest at 7 per cent; the balance of said installment to be paid in money at any time when my said wife may desire; the remaining installments to be paid annually thereafter from the proceeds arising from the sales of the produce of my farm."

Boyden and *Olds,* for the complainants.
Moore, for the defendant.

PEARSON, C. J. On the argument Mr. Boyden took the position that, in this State, when a legacy is given to the wife, she should be looked upon as a purchaser, and have priority over all other legatees. We do not assent to this proposition. A widow takes as an object of the testator's bounty, and stands on the same footing as other legatees. There is no sound reason why a legacy to her should not have the same incidents and qualities that the law attaches to legacies given to others, among which is the rule that specific legacies are preferred to general legacies, and general legacies are preferred to residuary legacies; for, in a specific legacy the testator, in a measure, perfects the gift himself, by pointing out the identical subject; whereas, a general legacy is only a direction to the executor to pay a certain amount or deliver a certain quantity; and a residuary legacy is, by its terms, confined to what is left, after all the other legacies are satisfied.

(25) Mr. Boyden assumed, in the first place, that in England and several of the States it is settled that, when a legacy is given to a wife in lieu of dower, the widow is looked upon as a purchaser, and her legacy is perfect; to support this position he cited several cases. In the second place, he insisted that in this State the statute, which requires a widow to dissent from her husband's will, gives to the legacy the legal effect of being a "bar to dower," and therefore drew the conclusion that the doctrine is applicable here, and that a widow who does not enter her dissent is to be considered as a purchaser.

In England and the States referred to the widow is entitled to dower of all lands of which the husband was seized at any time during coverture, so that after his death she may demand dower of all who have purchased land from him. Hence it is necessary to resort to jointures and provisions by will in the nature of jointures to "bar dower." In this State dower attaches only to land of which the husband dies seized, and there is no necessity for jointures or legacies in lieu of dower. So

that the same considerations are not involved in the question as applied to England and to North Carolina.

We do not deem it necessary to express an opinion as to the soundness of this doctrine; and will only say that if the widow is to be looked upon as a purchaser, it can only be the extent of the value of her dower. The excess of the value of the legacy is a new bounty, for it is idle to say "a testator may, if he sees proper, overreach himself by offering a higher price for the dower than it is worth, and in this way deprive him of the merit of considering his wife in any degree the object of his bounty, and hold him up merely in the light of one who is driving a bargain on his death bed! Admitting, for the sake of argument, the first branch of the proposition, we are fully satisfied that the second branch of it is not true.

A widow who takes *under* a will is not allowed to claim dower (26) in land, which is disposed of by the will. This rule is not the effect of the statute in reference to dissents by widows, nor does it rest on the idea of creating a bar to dower, but it is raised upon the equitable doctrine of election, which forbids one who claims *under* a will from setting up a claim *against* it, so as to disappoint the intention of the testator. This doctrine applies as well to all other legatees as to the widow. For instance, if a testator gives one of his own horses to A, and gives a horse belonging to A to B, A shall not have both horses, but is to put to his election; so if a testator gives a legacy to his wife, and devises land in which the wife is entitled to dower to B, the wife shall not take her legacy and be also allowed to claim dower, and disappoint the intention of the testator in respect to the devise to B, but is put to her election; and the effect of the statute is simply to require her to make her election in reasonable time, and to give her neglect to do so the effect of an election to claim under the will; so that her right of election may not delay the settlement of the estate. The fact that this doctrine of election is confined to property disposed of by the will, and that in any land not disposed of the widow is still entitled to dower, and that she is also entitled to a distributive share of any part of the personal estate of which the husband dies intestate, clearly upsets the idea that the legacy is given as a bar to dower, and makes the supposed doctrine in England and some of the States altogether inapplicable. To this cause we ascribe the fact that it has never before been contended in our courts, so far as we are aware, that a legacy to a widow is to be looked upon as a purchase, and to be secured to her in preference to all other legacies, and, in fact, to the extent of the value of her dower, in preference to creditors; for the reasoning would carry the conclusion that far—inasmuch as dower was not liable for the payment of debts. And under this principle we find that (27)

the statute, which secures to the widow the equity of subrogation, provides that land devised to the widow shall be exempt from liability to creditors, in the same way that her dower would have been *to the extent of the value of the dower.*

We do not concur in the position taken by Mr. Moore on the part of the defendants, that this $20,000 legacy is so far specific as to be confined for its payment to the subjects pointed out by the testator, and must fail to the extent that these sources of payment have failed. We think that, by the proper construction of the will, this is a general pecuniary legacy, with reference to a fund for its payment in the first instance, but that the legacy is not to fail to the extent that the fund fails—in other words, the legacy is not confined to the fund indicated by the testator as the source out of which he expected and wished the money could be raised; but on failure of the fund, either wholly or in part, it is to be paid out of any part of the estate to which the law does not give other legatees the preference. *Graham v. Graham,* 45 N. C., 291. "This is a legacy of quantity (in our case, of *number*), in the nature of a specific legacy, as of so much money with reference to a particular fund for its payment. This kind of legacy is so far general, and differs so much in effect from a specific one, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets." This passage from 1 Roper on Legacies, 149, 150, fits our case precisely, and is adopted by the court.

We have seen that specific legacies have a preference over general legacies. The case of *Biddle v. Carraway,* 59 N. C., 95, cited by the plaintiff's counsel, where it is held that a general legacy was so charged on the estate as to give it preference over specific legacies, was decided on its peculiar circumstances, and is not applicable to our case.

Treating this as a general pecuniary legacy, it has preference over the residuary legacy given to the two children, and in aid of
(28) the fund refered to in the first instance, every part of the estate not given specifically must be applied to pay off this legacy and the other small pecuniary legacies, which stand on the same footing. Of course this remark does not apply to the real estate.

There will be a decree according to this opinion, and a reference for an account.

PER CURIAM. Decree accordingly.

Cited: Hinton v. Hinton, 61 N. C., 413; *Avery, ex parte,* 64 N. C., 114.

Modified: Mitchener v. Atkinson, 63 N. C., 587.

JOSEPH PARKER v. ROBERT J. GRAMMER.

Where there is reason to apprehend that the subject of a controversy in equity will be destroyed or removed, or otherwise disposed of by the defendant, pending the suit, so that the complainant may lose the fruit of his recovery, or be hindered and delayed in obtaining it, the court, in aid of the primary equity, will secure the fund by the writ of sequestration, or the writs of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause.

ORIGINAL BILL, for an account of a partnership, etc., filed to Spring Term, 1866, of GATES. Upon the coming in of the answer at that term a motion was made to dissolve an injunction theretofore obtained. *Barnes, J.,* having disallowed the same, the defendant appealed.

The bill stated that in March, 1865, a partnership had been formed between the parties, for the purpose of trading in cotton. By its terms complainant was to furnish the money, and the defendant was to buy the cotton and deliver it over for sale to the complainant, (29) who was to account for the proceeds. The business lasted until March, 1866, and whilst it was going on (in March, 1865), the defendant purchased twenty-four bales of cotton, weighing some ten thousand pounds, which has been in his possession since May, 1865, and which he has refused to turn over to the complainant, according to the terms of the partnership; although the latter has offered to execute a bond to him to secure his share of the proceeds. That the defendant is in humble circumstances, has sold about one thousand pounds of the cotton and applied the proceeds to his own use, and has declared his intention to sell the remainder thereof and put the money in his wife's hands, etc. The prayer of the bill was for an account, and meanwhile for writs of injunction, sequestration, etc.

By the answer the right of the complainant to the cotton in question was denied, and a right in the defendant to dispose of it asserted. A detailed statement was given as to the connection between the parties. In the course of it some of the allegations of the bill were denied, others were admitted, and a full statement of other facts and circumstances made, and relied upon to avoid the conclusions in the bill.

The view taken in the opinion of the court renders it unnecessary to report the contents of the *pleadings* more fully.

Smith and *Yeates,* for the complainant.
Peebles, for the defendant

PEARSON, C. J. Where there is reason to apprehend that the subject of a controversy in equity will be destroyed, or removed, or otherwise

disposed of by the defendant, pending the suit, so that the complainant may lose the fruit of his recovery, or be hindred and delayed in obtaining it, the court, in aid of the primary equity, will secure the fund
(30) by the writ of sequestration, or the writs of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause.

These writs are extraordinary process, and to sustain them, on a motion to dissolve the injunction and remove the sequestration, the court must be satisfied: 1st, that the complainant does not sue in a mere spirit of litigation, and seek to set up an unfounded claim, but has "probable cause," and may at the hearing be able to establish his primary equity; 2d, that its extraordinary process is not asked for simply to vex and embarrass the defendant, but because there is reasonable ground for apprehension in regard to the security of the fund pending the litigation.

At this stage of the proceedings there is nothing before the court but the bill, answer and exhibits; and treating the bill as an affidavit in support of the complainant's allegations, the court, upon that, in connection with the answer and exhibits, is taking the whole matter together to decide the question of probable cause in regard to the primary equity, and the question of a reasonable apprehension as to the security of the fund. *McDaniel v. Stoker,* 40 N. C., 274.

These principles are *settled,* and so fully sustain the order appealed from that we can account for the appeal only by supposing that the distinction between cases of special injunction and sequestration, like the one before us, and cases of the common injunction to prevent a party who has obtained a judgment at law from suing out execution (where the rule is, the injunction will be dissolved on the coming in of the answer, unless the equity be confessed or the answer be insufficient or evasive, see *Capehart v. Mhoon,* 45 N. C., 30), was not adverted to.

How the facts may be declared to be at the hearing of the cause will depend on the *proofs.* It is sufficient to say that, as they now appear to be upon the bill and answer, we are satisfied that the com-
(31) plainant has probable cause in support of his equity, and that there is reasonable ground to apprehend that the defendant, unless restrained, inasmuch as he sets up an *exclusive* claim to the cotton, would remove and dispose of it in violation of the agreement alleged by the complainant, whereby the latter would be hindered and delayed in having the decree enforced, should the case be decided in his favor. We refrain from entering into any discussion of the facts, in order to have the matter open until the cause is brought on for hearing.

In the meantime the parties may enter into such an arrangement as their *common* interests suggest, in order to have the cotton sold at the

present high prices, and the proceeds of sale held subject to the final decree.

PER CURIAM. Decretal order affirmed.

Cited: Reynolds v. McKenzie, post, 57; *Blossom v. Van Amringe, post,* 135; *Elliott v. Newman,* 92 N. C., 523; *McCless v. Meekins,* 117 N. C., 36; *Mfg. Co. v. Summers,* 143 N. C., 106; *Zeiger v. Stephenson,* 153 N. C., 530.

ELIZABETH KIDD v. JOHN MORRISON and CORNELIUS DUNLAP, Adm'rs, etc.

Where a bill has been filed to rescind a deed of release and quit-claim for a slave, on an allegation of fraud; upon the emancipation of the slave by act of law, the court declined to hear the cause, and ordered the bill to be dismissed without prejudice, and that each party should pay his own costs, as if the suit had abated.

ORIGINAL BILL, filed to Spring Term, 1861, of MOORE. At Fall Term, 1863, the cause was set for hearing, and transferred to this court. It is unnecessary to give any further statement of the facts than is contained in the opinion of the court.

No counsel in this court for the complainant.
Strange, for the defendant.

PEARSON, C. J. The bill is filed for the rescission of a deed (32) of release and quit-claim for a negro slave named Tom, on an allegation of fraud in obtaining its execution.

At the filing of the bill the slave was in the possession of the complainant, and continued in her possession up to the time of his emancipation by act of law. So that the bill presents no question in respect to profits or hires, and the sole question made is in respect to the title.

That question is now gone. It has passed away by the political death of the slave, as completely as if he had died a natural death. There being no longer any subject matter of controversy, the question arises whether the court will hear the cause, and make a decree that can only serve to dispose of the costs?

To say nothing of the labor and consumption of time in wading through a mass of depositions, and weighing the learned arguments which the hearing would elicit, the court does not consider itself at liberty to go into a hearing, for the reason that there is nothing now before it but a mere hypothetical case, and any declaration of principle

set out in the decree would be entitled to, and would receive, no more consideration than mere *dicta*.

It was suggested at the bar, that the complainant has no longer a cause of suit, the bill ought to be dismissed at her costs. If the slave belonged to her, it is hard enough that she must bear the loss caused by the act of law. Whether she ought to pay the costs depends upon whether the act of the defendant which gave rise to the suit was wrongful or not, and that can not be determined without hearing the cause.

The bill will be dismissed without prejudice; the parties each to pay their own costs, as if the suit had abated.

PER CURIAM. Bill dismissed.

Cited: Broughton v. Askew, ante, 22; *S. v. R. R.,* 74 N. C., 289; *May v. Darden,* 83 N. C., 239; *Hasty v. Funderbunk,* 89 N. C., 94.

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(33).

JOHN BURROUGHS, Administrator of Mann Jenkins, deceased, v. JOHN A. JENKINS, and others.

1. In order to set aside a conveyance that is very advantageous to the bargainee, it is necessary to allege and prove, either the existence of those confidential relations between the parties, on account of which public policy will not allow such a transaction to stand, or, the actual exercise by the bargainee of undue influence, circumvention or fraud.
2. Declarations of a bargainor impeaching conveyance, made after its execution, are not admissible in evidence.

ORIGINAL BILL, to impeach a deed of conveyance, filed to Fall Term, 1859, of ORANGE, and set for hearing and transferred to this court at Spring Term, 1866.

The deed sought to be set aside was dated 27 November, 1855, and conveyed to the defendant a reversionary interest in certain property (chiefly slaves) which, after it had fallen into possession, was sold for about three thousand five hundred dollars. The bargainor was a man of about sixty years of age; the bargainee was his son, aged about twenty-five years; and the person, upon whose death the property was to come into possession, was above eighty years of age.

The other facts necessary for the understanding of the opinion are sufficiently stated therein.

Graham, for the complainant.
Norwood, for the defendant.

BATTLE, J. The relief which the complainant seeks in this case is founded upon the allegations that the deed mentioned in the pleadings

was obtained by the defendant, John A. Jenkins, from his father, by taking advantage of the pressure upon him for money, his fears of being compelled to sacrifice the property conveyed, a state (34) of partial intoxication, an undue control which he had acquired over him, and by making false pretenses to him. There is no averment in the bill, and certainly no proof, that there existed between the defendant, John, and his father either of those confidential relations in life in which a conveyance obtained from the defendant or inferior party by the superior will, upon principles of policy alone, be set aside, unless the utmost fairness is shown, *Futrill v. Futrill,* 58 N. C., 61, and the cases therein referred to. The allegations in the present case are, in effect, charges of undue influence, circumvention and fraud; and in order to entitle the complainant to relief, inasmuch as they are fully, positively and distinctly denied in the answer, they must be proved. *Deaton v. Munroe,* 57 N. C., 39, and cases therein cited.

The only inquiry, then, is one of fact, whether the complainant has sustained his allegations by the requisite proof.

Upon a careful examination of the testimony, we are satisfied that he has not.

The charge, that the deed was executed whilst the bargainor was in a state of partial intoxication, is entirely disproved by the statement of the subscribing witness. The same witness, who is the professional gentleman that drew the instrument at the request of the parties, proves further that the bargainor himself gave the instructions as to the terms of the instrument, seemed to understand them perfectly, and did not appear at the time to be acting under the influence of the bargainee. He states also, that although "five dollars" was inserted in the deed as the consideration thereof, the bargainee, who was not present at the time, said soon afterwards, when informed of it, that *three hundred dollars* was the true consideration; to which the bargainor assented, and that thereupon he, the witness, expressed the opinion (35) to them that it would make no difference.

There is full proof of the fact that the bargainor was a poor man, having a family to maintain by daily labor; that he was in debt, and often pressed for payment; but it does not appear that his son, the defendant, availed himself of those circumstances for the purpose of acquiring influence over him. He did indeed come to the relief of his father by assuming the payment of his debts, at least of the most pressing of them; but it is not proved that this arrangement was made at his and not at his father's instance.

The allegation that the bargainor was a man of weak mind, and easily influenced, is not sustained. The only witnesses examined, other than the attesting witness, were produced by the complainant, and

no one can look over the testimony without being satisfied that the bargainor was a man of ordinary intellect, ordinary firmness, and was by no means so habitual a drunkard as he is represented in the bill.

The charge of undue influence exercised by the defendant, John, over the bargainor, is equally unsupported by proof. It is true that the father sometimes worked in the employment of the son (both being carpenters), and one of the witnesses testifies to the use of harsh language by the son whilst giving a command to the father in relation to his work. Another witness, however, who worked with the father whilst employed by the son, states that he never heard any such language used by the son in addressing the father, whilst still another witness expresses the opinion that the bargainor might have been influenced by love, but could not have been by fear.

The declarations made by the bargainor after the execution of the conveyance was not admissible to vary its effect. Supposing, however, that they were, in the present case they tend to prove either too
(36) little or too much.

No reliance can be placed upon the evidence which represents the bargainor as being too drunk to know what he was about in executing the deed, when it appears from the testimony of the subscribing witness that at that time he was perfectly sober.

Upon the whole, we are satisfied that the essential allegations of the bill are not sustained by the proofs; and the consequence is that the bill must be

PER CURIAM. Bill dismissed with costs.

VIOLET W. ALEXANDER v. MOSES B. TAYLOR and others.

1. A bill seeking an attachment, on account of a single claim, is not multifarious because it prays that such attachment issue against property in the hands of various persons, or because it seeks from such persons an account of their respective dealings with the debtor.
2. Where, in such a bill, process (but not relief) had also been prayed for against the executors of the surety to the debt, and a judgment *pro confesso* had been taken against them: *Held*, that, although the bill would have been dismissed as to them if *they* had demurred, no other defendants could complain of their misjoinder.
3. The debtor in an attachment suit in equity has no *status* in court until he has appeared and replevied, in accordance with the 25th section of Rev. Code, ch. 7.
4. An attachment *in equity* will lie against the principal, even though the remedy *at law* against his surety has not been exhausted.

ORIGINAL BILL, attaching the estate of a nonresident debtor, filed to Spring Term, 1866, of MECKLENBURG. At the same term the cause was argued before *Mitchell, J.*, upon a demurrer.

The bill showed that the defendant, Taylor, who had left the State and was then residing in Pennsylvania, was indebted in a considerable amount to the complainant; that one Steele was surety (37) to the debt, and was then dead, leaving one White as executor, who was also dead, leaving the defendants Sarah J. White and John M. White his executors; also, that Taylor, before leaving this State, had entered into a partnership for mercantile purposes with the defendants J. M. Sanders and J. J. Blackwood, and retains a considerable interest therein; and that he is a stockholder in the Charlotte and South Carolina Railroad Company. The bill also showed that the complainant had issued an attachment at law against certain real estate, which was all the property, subject to an attachment at law, that Taylor owned in the State, and that was wholly insufficient to satisfy the claim in question.

The bill prayed for an attachment against the stock, and the interest in the partnership, and for an account against the partners, also for other relief; and for that purpose prayed for subpœnas against Taylor, S. J. White and J. M. White, as executors of A. C. Steele, John J. Blackwood, J. H. Sanders and the Charlotte and South Carolina Railroad Company.

Publication was made as to Taylor, and judgment *pro confesso* taken as to the railroad company and the executors.

A demurrer was filed by Moses B. Taylor, John J. Blackwood and James H. Sanders, showing as cause: "1st, that the said bill is bad for multifariousness, in that it contains two distinct grounds of suit, wholly distinct and separate from each other; and in that it makes persons party defendants who are unconnected with a large part of the subject matter; 2d, that the said bill is bad for the misjoinder of Steele's executors."

After the demurrer had been argued, his Honor overruled the same, and ordered that the defendants who demurred should answer. From this order they appealed to this court.

Wilson, for the complainant. (38)
Dowd, for the defendants.

PEARSON, C. J. This is an attachment by bill in equity under the statute, Rev. Code, ch. 7, to subject the interest of Moses B. Taylor, in the firm of J. M. Sanders & Co., and his interest as a stockholder in the Charlotte and South Carolina Railroad Company, to the satisfaction of the complainant's debt, on the ground that Taylor is a nonresident and has not "enough estate" on which an attachment at law could be levied to satisfy the debt.

A joint demurrer is filed by Moses B. Taylor, John J. Blackwood and James M. Sanders. The statute, sec. 25, authorizes the debtor at any time before final decree to replevy, by executing a bond, etc., and "thereupon he shall be permitted to plead, answer or demur to the bill," etc. Taylor has not executed a bond, and therefore has no *status* in court, and, if the demurrer stood in his name only, the court would order it to be stricken from the file; but, as Blackwood and Sanders join him in the demurrer, his name will be treated as surplusage, and the demurrer considered as made on the part of Blackwood and Sanders only.

The bill makes out a case under the statute, and is not defective in substance. The suggestion, that the complainant can not proceed by attachment in equity against Taylor, because Steele is a surety to his debt, and it is not averred that the remedy at law against him has been exhausted, has nothing to support it. It would be strange if a creditor were required to exhaust his remedy against the surety before he is at liberty to proceed against the principal!

The demurrer sets out two special grounds: (1), the bill is multifarious, in that it contains two distinct grounds of suit, and in that it makes "parties defendants, persons who are unconnected with a large part of the subject matter." It is true that Taylor's interest
(39) in the firm of Sanders & Co., and his interest in the railroad are two distinct things, and that the members of the firm and of the railroad company are distinct persons; but it is not true that the bill contains two distinct *grounds of suit*. The debt due by Taylor, a non-resident, is the ground of suit, and there is no reason why the complainant may not, in the same bill, seek to have it satisfied out of two or more subjects, in which the debtor has an interest; (2) The misjoinder of the executors of Steele.

No decree is asked against the executors, and it was not necessary to make them parties. If they had demurred, the bill would have been dismissed as to them, but the fact of making them parties nowise affects the rights of Blackwood and Sanders, and consequently presents no ground of demurrer for them.

PER CURIAM. Decretal order affirmed.

JAMES M. IJAMS v. DENTON IJAMS and PHILIP BOOE.

The rule that in injunction causes all the defendants must answer before a dissolution will be ordered, will not be enforced where the party not answering is not charged with any particular knowledge of the material facts alleged; and more particularly, where no steps have been taken to bring such party into court.

IJAMS *v.* IJAMS.

ORIGINAL BILL, praying for an injunction against an ejectment, and for specific performance of a contract in relation to land, and for other relief, filed at Fall Term, 1863, of DAVIE.

Upon the coming in of the answer of the defendant, Denton, (40) *Bailey, J.*, at the same term, dissolved the injunction theretofore obtained, and from his order the complainant prayed for and obtained an appeal.

The view taken by the court renders it unnecessary to state the facts in detail.

It did not appear that the defendant, Booe, had been made a party to the proceedings, either by subpœna or by publication.

Boyden and *Furches,* for the complainant.
Bragg and *Clement,* for the defendant.

BATTLE, J. The equity, which the complainant seeks to establish in this case, is based upon the allegations which he makes in relation to the purchase by the defendant, Denton Ijams, of the land in controversy from A. A. Harbin. The complainant avers that this purchase was made for his benefit, and that the purchaser was to take the title to himself, and to hold it only as a security for the purchase money until he, the complainant, could pay the amount to him. The other defendant is alleged to have been a purchaser with notice, and therefore subject to the same equity that attached to his vendor. In this aspect of the case, it is clear that the complainant can not have the relief which he seeks, unless he can sustain his allegations as to the facts and circumstances attending the purchase by the defendant, Ijams, from A. A. Harbin; *Foster v. Jones,* 22 N. C., 201. But these allegations are all distinctly and positively denied in the answer of the defendant, Ijams. Such being the case, the usual result of a dissolution of the injunction must follow, unless it can be prevented by the objection that the other defendant, Booe, has not filed an answer to the bill.

The general rule in injunction causes is, that all the parties defendant must answer before motion to dissolve will be enter- (41) tained. But this rule may be dispensed with under peculiar circumstances. *Ashe v. Hale,* 40 N. C., 55; *Wilson v. Hendricks,* 54 N. C., 295. One of the exceptional cases is, where the party not answering is not charged in the bill with any particular knowledge of the material facts alleged, and the party answering is so charged. And more particularly is this so when no steps have been taken to bring the non-answering party into court. *Ashe v. Hale, supra.* The present case is clearly within this exception. No proper means have been used to bring the defendant, Booe, before the court, and if there had been, he is not charged with a particular knowledge of the facts connected with the

purchase by his co-defendant. His answer could do no more than fix him as a purchaser with notice, but could not in any way relieve the plaintiff from the effect of the full, distinct and positive denials of the other defendant.

PER CURIAM. Ordered accordingly.

Cited: Thompson v. McNair, post, 123.

DAVID KINCAID v. ISAAC LOWE and others.

1. The rule, that latent ambiguities in wills may be explained by parol evidence, approved of and applied ("Linebarger Plantation").
2. Decree as to costs in a suit for partition of land.

ORIGINAL BILL, filed to Spring Term, 1864, of LINCOLN.

The purpose of the suit was to obtain a partition of a tract (42) of land described in a will as "the Linebarger plantation."

No further statement of facts is required by the opinion.

Bynum, for the complainant.

No counsel for the defendant.

BATTLE, J. The difficulty, which is shown by the pleadings, does not arise from any complication in the construction of the will of David Kincaid, Sr., but grows out of the alleged uncertainty of what is meant in that will by the expression, "the Linebarger plantation." This is a plain case of *latent* ambiguity, as to which it is equally *plain* that it may be removed by parol testimony. *Institute v. Norwood,* 45 N. C., 65, and the cases therein referred to and commented upon. Testimony has accordingly been taken, and it proves, beyond all question, that by "the Linebarger plantation" the testator meant all the land he had originally purchased from Alexander Brevard, a part of which he had afterwards sold to David Linebarger, who settled upon and improved it, and then resold it to the testator. The reason why the testator called the whole tract purchased of Brevard by the name of "the Linebarger plantation" was, no doubt, because the only settlement upon it was that made by Linebarger. At all events, it is certain that he did call the whole tract by that name, and as such gave it in for taxation for several years before his death. The parol testimony on this subject is strengthened by the fact that the testator does not mention any land except the two tracts which he devises under the name of "the plantation on which I now live," and "the Linebarger plantation"; and yet it is

manifest from his will that he intended to dispose of all his estate, both real and personal.

There must be a decree for partition according to this opinion. The shares of James Kincaid, who died before the testator, must, (43) of course, be equally divided among all the parties, and the costs of the suit must be paid by the complainant and defendants, in proportion to their respective shares.

PER CURIAM. Decree accordingly.

Cited: Horton v. Lee, 99 N. C., 232; *Fulwood v. Fulwood,* 161 N. C., 602.

BEVERLY COLEMAN v. JOHN COLEMAN.

A mistake in a deed will be corrected only upon the terms, that the person applying therefor will give effect to such counter equities in favor of the bargainor as may arise out of the transaction.

ORIGINAL BILL, for the reformation of a deed, filed at Fall Term, 1858, of WILKES, and set for hearing, and transferred to this court by consent of parties at Spring Term, 1860.

The facts necessary to an understanding of the opinion are set forth therein.

Clement, for the complainant.
Caldwell, for the defendant.

READE, J. It clearly appears that the draftsman of the deed in question did, by mistake, insert the word *"poles"* as often as the same appears in the deed, instead of the word "chains"; which was intended to be used. In this way the lines are much too short, and include a part only of the land which it was intended to convey. It is therefore a fit case for the correction of the deed.

The defendant, however, sets up certain equities, which he insists ought to rebut the equity of the complainant.

He says that the deed, although on its face absolute, was in (44) fact but a mortgage to secure a certain sum which the complainant advanced for him, in order to relieve the land from a prior incumbrance, and that for this the complainant has been fully reimbursed. The evidence does not sustain this allegation, which, moreover, is inconsistent with the other equity set up by the defendant.

2. He also says that it was verbally agreed, as part of the transaction, in the course of which the deed was executed, that the complainant should allow him and his wife to live upon the land during their lives,

and to be supported out of its rents and profits. This allegation we find to be true, being supported by the evidence and indeed, in effect, admitted by the complainant.

It would be inequitable to reform the deed as prayed for, and thereby place the defendant in the power of the complainant, without securing to the defendant the right which he has established.

We are therefore of opinion that the deed in question should be corrected by substituting the word "chains" for the word "poles," wherever it occurs in the deed, upon the terms that the complainant execute a conveyance of such part of the land remaining unsold to Howard as the defendant may designate, in trust, that the defendant and his wife be permitted to live upon the land during their lives, and be supported out of the rents and profits.

Each party will pay his own costs.

There may be a decree in conformity with this opinion.

PER CURIAM. Decree accordingly.

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(45)

DAVID R. BENNICK v. P. H. BENNICK and J. R. STAMEY, Adm'r, etc.

Where a creditor has exhausted legal remedies without avail, he may have the assistance of equity in subjecting to his claim the trust funds of his debtor—as, here, an interest in an estate in the hands of an administrator.

ORIGINAL BILL, to subject an interest in the hands of an administrator to the satisfaction of a claim of a creditor of one of the next-of-kin. It was filed at Fall Term, 1864, of LINCOLN, and the defendant, Bennick, demurred thereto; the other defendant filing neither answer nor demurrer, and no other proceedings being had in regard to him. The case was thereupon "set for hearing, and sent to the Supreme Court by consent."

The course of the opinion renders no statement of the facts necessary.

Bynum, for the complainant.
Logan, for the defendant.

BATTLE, J. We are unable to perceive any ground upon which the demurrer in this case can be sustained. The bill alleges debts due the plaintiff; that they have been reduced to judgments; that executions of *fi. fa.* issued upon them have been returned, "No goods and chattels, lands or tenements, to be found"; and that the defendant, P. H. Bennick, is insolvent, except as to the distributive share now in the hands of the defendant, Stamey. These allegations are admitted by the de-

murrer, and according to *Hough v. Cress,* 57 N. C., 295, and *Tabb v. Williams, Ibid,* 352, they show that the plaintiff should have the relief which he seeks.

The demurrer must be overruled and the cause remanded, to (46) the end that the defendants may answer the bill.

PER CURIAM. Demurrer overruled.

MARY LYNCH v. AARON LYNCH.

1. Upon appeals from interlocutory orders granting alimony *pendente lite,* the Supreme Court found its decree on a re-examination of the petition only.
2. Where such petition alleges adultery, it is a sufficient foundation for the order appealed from.

PETITION, for divorce and alimony, filed at Spring Term, 1864, of STOKES.

The petition alleged adultery and other matters as ground for the relief desired. These allegations were denied, specifically and distinctly, by the answer.

At Fall Term, 1864, after the answer had been filed and replication thereto taken by the petitioner, upon motion of the latter, the court allowed her alimony *pendente lite,* and from that decree the defendant appealed.

Gilmer, for the petitioner.
Morehead, for the defendant.

READE, J. Sec. 15, ch. 39, of the Rev. Code, authorizes the Superior Courts to decree alimony at any time "pending the suit"; for the meaning of which phrase we may refer to *Simmons v. Simmons, post,* 63. In the present case his Honor made the decree at the return term, after the coming in of the answer; and, in considering the appeal that has been taken, this court is allowed by the express words of the section above cited, to "re-examine *only* the sufficiency of the (47) petition to entitle the petitioner to relief." That petition, among other things, alleges that the defendant is guilty of adultery. If this be true, it is sufficient to entitle the petitioner to relief.

The alimony in question was allowed in 1864, and its amount may be excessive now, but it will be within the power of the court below to revise that allowance, and adjust it to present circumstances.

The interlocutory order must be

PER CURIAM. Affirmed.

Cited: Morris v. Morris, 89 N. C., 113; *Pettigrew v. McCoin,* 165 N. C., 475.

MILLIAM MAYHEW and others v. GEORGE F. DAVIDSON, Executor of John Mayhew, deceased.

1. A testator directed "that the shares * * * which my son Presley, etc., are entitled to under this will, * * * as well as their equal dividend of my estate not bequeathed, be retained by * * * trustees, etc., for them during their lives, and at the decease of any one of them the property * * * to return to his, her or their brothers and sisters": *Held*, that upon the death of one of the tenants for life, her share devolved upon such of her brothers and sisters as survived her, together with the representatives of such as had died since the death of the testator.
2. *Also*, that Presley's interest in such share is not subject to the trust which affects the property originally given to him.

ORIGINAL BILL, filed to obtain a declaration of the respective interests of the complainants in so much of the estate of John Mayhew, deceased, as had first vested in his daughter, Mahala, and also for the payment of their shares as they might be declared.

(48) The complainants were the only children of the testator who were surviving when the bill was filed, and the administrator of two that had died since his death. The other child who had outlived the testator was Mahala, whose death is mentioned in the opinion. The defendant was the only executor that had qualified.

The only clause of the will that was in dispute was as follows: "16th. It is my wish, and I so direct, that the shares in the lands and negroes which my son, Presley, and my daughters, Matilda, Mahala and Evalina, are entitled to under this will, except, etc., as well as their equal dividend of the residue of my estate not bequeathed, be retained by and be subject to the control of William Mayhew and George F. Davidson, trustees as aforesaid, in trust for the said Presley, Matilda, Mahala and Evalina, during their lives, and at the decease of any one of them the property and its increase to be divided by said trustees equally among the children of what was due the parent, and should there be no children, the property to return to her, his or their brothers and sisters."

The cause was set for hearing upon bill and answer, and ordered to be removed to this court, at Fall Term, 1863, of IREDELL.

Caldwell, for the complainants.
Boyden, for the defendant.

PEARSON, C. J. The property given to four of the children of the testator, to wit: Presley, Matilda, Mahala and Evalina, is to be held in trust for them during their natural lives; and at the death of any one of them leaving a child or children, the share of the deceased parent

is to belong to such child or children; but if one or more should die without leaving a child or children, "the property is to return to her, his or their brothers and sisters." Mahala died without (49) leaving a child, and the question is, Who take under the description, "her brothers and sisters"?

The will takes effect and *speaks* at the time of the testator's death, and the brothers and sisters of Mahala living at that time are as clearly designated by this description as if they had been named. These words do not include brothers and sisters who may have died in the testator's lifetime. For they would naturally be referred to as "deceased brothers and sisters." The children of such would be spoken of as Mahala's nephews and nieces. On the other hand, the words can not be restricted to brothers and sisters *living at Mahala's death;* for to give them that effect, it would be necessary to add the words "living at her death," or to say, *surviving* brothers and sisters, or words of a similar import.

We have here then a contingent limitation, where the persons are certain and the event uncertain. Interests of this sort, if in land, are transmissible by descent; if in personalty, devolve upon the personal representative; *Newkirk v. Hawes,* 58 N. C., 265.

The property to which Presley becomes entitled as one of these brothers, will not be subject to the trust which affects the property originally given to him.

There will be a decree declaring the rights of the parties according to this opinion. The costs will be paid out of the fund.

PER CURIAM. Decree accordingly.

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(50)

W. D. REYNOLDS & CO. v. ROBERT MCKENZIE.

1. The offices in the courts of law having, in November, 1865, become vacant by the result of the late war, the Provisional Judges, (who by an ordinance of the Convention had power to exercise at chambers all such authorities as by the laws of the State are conferred on judges at chambers, were authorized to exercise jurisdiction in cases in which, when the courts of law are open, equity has no jurisdiction.
2. Being so authorized, neither they nor the courts which succeed them lose jurisdiction of a cause entertained during such vacancy, by the reinstatement of the ordinary tribunals in their usual jurisdiction.
3. Where a bill avers that the defendant threatens to sell the article in dispute, and send it beyond the limits of the State, and the answer admits the averment, with the explanation that the defendant does not intend to deprive complainants of such rights thereto or to its proceeds, as the law shall assign them: *Held,* to be a fit case for continuing an injunction.

ORIGINAL BILL, for specific performance, and for an injunction, filed to Spring Term, 1866, of ROBESON.

The bill stated a purchase by the complainants, through E. Murray & Co., as their agents, from the defendant, of eleven hundred barrels of rosin, about 7 May, 1862, and a payment of $3,575 for the same. The transaction was evidenced by a paper in words and figures following, to wit:

WILMINGTON, 7 May, 1862.

Received of E. Murray & Co. three thousand five hundred and seventy-five dollars ($3,575), on purchase of eleven hundred sound barrels of virgin rosin, subject to weight on delivery, at three dollars ($3) per three hundred pounds to the barrel. Rosin in good order, and to remain under shelter for six months free of storage; if longer a reasonable rate of storage after the expiration of six months. My personal
(51) attention, if required, will be given to it, and any additional cooperage to be paid for, it being at the risk of fire or otherwise by the purchaser. Said rosin is located immediately on the Wilmington, Charlotte and Rutherford Railroad—the above rosin to be delivered to the order of W. D. Reynolds & Co., where located, the difference made by weight to be settled for, with interest, on delivery of the rosin.

ROBERT MCKENZIE.

It stated that the complainants have always been ready to pay the reasonable rate of storage as well as what is due for the services of the defendant, etc., and that they have offered to the defendant so to do, and have requested him to deliver the rosin, which he has refused to do. It alleged that defendant is a mere warehouseman for plaintiffs, but is dealing with the rosin as his own, and threatens to sell the same, and send it beyond the limits of the State, or so to deal with it that it shall never benefit the complainants. The bill prayed for an injunction, the appointment of a receiver, and for general relief.

The answer admitted the execution of the paper (above), date 7 May, 1862; also, that sometime in the summer of 1865, complainants offered to pay (upon the defendant's having the rosin weighed to determine the overweight), and demanded a delivery of the rosin, which he declined; also, that after the filing of the bill complainants offered to pay storage and whatever other charges might be due for cooperage. It denied that, at any time before the summer of 1865, complainants had demanded the rosin, or showed any readiness to pay charges as stated in the bill, or as therein stated, had before the summer of 1865 demanded the rosin. That in 1863, under advice of counsel, he had offered to deliver to E. Murray & Co., agents for complainants, the rosin, but Murray refused to receive it; that he then tendered to Murray & Co.
(52) "the money which had been paid by them as an earnest of the bargain, to wit, $3,575, together with interest thereon," which

Murray also refused to receive; that a short time before he had offered, through Murray to the complainants to deliver the rosin, but that, as Murray told him, they refused to receive it; that in May, 1862, he had 1,160 barrels of rosin *in mass,* out of which the 1,100 sold to complainants were to be taken, and that no separation was to be had until complainants should comply with their contract, and then the barrels were to be weighed, and weight above three hundred pounds to the barrel was to be paid for. Defendant submits that the contract was executory, and that complainants have complete remedy at law. He claims the rosin as his own and intends to sell or otherwise dispose of it, denying, however, any intention to deprive complainants of it or its value, in case the law of the State shall determine that they are entitled to it, or its proceeds. Finally, he submits that no bill for an injunction will lie in such a case.

A preliminary injunction was obtained before *Buxton, J.,* on 18 November, 1865; and the same at Spring Term, 1866, of ROBESON, was by him continued to the hearing. Thereupon the defendant appealed to this Court.

Moore and *W. A. Wright,* for the complainants.
Strange and *Person,* for the defendant.

PEARSON, C. J. There is no such want of equity on the face of the bill as to support the motion to dismiss.

1. The ground taken by the defendant's counsel, that a Court of Equity has no jurisdiction to compel the specific performance of a contract to deliver rosin or other articles of a like nature, having no intrinsic value, because the party has a plain and adequate remedy at law, is stated too broadly. Courts of Equity have jurisdiction to compel the specific performance of all contracts; in other (53) words, to make the party do the very thing he has agreed to do. This is *equity.* It is true that the court will not, except under peculiar circumstances, entertain a bill to enforce the specific performance of a contract like the one before us. This is not for the want of jurisdiction, but because it is not worth while. For the party may, with the money, go into market and buy an article of the same kind that will suit him as well.

Adams on Equity assumes that the court has general jurisdiction on the subject; but lays it down that, to induce the court to entertain a bill for specific performance—(1) There must be a valuable consideration. (2) A specific performance must be practicable. (3) Such a performance must be necessary for the purposes of justice; for if the party can maintain an action at law and recover damages, and with

the money buy an article of the same kind, there is no occasion for the interference of a court of equity.

In our case there was no occasion for the interference of a Court of Equity on account of the intrinsic value of the rosin, but there was a necessity for it on another ground. At the time this injunction issued (November, 1865), although the offices of the courts of law existed, there were, by the result of the war, no judges to fill them. The offices were vacant. So there was no court in which the complainant could institute an action of *assumpsit,* for the recovery of damages for breach of the contract. The judges of the courts of oyer and terminer had no powers except those conferred by the President through the Provisional Governor. These did not embrace civil suits, and those conferred by the Convention. The ordinance, entitled "An ordinance to protect the owners of property and for other purposes," ratified 18 October, 1865, invests the persons appointed by the Provisional Governor Judges
(54) of the Courts of Oyer and Terminer, with power to exercise at their chambers all such powers and authority as by the laws of the State are conferred on the Judges of the Superior Courts of Law and Equity at chambers, *e. g.,* to issue writs of injunction, sequestration, etc. It is further ordained, that so soon as the Superior Courts are restored, the Judges of the Courts of Oyer and Terminer shall transfer the cases before them into the Courts of Equity, and the latter courts shall proceed as if the cases had been instituted there. Here is a declaration by the Convention that the ordinary courts of the State were not in the exercise of their powers, and that but for the ordinance the complainants would have had no remedy whatever when the defendant refused to deliver the rosin; so the interference of the Judge of Oyer and Terminer was necessary.

It was much discussed at the bar whether this contract was *executed* in respect to the rosin so as to vest the legal title in the complainants; or only *executory,* leaving the title in the defendants. We deem it unnecessary to express an opinion on that question, for it is certain that so much of the agreement as obliged the defendant to deliver the rosin to the order of the complainants was executory, and in respect to that part of the agreement the complainants are clearly entitled to a specific performance, and this is the primary equity which the bill seeks to set up.

2. It was insisted that, as in the first instance, the bill was entertained because there was *at that time* no court of law in condition to give a remedy; therefore, inasmuch as this reason had ceased by the restoration of the courts at the time that the motion was made to dismiss, the cause should not have been retained—under the maxim, *cessante ratione,* etc.

As the court had jurisdiction over the subject, and it was necessary for it to entertain the case in the first instance, there is no principle by which the fact, that the courts of law were afterwards restored, could oust the jurisdiction. Having possession of the case, it was proper to retain it and give relief. This is in analogy to the rule that where a Court of Equity has jurisdiction, it will not decline its exercise, although a statute be passed conferring a like jurisdiction on the courts of law, unless the statute contain words of exclusion, which oust the jurisdiction of the courts of equity. The subject of relief against penalties furnishes a familiar instance of the application of this rule. (55)

3. It was insisted that the equity for a specific performance was lost by laches and unreasonable delay, and that this was a good ground in support of the motion to dismiss; or that, at all events, it supported the motion to dissolve the injunction on the coming in of the answer, by which it appeared that, in 1863, the defendant had offered the rosin to the complainants and they refused to come and take it away, or to take back the purchase money which the defendant tendered, with interest. This conduct, as the defendant insists, amounted in effect to a rescission of the contract, and certainly makes it unreasonable afterwards to ask for its specific performance.

We can not perceive the force of this reasoning. In 1862, the defendant sold the rosin to the complainants, and received the purchase money, and as a part of the bargain agreed that the rosin should remain under his shelter for six months, free of storage; if longer, a reasonable rate of storage was to be allowed—any additional cooperage that should become necessary to be paid by the complainants, and the rosin was to remain there at the risk of the complainants in respect of fire or otherwise. So, it was in the contemplation of the parties that the rosin would remain at the place where it was for some considerable time; how long is not expressed, but, say, a reasonable time. We do not consider that it was at all unreasonable, under the circumstances, that it should be left there until some time in the summer of 1865, after the war was over, and things had somewhat cleared up, so that it could conveniently be removed. Taking into consideration the facts that the purchase money was paid, that the defendant was to be allowed storage, that the rosin was at the risk of the complainants by fire or otherwise (which includes the ravages of war), and that war was going on at the date of the contract, that the complainants could not, until its close, remove the rosin to a seaport without heavy expense, or ship it owing to the blockade—the silence of the agreement as to the time raises an almost necessary implication that the rosin was to remain there until the end of the war. In *Falls v. Carpenter,* 21 N. C., 237, specific performance is decreed, although the purchaser had failed for (56)

more than six years to comply with the contract, had become insolvent, and never would have been able to pay the price but for the discovery of a gold mine upon the land. In equity, time is not of the essence of the contract unless made so by its terms.

4. It was insisted that the injunction should be dissolved, because there is no reasonable ground to apprehend loss on the part of the complainants, as the defendant is solvent, and fully responsible for such damages as the complainants can recover at law. The bill avers that the defendant has threatened to sell the rosin and send it beyond the limits of the State. The answer admits that the defendant, considering the rosin as his own property, has the purpose to sell it, or otherwise dispose of it as may seem most to his interest, but he denies that he intends to defraud the complainants of it or its value. In other words, he thinks that although he has sold the rosin once, and received the price, he can, with a good conscience, sell it again, and let the first purchaser recover damages at law, if he can. This does not accord with the principles established in Courts of Equity. The maxim is:

(57) Every one is obliged in conscience to do the very thing which for a valuable consideration he has promised to do; and the court will restrain the party from doing any act which will hinder or delay a compliance with its decree to that effect. See *Parker v. Grammer, ante,* 28.

PER CURIAM. Decretal order affirmed.

JOHN CARSON, Executor, and others v. GEORGE S. CARSON and others.

Where real and personal property was given to A, in trust for his wife and their children, with *power* to apply the proceeds to the maintenance, etc., of the *cestui que trusts*, and as the children should come to maturity to advance them, and also to devise the property to his wife and such of his children as he should deem right (60 N. C., 575): *Held*,

(1) That, upon the death of any such children in A's lifetime, their several shares in the property vested in their real and personal representatives respectively, *subject* to any execution thereafter of the said power.

(2) That under the power to devise, inasmuch as some of the children survived him, he could not devise to a grandchild.

ORIGINAL BILL, upon an application for further directions.

The case is sufficiently set forth in 60 N. C., 575, June Term, 1864.

Bynum, for the complainants.

No counsel in this court for the defendants.

BATTLE, J. When this case was before the court at June Term, 1864, we confined our decision to the question as to the construction

of the deed executed by Jonathan L. and George M. Carson, to (58) their brother, William M. Carson, in trust for certain persons therein described; and we held that the *cestui que trusts* were the trustee's then wife, Elmira, and the children which she then had and might thereafter have by him; and that the children which the trustee had by a second wife took no part of the trust fund. *Carson v. Carson,* 60 N. C., 575. Some other questions were presented by the pleadings which we declined to consider until we could hear an argument upon them.

One of the questions is, whether the children of William M. Carson by his first wife had, during the lifetime of their father, such an interest in the trust property not advanced to them by him, as survived to the real and personal representatives of those of them who died before him. We are clearly of opinion that they had, as is shown by the cases referred to by the counsel. *Miller v. Bingham,* 36 N. C., 423; *Simmons v. Gooding,* 40 N. C., 382; *Brinson v. Wharton,* 43 N. C., 80. The consequence is, that the husbands of the deceased daughters will be entitled, respectively, to the shares of their wives in the personal estate. The land and its proceeds will go to the heirs-at-law of the deceased, who will be the children of the daughter who left children, and the brothers and sisters, including the half-blood, of the daughter who died without children. The brother and sister of the half-blood will also be entitled to equal shares with the other brothers and sisters of William, who died intestate and without issue.

Another question is, whether the trustee, under power to make provision for his children by will or deed, could thus provide for grandchildren, the children of a deceased daughter.

It is settled that, where there are gifts in a will to children, grandchildren can not take when there are any persons answering to the description of children. *Ward v. Sutton,* 40 N. C., 421. Upon the same principle, a power conferred upon a person to dispose (59) of a fund among children will not authorize a disposition of a part of the fund to grandchildren, at least while there are any children who can take it. *Scott v. Moore,* 60 N. C., 642, referred to by the counsel, does not apply, because that was the case of a marriage settlement decided upon the peculiar wording of the instrument, aided by the consideration that from its nature it was intended to provide for the offspring of the parties to it. A decree may be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

Cited: *Lee v. Baird,* 132 N. C., 760.

JACKSON JOHNSON and L. W. SILER, Executors, etc., v. A. J. OSBORNE and others.

Where a testator directed that two of the shares, into which he divided his estate, "shall be in negro property, which shall be designated by the executors to this will": *Held*, that such legacies were demonstrative, and, therefore, that upon the emancipation of slaves the legatees thereof lost them, and could not look to other parts of the estate for indemnity.

ORIGINAL BILL, praying for instructions in regard to a will, filed at Spring Term, 1866, of HAYWOOD, when the cause was set for hearing upon bill and answer, and transferred to this court.

The complainants were the executors of Ephraim Osborne, deceased, and the defendants his legatees. The will consists of numerous items, and it appeared from it that, previous to its being written, the testator had divided his lands into several "divisions," which were duly numbered on a *plat* filed with his will.

No further statement is deemed necessary in order to understand the opinion.

(60) No counsel in this court for the complainants.
Bailey, for the defendants.

PEARSON, C. J. In the fourth item of his will the testator provides for raising three shares, to be allotted to the children of his three deceased daughters; such children to represent their mothers respectively; each set to take one share, and the share of each set to be assigned by drawing lots.

The three shares were to be made up as follows: "Division No. 3," in the plat to which reference is made, was to make one of the shares; "the other two shall be in negro property, which shall be designated by the executors to this will."

At the death of the testator he owned many negroes, out of which the two shares could have been made. But by the act of emancipation it has become impossible to make the two shares in the manner directed by the testator, and the question is, Does the loss of these two shares fall upon the grandchildren named in this item or "upon the estate at large"? by which we understand to be meant, Shall the value of these two shares be made up out of other funds in the hands of the executors?

This legacy is *demonstrative, i. e.,* the species of property of which it is to consist is pointed out by the testator, to wit, a part of his negroes to be designated by the executors. The legacy then is specific, and as the subject has been destroyed by the political death of the slaves, the effect is the same as if they had all died a natural death; and in

that case it is settled that the legatees must lose the legacy, and can not look to the other parts of the estate for indemnity.

No further instructions are asked for, and as the legatees get only one of the shares, to wit, "Division No. 3," and that one share can itself be divided in the manner directed by the testator, we (61) presume that they will have no difficulty in dividing it in that, or in some other mode.

This opinion will be certified to the court below; and the costs will be paid by the executors out of the assets of the estate.

PER CURIAM. Decree accordingly.

Dist. Hill v. Toms, 87 N. C., 496.

WILLIAM L. TWITTY, Executor, v. J. C. CAMP and others.

A clause, annexed to a devise in fee, providing that in case either of the devisees "shall sell, or encumber his land with any sort of lien, by way of mortgage or otherwise," before attaining the age of thirty-five years, then the devise should be void, is invalid.

THIS was a bill filed at Fall Term, 1864, of RUTHERFORD, in order to obtain a construction of the will of Robert G. Twitty, deceased.

One of the questions made in the bill referred to certain slaves that had been bequeathed by the testator. The clause of non-alienation, referred to in the opinion of the court, was as follows: "Item 7. It being my desire that my children should enjoy the benefit of the property which I have given them; and believing that they can not be better located than upon the lands which I have respectively given them, I therefore desire this condition to be annexed to each separate devise of land, and I do hereby make it a part of this my last will and testament; that is to say, that in case either one of my children shall sell or encumber his land with any sort of lien, by way of mortgage or otherwise, before they attain the age of thirty-five years, then the devise to them of their respective parts of land to be void, and my will is that it fall back to such of my children as may be living. It is, (62) however, my will that should any of my children marry, and have heirs, and die before they attain the above age, then that their children shall inherit their father's and mother's lands."

No further statement of the contents of the bill or answer is necessary.

Bynum, for the complainant.

No counsel for the defendant in this court.

BATTLE, J. In the events which have happened since the death of the testator, it has become unnecessary for us to decide the question raised in respect to the slaves given to his daughter, Mary Jane.

The only inquiry pressed upon us relates to the clause of non-alienation annexed to the devises of land to each of the testator's children. These devises are in fee simple, and the condition, by which the testator has attempted to restrain the alienation of the land before the devisees respectively attain the age of thirty-five years, is contrary to the nature of the estate, and is therefore void: See *Pardue v. Givens*, 54 N. C., 306, where a condition restrictive of the power of free alienation was pronounced a nullity. The present case differs from that only in the circumstance, that here the restriction is confined to a disposition of the land under the age of thirty-five years. But this, we think, makes no difference. If the testator had the power to impose such a condition for thirty-five years, he might have imposed it for fifty, seventy or a hundred years, for we are not aware of any particular age up to which the restriction would be good, and beyond which it would be bad. Coke, Blackstone, and other elementary writers lay down the rule generally that a condition of non-alienation annexed to the conveyance
(63) *inter vivos*, or to a devise of a fee, is void, because it is inconsistent with the full and free enjoyment which the ownership of such an estate implies. Our conclusion is, that the devisees in fee under the will before us have the full power of selling, or otherwise disposing of their lands respectively, without the danger of incurring a forfeiture for so doing. A decree to that effect may be drawn accordingly.

PER CURIAM. Decree accordingly.

Cited: Hardy v. Galloway, 111 N. C., 523; *Latimer v. Waddell*, 119 N. C., 377; *Ricks v. Pope*, 129 N. C., 55; *Wool v. Fleetwood*, 136 N. C., 465.

ELIZABETH SIMMONS v. ALFRED SIMMONS.

Where the defendant in a petition for divorce and alimony, not having been served with process, was present however in court at the term when the petition was filed, and made objection personally to any order granting alimony: *It was held*, that such presence and action did not give to the cause the character of a *lis pendens;* and, therefore, that at such stage no order for alimony could be made.

PETITION for divorce *a vinculo* and for alimony.

The petition was filed to the Spring Term, 1866, of WATAUGA. It stated various acts of adultery and of desertion upon the part of the defendant; but instead of alleging these things directly, frequently repeated the expression, "your petitioner *would* show," etc.

The record transmitted to this court stated, among other things: "At this term of the court the petition was presented to the judge, and his fiat [made] that process issue to the defendant. The petition was then

filed in court, and a motion made that alimony *pendente lite* be allowed petitioner. The defendant, being present in court, admitted that the matter set forth in the petition was sufficient to entitle petitioner to the relief prayed for, but resisted the motion, upon the ground (64) that the court could not decree alimony *pendente lit,* until a copy of the petition and subpœna had been served upon him. The court was of a different opinion, and allowed petitioner the sum of fifty dollars as alimony *pendente lite,* and awarded execution to issue for the same." Whereupon the defendant appealed.

No counsel in this court for the petitioner.
Haywood, for the defendant.

READE, J. In the case before us the petitioner came into court and read her petition to the judge, and he "ordered that process issue to the defendant." "The petition was then filed, and a motion made for alimony," which was allowed. The defendant being present, but not having been served with process, nor yet entering an appearance, was allowed by the court to object to its power to decree alimony at that stage of the proceedings. But his Honor, being of opinion that he had the power, allowed alimony, and ordered execution to issue for the same. The defendant prayed for and obtained an appeal.

The statute, Rev. Code, ch. 39, sec. 15, provides that, in petitions for divorce and alimony, the court may "at any time pending the suit," decree reasonable alimony.

The question is: Was the suit *pending?* If it was, then his Honor had the power to allow alimony. If it was not *pending,* then he had no such power.

"It is no suit pending till the parties appear, or have been served to appear, but only a piece of parchment thrown into the office, which may be there forever, and never come to a suit." *Moore v. Welsh Copper Co.,* 1 Eq. Ca. Ab., 39.

In a plea of "Former suit pending," it must be averred "that there have been proceedings in the suit, as appearance, or process requiring appearance, at the least." 2 Dan. Ch. Pr., 726; Mit- (65) ford Ch. Pl., 247. In the form given of a "Plea of a former suit pending," in Curtis' Equity Precedents, 164, it is said, "and this defendant appeared, and put in his answer to the said former bill," etc. So, there can be neither *retraxit* nor nonsuit, until the return term, when the plaintiff is demandable. See *Eagin v. Musgrove,* 61 N. C., 13, at this term, and the cases there cited.

It seems therefore to be settled that a suit is not *pending* until the return term, or at least until service of process.

In cases of divorce, alimony ought not to be allowed until the return

term, and after the service of the process; for, although the petitioner's claim to alimony is to be determined by the judge from the allegations of the petition only, yet, it is settled by *Shearin v. Shearin,* 58 N. C., 233; *Taylor v. Taylor,* 46 N. C., 528, that not only the answer but affidavits may be heard as to the amount of alimony proper to be allowed. The utmost reach of indulgence has been allowed by the Legislature and the courts when alimony is decreed upon the mere allegations of the petitioner; but to allow the *amount* of alimony, as well as the *right* to it, to depend upon the statements in the petition, might in all, and doubtless would in many cases, work great hardship. The defendant therefore ought to be heard, at least upon the *amount* of alimony; and this can only be after he is brought in by the service of process.

The similarity of the language used by the judge in stating this case, to that of this court in *Taylor v. Taylor, supra,* induces us to believe that his Honor acted in deference to what he supposed to be the proper construction of that case. It will be found, however, that that case was decided before the Revised Code was enacted, under the statute of 1852, which gave the court power, at the return term, or at any time thereafter, to allow alimony. The court, in commenting upon that
(66) statute, said, "that it was the duty of the court, at the return term, or at any time when application is made," to allow alimony. But it is evident that what was meant by "at any time," was, at any time subsequent to the return term. And in that case the fact was that the application was subsequent to the return term.

We have not overlooked the fact that, in an appeal to this court from an order for alimony, this court is restricted by the statute from looking into anything except the petition itself, in order to determine the petitioner's right to relief. But the present is a question as to the *power* of the court over the subject at the time; and we think that his Honor had not the *power* to allow alimony at that time, because *the suit was not pending.*

It was insisted on in the argument that the petition is so inartificial in form that no decree can ever be founded upon it; that the facts are not *alleged,* but only stated hypothetically. The haste with which pleadings have to be prepared upon the circuit affords a reasonable excuse for an occasional absence of accuracy and precision. But a radical departure from ordinary forms is inexcusable. It embarrasses the court and jeopardizes the interests of suitors. As the case has to go back, the petition will probably be amended.

The interlocutory order allowing alimony is

PER CURIAM. Reversed.

Cited: Lynch v. Lynch, ante, 46; *Morris v. Morris,* 89 N. C., 113; *Pettigrew v. McCoin,* 165 N. C., 474, 475.

(67)

HENRY G. SPRINGS v. JAMES M. SANDERS.

1. So long as a contract for the sale of land remains executory on both sides, the vendor has the same right to enforce a specific performance of it against the purchaser, as the latter has against him; therefore—
2. In such a case the vendor may maintain a bill against the vendee, to enforce the payment of the purchase money.

ORIGINAL BILL, filed to Spring Term, 1866, of MECKLENBURG. At the same term a demurrer was filed, and the cause set down and argued. The demurrer having been overruled, the defendant appealed to this court.

The bill showed a contract for the sale of a lot of land, and alleged that a large portion of the purchase money was still due. The prayer was for a decree directing the land to be sold, and the proceeds to be applied to the payment of the purchase money, and for other relief.

To this the defendant filed a general demurrer.

Wilson, for the complainant.
Dowd, for the defendant.

BATTLE, J. There is no doubt that where the contract for the sale of lands remains executory on both sides, the vendor has the same right to enforce a specific performance of it against the purchaser as the latter has against him. This is not denied by the counsel for the defendant, but he insists that where there is nothing for the purchaser to do but to pay the price, the vendor can not sustain a bill in equity against him, because he has a complete remedy by a suit for the money at law. For this position the counsel relies on the authority of a case referred to in a note to Adams' Equity, 77, where it is said: "A specific performance will not be decreed except where the legal remedy is inadequate, and something remains to be done besides the mere payment of money.' See *Phyfe v. Wardell,* 2 Edwards (68) (N. Y.), 47.

This is undoubtedly so in a case where the title to the land has been conveyed to the vendee, and the vendor has taken his note, or other security, for the purchase money; but it is otherwise when the title has been retained as a security for the price. In the latter case something remains to be done on both sides, and as the purchaser can go into equity for a specific performance, the principle of mutuality gives the same right to the vendor. Thus we find it stated in a recent treatise on the subject, that "it is the principle of mutuality which has led to the practice of compelling specific performance of contracts for sale against the purchaser, where, in fact, the claim made by the bill is only the sum of money agreed to be paid. Now equity originally interfered to effect

the performance of contracts, in order to give the party the actual thing contracted for, and at the instance of the purchaser; but when once that jurisdiction was assumed, the principle of mutuality compelled equity to assist the vendor." Batten on Spec. Perf., p. 66 (67 Law Lib., 59). In the case of *Phyfe v. Wardell,* above referred to, nothing remained to be done by the vendor, so that he could not have maintained his bill for the price which the vendee had agreed to pay, but for another ingredient of equity which the case discloses. Had the title been retained by the vendor, then there would have been no necessity to resort to any other matter to sustain the equitable jurisdiction, for the case would have come within the principle stated by Mr. Batten, and in support of which he cites several authorities.

The order is affirmed, and the cause remanded, in order that the defendant may answer the bill.

PER CURIAM. Affirmed.

Cited: Rodman v. Robinson, 134 N. C., 513.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JANUARY TERM, 1867

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(69)

MARIA de EGYPTO OLIVEIRA v. THE UNIVERSITY OF NORTH CAROLINA.

1. It is not necessary to make the administrator of the deceased a party to a bill preferred by the next of kin against the University, to recover property which had improperly been paid over to that institution.
2. Courts of equity are not ousted of their jurisdiction in regard to subjects which by statute have been committed to the jurisdiction of courts of law, unless there be in such statute express language or clear intendment therefor.

BILL, filed to Fall Term, 1866, of CHOWAN, at which term the defendant filed a general demurrer, and the cause was set down for argument and transferred to this court.

The bill alleged that the complainant was sister of one Simao da Rocha Oliveira, who died intestate in Bertie County in 1850, leaving a large personal estate, which, having been administered upon in the year 1859 or 1860, was paid over to the University as escheated property; and that in 1861 the complainant had demanded such property from the defendant, but the latter had declined to settle except according to law. The prayer was for discovery, an account, and for further relief.

W. A. Moore, for the complainant. (70)
Moore and *Bragg,* for the defendant.

READE, J. The causes assigned for demurrer are: (1) That the administrator is not a party; (2) That the complainant has complete remedy at law.

1. Seven years after the qualification of an administrator, it is his duty to pay over to the University all sums of money, or other estate, which shall remain in his hands unrecovered or unclaimed by suit, by creditors or next of kin. And the University has the right to hold the same, without liability for profits or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto. Rev. Code, ch. 46, sec. 27. As soon as the administrator performs this duty, he is thereby, and immediately, divested of his character of trustee of the fund, and the University is substituted in his place, with all his liability to creditors and next of kin. There is, therefore, no necessity that the administrator should be a party, even supposing he is alive.

2. The recovery of distributive shares in intestates' estates by the next of kin, is a well recognized subject of equity jurisdiction; and such jurisdiction is not to be ousted by any supervening jurisdiction of courts of law, excet by express enactment or clear intendment. *Barnwell v. Threadgill,* 40 N. C., 86. Supposing, therefore, that the complainant has complete remedy at law, which is by no means clear, it is only concurrent and not exclusive; but further, it is to be observed that the bill seeks discovery, and therefore is peculiarly within the jurisdiction of this court.

For these reasons the demurrer is overruled and the cause remanded, to the end that the defendant may answer.

PER CURIAM. Demurrer overruled.

Cited: Humphrey v. Wade, 70 N. C., 281.

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(71)

CHRISTOPHER L. WARD v. GEORGE BRANDT, JESSE G. SHEPHERD and THOMAS J. CURTIS.

1. Where a trustee, holding land as security for a creditor residing in Pennsylvania, had been compelled, by a decree in a Confederate court, to sell and pay the proceeds to one of its officers: *Held,* that such creditor could still subject the land to his debt, whilst in the hands of a purchaser with notice.
2. *Also,* that the remedy in such case is not to order the deed to the purchaser to be delivered up for cancellation, but to declare such purchaser affected by the trust.
3. The prayer of the bill being for a cancellation of the deed, and for general relief, the Court, declining to grant the former part of the prayer, under the latter, declared the purchaser to be a trustee.

BILL, seeking relief against a sale made by a trustee for a Pennsylvania creditor, under an order of confiscation by the District Court of the Confederate States, in 1862.

The bill was filed to Spring Term, 1866, of CUMBERLAND, and alleged that the complainant, who was a citizen of Pennsylvania, being a creditor of the defendant, Curtis, for about four thousand dollars, had been secured by him, in the year 1855, by a conveyance of a house and lot in Fayetteville to the defendant, Shepherd, as trustee; that the debt, not having been satisfied at the breaking out of the late war, was confiscated under an act of the Confederate Congress, passed in September, 1861, and the trustee compelled, by an order of the Confederate Receiver, to sell the house in December, 1862, and pay over its proceeds to him; that at such sale the defendant, Brandt, became purchaser, paying the price to Shepherd in Confederate Treasury notes, and receiving a deed from him; and that he bought with full knowledge that the sale was made under an order of the Confederate Court, sitting at Salisbury; and that the money which he paid was to be applied under (72) that order, and not for the benefit of the complainant. The prayer was that the deed from the trustee to Brandt might be delivered up to be cancelled, and for further relief.

A copy of the deed from Curtis to the trustee, which had been duly registered, was filed with the bill, as an exhibit, and recited the fact that complainant was of Bradford County, Penn.

The answer of the defendant, Brandt, admitted that the lot had been conveyed to Shepherd to secure a debt due by Curtis to Ward, and that at its sale he had become the purchaser; it denied that the price was paid in Confederate notes, and asserted that, on the contrary, it had been paid by his check upon the Bank of Clarendon, in Fayetteville, which check was good for its amount "in good and lawful money"; it also denied that he knew of any Confederate Court held at Salisbury, or that the house had been confiscated, and asserted that he had bought *bona fide,* being assured by the trustee, to whom he had applied for information, that he would get a good title; that no proclamation was made at the sale; that the house was sold as confiscated, but that it was then publicly said that it was sold as trust property. The answer also denied that Brandt knew that Ward was of Pennsylvania, or was treated as an alien enemy, or that the proceeds of the sale were to be applied to satisfy any decree in a Confederate Court, or that the trustee could not remit them to the complainant. It admitted that Brandt was a merchant of Fayetteville, residing nearly opposite to the house last mentioned.

The deed from Shepherd to Brandt was filed with this answer as an exhibit, and recited that it was "between Jesse G. Shepherd, trustee of Thomas J. Curtis, under a deed of assignment in favor of C. L. Ward, of the one part, and George Brandt," etc.

The answers of Shepherd and Curtis admitted all the material allegations in the bill.

(73) Several depositions, taken upon the part of the complainant, tended to show that the defendant, Brandt, had been informed in April, 1862, and again just before and upon the day of sale, that the house was to be sold as confiscated property; that for some days before, as well as upon the day of sale, the trustee was absent in Raleigh, and that the sale was made by a public auctioneer.

The deposition of the auctioneer, taken for the defendant, Brandt, was that at the time of the sale, in response to an inquiry, he had announced that a trustee's title would be given; also that Brandt's check was good and was paid, and that B. was worth its amount (viz.: $4,500) in gold; but that it was his impression that it was not a specie check, but payable in currency, which then was Confederate money; and that when the trustee employed him to make the sale, he had informed him that the house was sold in consequence of a decree of the Confederate Court.

Phillips & Battle, for the complainant.
Bragg and *Person,* for the defendant, Shepherd.
Haigh and *McDuffie,* for the defendant, Brandt.

(74) PEARSON, C. J. The scope of the bill is to set up a trust, according to which the house and lot mentioned in the pleadings was held by the defendant, Mr. Shepherd, in order to sell and pay off, when required, a debt due by Curtis, one of the defendants, to the complainant, and to pay the excess of purchase money to Curtis; and this, upon the allegation that Mr. Shepherd exposed the house and lot to sale at public auction, and conveyed the premises to the defendant, Brandt, not for the purpose of executing the trust in favor of the complainant, but for the purpose of excluding him, and diverting the trust fund so as to pay it over to the Confederate Government, under the pretext that the fund was payable to the Confederate Government by reason of certain confiscation acts, by force and effect whereof that Government, instead of the complainant, had become entitled to receive the debt secured by the deed of trust.

This equity does not rest on the motion that a purchaser at a trustee's sale must see to the application of the purchase money; but upon a broad principle of justice, recognized and acted upon in Courts of Equity, and which is too plain to admit of discussion. It would have been "plainer sailing" had Mr. Shepherd set out in the deed executed by him to Brandt the purpose and reason for exposing the property to sale and passing the legal title, for there can be no question that the original trust in favor of the complainant, or the resulting trust in favor of the defendant, Curtis, are still subsisting, and must be made to attach to the house and lot, unless Brandt can protect himself as a

purchaser without notice under the rule, "When equities are equal the law prevails." And as the complainant does not seek, by his bill as framed, to charge Mr. Shepherd for the breach of trust, but only to follow the land and subject it in the hands of Brandt to the original trust, the whole matter is narrowed down to the single point, Has the complainant fixed Brandt with notice, so as to affect his conscience, and make it iniquitous in him to insist upon the legal (75) title, so as to bring the case under the principle by which Courts of Equity relieve against fraud or illegality in procuring the execution of deeds, by converting the party into a trustee?

It would have better evinced on the part of Mr. Shepherd the desire, which no doubt he felt, to protect the interests of his *cestui que trusts*, as far as it was in his power to do so under the circumstances in which he was placed, had he set out in his deed to Brandt the fact that he made the sale at the instance and by order of the Confederate Government, through its agent, Mr. Wilder. That would have furnished his *cestui que trusts* with full evidence to fix the purchaser with notice, and have enabled them, without any difficulty, to set up their equity upon the events which have since transpired. The complainant has undertaken to supply this omission on the part of his trustee, and we think he has succeeded in doing so.

The defendant, Brandt, in order to avoid giving up valuable property, which would have been his had the late war resulted differently, was evidently greatly tempted, in framing his answer, to deny notice, by the use of general terms; and he shows a want of candor, in trying to take advantage of ignorance of what is considered in equity sufficient notice to affect the conscience and prevent a party from setting up a legal title, in order to deprive one of his original equity. We need hardly repeat that such circumstances as will put a man of ordinary prudence upon inquiry amount to notice. Without entering into a particular discussion of the proofs in the cause, the admission in the answer of defendant Brandt, that he made inquiry of Mr. Shepherd as to whether he could make a good title, tends strongly to show the existence of circumstances calculated to excite inquiry; for if the trustee had been selling in the usual way, in order to pay off the debt secured by the deed of trust to the party entitled to the money according to the provision of the deed, there would have been no occasion to ask for any such (76) assurance; and, taking this admission in connection with the general tone of the answer, the proofs in the cause and such matters of public notoriety, of which the courts take notice as part of the history of the times, the court declares the fact to be that the defendant, Brandt, purchased with notice, and that he bought under the expectation and belief that if the independence of the Confederate States should

be established, he was acquiring a good title; otherwise, he would be subject to the trust and to the equity of the complainant, and to the resulting trust of the defendant, Curtis.

The specific relief prayed for by the bill is to have the deed, executed by Shepherd to Brandt, "set aside and delivered up to be cancelled." That relief is only appropriate when there is fraud in the *factum* of the deed. Under the general prayer, however, the complainant is entitled to a decree, declaring Brandt a trustee, and directing a sale by the Clerk and Master; and requiring the defendants, Brandt, Shepherd and Curtis, to join in a conveyance to the purchaser. The proceeds of the sale, together with the amount for which Brandt is chargeable on account of rents (as to which there will be an account), will be applied, in the first instance, to the satisfaction of the complainant's debt and interest, and the surplus, if any, will be paid to defendant, Curtis; and Curtis will be allowed, in respect of his resulting trust, the privilege of discharging the complainant's debt and interest by a given day, six months from the first day of this term, in which case the defendants, Brandt and Shepherd, will execute a deed to him, to be approved of by the Master. The complainant's costs will be paid by the defendant, Brandt.

PER CURIAM. Decree accordingly.

Cited: *Justice v. Hamilton,* 67 N. C., 112.

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(77)

T. C. SINGLETARY v. RICHARD B. WHITAKER.

A sale of land under a petition in the name of an infant having been confirmed, the court ordered the master to collect the note when due, and, upon payment to make title; at another term, the court ordered the master to pay the note over to the infant's guardian; this was done, *and the master made title to the purchaser;* on a petition by the infant after coming of age, praying that the land might still be held subject to the payment of the purchase money: *Held,* that the deed by the master was irregular and invalid, and that the petitioner was entitled to the relief which he desired.

PETITION, filed at Spring Term, 1866, of BEAUFORT, in a cause constituted at Fall Term, 1858.

The petition stated, that in the original cause the petitioner, then an infant, had appeared by guardian and prayed that a tract of land should be sold; upon a report of the sale, at Spring Term, 1859, the same was confirmed, and the Master ordered to collect when the note became due, and upon the payment thereof to make title. At Fall Term, 1860, the Master was ordered to pay the note to the petitioner's

guardian; this was done, and it remained still unpaid, and was the property of the petitioner, who was then of age. Upon applying in 1866 to the purchaser for payment, it was refused, and the petitioner was told that title to the land had been made to him by the Master. It also alleged that the petitioner was in danger of losing his money from the insolvency of the parties.

It prayed that the deed might be declared irregular and void; that the debt be declared a lien on the land; and that on default of payment the land be sold, etc., and for further relief.

The answer admitted most of what was stated in the petition, but alleged that the note had been passed by the petitioner, for value, to other parties, and that the defendant did not know whether, at the time of filing the petition, it was in the hands of the peti- (78) tioner and his property; the deed from the Master, as he was advised, was not made without authority of the court; also, that it was made with the consent of the guardian, who preferred the note to money; the transfer of the note by the Master to the guardian, as he was advised, destroyed the lien, and this effect was strengthened by its receipt by the petitioner, upon coming of age; the answer also alleged that the guardian bond was good for the claim, and it denied that the makers of the note were insolvent.

Replication was taken to this, and at Fall Term, 1866, the cause, by consent, was ordered to be sent to the Supreme Court.

Rogers & Batchelor, for the complainants.
No counsel for the defendant.

PEARSON, C. J. The purchase money of one-half of the land, to which the petitioner was entitled, was secured by the bond of Whitaker, with Selby as surety, and also by the title which was retained as additional security.

We do not concur in the position taken on the part of the defendant, that the order made at Fall Term, 1860, that the Clerk and Master deliver the bond to the guardian of the petitioner, so modified the former order as to direct the Clerk and Master to make title to the defendant before the bond was paid. In the absence of an order in express terms to that effect, we can not suppose that it was the intention of the court to relinquish one of the securities and leave the infant, whose interest was under the protection of the court, to depend on the security of the bond alone. Upon what ground could the defendant ask that one of the securities which the court held should be relinquished? He paid nothing, and put nothing in its stead.

There being no order for the Clerk and Master to make title, his deed was irregular and invalid, and the petitioner is entitled

(79) still to look to the land as a security for the price which the defendant undertook to pay, and which he has failed to pay.

The idea that the guardian, in prejudice of his ward's interest, could relinquish the security of the land and authorize title to be made, can not be entertained for a moment. Nor can the suggestion, that the defendant and his surety are able to pay the amount of the bond, and if not, that the petitioner may resort to the bond of his guardian, avail anything in the face of the fact, that the defendant has the land of the petitioner, but has not paid for it. This court will see that he specifically performs his contract.

The petitioner is entitled to the relief prayed for.

PER CURIAM. Decree accordingly.

Cited: Rogers v. Holt, post, 110; *Walker v. Moody,* 65 N. C., 602; *Thaxton v. Williamston,* 72 N. C., 127; *Lord v. Beard,* 79 N. C., 11; *England v. Garner,* 84 N. C., 214; *Davis v. Rogers, Ibid,* 416; *Hudson v. Coble,* 97 N. C., 263.

Dist.: Fleming v. Roberts, 84 N. C., 542.

LEWIS COTTEN, *ex parte.*

1. The mere affidavit of the party, upon whom a notice was alleged in the sheriff's return to have been *served*, is, in the absence of proof, no ground for reviewing a declaration in a decree, that it satisfactorily appeared to the court that such return was true.
2. Any court, which orders a judicial sale, has the power to make a decree for the money, after a ten days notice thereof.
3. The statutory provision to that effect (Code, c. 41, s. 129), is constitutional, and, as regards courts of equity, merely substitutes notice and execution for the original power of proceeding by attachment.
4. Where the note given at a sale was to a former clerk and master: *Held*, that a decree in the name of the present clerk and master was valid.
5. A suit, upon a note made to a former clerk and master by his name and office, need not be brought in his name. It were more safe to bring it in the name of the State.

PETITION, filed at Fall Term, 1866, of NORTHAMPTON, to review a decree made at Fall Term, 1861, in a petition for a sale of slaves,

(80) under which the present petitioner had become a purchaser. In the court below, *Gilliam, J.,* dismissed the petition, and the petitioner appealed to this Court.

The facts were, that a notice had duly issued to the petitioner and the sureties upon his bond, returnable to Spring Term, 1861, informing them that a motion would be made at such term to have a judgment or order for the speedy collection of said bond. This notice was returned

as having been executed. At Fall Term, 1861, an order was made, which, after reciting the judicial sale, the purchase, and the bond, and that ten days' notice of the present application had been given to the obligors—directed that the latter should pay the money into office on or before 1 April, 1862, otherwise, that an execution should issue against them.

At Fall Term, 1866, the present petition was filed, which, after referring to the sale and the note, stated that about 10 October, 1866, the petitioner had received notice that a decree had been entered against him upon that note, and that, unless the money was paid, execution would be issued; that upon inquiry the petitioner had found that a summary decree had been entered in 1861, but had not been enrolled, and that notice thereof was said to have been given; that such notice had not been given, and he was totally ignorant of the proceedings under which the decree was made; that he is advised that such decree is irregular and not warranted by law, because said notice was not served, and also because, if it had been served, the court could not have given a decree against the petitioner; also, because the decree was given in the name of the present Clerk and Master, and not of the late one—to whom his note was payable. The prayer of the petition was to have the decree set aside as void, or that it be reheard, or reviewed, and for other relief.

Bragg, for the petitioner.
Peebles, contra.

READE, J. 1. The petitioner alleges that, in fact, the notice (81) set out was never served on him.

The notice is returned by the sheriff "executed," and the decree sets forth that it satisfactorily appeared to the court that notice had been served, and the petitioner offers no proof. There is, therefore, no ground for this complaint. Indeed, this court could not review the finding of the judge below, as set forth in the decree, that notice had been given.

2. The petitioner insists that the court had no power to render the decree.

The Supreme and other courts ordering a judicial sale, or having possession of the bonds which may have been taken on such sales, may, on motion, after ten days' notice thereof in writing, enter judgment, as soon as the money may become due, against the debtors, or any of them, etc. Rev. Code, ch. 31, sec. 129.

It was under that statute that the decree was entered; and in terms it certainly authorizes it. But it is insisted that the statute is unconstitutional, because it contravenes the right of trial by jury.

The Declaration of Rights provides: That in all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the people, and ought to remain sacred and inviolable.

What controversy did the petitioner have which he had the right to have determined by a jury?

In a proper proceeding for the purpose, the Court of Equity had ordered the sale of property, and he became the purchaser at a certain price, and promised to pay the amount at a given day. He failed to pay, and the court had the power to attach him for a contempt for not paying. The proceedings of the court would be obstructed without end, if, in attempting to enforce its judgments and decrees, the
(82) person against whom they are to be enforced could stop the proceedings until he could make up a controversy with the court and have it tried by a jury.

So, in this case, certain persons sought the aid of the Court of Equity to sell their property; the court ordered the sale, and the petitioner bought, and now seeks to stay the proceedings of the Court of Equity in that case until another suit can be instituted against him, in which a jury can determine whether he ought to pay. The constitutional provision was certainly never intended to apply to a case like this.

As a substitute for an attachment by which a Court of Equity can enforce all its decrees, a milder remedy is provided in the aforesaid statute, by notice and judgment on motion. And that statute is not unconstitutional.

3. The petitioner objects that the notice to him was in the name of G. B. Barnes, who was Clerk and Master at the time notice was issued, whereas his bond was given to W. W. Peebles, Clerk and Master at the time of the sale.

There is no force in the objection. If the proceeding against the petitioner had been by suit on his bond, which was payable to W. W. Peebles, Clerk and Master, it may be that it would have been necessary to sue in the name of W. W. Peebles, and not in the name of the new Clerk and Master; but we do not decide the question, and such is not the inclination of our opinion. And the statute, Rev. Code, ch. 13, sec. 11, authorizes a suit upon such bonds *in the name of the State,* which would, therefore be the most safe practice where a suit is instituted at all. But in this case the proceeding is presumed to be at the instance of the court itself, in a cause pending before it.

Notice is given to the defendant, that the court will render judgment against him in the cause then pending before it, if he fail to pay for the property which the court ordered to be sold. And the decree is neither in favor of the old nor the new Clerk and Master, but "that he pay into the office of the Clerk and Master," etc.

We concur with his Honor in the court below, that the peti- (83)
tion ought to be

PER CURIAM. Dismissed with costs.

Cited: Rogers v. Holt, post, 110; *Lord v. Beard,* 79 N. C., 11; *Hudson v. Coble,* 97 N. C., 263; *Lackey v. Pearson,* 101 N. C., 653.

MARTHA COOPER and others v. CALEB CANNON, Administrator, and others.

Where a testator, having devised certain property to his wife, ordered that after her death, the remainder should "be divided amongst *our* next of kin," and died leaving no persons who were at once next of kin to both: *Held*, that the property should be divided into two equal parts, and be given, one to the next of kin of the testator, the other to the next of kin of his wife.

BILL, for the settlement of an estate, filed to Spring Term, 1861, of PITT, and at Spring Term, 1866, transmitted, upon bill, answers and exhibits, to this court.

The complainants, who were some of the next of kin of Theophilus Slaughter, deceased, set forth that he left a considerable estate, most of which he had devised to his wife, and then, "at the death of my beloved wife, whatever property remains belonging to my estate, to be divided amongst *our* next of kin," etc.; that the testator had left no persons who were, at the same time, next of kin to both himself and his wife; but had left some who were next of kin to him, and others who were next of kin to his wife. They claimed that under the above devise the testator's next of kin alone were entitled. The prayer was for an account from the administrator with the will annexed, a sale of the land that belonged to the estate, for distribution, and for further relief. (84)

The bill was taken *pro confesso* against certain other of the next of kin of the testator, who were out of the State.

The answers admitted the facts stated in the bill, but claimed that the property was distributable, under the clause in question, among the next of kin of both parties.

Rogers & Batchelor, for the complainants.
No counsel for the defendants.

READE, J. The clause of the will presented for consideration is as follows:

"I give unto my beloved wife, Nancy, all of my stock," etc. "What-

ever property remains belonging to my estate to be divided among our next of kin."

There are persons who are next of kin to the husband (the testator), and there are persons who are next of kin to the wife; but there are no persons who are next of kin to both husband and wife.

The question is, who are meant by *our* next of kin?

If there were persons next of kin to both husband and wife, they would fit the description, *our* next of kin, and they would take the whole.

As there are none such, then the estate must be divided into two equal parts, and one part distributed among the next of kin to the husband, and the other part among the next of kin to the wife. *Grandy v. Sawyer, ante,* 9.

There will be a reference for an account if the parties desire it.

PER CURIAM. Decree accordingly.

Cited: Slaughter v. Cannon, 94 N. C., 190.

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(85)

AUGUSTE W. MILLER v. ANNIE W. MILLER, ROBERT H. COWAN and HAYWOOD W. GUION, and wife, ELLEN.

Where a vendor had executed a full title to the land sold, taking from the vendee a personal bond, with two sureties, for the purchase money; upon the insolvency and death of the vendee and one of the sureties, and a sale of the land by the devisee of the vendee to a purchaser with notice: *Held*, that the other surety could not subject the land for his indemnification upon the bond.

ORIGINAL BILL, filed to Fall Term, 1866, of BLADEN, at which time a demurrer and an answer were put in, and the cause was set for hearing and transmitted to this court.

The bill stated that in 1853 Mrs. Guion, then Miss Owen, sold to Thomas C. Miller an improved lot in Wilmington (which was described), and made a deed in fee to him, taking bond from him for $12,000, payable, with annual interest, at ten years after date, and with the complainant and James S. Miller as sureties thereto; that Thomas C. Miller died in 1865, and James S. Miller previously, and that the estates of both are insolvent: also that Annie W. Miller, the wife of the former, is his devisee, and has, by the will, an absolute power of sale. The bill further stated that complainant had applied to Mrs. Miller to be allowed to take the lot and assume payment of the debt, but had been refused, because she wished to make an application of its proceeds for her own advantage; and that afterwards she sold it on a

credit for $12,000, which is considerably less than its value, to Robert H. Cowan, who purchased under various circumstances that put him upon notice; that Miss Owen has married Mr. Guion, and the latter holds the bond on which complainant is surety, and has notified him that he will sue upon it.

The prayer was that Cowan be declared a trustee for the benefit of the complainant; that the land might be sold for his indemnity; that an account might be taken, and that complainant might (86) have other relief, etc.

The answer of Mr. and Mrs. Guion admitted the material allegations of the bill.

Mr. Cowan and Mrs. Miller filed a joint general demurrer.

Shepherd, for the complainant.
Strange and *Person,* for the defendant, Cowan.

PEARSON, C. J. It was properly conceded by Mr. Shepherd, on the argument, that the doctrine of "the lien of a vendor for the purchase money" does not obtain in this State. (See the cases collected in Battle's Digest.) He rested the complainant's right to relief on the relation of principal and surety, and assumed, in the first place, that a surety is not bound to wait until he has been forced to pay the debt, but is allowed to file a bill *"qui timet"* and obtain a decree, (88) that the principal pay the debt for his exoneration. This proposition is true, and the only difficulty is that it does not fit the case; for one of the allegations of the bill is that the estate of the principal is hopelessly insolvent; so a decree of this kind would be useless, and is not prayed for. The scope of the bill is to have a house and lot, belonging to the principal, subjected to the payment of the debt. Mr. Shepherd puts this equity on the ground that the debt, for which the complainant is bound as surety, was created for the purchase of this very house and lot, and as the principal is insolvent, the complainant, as surety, has an equity to be indemnified out of it, in preference to any other creditor, on the broad principle that a surety who pays or is about to be forced to pay for the property, ought in conscience to have it, or at least to be indemnified by it; and he insists that the defendant, Mrs. Miller, who is the executrix of the principal, and the defendant, Mr. Cowan, who purchased from her with notice, are subject to this equity. The latter branch of this proposition is true. Neither Mrs. Miller nor Mr. Cowan can be in a better condition than the principal debtor, "in whose shoes they stand." So the only point is: Can the first branch of the proposition be sustained, either upon principle or by authority?

That a surety who is forced to pay for property ought in conscience

to be indemnified out of it, is a proposition which, at first view, will strike every one as in accordance with natural justice. Yet, upon examination, it will be found that it can not be practically applied, without interfering too much with the ordinary dealings between man and man, and without restricting too much the exercise of the rights of property. For this reason, although Courts of Equity have at all times been studious to protect sureties, yet they have never adopted this broad principle, and have confined their interference to the limited bounds, which I will have occasion to state below.

(89) Take our case, by way of illustration. In 1853 Thomas C. Miller bought the house and lot of Mrs. Guion, and she accepted from him a bond, with two sureties, for the purchase money, to be paid at the expiration of ten years, interest to be paid annually, and thereupon executed to him a deed for the property, by force and effect whereof he became, to all intents and purposes, the owner, both at law and in equity. After that time Mrs. Guion had no more right to look to this property for the payment of the debt than to any other property of his, and no more concern with it than any other creditor; and he had as full ownership in it as in any other property that belonged to him. What an intolerable fetter would it be on the rights of property to adopt the doctrine that he could not sell this house and lot, and that it could not be sold for his debts as long as a bond which, by the acts of the parties, had become a *naked personal* obligation, or any part of it, remained unpaid?

Let us now see how far the courts have felt at liberty to go in favor of sureties. It is true, as Mr. Shepherd contended, that, when a surety pays the debt, he is held in equity to be entitled to the benefit of any security which the creditor holds against the principal; in other words, to be subrogated to the rights of the creditor against the principal. So here, if Mrs. Guion had retained the title as security, or if she had taken a mortgage, the surety would have been entitled to the benefit of the security. For this position *Green v. Crockett,* 22 N. C., 390; *Polk v. Gallant, Ibid,* 397, and the other cases cited for the complainant, are authorities; but they all proceed on the principle that the legal title being in the creditor, as a security, the surety may call for it, as an indemnity. The learned counsel was forced to concede that these cases do not apply. But he relied upon *Freeman v. Mebane,* 55 N. C., 44, as an authority in point; for he says that there the legal title

(90) was in the principal, and not in the creditor, and was subjected in the hands of a purchaser to indemnify the surety.

It is true, that in that case the legal title was in the principal, but an examination of the case will show that it was not an extension, but a new application, of the doctrine of substitution, laid down in *Green v.*

Crockett and the other cases, and is subject to the very same limitations. Freeman was the surety of one Sutton on a bond to make title to one Nichols. Afterwards Mebane bought the legal estate which Sutton held at sheriff's sale. Freeman thereupon filed a bill and obtained a decree to subject the land to his indemnity on the ground that Nichols, the *creditor* in the bond, had the equitable estate, and could force Mebane to convey the legal estate to him; and by the doctrine of substitution, Freeman, the surety, had a right to call on the creditor and have the benefit of all the rights and securities which he held against the principal. There the surety took the place of the creditor, and was allowed to set up his *equitable* title. In *Green v. Crockett,* and the other cases, the surety took the place of the creditor and asserted his *legal* title. But in all of the cases the *creditor* had either a legal or equitable title; whereas, unfortunately for the complainant in our case, the creditor has neither a legal nor equitable title, and there is nothing for a Court of Equity to act upon, by way of substitution. It is the misfortune of the surety that the creditor relied on the bond alone, and he himself neglected to take any counter security.

PER CURIAM. Demurrer allowed, and bill dismissed with costs, except as to defendants Guion and wife.

Cited: Reade v. Hamlin, post, 132; *Thigpen v. Price, post,* 147; *Latham v. Skinner, post,* 299; *Crawford v. McAdams,* 63 N. C., 69; *Blevins v. Barker,* 75 N. C., 438; *Carlton v. Simonton,* 94 N. C., 404; *Quinnerly v. Quinnerly,* 114 N. C., 148; *Piano Co. v. Spruill,* 150 N. C., 169.

(91)

DAVID McNEILL and others v. JOHN SHAW.

Where a commissioner, appointed by a court of equity to sell land "for cash," (in conformity with a representation that it would be best to sell for "ready money"), received in payment Confederate Treasury notes, the sale was set aside.

MOTION to set aside a sale that had been made under an order of CUMBERLAND, at Fall Term, 1864.

"In the matter of David McNeill and others," a petition had been filed to sell certain land held by the petitioners in common, and at Fall Term, 1864, an order of sale was made, which, reciting that the interests of the tenants in common would be promoted by a sale for "ready money," "allowed the sale to be made for cash," and appointed the above named David McNeill commissioner. At the next term, viz.: Spring Term, 1866, the commissioner reported that on 24 January,

1865, he had made sale as ordered, at which time John Shaw became the highest bidder, and paid the price over in Confederate Treasury notes.

Thereupon cross motions were made by the petitioners and by the purchaser to set aside and to confirm the sale. *Buxton, J.*, ordered the sale to be set aside, and the purchaser appealed.

Shepherd and *W. A. Wright*, for the petitioners.
W. McL. Kay, for the purchaser.

PEARSON, C. J. The commission was directed to sell for "cash," and in another part of the order the word money is used. These two words have a different legal meaning, which certainly does not embrace "Confederate Treasury notes." So the commission did not make the sale in compliance with his order, and for this reason the sale ought to have been set aside.

(92) This view of the matter excludes the point made on the argument that, if the order had been to sell for Confederate Treasury notes, his Honor should, in setting aside the sale, have imposed upon the petitioners the terms of making compensation to the bidder, by paying to him the money value of the Confederate notes, at the time he paid them to the commissioner.

PER CURIAM. Affirmed.

ADOLPH COHN v. LOVEY L. CHAPMAN, LAURIE CHAPMAN, MARY C. CHAPMAN, and JAMES W. CARMER.

1. Where it is proved or admitted that one bought and took title to land, under a *parol* agreement with another to hold it subject to the right of the latter to repay the purchase money, and have the land conveyed to him, such agreement will be enforced.
2. One who purchases such land at a sale by a clerk and master, made under a petition by the representatives of the person bound by the agreement, can not, before payment of the purchase money, on execution of title, claim to be either a purchaser for valuable consideration, or a purchaser without notice.

BILL for a specific performance of a contract for the purchase of land, filed to Fall Term, 1866, of CRAVEN, at which term, answers having been filed, the cause was set for hearing upon the bill and answers, before *Barnes, J.*, and upon the decree then made the defendant, Carmer, appealed to this court.

The bill stated that under negotiations begun in 1857, the complainant had bargained and partially paid for a lot in New Bern, which

(93) was described; that in 1860 John Chapman agreed to advance the residue of the money due upon the purchase and take title to himself, and agreed that, upon repayment thereof by the complain-

ant, he would convey the lot to him; that this was known to the person who then had the legal title, and was assented to by him; but that through ignorance in the parties, the agreement was not inserted in the deed made to Chapman; that in the same year Chapman was killed, leaving Laurie and Mary Chapman, his only children, and Mrs. Lovey L. Chapman, his widow; and that the latter is administratrix, and also guardian for her children; that an *ex parte* petition in their names was filed in the Court of Equity for Craven County, to sell said lot; and at such sale James W. Carmer became purchaser, and after some delay has executed his bond for the price, but has paid nothing as yet; that complainant had recently communicated with Mrs. Chapman in regard to the residue of the money due to her husband from him upon the contract in 1860, and as she, being guardian, preferred a bond for the money to the money itself, he had executed such bond, with two persons (naming them) as sureties, and that it was "amply good"; and that since then Carmer has notified him not to pay for said land, and not to take a deed, as he insists upon his title, and intends to apply for a deed. The prayer was, "that the defendants do convey unto your orator a good and valid title to said lot," and for further relief.

The answer of Mrs. Chapman admitted the statements in the bill to be true.

The answer of James W. Carmer alleged that the agreements between the complainant and the others who were concerned in the bargain were intended to defraud the complainant's creditors; also, that complainant was present at the sale under the decree in equity, laying no claim to the lot, and bidding for it a sum within but a few dollars of that at which it was purchased; and that defendant had no knowledge (94) of any such claim by him until within a short time before the Spring Term of CRAVEN.

His Honor made a decree in behalf of the complainant, in accordance with the prayer for specific relief.

Manly and *Haughton,* for the complainant.
Green, for defendant, Carmer.

READE, J. The agreement between the complainant and John Chapman, the intestate and former husband of the defendant, Lovey Chapman, and the father of the infant defendants, as set forth in the bill, is fully admitted in the answers of said defendants; and the performance of the agreement on the part of the complainant is also admitted.

Nothing remains, therefore, but to determine whether it is such an agreement as will be enforced in this court.

A parol agreement between A and B, that A will purchase land for B and take the title to himself, and hold it for B until the latter can pay

for it, and when paid for, will convey it to him, is such an agreement as equity will enforce. And such, substantially, is the agreement in this case. *Lyon v. Crissman,* 22 N. C., 268; *Hargrave v. King,* 40 N. C., 430; *Cloninger v. Summit,* 55 N. C., 513.

This would be true even if the agreement were denied in the answers, and rested on proof by the complainant. But the agreement is fully admitted in the answer of Mrs. Chapman, for herself and her children, and said defendants declare their readiness to comply with it. But the defendant, Carmer, sets up title under his purchase, and objects to the other defendants making title to the complainant. And his objection was supposed to make the necessity for this suit. The defendant, Carmer, can not set up any title against the complainant's equity, for he has paid nothing under his purchase, and he will be entitled,
(95) by proper motion in the cause under an order in which he purchased the land, to have his bond for the purchase money cancelled. And besides, he is a purchaser affected with notice of the complainant's equity. *Cloninger v. Summit, ubi supra.*

The complainant is entitled to a decree against the defendant, Mrs. Chapman, for title to the land. And he is not entitled to cost against said defendant, but not against the defendant, Carmer, nor is Carmer entitled to cost against the complainant.

PER CURIAM. Decree accordingly.

Cited: Harrison v. Emery, 85 N. C., 165; *Barnard v. Hawks,* 111 N. C., 338; *Cobb v. Edwards,* 117 N. C., 247; *Avery v. Stewart,* 136 N. C., 440.

ANNA HOUSTON and others v. JOSEPH A. HOUSTON and others.

Where all the persons who have any interest in the land, whether vested, contingent or executory, are *in esse,* and are before the court, the court may make an order of sale.

BILL, filed at Spring Term, 1866, of GUILFORD, and at Fall Term, 1866, set down for hearing upon bill, answers, exhibits and the report of the Master, and transferred to the Supreme Court.

The bill alleged that Levi Houston died in 1862, leaving a will by which he devised certain lands and other estate, after the death of his wife, to two daughters, and if they "should not leave any heirs," then to revert to *his* heirs, providing also that if either of such daughters "should decease, the surviving daughter should possess all the estate which he bequeathed to both, if there should be no heir left by the deceased daughter"; that a large price had been offered for some thirty or forty acres of land for a cemetery, and it would be best for all

interested to sell, etc.; that some of the heirs were under age, and (96) it was desirable there should be a construction of the will.

The heirs were all made parties, and filed answers admitting the facts set forth in the bill; and there was a report by the Master approving of the proposal to sell.

W. L. Scott, for the petitioners.
No counsel for the defendants.

BATTLE, J. The principles involved in the question which this case presents were fully considered by the court in *Troy v. Troy,* 45 N. C., 85, and *Watson v. Watson,* 56 N. C., 400. In the former we said "that a Court of Equity has in this State the power to decree a sale of land held in trust for a *feme covert* and infants, upon the petition of the *feme* and the guardian of the infants," and that in a proper case a sale would be ordered, and the proceeds directed to be laid out in the purchase of other lands, or perhaps vested in stock and settled upon the same trust. See Rev. Stat., ch. 44, secs. 26 and 27; Rev. Code, ch. 54, secs. 32 and 33. The same thing was said in *Watson v. Watson,* with regard to the case of a devise to one for life, remainder in fee to infant children *in esse;* but we held that if the children was not *in esse* the court had now power to act, because such children *in posse* could not be represented before it.

The present case differs in its facts from both of those to which we have referred, but in principle it accords with the former.

Here the devise of the testator gives to his widow an estate for life in the land in question, with remainder in fee to his two daughters as tenants in common, with cross remainders in the event of either dying without leaving issue in the lifetime of the other; and, upon both dying without leaving issue, with an executory devise in (97) fee to the heirs of the testator.

All the persons who have any interest in the land, whether vested, contingent or executory, are *in esse,* and are before the court. If they were all of age they could, by uniting in a deed of bargain and sale, convey a good title to the purchaser; but as some of them are infants, it requires the aid of the Court of Equity to make the assurance good. All the parties who can act for themselves agree that the proposed sale would be an advantageous one, and the Clerk and Master, upon a reference, has reported that the best interests of the infants would be promoted by it. We think, therefore, that the sale ought to be made, and there may be an order for that purpose.

PER CURIAM. Decree accordingly.

Cited: Dodd, ex parte, 99 *post; Barcello v. Hapgood,* 118 N. C., 726.

In the matter of ORREN L. DODD and others.

Where any members of a class, to which an executory devise is limited, are *in esse*, a court of equity in North Carolina will, upon a proper case being made, order a sale of the land devised; *otherwise*, where no such members are *in esse*.

PETITION for the sale of land, which had been devised to Orren L. Dodd during his life, and at his death, "in fee simple to his child or children, if he has any living at his death, or the issue of any of the said Orren L., who may predecease him"; failing such issue, however, the whole "shall belong to and be equally divided amongst the children of his brother, Dr. Warren Dodd," etc. The petitioners, besides
(98) Orren, were his children, who were under age. It was stated that Dr. Warren Dodd was about fifty years of age, and had never married. Otherwise, a proper case for sale was reported by the Master as having been made out by the petition, and the affidavits of several persons filed in the cause.

The petition was filed to Fall Term, 1866, of JOHNSTON, and upon a report of the Master and affidavits, set for hearing and transmitted to this court.

B. F. Moore, for the petitioners.
No counsel *contra.*

BATTLE, J. We deem it unnecessary to express any opinion in relation to the correctness of the interesting account given by the counsel for the petitioners of the origin and extent of the chancery jurisdiction as exercised in the Courts of Equity of this State. The powers of such courts to order the sale of the real estate of infants, upon the application of their guardians, showing that the interests of their wards would be promoted by it, can not be questioned since the passage of the Act of 1827, ch. 33. See Rev. Code, ch. 54, sec. 32. *Troy v. Troy,* 45 N. C., 85; *Watson v. Watson,* 56 N. C., 400, and *Houston v. Houston,*
(100) *ante,* 95, are instances to show where the power will or will not be exercised. It is certain that if land be devised to a person for life, with an executory devise in fee to his children, the court can not order a sale of the land before the birth of any child, because, not being *in esse,* there can be no one before the court to represent its interests. Such was the case in *Watson v. Watson.* But if there be any children *in esse,* in whom the estate in fee can vest, a sale may be ordered, because, if their interests require it, they may be represented by their guardians; and this may be done, though all of the children of the class may not yet have been born. Such is the case now before us, with the

exception that there is an executory devise to the unborn children of another person, depending on the event of the tenant for life dying without leaving issue. Can this latter circumstance make any difference? We think not, because the first class of children are the primary objects of the devisor's bounty; and as they have vested remainders in fee, and as their interests, as well as that of the tenant for life, will be promoted by having the land sold and the proceeds invested in other lands, or in stocks or other securities for their use, the Court of Equity is authorized, under the general power conferred by the act to which we have referred, to order a sale. In the new investment, the interests of the second class of executory devisees must be provided for by proper limitations, and we think there should be a regular guardian appointed for the infant petitioners before any sale is ordered.

PER CURIAM. Ordered accordingly.

Cited: Morris v. Gentry, 89 N. C., 252; *Miller, ex parte,* 90 N. C., 627; *Overman v. Sims,* 96 N. C., 455; *Tate v. Mott, Ibid.,* 22; *Irvin v. Clark,* 98 N. C., 445; *Branch v. Griffin,* 99 N. C., 183; *Barcello v. Hapgood,* 118 N. C., 726; *Marsh v. Dellinger,* 127 N. C., 362; *Hodges v. Lipscomb,* 128 N. C., 62; *Springs v. Scott,* 132 N. C., 552; *Deal v. Sexton,* 144 N. C., 161; *Jones v. Whichard,* 163 N. C., 245.

Dist.: Whiteside v. Cooper, 115 N. C., 576.

(101)

SION H. ROGERS, Adm'r., etc., v. JOSEPH B. HINTON and others.

1. If one, who has *a general power* over an estate, exercises it for purposes regarded as *secondary*, a court of equity will hold such estate as thereby rendered liable to all the usual incidents of property; *therefore*,
2. Where a *feme covert*, who had a separate estate, with a general power of appointing the same by deed or will, disposed of such estate to various devisees and legatees, subjecting expressly only a portion of it to the payment of her debts: *Held*, that her creditors had a right to resort to the whole estate fof their satisfaction.

BILL to obtain instructions as to the duty of the complainant, as administrator with the will annexed of the late Mrs. Margaret G. Hinton, filed to Fall Term, 1859, of WAKE, and at Fall Term, 1866, set for hearing upon bill, answers and exhibits, and transferred to this court. The husband and the devisees and legatees of the testatrix were made parties.

The deed, under which Mrs. Hinton acquired the right to make a will, conveyed the property to a trustee, "to the sole and separate use of Margaret G. Hinton, wife of Joseph B. Hinton, as if she were a *feme*

sole," etc., and to "convey the slaves and lot as she may, by any paper-writing executed by her in the nature of a deed or will, direct, although she may, at the execution of said deed, or will, or paper in the nature of either, be under coverture," etc.

The will expressed an intention "hereby to execute all powers of appointment to all property, real and personal, owned by me, and of which I have the right to dispose, by virtue of any deed, will or agreement whatsoever, and especially by virtue of a deed," etc. [the above].

By the first clause of the will Mrs. Hinton directed a negro,
(102) named "Happy," to be sold, and the money arising therefrom "to be applied to the payment of my debts and funeral expenses, my debts being very small, and principally due to Mr. James McKimmon and Dr. Fabius J. Haywood; and out of the surplus"—she gave some legacies. By the second clause she gave a valuable house and lot in Raleigh, certain slaves and other property to her husband for life, and then over. Her debts were not mentioned in any other part of the will, which consisted of seven clauses.

The executor named in the will having renounced, the complainant propounded the will in Wake County Court, at November Term, 1857, when, under the direction of *Mr. Badger,* then presiding, the verdict of the jury upon the issue, "Is the paper-writing, etc., or any part thereof, the last will and testament of Margaret G. Hinton, deceased, and if so, what part?" was thus entered, viz.: "That the said paper-writing is the last will and testament of the said Margaret G. Hinton, late wife of the caveator, Joseph B. Hinton, of and concerning all the property, estate and effects of which, notwithstanding her coverture, she had power to dispose, under the deed of Sarah Stone in the said paper-writing mentioned, and of and concerning all other property, estate and effects of any of which she had otherwise power to dispose, without the consent of her husband, and as to such property, estate and effects she did devise, bequeath, appoint and direct as contained in the said paper-writing."

Batchelor, for the creditors.
(104) *B. F. Moore* and *Haywood, contra.*

BATTLE, J. The bill, which was filed by the plaintiff as the administrator *cum testamento annexo* of Margaret G. Hinton, deceased, wife of the defendant, Joseph B. Hinton, propounds many questions about which it asks the advice of the court; but on the argument here only one of them has been pressed on our attention. It is, whether the property, real and personal, which the testatrix disposed of by her will, under the power conferred upon her by the deed of her sister, Sarah

Stone, mentioned in the pleadings, is liable as assets for the payment of the debts of the decedent.

We are decidedly of the opinion that it is.

The power is undoubtedly what is called a general one. It directs the trustee, who is to hold the property for her sole and separate use during her life, to convey it "as she may, by any paper-writing executed by her in the nature of a deed or will, direct, although she may at the execution of said deed or will, or paper in the nature of either, be under coverture; and in case she die without making any (105) conveyance of it," then the trustee is to hold the personalty in trust for her personal representatives, and the realty for her heirs-at-law. That a power expressed in such terms is a general one is settled. *Lord Townsend v. Windham,* 2 Ves. Sen., 1; *Jenny v. Andrews,* 6 Madd., 264; *Tomlinson v. Dighton,* 1 P. Wms., 149, 171.

It is too plain for doubt, that the will of the testatrix is an execution of the power, for it expressly refers both to it and the property embraced in it; and, furthermore, the will is proved as having been made in execution not only of that identical power, but of all others with which she was invested. In such a case it is a well established principle of equity in England that the property appointed shall form part of the assets of the appointor and be subject to the claims of his creditors in preference to the claims of the appointee. 4 Kent., 333. The reason for the doctrine is well expressed in an opinion delivered by Chief Justice *Parker,* of New Hampshire, in *Johnson v. Cushing,* 15 N. H., 307. "Where the owner of property, who has the right to dispose of it in such manner and under such limitations as he pleases, confers upon another the general power of making such disposition of it as *he* pleases, or, in other words, invests him with all the attributes of ownership over it, and that other accepts the power thus tendered to him and undertakes to exercise dominion over the subject matter as if he was an owner; the original proprietor having authorized the other to treat it as if it was the property of the latter, by exercising all the power over it which he could exert if it were actually his property; and he having undertaken to treat it as if it was his property by making a disposition of it under such a power, a Court of Equity may well do what the parties have done—that is, treat it as the property of the appointor and make it subject to the incidents attending such property. The court in such case do no more than treat it as the (106) property of the party, who, by the express authority of the owner, has the power and right to treat it as if it were his property, and who undertakes to do so." If it be treated as the property of the appointor, it will of course be liable to his debts in preference to the claims of *volunteers* under his appointment.

This principle of equity has been introduced into our system, and applied to the case of a married woman exercising a power of appointment given to her over property settled to her sole and separate use during life. In *Leigh v. Smith,* 38 N. C., 442, which was fully considered and decided, after arguments by very able counsel on both sides, it was held that the appointees under a will of property which a *feme covert* had a right under marriage articles to appoint to any person she might think proper, were trustees in the first instance for her creditors; and it was so held, though the will did not make any mention of her debts, or in any way attempt to provide for their payment.

But it is said by the counsel for the defendants that this doctrine has been modified by the recent decisions of this court, and *Felton v. Reid,* 52 N. C., 269, and *Knox v. Jordan,* 58 N. C., 175, are relied upon to show that the separate estate of a married woman is not liable to her debts or other personal engagements *generally,* but only where the debt is charged specifically upon the separate estate, with the concurrence of the trustee, if there be one. It will be seen at once that these latter cases apply to the debts sought to be charged upon the separate estate of a *feme covert* during her life, and not to her debts claimed out of property which she had appointed under a power to others by a will, or a deed to take effect after her death.

It is certain that the court, which decided the case of *Leigh v. Smith, ubi supra,* thought there was a difference; for at the next preced-
(107) ing term it had decided the case of *Frazier v. Brownlow,* 38 N. C., 237, which is referred to with approbation in *Knox v. Jordan, ubi supra.*

The case at bar, however, can not derive any aid from *Felton v. Reid* and *Knox v. Jordan,* because the testatrix expressly recognizes her debts, and attempts to provide for their payment. It is true that they were not recognized with the concurrence of her trustee, but that omission, even if a recognition were necessary in the case of the execution of a power, would be excused, because the pleadings show that the trustee was dead when the will was made, and it does not appear that any other was appointed in his stead.

We have only to say, further, that the appropriation of the proceeds of the sale of the woman Happy, as the fund out of which the debts of the testatrix are to be paid, can not prevent the creditors from claiming their debts out of the other property appointed under the power, if from any cause the specified fund is not available for the purpose. Let a decree be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

Cited: *S. c.,* 63 N. C., 81; *Hicks v. Ward,* 107 N. C., 393.

(108)

JAMES ROGERS and others v. JOSEPH S. HOLT and others.

Where a bill recited that a petition for a sale of land had been filed, and was still pending in the same court, and that the money was still due by the purchaser, and prayed that, inasmuch as the price at such sale was at an extravagant rate, being cased upon Confederate paper money, the purchaser and his sureties might be decreed to pay its reasonable value, etc.: *Held*, that as this relief was no other than might have been had in the petition then pending, the bill would not be entertained; *also*, that, as the bill showed upon its face that the relief might have been had in the former proceeding, the objection was well taken by *demurrer*.

BILL, filed at Fall Term, 1866, of ALAMANCE, at which term a demurrer was put in, and the cause set down for argument, and transferred to this court.

The bill alleged that at Fall Term, 1862, of ALAMANCE, the complainants had filed a petition to sell a tract of land (describing it) of which they were tenants in common; that the sale having been ordered, the defendant, Holt, upon 24 January, 1863, became the last and highest bidder at the price of $7,257.51, and gave bond with a surety therefor; that in November, 1863, one Albright filed in the office of the Clerk and Master a bid for the land, at an advance beyond Holt's bid of $1,088.62, and upon these bids having been reported to the court at Fall Term, 1863, the biddings were reopened immediately, and thereupon Holt became purchaser at the sum of $10,000, giving another bond, with security, for the excess beyond his former bid, and that this having been reported to the court at the same term, the sale was confirmed; that these proceedings took place during the late civil war, when (109) the *de facto* government, called "the Confederate States of America," had issued immense amounts of paper money, dependent alone upon the success and good faith of said *de facto* government, and at the sale it was probable, and soon became manifest, that to accept payment in that medium would be to sacrifice the consideration; that, therefore, they notified the Clerk and Master not to receive, and the purchaser not to pay, Confederate paper for said debt; that after the surrender of the armies of the Confederate States, they notified Holt that as the sale was made at an extravagant price, owing to the inflation of the currency, they did not expect to be paid the full sum called for in his bonds, but would accept the reasonable value of the land, which is about $3,000, and that, at Spring Term, 1866, they proposed to him in open court to set aside the order confirming the sale, and to expose the land to a new sale, etc., which he refused; that he has been in occupation of the land since January, 1863, cultivating and clearing it in a manner wasteful and destructive, and greatly impairing its value.

The prayer was, that Holt and the other defendants who were his sureties on the bonds, might be decreed to pay the true value of the land, with compensation for the rents and profits; that for this purpose the land should be sold; that inquiry might be made as to the injury done the land by waste, etc., and that the bonds given by the defendants might be resorted to, to make good any deficiency remaining after the sale; and for other relief.

Graham and *Ruffin,* for the complainants.
Phillips & Battle, for the defendants.

BATTLE, J. It is a well settled principle of equity pleading, that a decree substantially between the same parties and for the same
(110) subject matter, which is in its nature final, or may be afterwards made so by order of the court, is a bar to a new suit for the same cause. Story Eq. Pl., sec. 791; Mit. Eq. Pl., by Jeremy, 237.

It is usual to *plead* a decree in a former suit in bar to a second suit for the same thing, but when the second bill itself sets forth the substance of the pleadings in the former suit and the decree given in it, and alleges facts which, if established, would entitle the complainant to the same measure of relief as that to which the facts set forth in the former bill entitle him, the defendant may, for that cause, *demur* to the second bill. *Jenkins v. Johnston,* 57 N. C., 149; *Davis v. Hall, Ibid,* 403.

In the case at bar the bill professes to state the substance of the proceedings in the former suit, and the decree made therein, and as the defendant has demurred to the bill, the question is raised whether the complainants have stated in it facts which, if admitted or established by proof, would entitle them to the same relief, and no other, as they might have obtained under the former decree. That the complainants might, in their former suit, which is now pending in the Court of Equity for the county of Alamance, have the full measure of relief which they now seek, is clearly established by *Singeltary v. Whitaker, ante,* 77, and *Cotton, ex parte, ante,* 79. These cases assert the power of the Court of Equity, upon petition for the sale of land for the benefit of infants, to compel the purchaser, by orders *made in the cause,* to perform specifically his contract of purchase, and that in doing this they may compel him to pay the purchase money by a decree *in personam,* or give a judgment or decree for it, on motion, after ten days' notice; and, furthermore, that it may call in, and order to be cancelled, a deed for the land, improperly obtained before the payment of the purchase money. With such plenary power over the subject we can not doubt that the Court of Equity for Alamance can, by proper orders to

be made in the suit by petition, now pending there, compel the (111) purchaser of the land therein ordered to be sold, to pay the full amount of his bids, or such other sum as the court, under the circumstances, may deem right and proper. If this be so, the present bill is unnecessary, was improperly filed, and being objected to by demurrer, must be dismissed.

We have examined all the cases referred to by the counsel for the complainants as supporting their present suit. In none of them do we find anything to impugn the conclusion at which we have arrived. In *Whitted v. Webb,* 22 N. C., 442, it is stated expressly that the defendant waived any advantage, if any he had, under the former decree, and upon that waiver an order for another account was made. *Patton v. Thomson,* 55 N. C., 285, was a case of a bill to impeach a sale made under a former decree, for alleged fraud; and no objection was raised to the court's proceeding in the second suit, either by plea, demurrer or otherwise. *Trice v. Pratt,* 21 N. C., 626; *Green v. Crockett,* 22 N. C., 390, and *Shoffner v. Fogleman,* 60 N. C., 564, were all bills filed for the purpose of adjusting equities between the purchasers under the judicial sale in the former suit, or between such purchasers and their sureties; and in not one of them, except that of *Trice v. Pratt,* was there any objection to the second suit. The object of the bill, in *Trice v. Pratt,* was to obtain a specific performance of a parol contract made between the purchasers of the land sold under an order of the Court of Equity in a petition by the heirs of the former owner. No legal title had been obtained by either of the purchasers under the decree of the court, and hence it was necessary to make the Clerk and Master a party, for the purpose of obtaining such title from him. It does not appear from the published report of the case that the heirs of the former owner were made parties at all, and as we can not see that there was any necessity that they should be parties, we take it for granted that they were not. Under these circumstances it was objected by the (112) defendant, Pratt, one of the purchasers, and the one who had bid off the land and claimed to be the sole purchaser, that the complainant, if entitled to any relief, might have obtained it by motion or petition to the court in the former suit. This court declined deciding whether the complainant might have had a summary remedy by a proceeding in the former suit, but took jurisdiction of the case upon the original bill, and upon the proofs granted the relief sought.

It is manifest that the second suit was neither between the same parties, nor for the same subject as the former, and it is not therefore any authority for the government of the present case, in which both parties and subject matter are substantially the same, or may be made so by orders in the former cause. The bill must be

PER CURIAM. Dismissed with costs.

Cited: *Whitaker v. Bond, post,* 228; *Gee v. Hines, post,* 316; *Baird v. Baird, post,* 322; *Mason v. Miles,* 63 N. C., 566; *Covington v. Ingram,* 64 N. C., 125; *Council v. Rivers,* 65 N. C., 55; *Mann v. Blount, Ibid,* 101; *Clement v. Foster,* 71 N. C., 37; *Lord v. Beard,* 79 N. C., 11; *England v. Garner,* 84 N. C., 214; *Hudson v. Coble,* 97 N. C., 263; *Alexander v. Norwood,* 118 N. C., 382.

(113)

CAROLINE FERGUSON and others v. STEWART HASS and others.

1. Although the language of a bill may not be technical and precise, yet if, upon looking through it, enough appear to warrant relief, it will not be dismissed.
2. Real estate owned by a partnership is not regarded in this State as personalty.
3. Where a bill charged that the defendant had bought land upon a parol agreement, that another (who was the deceased husband of one of the complainants, and the ancestor of the others), should share in such purchase: *Held,* that the administrator of that other person was not a necessary party to such bill.
4. Where a bill named certain persons, and prayed that they might be made defendants, without expressly praying for process against them: *Held,* to be a sufficient designation of them as parties, especially as they all appeared and joined in the demurrer.
5. Where a bill was prolix, argumentative and inartificial, and was demurred to on that account: *Held,* that the proper order would be for its reformation in these respects *in the court below,* at the costs of the complainants.

BILL, praying relief, set down for argument upon demurrer at Fall Term, 1866, of CALDWELL, before *Mitchell, J.,* who sustained the demurrer; whereupon the complainants appealed to this court.

The facts appear sufficiently stated in the opinion of the court.

(114) *Blackmer & McCorkle,* for the defendants.

READE, J. The bill is at the instance of the widow and the heir of Allen Ferguson against the administrator and heirs-at-law of John Ferguson, to have a parol agreement for the purchase of land declared to be a trust. It is alleged that John Ferguson purchased the land belonging to Allen Ferguson at sheriff's sale for a very reduced price, under a parol agreement with Allen Ferguson that he would hold the same for the benefit of said Allen and himself. Both the Fergusons died, and the widow and the heir-at-law of Allen join in the bill. The object in joining the widow is to claim dower in the trust estate. The bill is demurred to and in the demurrer several causes are assigned:

1. "That the bill is inconsistent and repugnant in stating that Allen Ferguson died seized and possessed of the land, and afterwards showing only an equitable right." The language of the bill in this particular is not technical and precise, but still it sufficiently appears from the whole bill what the estate claimed really is.

2. "That the bill prays dower for the widow, without showing that the husband was entitled to an estate of inheritance."

If the statement of the bill be sustained, it shows that the husband had an equitable *estate* of inheritance, and not a mere *right,* and therefore the widow is entitled to dower. *Thompson v. Thompson,* 46 N. C., 430.

3. "That, according to the allegations in the bill, the land was treated as copartnership property between the two intestates, and was therefore personalty, and not liable to the widow's dower."

Such are not the allegations of the bill; but if they were, it does not follow that it was personalty. *Patton v. Patton,* 60 (115) N. C., 572.

4. "That the administrator of Allen Ferguson is not a party."

It is not necessary that he should be a party. *Avent v. Ward,* 45 N. C., 192.

5. and 6. "That the administrator and heirs of John Ferguson are not made parties, inasmuch as no precept is prayed against them."

The bill names these persons and prays that they may be made defendants; but it does not pray for process against them. In *Hoyle v. Moore,* 39 N. C., 175, the bill prayed that the clerk should issue subpœnas to the proper defendants, without saying who they were; and of course the clerk could not know to whom to issue. But here the bill does name the persons, and prays that they may be made defendants. From this the clerk can understand that he is to issue process against those persons. And besides, all the persons named, and who ought to be parties, do in fact appear and demur. This is sufficient. *Williams v. Burnett,* 45 N. C., 207.

7. "That the whole bill is wanting in precision and certainty."

To a considerable extent this is true. It is prolix, argumentative and inartificial. We have said before that such pleadings jeopardize the interests of the parties, embarrass the court and mortify the profession, and for this there is only the insufficient excuse of haste and the absence of books upon the circuits. The court below will probably allow the argumentative and other defective parts of the bill to be stricken out and reformed, at the costs of the complainants. The costs of this court will be a caution to defendants against careless and insufficient demurrers.

The order sustaining the demurrer must be

PER CURIAM. Reversed.

(116)

JOHN PHELAN v. JAMES M. HUTCHISON, Administrator of R. H. Brawley, deceased.

1. A partner, who, upon a dissolution of the firm, undertakes to collect the debts, is bound only to the diligence of a collecting agent, and so is responsible for all that it can be shown that he collected, or might, with reasonable diligence, have collected. It is an error to throw upon him the burden of proving what accounts in his hands were bad.
2. Where interest upon an account is charged upon a wrong principle, if no substantial damage is done to either party, the court will not disturb it.
3. In taking a partnership account, items of debt by the partners to the firm are to be deducted out of the shares of such partners respectively, and not out of the assets of the firm.
5. *Quære,* where the principle established in *Boyd v. Hawkins,* 17 N. C., 329, as regards commissions to trustees, etc., be not applicable to surviving partner who settles up the partnership business.

BILL to settle the accounts of a partnership, filed at Spring Term, 1857, of MECKLENBURG.

The bill stated that the partnership was formed between the complainant and Brawley about the beginning of 1848, Brawley having already been in business, and having in hand a stock worth $1,200, and that it ended by dissolution in 1851; that complainant was the active, and Brawley a dormant partner; that, upon the dissolution, its effects went into the hands of Brawley, who died in 1856 without rendering any account.

An answer having been put in, an account was taken, and to this the defendant filed several exceptions, as follows:

1. That intestate was charged with the accounts upon the books without evidence that they were due, or that the debtors were solvent, or that they had been received by intestate, or that intestate had been negligent in collecting.

2. That intestate was charged with interest upon these accounts from the time they had been charged on the books.

3. That intestate was credited with only $500, instead of $600, as his original share of the stock, although the bill stated that
(117) Brawley was originally the owner of the whole stock at $1,200, and complainant paid $600 for one-half.

4. That intestate is charged with the whole of his individual accounts, whilst complainant's individual accounts are taken out of the partnership fund, instead of out of his own share.

J. H. Wilson, for the complainant.
Bragg, for the defendant.

PEARSON, C. J. The cause comes on to be heard upon exceptions filed by the defendant to the report of the Clerk and Master, and for further directions.

1. The first exception is allowed to this extent: As Brawley, on the dissolution of the firm, took all of the notes and accounts into his possession, and assumed the entire control in regard to making collections and settling up the business, he is to be treated as a collecting agent, and should be charged with all of the notes and accounts which he has actually collected, or which he might, with reasonable diligence, have collected; whereas, the report charges him with all of the notes and accounts, except such as were proved to be insolvent. It ought also to have excepted all those which were not proved to be solvent, and in regard to which it was not proved that they could have been collected by the use of proper diligence.

2. The second exception is disallowed. If Brawley had kept an account, so as to show the amount of interest collected by him, that would have been the proper basis of the interest account. The Master has charged the defendant interest upon all of the notes and accounts, and allowed interest upon all of the disbursements and individual claims. This is not a correct principle, but under the circumstances it seems to have been the only one that the Master could act on; and, as there is really but little difference in the amount of (118) interest on the two sides, we are not disposed to disturb the calculation.

3. The third exception is allowed. The Master should not have brought the capital stock into the account until he had struck the balance and then, provided there was any fund on hand, each could be allowed to withdraw his capital, or a ratable part of it. The stock of each was $600. The $100 paid by Phelan to Brawley should not be brought into the account. It was paid to make up Phelan's stock, and he gets credit for it by putting his stock at $600.

4. The fourth exception is allowed. The two accounts which Phelan owed the firm should not have been deducted out of the assets of the firm; for, if so, he is only made to pay one-half of the amount. These assets should be deducted out of the part coming to him in the same way that his individual debts to Brawley are deducted.

There must be a reference to reform the account according to this opinion. The defendant may claim a revision of the account on the first exception.

It is proper to add that we have not felt at liberty to enter into the question, whether a partner who, after a dissolution, undertakes to act as collecting agent, or a surviving partner who settles up the business, should not be allowed commissions, as the point is not made by the exceptions. It may be that *Boyd v. Hawkins*, 17 N. C., 329, modifies the English doctrine upon this subject, and that a partner who winds up the firm should be allowed reasonable commissions as compensation for the time and trouble devoted to what it is a matter of mutual concern.

PER CURIAM. Decree accordingly.

(119)

WILLIAM J. PENDLETON v. JOHN H. DALTON.

Where the evidence satisfies a court that a person, from whom a specific performance is sought, entered into the contract in question without understanding it, such performance will not be enforced.

BILL, filed to Spring Term, 1863, of IREDELL. The defendant having answered, and testimony having been taken, the cause was set for hearing, and at Fall Term, 1866, transferred to this court.

The facts necessary to an understanding of the case are stated in the opinion of the court.

Boyden, for the complainant.
Bragg, for the defendant.

BATTLE, J. The object of the bill is to obtain the aid of the court in enforcing the specific execution of a contract for the purchase of land. The contract is alleged to be contained in a paper-writing which purports to be a receipt by the vendor of a part of the purchase money from a son of the purchaser acting as agent for his father. This receipt bears date the 13th day of February, 1863, and the part of it which specifies the land, which is the subject of the contract, calls it "homestead tract of land, containing.....acres, at six dollars per acre, belonging to the estate of P. Houston, deceased." It closes with the vendor's obligation to convey, in these words: "And I bind myself, as the executor of the said P. Houston, deceased, to make to Dr. William J. Pendleton, of Louisa County, Virginia, a good, lawful deed for the whole of the above homestead tract of land, containing.....acres."

J. H. DALTON,
Executor of P. Houston, deceased.

(120) From the pleading and the testimony taken in the cause, it appears that about four months previously, to wit: on 18 October, 1862, a contract was made between the vendor and the same son of the purchaser, who then professed to act for himself, and made no mention of his father, for the sale by the one and the purchase by the other, of the greater part, but not all, of the same tract of land. This contract is entitled, "Agreement for the sale of an estate by private contract." The articles are then set out in a formal manner and describe minutely the boundaries of the land agreed to be sold, the parts excepted out of the homestead tract, the price, and the manner and times of its payment, and then specify the time when possession is to be given and the deed of conveyance to be executed. The conclusion is equally formal with the other parts of the agreement, and the parties set their hands and affix their seals to it.

That an instrument so solemn and formal, stating every part of the contract with so much minuteness and circumstantiality, should be substituted by another, in so short a time, of such an opposite character in every particular, must strike every one with surprise, and prompt him at once to ask for an explanation. That explanation has been attempted by the son, who is the bargainee in the first instrument, but now professes to be the agent of the complainant.

We do not feel called upon to go into a detailed examination of his testimony, and we shall say no more of it than that it has failed to satisfy us that the defendant intentionally signed the receipt with a full knowledge of its contents; and when we come to examine and consider the other testimony in the cause, we are satisfied that he signed it under the belief that the money paid was in part execution by the purchaser of the contract made a few months before, and which he, on his part, had to some extent executed by putting the supposed purchaser in possession.

Having come to this conclusion as to the effect of the testimony, (121) we can not give the complainant the aid of the court in enforcing the contract which he was seeking to set up. It follows, as a necessary consequence, that his bill must be

PER CURIAM. Dismissed with costs.

Cited: Pendleton v. Dalton, 92 N. C., 188.

WILLIAM B. THOMPSON v. A. J. McNAIR and others.

1. Courts of equity grant special injunctions against trespass, with reluctance; and only in cases where, but for such interference, the injury would be irreparable, or where no redress can be had at law: *therefore,*
2. Where it was not shown that the defendant was insolvent, an injunction against his cutting pine timber, splitting lightwood and making tar, was dissolved.
3. An injunction will not be continued merely because one of the defendants has not answered, if the case show that such answer could not be material to the point upon which the injunction is claimed.
4. An allegation in an answer, that the trespasses complained of were committed by the defendant *in connection with two other persons who are solvent,* will be considered by the court as important upon the motion to dissolve.

MOTION to dissolve a special injunction, brought up by an appeal from an order by *Buxton, J.,* at Spring Term, 1866, of ROBESON.

The facts are sufficiently stated in the opinion of the court.

Leitch, for the complainants.

W. McL. McKay and *McNair,* for the defendants.

BATTLE, J. This case, in many of its features, is like those of *Thompson v. Williams,* 54 N. C., 176, and *Bogey v. Shute, Ibid,* 180. It seeks an injunction against one of the defendants, to wit, Archibald J. McNair, to prevent a trespass upon his land, which he alleges will produce an irreparable waste and destruction to it, before he can recover in an action of trespass, *vi et armis,* at law, and that the defendant is insolvent, and will be unable to pay the damages which he may recover.

The trespass charged is, that the defendant has "cut down the timber, split up the lightwood, made the same into tar, and hauled off and sold the same in market, and that he has threatened to cut and box, and is now engaged in cutting and boxing the valuable pine trees and timber upon about three hundred acres" of the complainant's land. It is alleged that the land "is mainly valuable on account of its timber, and that its marketable value will be irremediably injured by the trees being cut and boxed," in the manner above stated. The bill stated further, that the defendant, Archibald J. McNair, was "counselled and aided" in his trespass by the other defendants, though, as complainant afterwards states, not in a manner to make them responsible in an action at law.

The defendants deny that any trespasses were committed on the land of the complainant, and, while admitting that the defendant, Archibald J. McNair, had cut timber, etc., on lands which he had leased (123) from the other defendants who were the owners of it, did not allege, as was done in the cases above referred to, that these acts improved, instead of impairing, the value of the land. The answer denies positively and unequivocally the insolvency of the defendant, against whom the injunction is prayed, and not only avers his ability to pay any damages which the complainant may recover in an action, but states that two other persons, whom he names, were acting jointly with him in committing the alleged trespasses, and that their solvency was unquestionable.

Upon filing the answer, a motion was made by the defendant, Archibald J. McNair, to have the injunction dissolved, which was resisted upon two grounds:

1st. Because one of the defendants, Mary McNair, did not answer the bill.

2d. Because this being a special injunction, the complainant had a right to use his bill as an affidavit against the defendants, and to support it by other affidavits, and that from the bill, and these affidavits, it appeared that the defendant in the injunction was insolvent.

Upon a mature consideration of the case, we are satisfied that neither ground of objection can be maintained.

1st. Though the general rule in injunction causes is that all the

parties defendant must answer before a motion to dissolve will be entertained, yet it is well settled that there are exceptions to the rule. One is, where it appears that the answer of the non-answering defendant, if it had been obtained, could not affect the rights of the party enjoined. *Wilson v. Hendricks,* 54 N. C., 295; *Ijams v. Ijams, ante,* 39.

The only allegation upon which the injunction in the present case could have been sustained, is that of the insolvency of the defendant, Archibald J. McNair, and it is manifest that the missing answer could not have varied the case upon that point.

2. It is clear, from all the cases, that the Courts of Equity (124) interfere reluctantly in applications for special injunctions to restrain trespass, and never unless it is apparent that but for such interference the injury will be irreparable, and where no redress can be obtained at law. See *Irwin v. Davidson,* 38 N. C., 311; *Howell v. Howell,* 40 N. C., 258; *Simpson v. Justice,* 43 N. C., 115; *Lyerly v. Wheeler,* 45 N. C., 267. If it be shown that the acts which are charged as the trespass will rather improve than injure the land, the injunction will be dissolved, without reference to anything else. *Thompson v. Williams,* and *Bogey v. Shute, ubi supra.* But if that do not appear, it then becomes important to consider whether a recovery at law would be unavailing on account of the alleged insolvency of the defendant.

This allegation, when directly and positively denied in the answer, must be proved by the complainant, for the *onus* of such proof is upon him. We think that, in the present case, he has failed to make this proof. His testimony has only raised a doubt, when it ought to have produced conviction. In addition to this, the defendant avers that the alleged trespasses were committed by two other persons conjointly with him, and that they are responsible men. We have a right, on this motion, to consider this allegation, and we must take it to be true, as it is not disproved or even denied. This, of itself, is sufficient to dispose of the case, for it shows that the complainant has an ample remedy at law for all the damages which he can prove to have been sustained by the grievances of which he complains. The order made by the court below, dissolving the injunction, must be affirmed.

PER CURIAM. Order affirmed.

Cited: *R. R. v. R. R.,* 88 N. C., 82; *Levenson v. Elson, Ibid,* 185; *Rheinstein v. Bixby,* 92 N. C., 309; *Newton v. Brown,* 134 N. C., 445; *Lumber Co. v. Cedar Co.,* 142 N. C., 418.

(125)

JOHN J. COLSON, Adm'r., etc., v. JAMES H. MARTIN and others.

1. Where a married woman, entitled to personal property in remainder after a life estate, dies before the tenant for life, upon the death of such tenant, her administrator will be entitled for the benefit of her husband. If her husband then die, leaving an executor, the latter will take the beneficial interest.
2. An administrator is not bound to follow the assets of his intestate into another State; but he should hold the persons, in whose hands such assets are, to an account for them, if they prefer a claim against the estate in his hands.
3. An administrator will not ordinarily be allowed costs in a cause constituted by him for the purpose of having the instructions of the court upon questions which, with reasonable certainty, may be solved by counsel; nor where they are incurred by making unnecessary parties.
4. Partial allowance of costs in such a cause, under peculiar circumstances.

BILL, filed to Fall Term, 1860, of the Court of Equity for ANSON, by complainant, as administrator of Lemuel K. Martin, who died in 1840, in order to obtain a declaration of certain rights under the will of James H. Martin, who died in 1836.

In this will certain slaves were left to the testator's widow for life, and then to the said Lemuel. The widow outlived Lemuel, and died in 1858. She had allowed the defendants, James and Edmund, to take with them to Texas two of the slaves, which at her death would have gone to Lemuel, their father. Besides these, Lemuel left several children, one of whom, Emily, married James M. Waddill, and died leaving children. One Hough administered upon her estate, and since her death her husband has also died, leaving a will and an executor. Another daughter of Lemuel was Eleanor, who married Thomas Waddill, and died leaving children. The complainant made parties to his bill, amongst others, the executor of Emily's husband, as well
(126) as her children; also the husband of Eleanor, and her children. It asked for instructions as to who were entitled to the interests of Emily and Eleanor, and as to the duty of complainant in regard to the slaves taken, as above, to Texas.

Answers were put in, and at Spring Term, 1861, the cause was set for hearing, and by consent transferred to this court.

Dargan, and *Blackmer & McCorkle,* for the complainant.
Phillips & Battle, for the defendants.

READE, J. Under the will of James H. Martin his widow, Charlotte Martin, took a life estate in the property, with remainder to Lemuel K. Martin, the complainant's intestate. Lemuel K. Martin died intes-

tate in the lifetime of the tenant for life, and his remainder vested in the complainant as his administrator, for the benefit of the next of kin.

Emily, one of the daughters of Lemuel K. Martin, intermarried with James M. Waddill, and died after the death of her father, but in the lifetime of the tenant for life; and her interest vested in her administrator for the benefit of her surviving husband. Her husband then died in the lifetime of the tenant for life, and upon his death his *beneficial* interest vested in his executor, the defendant, Mr. Hargrave. *Woodley v. Gallop,* 58 N. C., 138; *Coleman v. Hallowell,* 54 N. C., 204.

The same facts and principles apply to the interest of Eleanor, another daughter of Lemuel K. Martin, intermarried with Thomas Waddill, except that Thomas Waddill is still living, and is entitled to the interest of his deceased wife, Eleanor, through her administrator.

The complainant was not obliged to go to Texas to recover the property of his intestate in the hands of the defendants, James H. Martin and Edmund Martin. But it is his right and his duty to retain their shares in the estate in his hands, and to hold them to an account for the benefit of the estate, to the extent of the value of the property upon the termination of the life estate of Charlotte Martin, if (127) of less value than their shares; and to the extent of the value of their shares if the shares are of less value than the property.

We have had some doubt as to allowing costs. An administrator or executor will not be allowed costs where the questions raised for the advice of the court may, with reasonable certainty, be solved by counsel; nor where costs are improvidently incurred in making unnecessary parties; all of which seems to be the case here. But as the questions raised have really been controverted by some of the defendants in their answers, we suppose that if the complainant had acted without the advice of the court, he would have been sued at all events. He is therefore allowed his costs, including $35, expenses incurred in attending on the clerk to state an account, to be paid out of the shares of James H. Martin and Edmund Martin, in the fund in complainant's hand. The defendants who have answered, except defendant Hargrave, whose cost must be paid out of the fund, must pay their own costs. And the complainant must pay, out of his own funds, the costs of making parties the other defendants, who have not answered except the defendants James H. and Edmund Martin aforesaid.

PER CURIAM. Decree accordingly.

(128)

E. G. READE* and G. W. NORWOOD v. CHESLEY HAMLIN.

1. Where a suitor in the court of equity for Person County made up his mind to appeal from an order, before Thursday of the term, and was prevented from doing so by the previous departure of the judge: *Held*, that it was a proper case for a *certiorari*.
2. An order for the specific performance of an executory contract for sale of land, when applied for by the vendor, includes: a reference for an account to fix the balance due for principal and interest of purchase money, and a decree for a sale of the land to pay such balance, unless at a day certain the vendee pays into court the said amount, and will accept the deed of the vendor, or make objection to his title and ask for a reference as to that.
3. Where, in a suit for specific performance brought by a vendor of land, it appeared that the property was being suffered by the vendee, who was in possession, to go to waste, and had thus already become an insufficient security for the price outstanding, and the bargainor had made reasonable propositions for a rescission of the contract, and an arbitration of differences: *Held*, that it was proper to appoint a receiver of the property.

BILL, filed at Fall Term, 1866, of PERSON.

The complainants alleged that in the year 1861 they had sold certain mills and other real estate to the defendant, taking from him a bond for the price, and reserving the title as security; that defendant had been in possession ever since, making considerable profits out of the mills, but allowing the houses to become out of repair, and the machinery worn out and broken; that defendant was insolvent, and threatened to let the mills go to ruin, and not to pay for them out of any other property of his; that the property was already deteriorated so as not to be worth the debt; that complainants had offered to take back the property, surrendering the bond for the price and leaving to arbitration any questions of rent, etc.; or to lose one-half of the accumulated interest,
(129) if payment should be made; all of which the defendants declined.

The prayer was for specific performance, an injunction against removal of machinery, a receiver, and further relief.

Upon this an order was made by Judge Battle, at Chambers, for an injunction and a receiver.

At Fall Term the defendant put in an answer, admitting the bargain and the debt, but denying insolvency, or that the mills were being allowed to go to ruin, and making statements of claims and grounds of complaint against the bargainors.

Affidavits were filed for both parties.

Upon a motion to dissolve the injunction and to remove the receiver, his Honor, *Fowle, J.*, granted the same, requiring, however, that the defendant should enter into bond with personal security, conditioned

* *Reade*, J., did not sit in this case, being of the parties complainant.

that he should abstain from waste, and should indemnify the complainants against waste by him (wear and tear, and accidents by high water, excepted), and that he should make necessary repairs.

The application for a *certiorari* by the complainants showed that this order was made upon Wednesday of the term, and that his Honor, having good reason for supposing that all business had been done, left the court shortly after, without the knowledge of the complainant who was attending more particularly to the case; that the latter upon consideration concluded, within some short time after the order was made to appeal; but upon going to the courthouse for that purpose, found that the judge had gone early in the afternoon of Wednesday.

Phillips & Battle, for the complainants.
Graham and *Venable,* for the defendant.

PEARSON, C. J. The motion to dismiss a *certiorari* is not allowed when an opportunity to appeal is lost by accident or unavoidable cause, and without laches. The writ of *certiorari* is usual to bring the case up, and after being put on the trial docket it is, to all purposes, as if there had been an appeal. In this case no laches can be imputed to the complainants. The law considers the term of the court in the county of Person as continuing until 4 o'clock on Thursday, and suitors have up to that time to decide whether they will appeal or not. So if the complainants had said on Wednesday that they were satisfied with the arrangement in respect to the bond against waste, they had a right, on second thought, to change their minds and avail themselves of the right of appeal freely given by our law to any party who is dissatisfied and is able to secure the costs. Suitors, therefore, can not lose this right by the accident, that the Judge took his departure on the day before, provided the intention to appeal was formed before the expiration of the term contemplated by law. There is no doubt as to the facts, and it would seem to be captious to rule the parties down and require them to come to a conclusion on the instant in reference to appealing, as the intention to appeal was made known in so short a time, and no inconvenience ought to have resulted from a day's delay.

Upon the merits, my brother BATTLE and I are fully satisfied that the sequestration and appointment of a receiver should be (131) continued until the hearing.

In contracts for the sale of land it is usual for vendors, besides retaining the title as security for the purchase money, also to require a note, with sureties, as additional security, at least for a part of the price, and the vendee is let into possession and the pernancy of the rents and profits, subject to the right of the vendor if installments are not promptly met, to take back the possession and receive the rents and

profits to meet accruing interest. The vendor may sue at law, take judgment on the note of the vendee, exhaust him and his sureties, and then apply to a Court of Equity for a specific performance of the contract in this form, *i. e.,* a reference for an account to fix the balance due for principal and interest of purchase money, and a decree for a sale of land to pay such balance, unless at a day certain the vendee pays into court the said amount and will accept the deed of the vendor, or make objection to his title and ask for a reference.

In our case, the vendors were content with the title as security, and let the vendee into possession without requiring personal sureties as to any part of the purchase money. After the expiration of several years beyond the time when the mills and land ought to have been paid for, the vendors, finding, as they allege, that the mills were getting out of repair and becoming subject to waste, and fearing that they would never get their pay, and would have to take the land back, made this proposition to the vendee: "Pay the purchase money and accept title, or else give up our bond for title and accept your notes, *so as to cancel the contract* subject to arbitration as to what you ought to pay either for interest or for *mesne profits* during the time you have had the use and benefit of our mills and land." To these propositions, which seem to us to be reasonable, the defendant declines to accede, and, on the
(132) contrary, insists upon keeping in his hands *both the land and the price of it, without securing rents or interest,* upon the ground that he has as much right to avail himself of the *"stay law"* as those who are indebted to him!

Without intending to intimate an opinion how far any man can honestly avail himself of the stay law to avoid doing that which for a valuable consideration he undertakes to do, we are confident in the opinion that the case under consideration stands on ground differing from that of one where the land has been conveyed, the vendor choosing to rely on the naked personal obligation of the vendee, as in *Miller v. Miller, ante,* 85; for here the land belongs to the complainants until the price is paid, and it is against conscience for the vendee to keep both the land and the price, and not secure the payment of rent or interest. We find, from the cases cited on the argument, that although a vendee let into possession is not accountable for rents and profits as a general rule, yet, under special circumstances importing insolvency and waste, the court will appoint a receiver, so as to secure something for the vendor. We have a strong legislative enactment on this subject. See Code, ch. 63, sec. 2. "And it is hereby declared that anyone let into possession, under a contract of purchase which fails, is within the meaning and provision of this section, and shall be liable for his use and occupation." Our decision is mainly put on the doctrine set out in Adams'

Equity, which we find to be fully supported by the cases cited. The court will not allow a vendee to keep the land and the price too, but will put him under a rule to pay the purchase money into court. The defendant admits his total inability to comply with a rule to this effect, so the rule appointing a receiver is much the milder course, and is the only one that could be adopted, unless the defendant is to be allowed to have the use of the complainants' mills and land for nothing, and without paying the price agreed on, until such time as the cause may be brought on for hearing according to the course of the (133) court, which would be to allow him to take advantage of his own wrong.

PER CURIAM. Decretal order reversed, and ordered that the sequestration and receiver be continued until the hearing.

Cited: *Oldham v. Bank,* 84 N. C., 307.

JOSEPH R. BLOSSOM v. GEORGE VAN AMRINGE, Jr., and others.

1. Upon motion to dissolve a special injunction, on the coming in of the answers: *Held,* that as there was upon the whole probable cause in regard to the primary equity, and also ground for a reasonable apprehension as to the security of the fund, the injunction should be continued to the hearing.
2. Upon such motion the answer of one of several defendants may be used as an affidavit in support of the bill.
3. The rule, a man must come into equity with clean hands, does not apply to a case in which the complainant seeks to set aside conveyances made by himself with a view to evade the Confiscation Acts of the Confederate government.
4. One of a number of transactions in a course of business is not, without special reason, to be isolated from the general account of such business.

BILL to settle the accounts of a partnership, and in the meantime for an injunction, filed to Fall Term, 1866, of NEW HANOVER. Upon the coming in of the answers in the court below, the defendants moved to dissolve the injunction, which having been refused *pro forma* by *Merrimon, J.,* they appealed.

The statements in the opinion of the court render it necessary to add here only a copy of the articles of partnership therein referred to.

"Memorandum of copartnership between Joseph R. Blossom and Cyrus S. Van Amringe, under the style and name of Joseph (134) R. Blossom & Co., in the town of Wilmington, N. C., to commence on 18 February, 1861: Said Van Amringe agrees to buy and said Blossom agrees to sell to him *one-fourth* interest in the distillery and

commission business, and one-fourth of the lots connected with said distillery, and as follows: Six lots in block 316, 6 lots in block 310, 3 lots (4, 5 and 6) in block 317, being south half of latter block, at the rate of $40,000 for the whole. Interest on capital furnished to be allowed to each. The fiscal year to end 31 December, in each year, and the actual realized net profits to be annually divided and set apart to each. Van Amringe's portion of profits, except $1,000 per year, to be applied to payment of his note, with interest, to Blossom for $10,000, payment for the interest named above, and for payment of the respective increase of interest named below. At the expiration of any fiscal year which shall see completed the payment of the said note for $10,000 to said Blossom by said profits, Van Amringe's interest in the property and business is to be increased to one-third share, said purchase and sale of such additional interest to bear interest, and to be paid in the same manner as the first interest of one-fourth. When the division of profits aforesaid shall enable Van Amringe to pay for the interest last named, then he is to purchase, and Blossom is to sell him, an additional interest in the property and business, making them *equal* payment for such additional interest on the same terms as the former. Van Amringe to give his undivided attention to the business, and to have no other interest outside of the firm. The name of the firm only to be used in their own business.

JOSEPH R. BLOSSOM.
CYRUS S. VAN AMRINGE."

(135) *Person* and *Strange,* for the appellants.
W. A. Wright and *Phillips & Battle, contra.*

PEARSON, C. J. The pleadings are very voluminous, but not more so than the complicated nature of the case and the large amount involved called for. Indeed the bill and answers are drawn with much care and professional skill, and no doubt fairly present the grounds on which the claims of the parties must ultimately be decided.

As is said in *Parker v. Grammer, ante,* 28: "At this stage of the proceeding there is nothing before the court but the bill, answer and exhibits; and, treating the bill as an affidavit in support of the complainant's allegations, the court upon that, in connection with the answer and exhibits is, taking the whole matter together, to decide the question of probable cause in regard to the primary equity, and the question of a reasonable apprehension as to the security of the fund."

1. We are satisfied that the complainant does not sue in a mere spirit of litigation, and seek to set up an unfounded claim, but has "probable cause," and may at the hearing be able to establish his primary equity. In January, 1861, the complainant, being a man of large means and extended credit, and engaged at the city of Wilmington in the distilling

of turpentine on a large scale, and in an extensive general commission business, took into copartnership with him Cyrus Van Amringe, a young man without capital, but of much intelligence and experience in that particular line of business, and in all respects an active business man. By the articles of copartnership, among other things, it was stipulated that Cyrus was to devote himself exclusively to the business of the firm. Upon the breaking out of the war the complainant, who was a Northern man by birth, went to the North, and transferred thither a large part of the partnership effects, and being deterred from returning to Wilmington on account of the state of feeling (136) there, and in order to evade the confiscation laws of the government of the Confederate States, he conveyed the legal titles of all of the property and assets of the firm, and also of his individual property situate in Wilmington, to Cyrus Van Amringe, his junior partner, in the confidence that he would hold it for him and dispose of it according to his directions. As the distilling and commission business could not be carried on successfully during the war, Cyrus, with the consent of the complainant, his senior partner, branched off eventually into the business of making salt, rosin oil, soap, lamp-black, etc., which he was enabled to do by the means and credit of the firm, using for these last purposes a large quantity of rosin belonging to the firm. Cyrus was very successful in his operations, and, among other things, made investments in real estate, taking the title in his own name to prevent confiscation. In 1862 Cyrus died, leaving the defendants, George Van Amringe and Heart his executors. George, who was the brother of Cyrus, and who had but little or no means prior to the war, under a general power of attorney from the complainant, as executor of Cyrus, took the place of his deceased brother, and undertook to work out his contract, by which, according to the articles of copartnership, he was to become entitled to one-half of the partnership property and effects, and to one-half of the "realized net profits." George was also very successful in his operations, and made large investments in real estate and other property, among other things, in a large quantity of spirits of turpentine, etc., in Sumter, S. C., which, to avoid paraphrase, is called the "Sumter stuff," some $20,000 in value, taking the title for all of this property in his own name, changing the name of the firm to that of *Van Amringe & Co.*, and taking receipts for debts of the firm of Blossom & Co., paid off by him out of the assets of the firm, in the name of himself, as executor of Cyrus.

In 1866 the complainant returned to Wilmington, took into (137) possession such of the effects of the firm as had escaped the ravages of war, called upon George for a transfer of the legal title of the original property of the firm, of that acquired by Cyrus and of that

acquired by George; and proposed a basis upon which they should go into an account and general settlement. This was not acceded to by George, who in turn proposed a basis of settlement, by which all of the operations of Cyrus and himself, including the "Sumter stuff," were to be brought into the account on the footing of an equal division of the property and of the profits made after June, 1861, provided the complainant would bring into the account his operations with the effects of the firm while at the North and in Europe. This was not acceded to. Afterwards the complainant makes sale of the "Sumter stuff," and is forced to "heave to" by a "shot ahead" in the shape of an action of *trover,* whereupon he files this bill for an account and a declaration of trust, and in the meantime for an injunction. It is manifest, from this general view, that a resort to a Court of Equity in order to have an account taken, and the rights of the parties declared, was eminently proper, and that the complainant has probable cause in support of his primary equity.

2. In support of the second branch of the proposition, "a reasonable apprehension as to the security of the fund," the complainant does not put his case upon an allegation of the insolvency of the defendant, George Van Amringe, but he alleges that the defendant, George, having the legal title as the executor of Cyrus, and in his own right, asserts an absolute ownership, and a right to dispose of it as he pleases, in respect to all of the property acquired by Cyrus and himself; that he assumes the right to withdraw from the firm large amounts without the concurrence of the complainant, who is the surviving partner; and has actually appropriated very considerable sums to the support of
(138) himself and his father and mother and a younger brother, under the pretext of paying off legacies given by the will of Cyrus; that he has taken receipts for debts of the firm, paid out of the assets of the firm, in his name as executor for Cyrus, and made entries to that effect on the books; and changed the name of the firm, with a view to complicate and embarrass the accounts; and that he has taken the books and papers, in reference to the transactions of Cyrus and himself, from the office of Blossom & Co., and assumes the entire control over them These allegations do not rest alone on the bill read as an affidavit, and the answer of Heart, which was also read as an affidavit; but receives such confirmation from the admissions in the answer of George Van Amringe, as to satisfy us that the complainant had ground for a reasonable apprehension as to the security of the fund.

It was urged by the counsel of the defendant that under the maxim in equity, a man must come into equity with clean hands (which is also a rule of law under the maxim, *"Ex turpi causa actio non oritur"*), this bill can not be entertained, as it sets out on its face, as the ground

of the equity of the complainant, that he transferred the legal title to Cyrus Van Amringe *in fraud and deceit,* with a view to evade confiscation acts of the government of the Confederate States. For this position he cited cases by which it is settled that one, who makes an absolute deed with intent to defraud creditors, can have no relief in a court of equity. We do not concur in this view of the subject. The objection would no doubt have been fatal, if taken before a court of the *de facto* State government, while it formed a part of the Confederate States; but this court is a coördinate branch of a rightful State government, forming a part of the United States, and can not entertain such an objection. For, in our view, the complainant did but "fight fire with fire"; that is, he resorted to artifice and deceit, *ex necessitate,* to avoid loss by reason of the acts of a public enemy of the (139) nation. He is justified, or rather is not to be blamed, on the ground that artifice, deceit and stratagem may, during war, be resorted to to deceive the enemy. For these reasons we concur in the opinion of his Honor that the injunction ought to be continued until the hearing.

It is apparent that the rights of the parties in respect to the Sumter stuff" must necessarily be involved in the general account, and can not be declared until the account is taken; and in the absence of any suggestion of the insecurity of this fund, by reason of a want of responsibility on the part of the complainant, we can see no reason for isolating that matter and allowing the defendant, George, who, in one aspect of the case holds the legal title simply as trustee, to proceed in his action, and recover the value of the property as damages, inasmuch as the value of the property must be brought into the account, so as to present the question of the equitable rights of the parties upon exceptions. We think, however, that the decretal order should be so modified as to allow the defendant, George, to take possession of and use such of the real property as was not in the possession and use of the complainant at the time the bill was filed, or which is not now in his possession and use; subject to an account by the said George of the rents and profits of the land which he so takes possession of and uses. The cost of this appeal will abide the final decision in the cause.

PER CURIAM. Decree accordingly.

Cited: Lutz v. Young, 61 N. C., 370; *Haley v. Haley, post,* 185; *Phillips v. Hooker, post,* 203; *Blackwell v. McElwee,* 94 N. C., 429.

(140)

A. J. FALLS and ROBERT TORRENCE Executors, etc., v. DAVID McCULLOCH and others.

A legacy of property, "to be sold at my wife's death and equally divided among all my children," is *vested;* and therefore the representatives of such children as survived the testator and died before the wife are entitled to shares.

BILL, by executors, praying for advice and a construction of a clause in a will, filed to Spring Term, 1865, of GASTON, and at Fall Term, 1866, taken *pro confesso,* and transferred to this court.

The facts appear sufficiently in the opinion of the court.

Bynum, for the complainants.

No counsel for the defendants.

READE, J. The clause of the will upon which the advice of the court is asked is as follows:

"The balance of my property I allow to be sold and my just debts paid. The negroes are to be sold at my wife's death and equally divided among all my children."

Some of the children died after the testator and in the lifetime of the tenant for life. The question is, was the remainder vested, so that the representatives of the deceased children take.

It is a vested remainder, and the representatives of the deceased children do take.

The doctrine governing this case is settled in *Conly v. Kincade,* 60 N. C., 594.

PER CURIAM. Decree accordingly.

(141)

THE STATE v. A. F. BREVARD and R. A. BREVARD, Executors, etc.

1. An executor is not liable, *as such,* for collateral tax to the State, upon a devise of land to himself, though he be liable as an individual.
2. An executor, in this State, is not responsible for collateral tax upon the property of his testator situate in another State, at the death of the testator.
3. If an executor is required to *make good* valueless currency in his hands on settlement with the legatees, the State is entitled to its tax on the amount.

BILL for collateral tax due the State on devises and bequests to collateral relations of Ephraim A. Brevard, filed to Spring Term, 1858. of LINCOLN. At Fall Term, 1862, a decree *pro confesso* was rendered,

and an account ordered to be taken by the Master. At Fall Term, 1866, the report of the Master having been filed, the cause was transmitted to this court. In this court a further report was ordered to be made immediately by the clerk, and the cause heard upon such report, and exceptions filed by the counsel for the defendants. The nature of the exceptions sufficiently appears from the opinion.

The testator, Ephraim A. Brevard, died in the year 1854, leaving no issue, and his devisees were brothers and sisters, and other collateral relatives. The estate was very large, and consisted of realty and personalty in this State and in Alabama. The property in Alabama was sold by an administrator appointed in that State, and a part of the proceeds paid to the defendants, the executors appointed by the will and duly qualified in Lincoln County Court. Among the specific legacies was that to R. A. Brevard, a brother, and one of the executors of the testator. It consisted of "the tract of land on which Vesuvius furnace is situate, with all the appurtenances of said furnace," etc., and a number of negroes—charged with the payment of sums of money to other relatives.

It appeared from the reports filed that the executors have in (142) hand valueless currency, collected by them during the late war, to the amount of $4,965.10.

No counsel for the State.
Bynum and *Phillips & Battle,* for the defendants.

BATTLE, J. The counsel for the defendants admit that they are liable in this suit for the tax on all the legacies, general and specific, paid out of the testator's property, situate at the time of his death in the State of North Carolina, except that on the bequests and devises to R. A. Brevard, one of the executors. With regard to the bequests and devises referred to in the exception, it is contended that the tax on them is to be paid by the legatee and devisee himself, as an individual and not as executor, and in support of this position the sections from 7 to 12 of the Rev. Code, ch. 99, are relied on. Section 11 sustains the exception as to the devise of land, but there is nothing in any of the sections of the act to prevent the liability of all of the executors to pay the tax on a legacy given to one of them.

Alvany v. Powell, 55 N. C., 51, fully sustains the objection that the defendants are not liable for any tax to this State on account of the property of the testator which was situate in Alabama at the time of his death. It is true that the point of that decision is that the property of a nonresident, situate in this State at the time of his death, is liable to pay a tax to the State upon its devolution to collateral kindred; but in the opinion of the court it seemed to be clearly admitted that our

revenue law does not impose a tax on the property of the decedent which was not in the State, though given by will, or devolved by law upon one of our citizens.

Whether the defendants are to be excused from paying any tax (143) on the Confederate money which became valueless on their hands, we can not be prepared to decide until it is determined whether they will be allowed for it in their settlement with the legatees. If the latter get good money, the State must, of course, have a tax from it. A decree may be drawn in accordance with this opinion, and the cause will stand on further directions.

PER CURIAM. Decree accordingly.

Cited: *S. v. McGaillard, post,* 349.

DANIEL LEFLER, Adm'r., and others v. DAVID I. ROWLAND.

Where it appeared that the *sole motive* with a testator, for leaving the greater part of his estate to a son, was, that the latter should live with him and help him pay his debts, and also treat his parents with "humanity and kindness," and such son died in the lifetime of the testator: *Held*, that the devise lapsed; *also*, that the son's interest in the condition was not "real or personal estate" within the statute (Code, c. 119, s. 28), which gives such estate to the issue of a son dying under such circumstances.

BILL to obtain construction of a paragraph in the will of Thomas Rowland, filed to Fall Term, 1864, of STANLY, and then set for hearing upon bill and answer and transmitted to this court.

The paragraph was as follows: "My will and desire is that my dearly beloved son, John A. Rowland, should live with me my lifetime; and if in case he will do so and help me pay all my just debts and demands against me, and treat me and his mother with humanity and kindness, I will and bequeath to him and his heirs and assigns forever all my tracts of land, except that I shall hereafter name; and in case I keep my negro man, Jacob, till my death, I also will and bequeath him to my son, John, with all and everything that I own and possess, of (144) whatever kind and nature named and not named, by his paying my daughter, Luda," etc.; "and now, if in case there should be any dispute about this will being my will and desire, it may be ascertained that it is, as it is, by looking at a deed of conveyance that I made to him some six or eight years ago, that I made to him the said John A. Rowland for three hundred and twenty acres of land, being the same land with some more now added to it."

The facts were that the testator died in November, and John A. Rowland in August, 1862; that the testator left surviving him as issue four daughters, besides an infant child of said John A., who is the defendant; also that no deed like the one referred to in the will could be found, and that the administrators with the will annexed had, since the death of the testator, paid off some three hundred dollars of debts that had been due by him for two or three years before his death.

Dargan, and *Phillips & Battle,* for the administrators.
No counsel for the other parties.

BATTLE, J. A devise of land upon a condition precedent can never take effect where the condition has become, in any way, impossible to be performed. All the authorities agree in this: "But by the civil law, which on this subject has been adopted by the Court of Equity, when a condition precedent to the vesting of a legacy is impossible, the bequest is single, that is, discharged from the condition, and the legatee will be entitled as if the legacy were unconditional." An exception to this rule in relation to legacies prevails where the condition is the motive, or as some authors say, the sole motive of the bequest. 2 Wms. Ex'rs., 786; 1 Rop. Leg., 505, 506. In *Nunnery v. Carter,* 58 N. C., 370, we held that where personal property was bequeathed to a son, "provided he take care of his mother for her lifetime," it was not the intention of the testator that the whole condition should be performed before the property vested, but that he should take an estate at once, to be (145) forfeited on failing to perform the continuing duty. It followed from this that the son took the legacy, notwithstanding the death of his mother in the lifetime of the testator, because the taking here of the mother was not the sole motive of the bequest to the son. But in the present case the condition precedent assumes a different aspect. It appears that the sole motive with the testator for leaving the greater part of his estate to his son, John, to the exclusion of all his other children, was that John should *live with him and help him pay his debts,* as well as treat his parents with "humanity and kindness." John's life was terminated by the act of God before the death of the testator, so that he could not perform the condition upon which he was to have the property. Indeed his death in the lifetime of his father, the testator, caused the legacy to lapse and the benefit of the condition is not "real or personal estate," which the statute gives to issue of the legatee dying under such circumstances. See Rev. Code, ch. 119, sec. 28.

It must be declared that the death of the devisee and legatee, John A. Rowland, in the lifetime of the testator, has left the property, both real and personal, intended for him undisposed of, and that the same

belongs to the heirs-at-law and next of kin of the testator. There may be a decree for the necessary accounts, etc.

PER CURIAM. Decree accordingly.

Cited: McNeely v. McNeely, 82 N. C., 186; *Burleyson v. Whitley,* 97 N. C., 298.

(146)

WILLIAM A. THIGPEN, Ex'r., and others v. SIMON T. PRICE and others.

1. Sureties can sustain a bill to have a debt paid by their principal, or out of his estate, before they have been compelled to pay the debt.
2. One in possession under a purchase of a resulting trust in land, conveyed to a trustee to secure creditors or sureties, does not hold adversely to the trustee and *cestui que trusts.*

BILL, for the indemnity of sureties, etc., filed to the Fall Term, 1866, of MARTIN. A general demurrer was filed at that term, and, upon argument before *Merrimon, J.,* the demurrer was overruled, and the defendants appealed to this court.

According to the allegations of the bill, one J. B. Whitley, on 10 April, 1857, executed to one Eli Cherry a deed of trust for certain personal and real estate, including a house and lot in Williamston (the subject matter of this bill), to secure the payment, among other debts, of a note given by him, with Cherry and the defendant William Thigpen as sureties, to one John B. Griffin. On 22 April, 1857, Whitley executed another deed in trust, in which he conveyed said house and lot and other property to the defendant, Simon T. Price, to secure the debts named in the deed to Cherry, besides others; and providing that if said debts were not paid by 1 January thereafter, Price should sell the house and lot, with the other property, and pay the debts, etc. Neither Cerry nor Price, as trustee, took into possession or sold the house and lot, but Whitley "conveyed the same to one Bennett S. Baker, or upon some agreement placed said Baker in possession" thereof. Baker afterwards died and his widow, the defendant Mary, and the defendant Frank A. Bobbitt, whom she has since (147) married, are in possession of the house and lot. The debts which the deeds of trust were made to secure have been paid, with the exception of the one due to Griffin, above set forth.

Cherry made a will and died in 1859, and Griffin and Whitley are dead intestate.

The parties are William A. Thigpen, executor of Cherry; W. H. Lee, administrator of Griffin; Mary E. Cherry, widow and devisee, and William S. and Lawrence Cherry, heirs-at-law and devisees of Eli

Cherry, and William Thigpen, *complainants,* and Simon T. Price and F. A. Bobbitt and wife, Mary, *defendants.*

The prayer is that a new trustee be appointed in the place of Eli Cherry; that Bobbitt and wife be required to surrender the possession of the house and lot; that the same be sold and the proceeds applied to the Griffin debt; that Price, as trustee, be required to render an account of the property, etc., that may have come into his hands as trustee, and pay the Griffin debt to the administrator; and for further relief.

Biggs, for the complainants.
Rogers & Batchelor, for the defendants.

PEARSON, C. J. There is no error in the order appealed from.

The demurrer is general. Neither of the grounds taken at the bar in support of it is tenable.

Sureties may file a bill to have a debt paid by the principal, or out of his estate, for their exoneration, before they are forced to pay the debt. This is settled. *Miller v. Miller, ante,* 85. It follows that, although the bill might have been sustained without making these parties complainant, it is not error to join them as complainants in a bill to enforce a trust for the payment of the debt.

The second ground is also untenable.

The allegation of the bill is that Whitley conveyed his result- (148) ing trust to Baker, under whom the defendants Bobbitt and wife are in possession; and taking that to be so, their possession is not adverse. They may be entitled to the excess of the proceeds of sale after paying off the debts secured by the rust deed.

PER CURIAM. Demurrer overruled.

LATHAM DONNELL and JAS. DONNELL v. GEO. DONNELL.

Upon taking an account between a *cestui que trust* and trustee: *Held,*

1. That the former could not, in 1866, raise any question *as to the value* of Confederate Treasury notes received by him, being *sui juris,* without objection, in 1863, 1864, and 1865.
2. Where one of the obligors upon a bond of $102, given in 1858, became insolvent in 1861, and the other in 1865, having been in failing circumstances for two or more years before, the trustee was not responsible for negligence as to collection.
3. Where both principal and surety upon a bond given in 1857 for $2,500.00, were solvent, and there was no necessity for its collection, the trustee was responsible for collecting it in February, 1863, in Confederate notes and individual notes made after 1861.
4. The trustee was responsible for collecting any more of the interest upon the bonds in his hands than was necessary for the maintenance and support of his *cestui que trusts.*

BILL for the settlement of a trust, filed to Spring Term, 1866, of GUILFORD. At Fall Term the cause was set for hearing upon bill, answer, report of the Master, and exceptions thereto, and by consent transmitted to this court.

The bill showed that in 1857 the defendant was constituted trustee by a conveyance of property amounting in value to about fifteen
(149) thousand dollars, of which he was directed by the deed to hold one-third for the benefit of the wife of Latham Donnell for her life, with remainder to her children, or failing such, to her next of kin; and the other two-thirds "the said George Donnell is to keep for said Latham Donnell as constantly at interest as he conveniently can, and pay the interest arising out of" it to said Latham for life, and then to pay over the same to his next of kin—the receipts of said Latham and his wife to be good to the trustee for the interest from time to time; that the wife was dead, and the complainant, James, an infant, was the only child. The prayer was for an account, the substitution of another trustee, and for further relief.

Upon taking the account the Master allowed the trustee: 1. Various items of Confederate treasury notes paid by him to Latham Donnell at different times during the late war. 2. A bond for $102, with interest upon W. I. McConnell and Joel Hiatt, due in 1858; the facts being that the former had left the country insolvent in 1861, and the latter had died insolvent in the fall of 1865, having been considered to be in failing circumstances for two or three years before. 3. A bond for $2,500, given in 1857 for land and collected in February, 1863; the facts being that it was due by Emily Donnell and W. A. Caldwell as surety; and that before Emily's death the defendant, who was also one of the administrators, paid it to himself as trustee in Confederate treasury notes, and individual notes due in 1861 and after, more than $2,500 of such payments being in Confederate money. 4. Two Confederate certificates of deposit made 1 July, 1864, for $400, being so much interest collected, which Latham Donnell refused to receive.

No further statement appears to be required to understand the opinion.

(150) *Dick, W. L. Scott,* and *Phillips & Battle,* for the complainants.
Bragg, for the defendant.

PEARSON, C. J. The cause comes on for hearing upon exceptions filed by the complainants to the Master's report, and for further instructions.

1. The first exception of the complainant, Latham, is not allowed. The Confederate treasury notes having been received by him without objection, it is now too late to raise a question as to the value of such notes according to a specie standard.

2. The second exception of the complainant, Latham, is not allowed. The trustee, holding a note, ought not, after the depreciation of the currency, to have attempted to collect it, although one of the obligors had become insolvent; because it was for the interest of the fund to let it stand without one of the obligors rather than to have collected it in Confederate notes, and considering the state of feeling in the country, we much regret the idea that it was the duty of the trustee to attempt to collect the debt *in specie,* and to refuse currency; for that was more than could have been expected of the most prudent men in regard to their own debts. So the trustee took the most prudent course in allowing the debt to stand upon the responsibility of Mr. Hiatt, and his failure, by reason of the emancipation of slaves, is a matter for which the trustee can not be held liable.

3. The exception, marked 3d, of the complainant, Latham Donnell, being included in the 1st and 2d of the complainant, James Donnell, is allowed. A trustee holding a note for $2,500 due before the war, principal and surety both being solvent in 1863, without any special occasion for the use of money, and with no object, so far as we can see, except to enable him to settle up the estate of his brother-in-law, receives in payment of the note Confederate notes and notes (151) on individuals, due with small exception after 1861. This naked statement is enough to convict the trustee; he should have observed the same prudence in regard to this note as he did in regard to the note of General Hiatt.

4. The third exception of the complainant, James, is allowed. The trustee was not bound to collect all of the interest annually, but only so much as was necessary for the support and maintenance of his *cestui que trusts.*

The Master was under a misconception as to the proper construction of the trust deed. It is hard enough upon the *cestui que trusts* to allow the trustee credit for the amounts which they received in Confederate notes, as of the nominal instead of the actual value, but to allow him credit for a sum which they refused to receive, and which the trustee should not have collected, would carry the matter much too far. In 1864 no prudent man would have received Confederate notes at par in payment of interest upon an ante-war debt. A sheriff or constable, without any special instructions, would have refused to take such notes in discharge of an execution in his hands. We are unwilling to open the door so wide for the entrance of fraud. In face of the high commendation of the trustee, which the very respectable gentleman who makes the report felt himself at liberty to express, we are not at liberty to suppose that the trustee did in fact offer to pay Confederate notes which he had not received in payment; but how easy would it be for a trustee

or guardian to pay over "trash," of which he had a pocket full, and retain for his own benefit the original note and claim for interest!

There will be a reference to reform the account according to this opinion, and the cause is retained for further directions.

PER CURIAM. Decree accordingly.

Cited: *Larkins v. Murphy,* 71 N. C., 561.

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(152)

PETER CHAMBERS v. DOLPHIN A. DAVIS and others, Ex'rs.

Where a testator, in his will, recommended one to the humanity of his executors, and added that he left in their hands the interest on a certain fund for the support of the person so recommended during his life, and upon his death the surplus, if any, to go over to another: *Held,* that the clause was *imperative,* and gave to such person a right to a support for life under it.

BILL for an account and payment of a legacy under the will of Maxwell Chambers, filed to Fall Term, 1866, of ROWAN, and set for hearing on bill and answer at the same term, and transmitted to this court.

The complainant was a slave of Maxwell Chambers, deceased, at the time of his death, in 1855, and the defendants are the executors of the will of Maxwell Chambers.

The only point in the case was in the construction of clause 34 of the will. That clause is as follows: "I feel desirous to make ample provision for my poor old friendless woman, Lucy, as well as my old man, Peter; therefore rely on the humanity and tender feelings of my executors to have them well taken care of and kindly treated during the short time they will probably want it. I leave in the hands of my executors the annual interest as it becomes due on $1,500 of my Wilmington bonds, or so much of it as may be necessary," etc., "to support them during their lives, the surplus, if any, including the principal, $1,500, to go to the trustees of Davidson College," etc.

Boyden and *Bailey,* for the complainant.
Blackmer, for the defendants.

BATTLE, J. The only question as to which the counsel for the parties have asked our advice is, whether the language of clause 34 of
(153) the testator's will is imperative, or only precatory. The counsel for the defendants say that if, in our opinion, it is imperative, the intention of the testator shall be carried out, without regard to any other objection that might be made to it, arising out of the plaintiff's condition as a slave at the time when the will went into effect.

The first sentence of the clause would seem to indicate the purpose of the testator to leave it as a matter of humanity, rather than of legal obligation, on his executors to provide for the wants of his slaves. But when we notice that in the second sentence he sets apart the interest of a certain fund for their support, directs its application to that purpose, and disposes of any surplus which may remain unexpended at their deaths, we must conclude that the intention was to impose it as a legal duty on his executors to appropriate such interest to the use of the objects of his bounty. We hold, therefore, the clause in question to be imperative, and that the plaintiff is entitled to whatever sum may be found necessary as an annual support during life. There must be a reference to ascertain what that sum shall be.

PER CURIAM. Decree accordingly.

ELIZABETH COLLINS v. JOHN M. COLLINS.

Articles of separation between husband and wife, whether entered into before or after the separation, are against law and public policy, and therefore void.

PETITION for dower, filed to Fall Term, 1866, of WAKE.

The petition states that Mark L. Collins, the husband of the petitioner, died in August, 1863, seized of the land described in the petition, and of which dower is prayed. It further sets forth (154) that, prior to 1861, difficulties had arisen between the petitioner and her husband, and they had voluntarily separated from each other; and that in May, 1861, articles of separation were entered into between them, and duly executed by them and one Willie Dodd, as trustee for the petitioner. These articles were filed as part of the petition. After reciting the fact of separation, and an agreement that they should continue to live separate, "On condition that said Mark shall pay for her use and benefit one-third of the value of his estate, to be assigned by commissioners," the articles state that commissioners selected by the parties had reported the value of the estate, real and personal, of Mark L. Collins at $2,250, and that Mark executed his bond, with good security for one-third thereof, to said Willie Dodd, as trustee for Elizabeth Collins; and in consideration thereof she covenanted to relinquish, in case said bond was paid, "all claim upon the real and personal estate of said Mark which she has now or hereafter may have, by reason of *her right of dower* or otherwise, and she agrees that her said husband shall not be responsible for her debts contracted or to be contracted," etc. The defendant, by his guardian, filed a general demurrer to the petition.

The demurrer was set down for argument at Special Term of Wake Court, and by consent the cause was transferred to this court.

Rogers & Batchelor, for the petitioner.
Phillips & Battle, for the defendant.

(155) READE, J. It is to be considered for the first time, whether a deed of separation between husband and wife will be enforced in this court.

The relation of husband and wife is at the foundation of society. It is natural, as well as conventional. It was the relation of the first pair of our race, and has existed ever since. It is universal in civilization, and not uncommon in barbarism. It is indispensable to that other important relation of parents and children. Incident to it are its inseparable and indissoluble characteristics—its oneness—"they shall be no longer twain but one flesh," "to live *together* after God's holy ordinance," "so long as they both shall live." But little legislation is necessary to define and regulate it. We know it by intuition. It is induced by the strongest passion of the human soul, love. It is the most endeared relation which nature makes or society forms. When lusts entice, or wealth prompts the relation, it may prove a curse when the one is satiated and the other wasted; but when love, virtuous and disinterested, ardent and mutual, prompts the relation, it is incomparable. Such is the relation as it exists with us. It is formed in pefect freedom. There are no constraints of parents, of custom, or of laws; nor any influences but such as are conducive to its happiness. It is formed in perfect simplicity, and preserved in religious purity. The husband is the stronger, and rules as of right; the wife is the weaker, and submits in gentleness. The frailties of each are excused or forgiven, their (156) sentiments are in unison; their manners in conformity; their interests the same; their joys and sorrows mutual; their children are a common bond, and a common care; and they live, not separately, but *together*—the nursery of morality and piety, and the bulwarks of society.

How different from this is marriage, quarrel, separation!—the anomalous condition of a husband without a wife, a wife without a husband, parents without children, and children without parents! Such relations too surely follow *deeds of separation.* Let it be understood that marriage is only an experiment, to be formed inconsiderately, and broken capriciously; to be put on and off like a garment; that husband and wife may have separate establishments in which to nurse their hate and cover their irregularities; that children may be trained to hate one parent or both, and to have the care of neither; and society to have

constantly in view the nuisance of their infidelities; and what greater evil can be imagined?

It is to be admitted that in some of the old governments passions and vices have fixed this evil upon society. It was unknown to the common law. 2 Roper Husband and Wife, 267, says: "This kind of separation is the offspring of late years, and totally unknown to the common law; and the observation must be repeated that, as in the other innovations upon that law, so in this instance, the legal acknowledgment of this species of divorce has introduced in the administration of justice considerable difficulties and perplexities. According to the original policy of England, the Ecclesiastical Courts had exclusive jurisdiction of the rights and duties arising from the state of marriage, and they acknowledged no such kind of divorce as that under consideration. They did not permit the parties, by voluntary compact, to alter those rights and duties, and in so doing they prevented those anomalous cases which have occurred since the establishment of the doctrine in (157) courts of law and equity, that a separation *in pais* is in effect valid, and that while it continues, the wife is to be considered, in most respects, as a *feme sole.*"

Since this evil has attached to English society, learned judges have strongly condemned it; but too much property now depends upon it to disturb it. There has been no decision, and so far as we know there has not been even a *dictum* in its favor in this State. In *Elliot v. Elliot,* 21 N. C., 57, which was a bill to set up a conveyance by a husband to his wife, without the intervention of a trustee, *Ruffin, C. J.,* says: "In England it has certainly been held that a gift by the husband to the wife, without the intervention of a trustee, may be made under such circumstances as to render it valid in equity, and induce that court to constitute the husband himself the trustee. No case of that sort has occurred in this State; and, perhaps, the court might not feel the obligation to encourage the obtaining such donations, or the creation of separate interests in the wife, subject to her immediate and absolute control during the marriage, by an act between the husband and wife themselves, which is inoperative at law."

And in *McKinnon v. McDonald,* 57 N. C., 1, where a wife claimed her separate earnings against the husband's creditors, *Pearson, C. J.,* said: "The case presents this question: Does the doctrine of 'pin money,' by which, in the English Equity Jurisprudence, a husband is allowed to give his wife the privilege of working for herself, acting as a free trader, and of acquiring profits by her earnings and savings, which neither he nor his creditors can reach, obtain in this State? After much consideration we are satisfied that it does not; because it is inconsistent with our legislation in regard to the rights and duties of

husband and wife: it is at variance with the habits and usages of our people, and tends to produce an artificial and complicated state of things; so that, while at law the wife's existence is considered as (158) merged in that of her husband, her earnings are his, she can not contract or sue and be sued; in equity she is entitled to her earnings, may act as a free trader, acquire property, sue and be sued in respect thereto.

"We thus regret another of those refined doctrines of equity jurisprudence which render the English system so extremely artificial and complicated, and add pin money to the list of 'part performance,' 'the lien of a vendor for the purchase money,' 'the duty of the purchaser to see to the application of the purchase money,' and 'the wife's equity for a settlement.'"

Those cases are only in point to show that in kindred subjects our courts have desired to avoid every appearance of countenancing the separate relations of husband and wife, and to hold "that in respect to fortune, as in other things affecting their happiness, they intend by marriage to embark in the same bottom and to sink or swim *together.*"

If there were any doubt as to our policy it would seem to be clearly settled by our legislation. Important as the relation is, our whole legislation is comprised in a few pages of the Revised Code. It provides that marriage shall be indissoluble except for impotency at the time of marriage, or subsequent infidelity. It allows separation only where the wife's condition is intolerable, or life burdensome! And it allows separate support only where the husband is a drunkard or spendthrift, and is wasting his substance to the impoverishment of his family. And in all these cases the parties are not allowed to be the judges; but they must make application to court, and so far from their consent availing anything, there must be satisfactory proof that there has been no collusion or concert; and if for divorce, that it is not for the mere purpose of being *freed and separated* from each other—observe, *separated* from each other.

In contravention of this policy, and in disregard of their (159) marriage vows, the parties in this case had "difficulties" and separated; and to avoid the wholesome control of the court, they entered into an agreement by which the property was to be divided between them, and each relinquished to the other all the marriage privileges and responsibilities, and were to live *separately.* Such a course, if allowed, would virtually annul our marriage laws, and make the relation of husband and wife a mere trade or bargain, dependent upon their caprice. It is true that the courts will not *compel* them to live together; but it is equally true that they will afford them no encouragement to separate, except in those cases provided by law.

Thus much may be said where the separation is voluntary with both parties; but if allowed, it would open the door to fraud and imposition by one to compel a separation and settlement on the part of the other. An imperious husband, secure from exposure in the courts, would practice cruelties towards a faultless wife, to compel a separation; and she, to buy her peace, would take such terms as he might offer.

We do not know the facts of this case, except that it seems that the wife was induced to take less than she is now satisfied with, or than the law allows her.

We do not, however, put the case upon the ground of fraud or imposition on the part of the husband, but upon the broad ground that articles of separation between husband and wife, voluntarily entered into by them, either in contemplation of or after separation, are against law and public policy, and will not be enforced in this court.

PER CURIAM. Demurrer overruled with costs.

Doubted: Sparks v. Sparks, 94 N. C., 531; *Smith v. King,* 107 N. C., 275; *Archbell v. Archbell,* 158 N. C., 413.

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(160)

JOHN W. BOYLAN and others v. JOHN S. BOYLAN and others.

Where it appears, from other parts of a will, that the testator understood the distinction between "children" and issue more remote, grandchildren and great-grandchildren can not be included in a division directed to be made among *children.*

BILL for the sale of land for partition, and the construction of a paragraph of the will of William Boylan, deceased, filed to Fall Term, 1866, of WAKE, and upon bill and answer transmitted to this court.

The complainants are the sons and daughters, and a husband of one of the daughters, of the testator. The defendants are two grandsons and a great-granddaughter, and claimed to have an interest in the land. The will of the testator, filed as part of the bill, is voluminous, and the lands prayed to be sold are embraced in the residuary clause as follows:

"Twentieth. All the residue of my property, whether real or personal, or wheresoever situate, not herein disposed of, I give, devise and bequeath to my children."

In other parts of the will devises and bequests are made to the several parties to this suit, by name, and their respective relationship to the testator is incidentally noticed.

Moore, and *Phillips & Battle,* for the petitioners.

Haywood, for the defendant John S. Boylan.

BATTLE, J. The only question presented in this case has been already settled by this court in *Mordecai v. Boylan,* 59 N. C., 365. We entertained no doubt then, as we entertain none now, that as the testator clearly shows by his will that he understood the distinction be-
(161) tween children and grandchildren, the division of the residue of his estate directed to be made among "his children" can not embrace grandchildren and great-grandchildren. This is admitted to be the general rule, to which, however, there are two exceptions: (first) "from necessity, which occurs where the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import; and (secondly) where the testator has clearly shown by *other* words that he did not intend to use the term 'children' in its proper, actual meaning, but in a more extensive sense." 1 Roper Leg., 69. Neither of these exceptions applies to the case at bar, because the testator left children, as well as grandchildren and great-grandchildren, and it is manifest from his will that he knew the distinction between them.

A decree may be drawn according to this opinion.

PER CURIAM. Decree accordingly.

Cited: Lee v. Baird, 132 N. C., 760.

EDWARD WOMACK and others v. CHRISTIAN EACKER, Adm'r of Mary Rudisill.

Where property was bought at a public sale, of which the *conditions* were that payments should be made in "good current bank money," and a purchaser gave his note for the amount of his purchase in general terms, without adding "good current bank money," because he was assured it was implied: *Held,* that equity would correct the mistake, and supply the omission.

BILL to correct the terms of a note for the payment of money, etc., filed to Fall Term, 1866, of GASTON. At that term the defendant
(162) filed his answer, and by consent proofs were taken, and the cause set for hearing, and transferred to this court.

On 6 December, 1864, the defendant, after advertisement, exposed the personal estate of his intestate to public sale, on a credit of twelve months. The conditions of the sale were posted up at the place of sale, and the crier made them known to the bidders. One of the conditions was, that payments should be made in *"good current bank money."* Bank notes, at that time, were much below specie in value. The complainant, Edward Womack, became a purchaser to the amount of $2,430.-81, and gave his note, with the other complainants, Wiley Rudisill and

Joseph Lusk, as sureties. The complainant suggested to the clerk of the sale, one Samuel Black, Esq., that the note should be expressed to be payable in "good current bank money," according to the conditions of sale. Black, on whom he relied as a man accustomed to such business, informed him that it was unnecessary to insert those words, as they would be implied; and the note was expressed in the usual form, and in general terms.

The defendant refused to take bills issued by the chartered banks of the State, or their equivalent in specie, in payment of the note, and has sued at law for the full amount in the present currency of the country.

These are the essential facts as alleged in the bill and admitted in the answer, or established by the proofs.

The prayer of the bill was that the note should be corrected and made to conform to the understanding of the parties (as above) for an injunction against the proceedings at law, for an account, and for general relief.

Bragg, for the complainant.
No counsel for the defendants.

PEARSON, C. J. The complainants executed the note under a (163) mistake in regard to a matter of law, into which they were led by confiding in the opinion of Samuel Black, Esq., who was acting clerk and agent of the defendant.

We had at first some difficulty, because the complainants had notice of the words used in the note, and the mistake was in regard to the legal effect of the words used. But *McKay v. Simpson,* 41 N. C., 452, settles the question. It is there held: "Where an instrument is intended to carry an agreement into execution, but, by reason of a mistake, either of fact or *of law,* does not fulfill that intention, equity corrects the mistake."

PER CURIAM. Decree for complainants.

Cited: Lyman v. Califer, 64 N. C., 573; *Kornegay v. Everett,* 99 N. C., 34.

S. H. ELLIOTT v. G. W. LOGAN, Adm'r of Martha Cabaniss.

Where a creditor was paid a smaller sum than was due, and, without reading, signed a receipt, written by one in whom he confided, and expressed to be *in full of* his claim, though not so understood by him: *Held,* a proper case for a court of equity to relieve, by correcting the receipt.

BILL filed to Fall Term, 1860, of CLEVELAND, for relief against a mistake in a receipt for money, etc. Upon the coming in of the answer,

proofs were taken, and at Fall Term, 1866, the cause was set for hearing and transferred to this court.

The facts, so far as the opinion makes a detail of them necessary, were these:

The defendant's intestate was indebted to the complainant by two notes, for $105 and $110.75, bearing interest, and given 21 December, 1854, and 4 August, 1854, respectively, and also by account for a
(164) sum not established. In July, 1858, one Williamson, as agent for the defendant's intestate, paid the complainant $130, and wrote a receipt expressed as follows: "Received of Martha Cabaniss, by the hands of E. S. Williamson, $130, in full of an account and notes." The complainant having, as the bill alleged, confidence in the business capacity and honesty of Williamson, signed the receipt, without reading it, supposing it to be merely a receipt for the $130. The intestate did not claim in her lifetime that the receipt was a discharge of her debt, but for reasons stated in the bill, and not controverted, the matter was not adjusted; and the defendant, as of her administrator, refused to pay the balance due, in face the receipt.

The prayer of the bill was that the receipt should be corrected and made to speak the truth; that the defendant should pay the balance due, and for further relief.

Whitfield, for the complainant.
Logan, and *Phillips & Battle,* for the defendant.

READE, J. It is stated in the bill, and it is satisfactorily proved by the evidence, that the receipt, which is for a specific sum, and in full of an account and notes, was not in fact in full of an account and notes, and was not so understood to be by the plaintiff when he signed it; and that it was so written by the agent of the intestate of the defendant, in whom the plaintiff confided, and therefore did not read it, in mistake or fraud.

This mistake or fraud makes a proper subject for investigation in a Court of Equity; and the plaintiff has the right to have the receipt corrected, so as to make it a receipt for the specific sum named in it, and for no more.

To this it is objected that the complainant has complete remedy at law, for that when he sues at law and the receipt is offered in
(165) defense he will not be concluded thereby; but may show the mistake or fraud.

It is true that the plaintiff would not be *concluded,* but still the receipt would be *prima facie* evidence of the payment in full; and would put the complainant at the disadvantage of having to meet a *prima*

facie case against him, which has been made so by the mistake or fraud of the agent of the defendant's intestate.

To be relieved from this disadvantage, and to have the receipt corrected so as to state the truth, is the right of the complainant in this court.

PER CURIAM. Decree accordingly.

Cited: Jaffray v. Bear, 103 N. C., 168.

ALFRED HARGRAVE, Adm'r of Samuel Hargrave, v. O. M. SMITH and C. F. FISHER'S Adm'rs.

Where the owner of a one-third interest in land conveyed that interest to the owner of the other two-thirds, and took a covenant from the bargainee that he would sell the tract to the best advantage, and pay the bargainor one-fourth of the proceeds, but would not sell unless such one-fourth would amount to $1,500, and in case no sale should be effected *in six months,* would reconvey to the bargainor, or pay him $1,300; and a sale was not effected till after the lapse of six months: *Held,* that the obligation to sell had ceased, and the bargainor could only claim a reconveyance of his former interest in the land, or $1,300, at the election of the bargainee.

BILL for relief upon a covenant, filed to Spring Term, 1861, of DAVIDSON, and at Spring Term, 1864, set for hearing upon bill, answers and exhibits, and transmitted to this court.

The covenant in question was executed by the defendant Smith to the complainant's intestate, and "guaranteed" by the intestate (166) of the other defendants, 11 August, 1853. Its terms and the object of the bill sufficiently appear from the opinion of the court.

Bragg, for the complainant.
Gorrell, for the defendant.

PEARSON, C. J. Mr. Hargrave was very cautious in making the contract. He conveyed to Smith his one-third of the Garner tract of land, in the confidence that Smith would make a sale of the whole tract; and by the instrument set out in the pleadings Smith was bound to pay Hargrave one-fourth of the amount for which he should sell, making no deduction for expenditures necessary to develop the capacity of the mineral value of the land. Smith was not to sell at all, unless the one-fourth would amount to, at the least, $1,500; he was in good faith to make a sale for the highest price he could get, and, "in case no sale is effected within six months, *at the end of that time,*" Smith binds himself either to reconvey to Hargrave the one-third of the land or to pay him $1,300.

By the proper construction of this instrument the obligation to sell was, at the end of six months, *"functus officio,"* and Hargrave was entitled either to a reconveyance of the one-third of the tract of land or to $1,300, at the election of Smith.

The bill seeks for a specific performance of this agreement to sell, and demands payment of the one-fourth of the proceeds of a sale made long after the end of the six months. The complainant has misconceived his right under the instrument of August, 1853. No sale having been made, at the end of the six months he was entitled to a reconveyance of the one-third, or to $1,300, at the election of Smith. Neither Fisher nor Smith has been called on to make this election. But it is (167) clear that the agreement to sell under the instrument, which the bill seeks to enforce, was *functus officio,* and the bill must be dismissed without prejudice, leaving the complainant to take such proceedings as he may be advised.

PER CURIAM. Bill dismissed.

ELI HARTLY and wife, and others, v. REUBEN ESTIS.
REUBEN ESTIS v. ELI HARTLY and wife, and others.

Where a son, having acquired control over an old and imbecile father, in the absence of other friends of the father, and otherwise under suspicious circumstances, obtained a deed for all the father's land, at an inadequate price, and gave his note for the amount, a court of equity at the suit of the other heirs will order the deed to be cancelled.

BILL to set aside a deed, filed to Fall Term, 1858, of WATAUGA, and CROSS BILL for correction of same deed, filed to the same term. Answers having been put in, and proofs taken in both causes, at Spring Term, 1866, they were set for hearing and transmitted to this court.

The defendant in the original and complainant in the cross bill was the son of Lot Estis, deceased, and claimed the lands that had belonged to the deceased, under a deed executed to him a short time before his death.

The complainants in the original and defendants in the cross bill were either heirs at law of Lot Estis or husbands of such heirs.

The object of the original bill was to have the deed to Reuben (168) Estis canceled, as having been obtained by fraud; and that of the cross bill was to have the deed corrected, so as to be a conveyance of the fee simple instead of a life estate in the lands. The facts are sufficiently stated in the opinion.

No counsel for Reuben Estis.
Haywood & Folk, for the other heirs of Lot Estis.

BATTLE, J. From the pleadings and proofs in these causes, which are properly brought on to be heard together, it appears that the father of all the parties was, at the time of the transaction which forms the groundwork of the litigation, an old man, between seventy and eighty years; that he had been for many years very intemperate; that his body was worn down by his bad habits, and by a distressing disease; that his mind was much weakened by the same causes; that after raising a large family of children, all of whom were daughters except two, and all of whom had married and settled to themselves, he was left alone in extreme old age by the death of his wife; that after that event he was thrown upon the care of a few slaves and a single granddaughter; that he was incapable of attending to the ordinary business of his farm, and that his son Reuben, the defendant in the original and the plaintiff in the cross bill, became his manager; that he had advanced his sons by gifts of land and some articles of personal property, while he had given to his daughters nothing but articles of personalty of no greater value than those of a similar kind advanced to his sons; that in this condition of things he executed to his son Reuben a deed for the land on which he lived, and which was all he then owned, in consideration of his son's note for six hundred dollars, without interest; that the land was then worth between fifteen hundred and two thousand dollars; that no person was present at the execution of the deed but the bargainor's own son, who wrote it and signed it as a witness, and another man of doubtful character who could not write, and who had to make (169) his mark as the other attesting witness, and who alone attested the note given for the land. Now what does the law, as administered in a Court of Equity, say to such a transaction, attended by such circumstances?

It says that weakness of mind alone, without fraud, is not a sufficient ground on which to invalidate an instrument; nor will old age alone, without fraud, have that effect. But excessive old age, combined with weakness of mind, may constitute a ground for setting aside a conveyance. *Smith v. Beatty,* 37 N. C., 456. It says that neither weakness of mind nor old age is of itself a sufficient ground to invalidate an instrument. To have that effect, there must be some fraud in the transaction, either expressly proved or to be inferred from the circumstances. *Suttles v. Hay,* 41 N. C., 124. It says that mere inadequacy of price is no ground for setting aside a contract, unless it be such as amounts to *apparent fraud;* or the situation of the parties is so unequal as to give one of them an opportunity for making his own terms. *Potter v. Everitt,* 42 N. C., 152. It says that where a person standing in a confidential relation to another uses the influence and advantage of his position to make an unequal contract with his dependent or inferior, a

Court of Equity will relieve against it. *Mullins v. McCandless,* 57 N. C., 425. And it says further that it is an established doctrine, founded on a great principle of public policy, that a conveyance obtained without any proof of fraud, by one whose position gave him power and influence over the donor or grantor, shall not stand at all if without consideration, and shall stand as a security only for the sum advanced if upon a partial and inadequate consideration. *Futrill v. Futrill,* 58 N. C., 61.

With these principles before us, we have a son becoming the manager of an old and imbecile father, and, while thus acting, obtaining (170) from him, not long before he is laid in his grave, a conveyance for all his land at an inadequate price, without an opportunity to consult his other friends, and under circumstances of strong suspicion as to its fairness. A Court of Equity can not permit such a transaction to stand, except as a security for the note which it is admitted has not been paid. On the contrary, it must direct the deed mentioned in the pleadings to be delivered up to be canceled, and that the son permit the other parties to enter into possession of the land as tenants in common with him, and must account for the rents and profits while he has been in possession, he being allowed proper credits for substantial improvements.

Let a decree be drawn in accordance with the principles declared in this opinion.

The cross bill is dismissed with costs.

PER CURIAM. Decree accordingly.

Cited: McLeod v. Bullard, 84 N. C., 527; *Tillery v. Wrenn,* 86 N. C., 220; *Hodges v. Wilson,* 165 N. C., 330.

SAMUEL KEY v. JOHN H. DOBSON, and others.

Where it was alleged in a bill that the complainant, who was old and ignorant, had been induced by fears of prosecution, excited by the defendants (one of them a government official and a supposed friend), to transfer bonds and notes of a large amount to them at a price less than half their value, secured by a bond that is still unpaid though long overdue, and that the defendants are insolvent; which allegations were only partially denied by the answers: *Held,* upon a motion to dissolve an injunction against the collection or transfer of the notes, to be proper to look into *the whole case,* and, it appearing that the complainant had probable grounds for relief, to continue the injunction to the hearing.

BILL for a special injunction against thet collection or transfer of bonds, etc., and for an account, filed to Fall Term, 1866, of SURRY. (171) The injunction having been granted by *Mitchell, J.,* at chambers,

at the appearance term, answers were put in and exceptions thereto filed; whereupon *Buxton, J.,* dissolved the injunction *pro forma,* and the complainants appealed to this court.

The contents of the pleadings are sufficiently set forth in the opinion. The exceptions to the answers so far as sustained by this court were: That the defendant Dobson and the defendant R. E. Reeves had failed to meet the allegations in the bill that certain debts due from them to the complainant had been owing *eight or ten years,* which, if true, tended to establish their insolvency.

No counsel for the complainant.
Boyden and *Gilmer,* for the defendant.

READE, J. We have not to consider this as an application for a common injunction to stay proceedings at law, where the rights of the parties have been passed on, and where the continuance of the injunction depends upon *equity confessed in the answer.* But this is an injunction of a *special nature,* and does not stand upon the equity confessed in the answer, but upon the probability of the complainant's right to relief upon the final hearing, and the irreparable loss which may result. And these probabilities are to be collected from the whole case, *i. e.,* the bill, answer and affidavits. The distinction is so fully explained in *Capehart v. Mhoon,* 45 N. C., 30, and in *Heath v. Lloyd, Ibid.,* 39, that it is unnecessary to elaborate it.

The bill states that the plaintiff is old and ignorant, and that he gave in his credits for taxation under the Confederate government at $3,000. That the defendant Dobson was the assessor to whom he gave in his list; that his credits really amounted to seven or eight thousand dollars, and that the defendants conspired to alarm the com- (172) plainant with the danger of his being arrested, imprisoned and whipped; and advised him to sell his credits to them at what he had given them in, and that this would show that he did not think them worth more; that under the influence of the alarm thus caused, he did sell to the defendant Dobson the whole of his credits for $3,000, and took Dobson's bond, with security, for that sum. Such a transaction, supposing it to be true, would be a gross fraud, aggravated by the fact that the defendant Dobson was a sworn officer of the government and a confidential friend of the complainant.

But the defendants do not admit the statements in the bill. They do admit that the defendant Dobson did buy the complainant's credits at $3,000, and that the defendant R. E. Reeves subsequently took half of the purchase. But they deny all fraud in the transaction; and it is just to them that their statement should be heard.

From the answer of Dobson the following facts appear: After he

took the complainant's list he told him that there was a complaint in the country about his having made a false return, and that at court he heard one man very boisterous and abusive of him, and that *he* would be astonished to hear the name of one gentleman who was abusing him. The complainant asked him what was to be done, and he told him that it must be arbitrated; that each must choose a man. Complainant told him to settle it himself. He declined, saying it must be done by freeholders. Complainant insisted that he and the defendant Worth should do it. He then consented, and made an appointment to meet at complainant's house. At the meeting the complainant hesitated to produce his papers, but he told him it must be done. Complainant subsequently exhibited his papers, and he (Dobson) and Worth made the calculation, and found them to amount to upwards of $4,200. He then went out into the yard and had a talk with complainant's wife, who asked
(173) him how it came out, and he replied, "It comes out more than he gave in"; at which she seemed to be concerned, and asked him to talk to her husband and fix it right. She brought her husband out, and Dobson had a talk with him, and made the trade and agreed to have it all fixed right with the tax collector. That his and Reeves' debts amounted to $2,000, the whole of the solvent debts to upwards of $3,800, and the doubtful and bad debts to upwards of $1,600.

Now, when to the defendant's own statement it be added, what is fairly inferable from the whole case, that the complainant was old, ignorant and alarmed; his wife alarmed; Dobson, *his friend,* who yielded to complainant's solicitation to act as his counsellor, and settle the matter just as he pleased, so anxious was he to be relieved from the difficulty; that the credits were "old debts," subject to no scale of depreciation, and of much larger amount than the defendant's bond, given to secure the price of $3,000, which may be subject to the scale (but we do not decide that question); that the defendant Dobson was an officer of the government and bound to do equal justice between the citizen and the government. When all this is considered, it may be that but little evidence would be required to invalidate the transaction. The defendant Dobson denies that he intended to alarm the complainant. It is very certain that he did alarm both the complainant and his wife, and that he knew they were alarmed at the time he made the trade. He also denies that he deceived him as to the amount of the credits, and yet he admits that he stated the amount to be $4,200, whereas the list which he renders with his answer amounts to some $5,500. The defendants deny that they are insolvent, yet they have been owing the complainant eight or ten years, and have made no payment upon their $3,000 bond, although it has been given nearly two years, and they make no exhibit of their means and offer no evidence of their solvency other than their

own statement. If they were allowed to collect the complainant's credits, and should prove to be insolvent, his loss would be irre- (174) parable.

We have sought in vain in the answer of Dobson, for anything to relieve the transaction from the strong suspicion which is excited by the statements of the bill. And that portion of the answer especially, where he grows facetious and describes the perplexities of the old man (the complainant) when he was at his house to make out the list, how loath to show his papers, how he smoked his pipe, how he made "a good hand" at his dinner, how he smoked his pipe again, how much the old lady was concerned, and how placid he was himself the while, would better describe the sharper and his prey than the intercourse of neighbors and friends, or of an official and a citizen. And it strongly impresses upon us the propriety of the wholesome restraint of continuing the injunction until the hearing.

The fourth exception to the answer of Dobson, and the third exception to the answer of R. E. Reeves, are sustained. The other exceptions are overruled. The order dissolving the injunction is overruled, and the injunction is continued until the hearing, with leave to either party to apply for a receiver.

PER CURIAM. Decree accordingly.

Cited: *Williams v. Moore, post,* 212; *Harshaw v. Dobson,* 64 N. C., 387.

(175)

WM. H. HIGH, Trustee, v. GEORGE A. LACK and H. L. SALOMONSKY.

1. A transfer, in terms absolute, of all the effects of a firm (consisting of goods and choses in action of an unascertained value) having been made in the firm name by one partner without the consent of his copartner, for a certain sum, being the amount of the firm debts: *Held,* not to be absolute, but only a security for the firm debts;
2. *Also held,* that, as any surplus after payment of the firm debts belonged to the individual members of the firm; *therefore,*
3. An injunction granted at the instance of the non-assenting partner, should be continued to the hearing, and in the meantime a receiver should be appointed.

BILL for an injunction and sequestration, and for specific relief, filed to Fall Term, 1866, of WAKE.

The facts, so far as they are necessary to an understanding of the opinion, are as follows:

Charles M. Farriss, one of the complainants, and the defendant Lack, became partners as merchant tailors in Raleigh in the latter part of 1865. The copartnership was unsuccessful, and by May, 1866, had

contracted debts to the amount of $5,560.75, of which $4,880.98 was due the firm of Salomonsky & Co., of Norfolk, Va. On 9 May the defendant Salomonsky, a member of that firm, proposed to the defendant Lack that he would, for Salomonsky & Co., take the effects of Farriss & Lack, including all their choses in action, in payment of their debt of $4,880.98, and assume the other debts of Farriss & Lack. The proposal was accepted, and Lack, in the name of Farriss & Lack, executed the following paper:

NORTH CAROLINA—CITY OF RALEIGH.

In consideration of five thousand, five hundred and sixty dollars and seventy-five cents ($5,560.75), the receipt whereof is acknowl-
(176) edged, we bargain and sell to Salomonsky & Co., of Norfolk, Va., all our stock of cloths, cassimeres, vestings, tailors' trimmings, gentlemen's furnishing goods, ready made clothing, hats, caps, boots and shoes, and all other goods now used by us as merchant tailors; also all the store fixtures and shop fixtures in the storehouse now occupied by us; and for the said consideration we hereby assign unto said Salomonsky & Co. all the debts owing us as partners, whether by note or account.

Witness our hand, 9 May, 1866. FARRISS & LACK.

In return Salomonsky, in the name of Salomonsky & Co., signed a receipt for the amount of their claim against Farriss & Lack, and also agreed in the name of Salomonsky & Co., in writing, to pay the other debts, amounting to $679.77.

This transaction was completed without the consent or knowledge of the complainant Farriss, and upon being informed of it, he refused to be bound by what had been done; and on the day following, the 10th of May, he executed a deed of trust of his interest in the effects of Farriss & Lack (with certain of his individual property) to the complainant High, to secure certain individual debts, and especially to indemnify the other complainants, J. J. Ferrell and J. D. Pullen, his sureties in bank to a large amount. Immediately thereafter this bill was filed, praying that the complainant High, as trustee, might be put in possession of Farriss's interest in the partnership effects, and in the meantime, that the defendants, of whom it was alleged that Lack was involved, and Salomonsky a non-resident, might be enjoined from disposing of or removing the goods, etc., and that the same might be sequestered.

The injunction and sequestration were granted by *Battle, J.*, at chambers, and the complainants required to enter into bond in the sum of $4,000, to indemnify the defendants.

(177) The answers were put in at Fall Term, 1866, and at a special term in December, upon motion before *Barnes, J.*, it was ordered

that the injunction be dissolved and the sequestration removed. From this order the complainants appealed.

Moore, Rogers & Batchelor, and *Haywood,* for the complainants.
Bragg, and *Phillips & Battle,* for the defendants.

READE, J. Whether one partner has the right to sell out the whole of the partnership effects, *without the consent* of his copartner; and if he has, whether he has the right to sell the whole or any part, *against the known will* of the other partner; and if he has this for *some purposes,* whether he has for *all purposes,* without fraud, are some of the interesting questions which were discussed at the bar. But it is unnecessary to decide them, because we are satisfied that the transfer in this case, though absolute in terms, was only intended to be, and therefore can operate only as a security for the debts of the copartnership—that is, the debt to Salomonsky & Co. and the other debts assumed by them, which comprises, as was admitted at the bar, all the debts of the copartnership of Farriss & Lack. To this extent the transfer (179) was legitimate and proper, because it enured to the benefit of both partners; and to this extent it will be upheld. That it was not an ordinary out-and-out sale is apparent from the fact that there was an *unknown quantity* of goods of various kinds, and of debts due the firm by notes and open accounts, and they were all lumped together at a given price—that is, at precisely the amount of the debts of the firm. We could not regard such a transaction as an absolute sale, without attaching to it a badge of fraud against the non-assenting partner. But so far as it is for the common advantage of both partners, and for the legitimate purpose of paying the debts of the firm, it will be upheld. And if, after paying the debts, there shall be a surplus, it will belong to the members of the firm. *Peeler v. Barringer,* 60 N. C., 556.

Salomonsky is a non-resident, and if allowed to take away the effects conveyed to him, beyond the jurisdiction of the court, the complainant's loss might be irreparable. The injunction therefore ought to be continued to the hearing, and there ought to be a receiver appointed to sell the goods and collect the debts.

It is unnecessary at this time to decide the rights of the complainants as among themselves.

There is error in the decretal order dissolving the injunction. Let this opinion be certified to the court below, to the end that the order may be reversed and the injunction continued until the hearing.

PER CURIAM. Decretal order reversed with costs.

(180)

ALFRED HAYLEY and others v. WILLIAM H. HAYLEY, Adm'r with the will annexed, etc.

1. A testator, who died in 1864, by will dated in 1857, gave their freedom to certain slaves; and then, by subsequent clauses, also gave "to the above-named liberated slaves" property both real and personal: *Held* (*Battle, J.*, dissenting), that by the effect of the recent emancipation, such gift was valid.
2. *Also, by the court*, that emancipation was the primary, and the method thereof but a secondary object with the testator.
3. *Also*, by *Pearson, C. J.*, and *Reade, J.*, that waiving all questions as to the time and manner in which emancipation was effected, the testator, from his knowledge of the issue which at the time of his death was notoriously involved in the result of the war then existing, must now be presumed to have intended that if such war resulted in emancipation the gifts should take effect, otherwise not. *And*, that such intention was not against any public policy which the State can now recognize. *And*, that the contingency was not too remote.
4. By *Battle, J.*, that the proclamation of President Lincoln could have no effect in liberating slaves where they did not come under the control of the armies of the United States, as these did not until after the death of the testator.
5. *Also*, that the phrase "liberated slaves," unexplained, included only slaves that were such *at the death of the testator.*

BILL, filed to Spring Term, 1866, of NORTHAMPTON, when a demurrer was put in and the cause set down for argument and transmitted to this court. The demurrer was argued at the last term of the court, and having been retained under an *advisari*, was again argued at the present term.

The bill showed that one Holiday Hayley, late of Northampton County, died in June, 1864, leaving by will to the complainants, who were his slaves, their freedom and certain real and personal
(181) estate, and that for this they had applied to the defendant without success, etc. The prayer was for an account, payment of their legacies, and for further relief.

The will was filed as an exhibit to the bill, and bore date 5 August, 1857. Its contents, so far as here material, are: "Item 1. My will and desire is to set free the following slaves, viz.": etc., "and to the above named slaves I hereby give, grant and bequeath, to each of them, freedom forever. Item 2. I give and bequeath to the above named liberated slaves half of the tract of land I now live on, to them and to their heirs forever, including the buildings. Item 3. I give and bequeath to the above named liberated slaves the sum of seven hundred dollars annually for ten years," etc.

The demurrer was a general one.

Biggs and *Peebles*, for the complainants.

Bragg, for the defendant.

The judges delivered their opinions *seriatim,* as follows:

PEARSON, C. J. It is clear that if the defendants, who are his next of kin, are declared to be entitled to the property in controversy, and the complainants, who are his "liberated slaves," and the peculiar objects of his bounty, are left to enter their new field of existence without anything to start on, the wishes and expectations of the testator will be disappointed.

It is also clear that if the testator had died in 1857, when his will was executed, or in 1866, after the ordinance of emancipation, the legacies would have vested and the intention of the testator been carried into effect. So the inquiry is, upon what ground does the fact that he happened to die in 1864, during the war, work the effect of defeating his will?

1st. It is said: The complainants were not persons *in esse* (182) capable of taking a legacy at the death of the testator. True; but under the doctrine of trusts, and of executory devises and bequests, property may be given to a person not *in esse;* for in such cases the trustee or heir at law or executor holds the legal title and fills the ownership until the event happens, or the person is ascertained. Thus, a legacy to such of the children of A (he having no child) as may arrive at the age of twenty-one years, will be carried into effect. This doctrine is settled.

2d. It is said: The contingency in our case is too remote. The rule is, that the estate must be so limited that if it takes effect at all, it will take effect within a life or lives in being and twenty-one years, and a few months for gestation. In our case, as will be shown below, the result of a war then pending was the event upon which depended the vesting of their legacies. That event could hardly, in the nature of things, be protracted beyond a life or lives in being and twenty-one years.

But a conclusive answer to this objection is, that the legacies are given to individuals who are named, to be paid to them if liberated, or when liberated, and that fact is obliged to be determined in the lifetime of the individual.

Our case, then, falls under the class of cases referred to by Mr. Smith in his learned treatise on the subject of Executory Interests. 2 Fearne on Remainders, under the head of Limitations of Life Annuities.

3d. It is said that the Act of 1861 declared void all directions for the emancipation of slaves made by will; so that these slaves could not have been emancipated in the manner contemplated by the testator: *ergo,* he did not intend to make any provision for them if they should be liberated in any other manner.

After full consideration, according to my judgment, the fact of being liberated is the essence of the thing, and the manner of its being

(183) done is a mere circumstance which does not affect the validity of the legacies; for, as it seems to me, the paramount intention to make ample provision for these slaves if liberated, no matter how, and to give them a fair start in the world, is clear.

If allowed to make a guess, I should say this old man never heard of the Act of 1861. But it is a public statute. We must act on general rules, and take for granted that he did have notice of it. We are also to take for granted that he had notice of President Lincoln's Proclamation of 1 January, 1863, and of the fact that the condition of slavery had become an issue in the war; so that if the United States succeeded in suppressing the rebellion, every one expected the slaves to be liberated. And from the fact that this old man, with a knowledge of these matters, died, leaving his will unaltered and unrevoked, I feel bound to consider the matter as if he had said in so many words, "should these slaves be liberated by the result of the war, or in any other manner (I don't care how), I do, by this my last will, make provision for their support."

The testator, in framing his will, had two objects in view: First, that the slaves should be emancipated; second, that when liberated they should be provided for by competent legacies.

The second depends upon the first, for should the slaves not be liberated, they would have no occasion for, and be incapable of, taking legacies.

But the fact of prior emancipation is not imposed by the testator as a condition precedent, and is merely a thing collateral, and necessary in the nature of things in order to make the legatees capable of taking; so there is nothing to show that the legacies were at all to depend on the manner in which their emancipation was effected.

It is true, when the will was executed the manner contemplated by the testator was that it should be done according to the provisions
(184) of his will; but from thte fact that he kept the will unaltered and unrevoked, and left it at his death as an instrument to be of full force and effect, and that at this time events were transpiring which would probably result in emancipation in a way not contemplated by him at the time he executed his will, makes it clear that his intention was that the slaves should have the legacies "when liberated," without reference to the manner in which the liberation might be effected.

If this conclusion required further demonstration it is furnished by taking another view of our case. Suppose the testator had lived until after the ordinance of emancipation, or suppose the testator in his lifetime, to meet the requirements of the Act of 1861, had taken the slaves out of the State and set them free, no question could have then been made as to the validity of their legacies. This proves that emancipation was the substance, and the manner of it was not of the essence of the thing on which the legacies are made to depend.

4th. It is said that, apart from the Act of 1861, as the State was at the time of the death of the testator at war with the United States, his intention to give legacies to these slaves, should they be liberated by the result of the war, will not be carried into effect by the courts of the State, because it was an act against the policy of the State at that time, and was in substance an inducement or bribe held out to the slaves to aid the government of the United States in its war upon the government of the Confederate States.

That the courts will not give effect to an agreement or a will which is against the public policy is a settled rule; but in my opinion that rule does not apply to the case before us.

We have a complicated form of government, or rather two forms of government. The citizen owes allegiance to both, and both act directly upon the individual. At the time of the death of the testator the government of the State was in the possession of men who were not qualified to discharge the duties of their offices, not being bound (185) by oath to support the Constitution of the United States, but, on the contrary, bound by an oath to support the Constitution of the Confederate States, which was at open war with the United States. None of the acts of the State government, as then administered, were valid. See the ordinance of 1865, making valid certain acts of the *de facto* government, and *Blossom v. Van Amringe, ante,* 133, and *Wiley v. Worth,* 61, N. C., 171.

In other words, at the time of the death of the testator, when his will took effect, the State government was wrongful, and formed a part of the government of the Confederate States. The legacies under consideration were against the policy of the Confederate States, and of the wrongful State government, but was in accordance with the policy of the government of the United States and of the rightful government of the State, which was then suspended by usurpation, but must be taken to have been identical in interest and policy with the government of the United States.

Admit that the courts which formed a part of the wrongful State government in 1864, at the death of the testator, could not have given effect to these legacies; the whole condition of things is now changed. Such proceedings have been had that the State now has a rightful government, and it seems to me clear that the courts, which make a part of this rightful government, can not refuse to give effect to legacies which are not opposed to the policy of the United States or to its policy as a part thereof, and acting in accordance therewith, on the ground that the legacies, at the time of the death of the testator, were opposed to the policy of the government of the Confederate States, and of the wrongful State government, which was then acting in accordance with the government of the Confederate States.

So far from this being the case, we have seen that our court could
(186) not have given effect either to the legislative or judicial acts of the wrongful State government, except by force of the ordinance of a convention.

This view of the subject relieves me from the duty of expressing an opinion upon a point much discussed at the bar, and into which I choose not to enter, because both of the difficulty of its solution and the many important consequences involved.

I refer to the question, At what time and by what act was emancipation effected?

For whether it was by the proclamation of 1 January, 1863, or by the surrender and general military order of May, 1865, and the action of the owners of slaves in accordance therewith, or to the ordinance of 1865, is immaterial, it being only necessary, for the purpose of my conclusion, that a war was pending at the death of the testator, upon the result of which emancipation was made to depend as an issue tendered and accepted.

In my opinion the complainants are entitled to a decree for the legacies claimed by them.

READE, J. I have carefully considered the opinions filed by my brothers PEARSON and BATTLE, and I agree with the former, and for the reasons assigned by him. I have examined the case of *Shinn v. Motley,* 56 N. C., 490, and I do not think it has the resemblance in principle to this case, which is attributed to it by my brother BATTLE. If a legacy is given to the children of A, and A has no children living at the testator's death, but subsequently has children, the subsequent children will take when they come into being, because it is evident that the testator meant that A's children should take, and as he had no children at the testator's death, the testator must of necessity have meant his after-born children. But if a legacy is left to the children of A, and A has children at the testator's death, then *they* answer the description and take the
(187) whole to the exclusion of after-born children, because there being persons filling the description, it is to be supposed that they are the persons meant, and the legacy will not be withheld from them to see if others may not come into being who will answer the description also. The rule then is, that all who answer the description at the time when the legacy is to be paid will take, as where there is a life estate, and then to children, all the children at the end of the life estate will take, although they were not in being at the testator's death. *Sims v. Garrott,* 21 N. C., 393; *Petway v. Powell,* 22 N. C., 308. So here, if at the testator's death he had had any liberated slaves, they would have answered the description, and would have taken the legacies, to the exclusion of

such as might thereafter be liberated; but, as he had no liberated slaves at the time of his death, and yet gave legacies to his "liberated slaves," he must of necessity have meant such as should be thereafter liberated.

I concede that the conflict of opinion makes this a doubtful question. And the fact that the opinion at which I have arrived affects the clear intention of the testator has not been without its influence.

BATTLE, J., dissenting. The pleadings show that the will of the testator was made on 5 August, 1857, and that he died on 13 June, 1864. This will purported to emancipate certain of his slaves, who are the present complainants, and then proceeds to give "to the above named liberated slaves" both land and money. The question presented for consideration is, whether under the circumstances the complainants can take this land and money.

It is admitted that the bequest for emancipation is void by force of Laws 1860, chapter 37, that being settled by the decision of this court in *Mordecai v. Boylan,* 59 N. C., 366. The status of the complainants as slaves remained then unchanged at the death of the (188) testator in 1864, unless their emancipation was effected in some other mode. Their counsel contend that it was effected by the proclamation of the President, of 1 January, 1863; not by virtue of any civil authority conferred upon him by the Constitution, but as Commander-in-Chief of the armies of the United States. In this capacity it is said that he had the right to set the slaves in the revolted States free, as an incident to the war power and as one of the means of suppressing the revolt. This proposition may be viewed in two aspects; and in neither of these can it be maintained. First, if the States which formed the Southern Confederacy had no right to secede from the Union, their attempt to do so and to maintain their acts by force, was a rebellion, and in employing means for the suppression of that, the President was acting under the sanction of the Constitution, and had no right to violate any of its provisions. The Constitution recognizes the fact that there may be insurrections, and points out the means by which they may be suppressed, and among these the abolition of slavery is not comprehended. Secondly, if secession was lawful, and the seceding States rightfully established the Confederate government, so that the war which ensued became a *foreign* war, even then the proclamation of the President could not have had the effect to set free any other slaves than those which came under the control of the armies of the United States. This seems to be settled as the law of nations. See Dana's Wheat. on Int. Law, note 8 to sec. 347. See also the opinion of Judge SHEFFEY, of Virginia, in *Walker v. Loving.* It is admitted that the complainants were never under the control of the Federal forces before the death of their master,

but, on the contrary, remained with him until that event, serving him apparently as they had done before the commencement of the war. I conclude, therefore, that they were his slaves at the time of his death.

Supposing this to be established, the complainants still contend
(189) that as they have since become free, either as one of the results of the war or by force of an ordinance of the State Convention of 1865, they can claim under the will of their master as executory devisees and legatees. The argument is, that as the will of the testator speaks as at the time of his death (see Rev. Code, chap. 119, sec. 6), as he kept it by him unaltered, and as he must have been aware of passing events, he must have had in contemplation the event of the emancipation of his slaves as being probable, and that therefore the language he uses must be construed with reference to and by the light of all the circumstances by which he was surrounded. Hence, it is concluded that the devises and bequests to the complainants are all executory in their character, and that the event upon which they were intended to become vested, was not so remote as to come within the rule against perpetuities.

This argument is very ingenious, and I would be willing to give effect to it if it did not, in my opinion, violate one of the most firmly established rules relating to devises and bequests. This rule is, That where there is a bequest to the children of a particular person, and there is no life estate given in the meantime, and the time for a division is not postponed to a certain period after the death of the testator, only the children born at the testator's death can take. *Shinn v. Motley,* 56 N. C., 490. It is true, indeed, that if the testator use words that can be made to embrace future children, such for instance as children "which now are or hereafter may be," or "which might be living at or after his decease," they may take. *Ibid.; Shull v. Johnson,* 55 N. C., 202; *Defliss v. Goldsmith,* 1 Mer., 417; *Scott v. Lord Scarborough,* 1 Beav., 154 (17 Con. Ch., 154). It being thus the rule with regard to a bequest to the children of a living person that those only can take who are born,
(190) or are in *ventre sa mere* at the death of the testator, why will not the same rule apply to a bequest to liberated slaves? Why should those who may become free after the testator's death be allowed to take any more than future born children? The language of the will, in the case at bar, is very explicit in giving the testator's land and money to his "liberated slaves," and not to those "who now are or hereafter may be liberated," or "which might be liberated at or after his decease." Had the testator made a bequest to the children of one of his living brothers, it would seem to me to be a strange incongruity to exclude the future born children, and let in the after liberated slaves, in the construction of similar language. The hardship of excluding the *post obit* freedmen is not greater than that of excluding the *post obit* children. It

will be seen that I have not laid any stress in my argument upon the fact that the slaves were not emancipated in the manner contemplated by the will. I admit that if the language employed by the testator to express his wishes with regard to his slaves could be construed to embrace a future *post obit* emancipation, then it would make no difference how that emancipation was accomplished. But I can not admit that such words used by a testator as can not include children born after the testator's death, in a bequest to children, may include slaves liberated after his death in a bequest to liberated slaves. *Pandine v. Hubert,* 14 La., 161; *Woodruff's Succession, Ibid.,* 295, and *Deshotels v. Soilean, Ibid.,* 754, cited by the counsel for the defendants, were decided upon a statute of Louisiana similar to our Act of 1860, chap 37, and they tend to confirm the construction which we have adopted in relation to our act, and show that the status of the slaves intended to be emancipated by the testator remained unchanged at the time of his death. As slaves, they were incapable of taking a devise or bequest under his will at that time, and I can not discover anything in the language of (191) the will to justify me in holding that there is a provision for a future emancipation. My opinion therefore is that the disposition of the land and money mentioned in the will to the complainants is null and void.

PER CURIAM. Decree for the complainants.

Cited: Cooke v. Cooke, 61 N. C., 587; *Whedbee v. Shannonhouse, post,* 287; *Robinson v. McIver,* 63 N. C., 650; *Todd v. Trott,* 64 N. C., 282; *Heyer v. Beatty,* 83 N. C., 290.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JUNE TERM, 1867

JOHN R. PHILLIPS v. ELEANOR HOOKER.

1. A memorandum of a contract to convey the land of a principal signed by an agent in his own name, is a compliance with the statute of frauds, if it be expressed that the contract was made for the principal.
2. Such a memorandum setting forth that the agent agreed for "Mrs. H. to make a deed for her house and lot north of Kinston," to plaintiff, is not void as being too vague and indefinite—it being admitted by Mrs. H. (the defendant), in her answer, that she owned but one house and lot in the county, and that the agent had been authorized to sell her house and lot, and she is bound to convey *in fee simple*.
3. The fact that the consideration of an agreement (made in 1862), was Confederate treasury notes does not invalidate it; contracts upon such consideration being ratified by an ordinance of the Convention (Ordinances of 1865, p. 56), and chs. 38 and 39 of the Acts of Assembly of 1866, which do not conflict with the Constitution of the United States.
4. By *Pearson, C. J.* In 1862 Confederate treasury notes being the only circulating medium in the State, *ordinary* dealings in them were not accompanied with criminal intent to aid the rebellion, and were therefore not illegal and void. This rule applies to executory as well as executed contracts.
5. By *Reade, J.* A contract is not void merely because there is something immoral or illegal in its surroundings or connections: Therefore, the issuing of Confederate treasury notes was illegal, but the use of them after they were issued, was not illegal.

BILL for *specific performance,* filed to Spring Term, 1867, of LENOIR, and then set for hearing upon bill and answer, and transferred to this court.

(194) The plaintiff by his bill sought to enforce the specific execution of a contract for the purchase of a house and lot from the defendant. The contract was alleged to have been made with an agent of the defendant, in the following terms expressed in writing: "State

of North Carolina, Lenoir County. This agreement, entered into between me, Amos Harvey, of the first part, and John R. Phillips, of the second part, all of the county of Lenoir, witnesseth, for and in the consideration of the sum of twenty-five hundred dollars to me in hand paid, I, the said Harvey, do agree for Mrs. Hooker to make a deed for her house and lot north of Kinston, to the said John R. Phillips. This 13 December, 1862. Signed, sealed in presence of L. H. Alredge. Amos Harvey." The bill described the house and lot as being situate formerly near, and now within the corporate limits of the town of Kinston, and set out particularly the metes and bounds of it. The defendant, by her answer, admitted that she did appoint Amos Harvey as her agent to sell the house and lot described in the bill, but she denied that the written contract therein set forth is binding upon her, because it purported to be made by him on his own behalf, and was therefore obligatory only upon him. She admitted, however, that the plaintiff paid the purchase money to her agent, and that he paid it over to her, but she alleged that the payment was made in Confederate treasury notes. Nothing was said either in the bill or answer as to the value of the house and lot, or as to the adequacy of the price paid for it. The defendant admitted that she had no other house and lot in the county of Lenoir on 13 December, 1862, the date of the contract above specified, and that soon after that time the plaintiff entered into possession of the premises, and has been occupying them ever since.

No counsel for the complainant.
Strong, for the defendant.

BATTLE, J. (After stating the case as above.) The defendant objects to the relief sought by the plaintiff upon several grounds, which we now proceed to consider:

1. The first objection is, that the contract was that of the agent only, and that the defendant was therefore not bound by it. We think otherwise. It is true that the note or memorandum of the contract does not expressly state that Amos Harvey was the agent of the defendant, or that he was acting as her agent, but it does sufficiently appear by implication that he was so acting, for he says, "I do agree for (196) Mrs. Hooker to make a deed," etc.; which means that she shall make a deed, etc. This shows that Harvey was acting as agent, and then a signature in his name satisfies the requirement of the Statute of Frauds, as was expressly decided in *Oliver v. Dix,* 21 N. C., 158. In that case, at page 155, it is said that "within the statute the signature need not be that of the principal, nor in his name, but that of the agent is sufficient." Besides, it appears from the answer that the defendant admitted the agency, and ratified the contract of sale made by the agent,

a circumstance which is also relied upon in *Oliver v. Dix* as having a binding effect upon the principal. *Redmond v. Coffin,* 17 N. C., 439, and *Scott v. McAlpin,* 4 N. C., 587, referred to by the defendant's counsel, have no application, because they were cases of deeds of conveyance executed by attorneys in fact, and not cases of notes or memorandums of agreements under the Statute of Frauds.

2. The second objection is, that the note or memorandum of the contract is too vague and indefinite in several particulars: first, in that the defendant is to execute a deed without saying for what quality of estate; secondly, in that the location of the house and lot is stated only to be north of Kinston, without saying how far north; thirdly, in that the name of Mrs. Hooker is ambiguous, and, being a patent ambiguity, can not be aided by extrinsic evidence.

In noticing this objection, we must bear in mind that a note or memorandum of a contract is, in its very essence, an informal and imperfect instrument. Its object is to furnish aid to the memory of a transaction, and, though it must distinctly set forth all the material terms of the contract (*Mallory v. Mallory,* 45 N. C., 80), it will answer the purpose, if it do so in such words as will enable the court, without danger of mistake, to declare the meaning of the parties. An agreement (197) by a person having a fee simple interest in land to make a deed for it, is universally understood (in the absence of anything to show the contrary) to mean *a deed to convey the fee.* So as to the location of the property, when it is said in common parlance that a house and lot is north of a particular town, it would always be understood as being situated somewhere in the vicinity of the north part of the town. At all events, when the house and lot are spoken of as her house and lot, and the defendant admits that she had but one in the county, there can be no difficulty about the identification. Under such circumstances the description becomes specific and certain, just as a legacy of "my twenty-five shares of bank stock," the testator having just that number of shares, would be specific, while a bequest of twenty-five shares, without the addition of the word "my," would be a general legacy. *Davis v. Cain,* 36 N. C., 304. In this respect the present case differs materially from those of *Allen v. Chambers,* 39 N. C., 125; *Plummer v. Owens,* 45 N. C., 254; *Murdock v. Anderson,* 57 N. C., 77, and *Capps v. Holt,* 58 N. C., 153, referred to by the defendant's counsel.

Mrs. Hooker admits her identity with the person who authorized Amos Harvey to sell *her* house and lot, which is also admitted to be the house and lot mentioned in the pleadings, and this is perhaps a sufficient answer to the objection; but we regard the name *Mrs. Hooker* as rather an imperfect than an ambiguous description, and therefore liable to explanation by testimony *dehors* the instrument, like the case of the

bequest to the Deaf and Dumb Institution. *Institute v. Norwood,* 45 N. C., 65. That explanation is amply furnished by admissions in the defendant's answer.

3. The next objection is one of vital importance, not only to the parties to this case, but to the whole community. The answer alleges that the consideration paid for the purchase of her house and lot was in Confederate treasury notes, and the defendant's counsel contends that such consideration was illegal, and that therefore the (198) contract of purchase founded on it was void. The illegality is said to consist in the *passing* of the Confederate treasury notes, which, it is contended, had a tendency to aid the rebellion. The memorandum of the agreement does not state in what kind of currency the purchase money was to be paid; but as the cause is set for hearing upon the bill and answer, without any replication, we must take the allegation of the answer, that the price of the house and lot was paid in Confederate treasury notes, to be true. The question is thus fairly and directly presented, Whether a contract of purchase, founded upon such a consideration, can be enforced in a Court of Equity?

As a general rule it must be conceded that a contract, the basis of which is an illegal consideration, is void both in law and equity. *Ex dolo malo non oritur actia,* is a maxim too well established to be disputed, and too beneficial in its operation to be repudiated by any court.

The question, then, is reduced to this: Was the use of the Confederate currency as the medium of exchange in the transaction between the parties to the contract, illegal? In some of the other Southern States it is said that it has been so decided, and the counsel for the defendant has referred us to the note of a decision made in Tennessee to that effect. 1 Am. Law. Rev., 591. The case referred to is *Harris v. Thornburg,* 43 Tenn., 156, and is thus shortly stated: "A note was given for one hundred dollars in Confederate treasury notes lent to the maker. At the trial the jury were instructed that if the defendant borrowed Confederate treasury notes, knowing at the time what he was getting, he would be liable on the note, and the jury returned a verdict accordingly for the plaintiff. On writ of error to the Supreme Court, the judgment on this verdict was reversed, that tribunal holding that the consideration for the note in suit, being treasury notes issued by rebels in violation of the highest law of the land, and for the (199) purpose of levying war against the government, was illegal, and the note given by them void."

I am saved from the necessity of considering whether this case was properly decided by the Supreme Court of Tennessee, for the concurrent action of the Convention and the General Assembly of this State has prescribed a different rule of law for us. The Convention of 1865

passed an ordinance entitled "An ordinance declaring what laws and ordinances are in force, and for other purposes," in which, among other things, it is ordained that "All contracts, executory and executed, of every nature and kind made on or since 20 May, 1861, shall be deemed to be valid and binding between the parties, in like manner, and to the same extent, and not otherwise, as if the State had not, on the said day, or afterwards, attempted to secede from the United States; and it shall be the duty of the General Assembly to provide a scale of depreciation of the Confederate currency from the time of its first issue to the end of the war," etc. See Ordinances of the Convention of 1865, page 56. The injunction upon the General Assembly imposed by the above ordinance was carried out by Laws 1866, chapters 38 and 39; the first of which is entitled: "An act relating to debts contracted during the war," and the second: "An act to establish a scale of depreciation of Confederate currency."

These provisions of the State authorities, having been made for the purpose of enforcing and not of impairing the obligation of contracts, do not conflict with the Constitution of the United States, and are therefore valid and binding upon all the people of the State. It follows that the defendant can not object to the fulfillment of her contract on the ground that she chose to take Confederate treasury notes in payment for the price of her house and lot.

4. The fourth and last objection taken against the claim of (200) the plaintiff to a specific performance is, that the bargain is a hard and unequal one, and on that account the Court of Equity ought not to enforce it, but leave the plaintiff to his remedy at law, by a suit for damages. A conclusive answer to this objection is, that there is nothing in the pleadings to show any inadequacy of price, or any other inequality in the transaction. The agreement was, so far as appears, fairly made by the defendant's agent, who received the purchase money and paid it over to her without a murmur of disapprobation. The plaintiff was thereupon permitted to take possession of the premises, and has held them ever since, using them and expending money upon them as if they were his own.

The circumstances of the present case differ, therefore, very materially from those of *Cannaday v. Shepard,* 55 N. C., 224, and the other cases cited by the defendant's counsel, in which the court refused to decree a specific execution.

The plaintiff is entitled to the relief he seeks, and may have a decree accordingly.

PEARSON, C. J. The right of the plaintiff to relief does not rest alone upon the ordinance of the Convention or the act of the Legisla-

ture, but upon the broad ground that the courts are bound to administer justice and enforce the execution of contracts.

In 1862 the defendant agreed to sell to the plaintiff a house and lot, and received $2,500 in Confederate treasury notes as the consideration, and put him in possession. The contract had no special political significance, and there is no averment that it was entered into with an intent to give aid to the rebellion; so it is to be taken as a dealing in the ordinary transaction of business. The plaintiff bought the house and lot because it suited him. The defendant took the Confederate notes because she needed funds.

It is said that every dealing in Confederate treasury notes gave them credit and circulation, and consequently aided the (201) rebellion; so every such dealing was illegal and not fit to be enforced by the courts, without reference to the intent of the parties. The proposition is general—every man and woman who, in the ordinary course of business, received a Confederate note did an illegal act, tainted with treason. It embraces all contracts, as well contracts executed as executory; for if true as to one, it is also true as to the other, and it aims a blow at all dealings among our people during the war, and upheaves the foundations of society. I do not believe the proposition can be maintained by any authority or any principle of law.

1. That may be conceded that if, at the outbreak of an insurrection, parties to contracts, *with a view of aiding the cause* by giving credit and circulation to its paper, receive it as money in their dealing, such contracts are illegal.

But that is not the case under consideration.

In 1862 the contest had assumed the magnitude and proportions of war; each party in territorial limits had the boundaries of a mighty nation, and each party counted its people by millions. The "Confederate States" was recognized by the nations, and by the United States itself, as a belligerent power, entitled to the rights of war; and, in the exercise of its powers, it had issued paper as the representative of money, which excluded all other currency, and constituted the *only circulating medium of the country.* The government of the United States was unable to protect the people, and there was no currency but Confederate treasury notes. In this condition of things, was every man to stop his ordinary avocations and starve, or else be tainted with treason and deemed guilty of an illegal act if he received a Confederate treasury note?

The Attorney-General of the United States, in his opinion on the subject of disfranchisement, uses this language: "Officers in the rebel States who, during the rebellion, discharged official duties, (202) not incident to war, but in the preservation of order and the

administration of law, are not to be considered as thereby engaging in rebellion. The interests of humanity require such officers for the performance of such official conduct in time of war or insurrection as well as in time of peace, and the performance of such duties can never be considered as criminal." Was a judge to cease to do these "duties required by the interests of humanity"—"the performance of which can never be considered as criminal"—or was he to perform the duties and starve, rather than commit an illegal act by *receiving his salary in Confederate treasury notes?* Was the merchant to close his store, the blacksmith and shoemaker to quit work, and the farmer to let his tobacco and surplus grain rot on his hands, and allow his family to suffer for clothing and the other necessaries of life, or do an illegal act by receiving Confederate notes? Really, unless the receiving of such notes can be connected with a criminal intent to aid the rebellion, the question seems to me too plain to admit of argument. A naked statement exposes the absurdity of the proposition. The courts must act on the presumption that Confederate notes were received in ordinary dealing—not for the purpose of aiding the rebellion, but because there was no other currency.

2. Look at the subject in another point of view: At the close of the war the President granted amnesty and pardon to all, save a very few individuals. Congress by the Reconstruction Act disfranchised only those who, having taken an oath to support the Constitution of the United States, afterwards engaged, actively, in the rebellion, and it has refused to enforce the rigorous measure of confiscation. On what principle, then, can it be that the courts are called upon to take up the matter "at the little end," to search into the private dealings of the people and all the ramifications of ordinary business, and declare
(203) of no force—in effect *confiscate*—all contracts based upon the consideration of Confederate notes? What good can result from this action of the courts? It can have no effect upon the rebellion, for that is over. It can have no effect upon the future, for "necessity knows no law," and whenever a condition of things occurs, in which the people must use the only currency of the country or starve, the currency will be used. The idea of the courts assuming the duty of preventing civil wars by holding that it is illegal to receive the paper of rebels in ordinary business transactions, when there is no other currency, that such contracts are not fit to be enforced, presents to my mind a palpable absurdity. So, what good will be done by this action of the courts? None, save only to show, on the part of the courts, a detestation of treason by treading on the extremities of the monster after it is dead.

3. In *Blossom v. Van Amringe, ante,* 133, the maxim, *ex turpi causa*

actio non oritur, was pressed on the court, and it was insisted that, as the parties had made a transfer of property, in *fraud and deceit, with an intent* to evade the confiscation acts of the government of the Confederate States, the case fell under the maxim. The court says: "The objection would no doubt have been fatal if taken before a court of the *de facto* State government, while it formed a part of the Confederate States; but this court is a coördinate branch of a rightful government, forming a part of the United States, and can not entertain such an objection." In our case the matter is reversed. The turpitude, if any, was aimed at the United States, and the maxim applies, provided there be the criminal intent. That is the question! I deny the intent—there is no evidence of it or anything from which it can be implied. It can not be held that the mere receiving a Confederate note was illegal and base, without involving in the imputation of baseness every man and woman in the State! The minister of the gospel, the judge, who received his salary; the physician, the merchant, the me- (204) chanic, the farmer, who carried on his ordinary business, the poor seamstress, who, at the end of the day, received her hard-earned wages—were *all* guilty of an act so base that the doors of the courts of justice must be shut against them! The proposition is monstrous. During the war a farmer should not have made more grain than enough to support himself and family; making a surplus was illegal—it aided the rebellion. If every man had quit work the rebel army could not have been sustained, the war would have been stopped by starvation. We were told in the argument that *"gold,* as well as iron, is a sinew of war." It may be added, *meat* and *bread* are also sinews of war. *Reductio ad absurdum!*

4. But, it is said, the consequences of holding all such dealings to have been illegal will not be so grievous after all, for, in its practical application, the maxim will only make void *executory contracts.* The principle, if a sound one, evidently includes all contracts, executed as well as executory, and the admission that in practice it can only be made to reach the latter demonstrates the impotence and absurdity of this action of the courts as a *means* of putting a stop to *civil wars.* Let us see how it is to operate: A man buys a tract of land, pays for it in Confederate notes and *takes a deed.* The court can not reach him, for it is met by the maxim, *"in pari delicto melior est conditio defendentis";* so he keeps the land, not because he is innocent, but because the court can not take it from him and restore it to the original owner, who is equally guilty. If one has paid off a bond in Confederate notes, whether the creditor will be allowed to sue on the *original debt,* which is not tainted with this *"turpi causa,"* is a problem that I will not undertake to solve.

But supposing the bond is only paid in part, the payment must be rejected; for, being in Confederate notes, it is of no more legal effect than if made in counterfeit money. Or suppose, in our case, that
(205) Mrs. Hooker brings ejectment for the land; the contract has been in part performed, and the defendant is in possession, will the court shut its doors against her, on the maxim, *in pari delicto?*

In short, is the practical application of this novel principle to be allowed to cover all intermediate cases, when the contract has not been fully executed, or is it to be confined to contracts wholly executory, where the purchaser has paid the price, but, in the simplicity of his innocence, has neglected to take a deed, and has not even taken possession? The amount of it is: all who required the Confederate notes to be paid down, or who have taken deeds and acquittances *under seal,* although equally guilty, are to go unpunished, and only those who gave credit to their neighbors, or who neglected to take deeds, are to be made victims to the vengeance of the law, while the remiss debtors and dishonest vendors are to be the sole gainers, although equal participants in the illegal act. Lame and impotent conclusion!

Thus encouragement is to be given to dishonesty, justice is not to be administered, and the people of the country are to be involved in utter perplexity and confusion, in order to make a useless show of zeal on the part of the courts "to punish rebels."

READE, J. I propose to consider only so much of the case as involves the question whether Confederate treasury notes, which were paid for the land, were an illegal consideration. For, very clearly, if the consideration was illegal, the contract will not be enforced in this court. I shall treat it as a *dry legal question.*

A contract is not void merely because it *tends* to promote illegal or immoral purposes. *Hilliard on Sales,* 376; *Armstrong v. Toler,* 11 Wheat., 258; *Story Conflict of Laws,* 258.

A contract for the sale of a house and lot is not vitiated by the fact that the vendor knows, at the time of making it, that the vendee
(206) intends it for an immoral or illegal purpose. *Armfield v. Tate,* 29 N. C., 259.

A sale of goods is not void although the seller knows that they are wanted for an illegal purpose, unless he has a part in the illegal purpose. *Hodgson v. Temple,* 5 Taunt, 181; in which case MANSFIELD, C. J., says: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment." In *Dater v. Earl,* 3 Gray, 482, the Court says: "If the illegal use to be made of the goods enters into the contract, and forms the motive or inducement in the mind of the vendor or lender

to the sale or loan, then he can not recover, provided the goods or money are actually used to carry out the contemplated design; but bare knowledge on the part of the vendor that the vendee intends to put the goods or money to an illegal use, will not vitiate the sale or loan, and deprive the vendor of all remedy for the purchase money."

Where goods are bought from an enemy, even in his own territory, by a citizen of the United States, the sale is valid, and the price may be recovered, although the act might be a misdemeanor, and the property liable as prize. *Coolidge v. Inglee,* 13 Mass., 26. Authorities are abundant to the same effect.

It will be seen, therefore, that a contract is not void because there is something immoral or illegal in its surroundings or connections. And yet it is equally certain that a contract is void when the consideration is illegal or immoral. What, then, is the criterion? Probably the following cases will show the dividing line: Goods were sold to a man who the vendor knew of the design: *Held,* that the contract intended to smuggle them and defraud the revenue, and was valid, and that the vendor could recover the price. *Holman v. Johnson,* Cowp., 341. Goods were sold to a man who intended to smuggle them and defraud the revenue, and the vendor not only knew of the pur- (207) pose, but put them up in a particular manner, so as to enable it to be done: *Held,* that the contract was void, and that the price could not be recovered. *Briggs v. Lawrence,* 3 Term R., 454. Now what is the difference between the two cases? None!—except that in the latter case it was part of the arrangement, and entered into the *intent* of the parties that the smuggling should be done. All these authorities show that the *intent* of the parties to accomplish the illegal thing is necessary to vitiate the contract; and therefore, in the case before us, unless the intent of the parties in their contract was to aid the rebellion, the fact that it did so (if it did), by giving currency to the notes, does not vitiate the contract.

It is not pretended that the Confederate treasury notes were of *no value.* It is conceded that they were of value, and that, at the time of the sale in 1862, less than two dollars of the notes would buy one dollar of gold. But it is contended that although of value they were *illegal.* In what sense were they so? In no case can the thing used as a consideration, of itself and independent of the intention of the parties, invalidate the contract, if the thing be of value; unless, perhaps, by express statute. There is nothing which may not be turned to mischief in its use, as poisons, deadly weapons and the like; but still their sale is a sufficient consideration to support a contract, unless it be the *intent* of the sale to do mischief. *Randon v. Toby,* 11 Howard U. S., 493, is very strong in point. In that case Africans had been

imported and sold as slaves, which is forbidden by law. The vendor brought suit for the price of one which he had sold, and the defense was that the consideration was illegal. The court says: "The plea that the notes were given for African negroes imported into Texas after 1833 is unavailable. On the argument here, it was endeavored to be supported on the ground that the notes were void, because the
(208) introduction of African negroes into Texas was contrary to law. If these notes had been given on a contract to do a thing forbidden by law, undoubtedly they would be void. Neither of the parties had anything to do with the original contract, nor was their contract made in defiance of law. The crime committed by those who introduced the negroes into the country does not attach to those who may afterwards purchase them. As respects the defendant, therefore, he has received the full consideration of his notes." And then follows this strong language by the court: "If the defendant should be sued for his tailor's bill, and come into court with the clothes made for him on his back, and plead that he was not bound to pay for them, because the importer had smuggled the cloth, he would present a case of equal merits, and parallel with the present; but he would not be likely to have the verdict of the jury or the judgment of the court."

So in the case before us, it is conceded that it was illegal to issue the treasury notes, just as it was illegal to import the negroes; but the illegality is in the *issuing* in the one case and in the *importing* in the other, and does not attach to those who afterwards use the thing issued or imported. It was insisted, in the argument before us, that the value of the treasury notes depended upon their circulation, and that the parties, by using them in their contract, aided in their circulation; so, in the case just quoted, the value of the importation of negroes depended upon their sale, and the transaction between the parties aided their sale, and in that way encouraged importation. The fact was undoubtedly true, yet it did not render the contract void. The illegality consisted in their importation, and not in their use after importation; so the illegality consisted in the issuing of the treasury notes, and not in their use after they were issued. If balls, which had been shot in battle, had been found and sold, it might as well be said that
(209) the consideration was illegal, because they had been made for and used in the rebellion. In *Coolidge v. Inglee, supra,* the case was that in the War of 1812 a citizen of the United States bought goods of the enemy, contrary to law, and brought them to the United States and sold them, and when he sued the purchaser for the price, the defense was set up that it was unlawful for the plaintiff to buy the goods, and that, therefore, the consideration of the contract was illegal; but the court held the contrary. It is absurd to suppose that the goods

in that case, or the treasury notes in this, were illegal. Were not the goods precisely the same as if they had been bought of a friendly power? Certainly! The *goods* were not illegal, but the *trading* with the enemy was.

This is the first time that this very important question has come before us for consideration. It has been well argued and patiently considered. We are not without important aid in determining the question. It is well considered by the Convention of 1865, and by the Legislatures which have since assembled. The Convention was prompt to declare that the rebellion and everything in aid of it was illegal. And it declared void all contracts which were in aid of it; but it did not declare void all contracts, the consideration of which were Confederate treasury notes; on the contrary, it plainly declared such contracts valid; that all contracts made during the war shall be deemed to be payable in money of the value of said notes; and directed the Legislature to prepare a scale to show, not that said notes were of no value, but to show what their value really was. And the Legislature did prepare such a scale. Now, if the defense set up in this case be good, then the Convention and Legislature ought to have made short work of it, and declared that all contracts should be deemed to be payable in Confederate treasury notes; and that such notes were illegal as a consideration to support a contract, and therefore that all such contracts were void. I do not consider the question, whether the (210) Convention or the Legislature had the power to validate or invalidate contracts, but their action is cited to show that those bodies regarded these notes as valuable considerations to support contracts. We thus have the concurrent opinions of the Judiciary, the Convention and the Legislature of the State, and an uninterrupted train of decisions both in England and the United States on kindred subjects, that Confederate treasury notes are not illegal considerations in contracts between citizens, unless it was the *intent* of the parties to the contract *thereby* to aid the rebellion.

Our attention was called to an abstract of a case decided in Tennessee, in which Confederate treasury notes were held to be an illegal consideration. We regret that we have not the case at large. It seems to have been decided upon the ground that it was the money of rebels. Suppose it had been the coin of rebels. Doubtless there is some better reason than that assigned in the abstract which we have given. For it appears to be *an encouragement to rebels!* that they should be exonerated from a performance of their contracts, because of their participation in so great a mischief. If the Judiciary could be influenced at all by this consideration, it would hold them to a more rigid performance of all their undertakings. As a court, we neither favor nor oppress rebels,

but hold the scales of justice even. But we forbear further comment, lest we do our sister court injustice.

PER CURIAM. Decree for complainant.

Cited: Emmerson v. Mallett, post, 237; *Turley v. Nowell, post,* 302; *Harrell v. Watson,* 63 N. C., 460; *Martin v. McMillan, Ibid.,* 487; *Garrett v. Smith,* 64 N. C., 95; *Kingsbury v. Lyon, Ibid.,* 129; *Smitherman v. Sanders, Ibid.,* 526; *Haughton v. Meroney,* 65 N. C., 125; *McKesson v. Jones,* 66 N. C., 264; *Wooten v. Sherwood,* 68 N. C., 338; *Neaves v. Mining Company,* 90 N. C., 415; *Hargrove v. Adcock,* 111 N. C., 171; *Lupton v. Lupton,* 117 N. C., 31; *Fulcher v. Fulcher,* 122 N. C., 102; *Combes v. Adams,* 150 N. C., 68; *Stephens v. Lumber Co.,* 160 N. C., 109.

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(211)

PETER S. WILLIAMS v. SAMUEL MOORE, Adm'r., and others.

Where a partnership at its dissolution was much in debt, and the estate of the deceased partner was insolvent, *Held*, that the fact that a tract of land owned in common by the partners *was probably a part of the firm assets*, was sufficient grounds for an injunction in favor of the surviving partner forbidding the administrator of the deceased partner from proceeding under an order to sell such land by license from the county court in order to pay the separate debts of his intestate.

MOTION to dissolve an injunction, heard before *Shipp, J.*, at Spring Term, 1867, of HERTFORD.

The complainant had previously obtained an injunction against the defendant forbidding him to proceed under a license obtained from the County Court of Hertford authorizing him to sell certain land; but on the coming in of the answer his Honor, upon motion, ordered the same to be dissolved, and the complainant appealed.

No statement of the case beyond what appears in the opinion is necessary.

Smith, for the appellant.
Yeates, contra.

READE, J. There is a well defined distinction between a common injunction to stay a judgment at law, where the rights of the parties have been passed upon, and a special injunction, where the right is an open question.

The distinction is so clearly established in the cases of *Key v. Dobson, ante,* 170, *Peeler v. Barringer,* 60 N. C., 556, *Capehart v. Mhoon,* 45 N. C., 30, and *Heath v. Lloyd, Ibid,* 39, that it is not necessary to elaborate it here.

Whether the storehouse and lot, which is in dispute, is the property of

the mercantile partnership of Moore & Williams, or is the individual property of the partners, is the question in this case. If it is the property of the partnership, then very clearly it is primarily liable for the debts of the copartnership, and the defendant would have no right to sell the interest of his intestate, Moore, to pay his individual debts until all the parnership debts are paid.

How the fact is can not be determined with certainty until the final hearing. At this stage of the proceeding we can act only (213) upon the *probabilities,* as collected from the bill, answer and exhibits. If from these it appears to be probable that the house and lot is partnership property, that the partnership is in debt, that the defendant is about to sell the property to pay the individual debt of his intestate, and that the estate of his intestate is insolvent, then the injury to the plaintiff would be irreparable, and the injunction ought to be continued until the hearing.

1. Is it partnership property? It was the individual property of the plaintiff Williams. He sold an undivided moiety to Moore. For what purpose was the sale made? The plaintiff says it was made upon agreement with Moore that they were to form a mercantile partnership, and do business in that house, and the house and lot was to be partnership property. They did form a mercantile partnership, and did do business in that house; and the partnership paid the plaintiff for Moore's half of the house and lot, and the repairs of the house were paid for by the partnership, and charged on the books to "Real estate." Now what does that mean? Evidently that it was the real estate of the partnership, just as a charge of "Merchandise to sundries" means the merchandise of the partnership, or a charge of "Merchandise to cash" means the cash belonging to the partnership; so the charge of "Real estate to sundries" means the real estate of the partnership. At any rate it appears that the partnership paid the plaintiff for Moore's half of the house and lot, and paid also for the repairs.

The answer does nothing to break the force of these facts. It does not show for what Moore bought a moiety of the house and lot, if not for the purpose alleged. It could not have been merely for an investment, for he had no money to invest, but bought on a credit; and the answer sets forth a receipt for taxes, in which it is called the "storehouse and lot of Moore & Williams." Nor does the answer (214) allege any reason why the plaintiff sold, unless for the purpose alleged. It was not to raise money, for he sold on a credit. It was not because the lot was larger than he wanted, for he did not sell off a part but an undivided moiety of the whole. From these considerations, it seems that the house and lot must have been partnership property.

2. It is not denied that the partnership is in debt.

3. It is admitted that the defendant is attempting to sell the house and lot.

4. It is not denied that the estate of the defendant's intestate is insolvent, the statement in the answer being "that the estate of his intestate is largely in debt, and that the personal property is greatly insufficient to meet the indebtedness," etc.

A sale of the house and lot by the defendant under these circumstances would necessarily involve the plaintiff in litigation with the purchaser; and if upon the hearing it should appear certainly, as it does now probably, that the house and lot is the property of the partnership, the injury to the plaintiff would be irreparable. We think, therefore, the injunction ought to be continued until the hearing.

There is error in the interlocutory order appealed from.

PER CURIAM. Ordered accordingly.

Cited: *Ross v. Henderson,* 77 N. C., 173.

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(215)

FANNY SCHONWALD v. JAMES T. SCHONWALD.

1. Whether alimony *pendente lite* shall be allowed *at all,* is a matter of law; *how much* shall be allowed is a matter of discretion.
2. An appeal lies from an order refusing such alimony, under the Rev. Code, c. 39, s. 15.
3. The Superior Court may allow appeals in such cases without security, under the Rev. Code, c. 4, s. 23.
4. In North Carolina it is not necessary, as in England, to decide the question of marriage or no marriage, before passing upon the right to alimony *pendente lite.*
5. In deciding upon such right, the court is confined to a consideration of the petition in the cause.
6. A delay of seven years in filing a petition is sufficiently accounted for by the allegations that at the happening of the matters relied upon for a divorce, the petitioner was a non-resident of the State, and is now a pauper.

MOTION in a divorce cause, for alimony *pendente lite,* heard before *Fowle, J.,* at Spring Term, 1867, of NEW HANOVER.

The petition had been filed in the fall of 1857, and alleged that in 1843 the petitioner, then a widow residing in New York and carrying on a profitable business there as milliner, had been married to the defendant; in 1844 they removed to Baltimore, and lived there as man and wife; in 1845 the defendant went to Wilmington and established himself as a physician, and, having corresponded in the interval with the petitioner, who had remained, by agreement, carrying on her trade

in Baltimore, and awaiting the results of his enterprise, after he had succeeded, sent for her and their child to join him; upon her arrival she was treated as his wife for a year or two; all this while the petitioner had conducted herself as a faithful, affectionate and obedient wife. After they had lived together for some time in North (216) Carolina a change in his demeanor occurred, he became cold and then cruel, proceeding to personal violence, and making a dangerous assault upon the petitioner with a knife, so as to compel her to obtain security of the peace against him, and finally, as she was entirely among strangers and in despair, to consent to a separation upon the terms that she might keep the child and receive of the defendant ten dollars per month for their support; upon this she went to New York, hoping that time might soften the defendant and restore harmony between them. For a few months he remitted the allowance regularly, but after that became irregular and finally ceased to do so, and for five or six years has given her nothing. About seven years ago he married a Miss Catherine Joiner, and is now living with her as his wife, and denies having been married to the petitioner. The defendant is worth some twelve or fifteen thousand dollars, but has made an assignment of his property, as petitioner believes, in order to defeat her claim to a support. Petitioner has resided in this State for more than three years preceding the time of filing the petition, etc., etc., *praying* for a divorce *a vinculo* and for alimony (both *pendente lite* and other), and for other relief, etc.

To this petition an answer had been put in by the defendant.

His Honor disallowed the motion for alimony *pendente lite,* and granted an appeal to the petitioner without requiring security, "although inclined to believe that no appeal is given by the Rev. Code."

French, for the appellant.
Person, contra. (218)

PEARSON, C. J. His Honor was of opinion that the allowance of alimony *pendente lite* was a matter confided to his discretion. In this he was mistaken. Whether the matter set forth is sufficient to entitle the petitioner to a decree for alimony, assuming it to be true, is a question of law; and the discretion confided to the court below is in regard to what is a reasonable amount for the support and sustenance of the petitioner and her family. The provision of the act, Rev. Code, ch. 39, sec. 15, that upon an appeal "this court shall reëxamine only the sufficiency of the petition to entitle the petitioner to relief," treats it as a question of law, and excludes the other from reëxamination, treating *it* as a matter of discretion merely.

To this error we ascribe the doubt of his Honor as to whether an appeal could be granted from an order refusing to allow alimony. His

attention was not called to *Taylor v. Taylor,* 46 N. C., 528, where it is expressedly decided that the petitioner may appeal under the provision of the statutes upon the subject of "appeals." It is true that decision was made upon the Act of 1852, ch. 53; but it is apparent that the act before us is in this respect the same.

It was contended on the argument that, supposing his Honor had a right to allow the petitioner to appeal, he had no power to do so without requiring security; and much stress was laid on the fact that the 16th section of the Rev. Code, ch. 39, in giving an appeal from the *final*
(219) judgment, has an express provision that the court may grant the appeal without security, whereas the 15th section has no such provision.

The explanation is, that in reference to appeals from interlocutory judgments and decrees, such a provision had been already made by ch. 4, sec. 23, which allows appeals "upon such terms as shall appear to the court just and equitable."

It was then insisted that it appears by the petition that the question of marriage or no marriage is the main issue between the parties, and that alimony can not be allowed until that matter is disposed of. For this Shelford on Divorce, 33 Law Lib., par. (587), 347, was cited; such no doubt is the rule in England, but as is said, *Wilson v. Wilson,* 19 N. C., 377, "The jurisdiction of the Superior Courts being given by statute, the power of the court must be collected either from express enactments or from the general scope of these statutes, and no power can be derived by inference or from any analogy furnished by a coincidence of the provisions of the statutes with the practice of the Ecclesiastical Courts in England." Our statute is general—includes all petitions for divorce and alimony—makes no provision for disposing of the question of marriage or no marriage as a preliminary one, and puts the right to be allowed alimony *pendente lite* upon the sufficiency of the matter set forth in the petition; proceeding upon the idea that it is better when a woman makes oath under the penalty affixed to perjury to the fact of marriage, to take it to be true for the purpose of allowing alimony *pendente lite,* even although it may turn out to be false and the man may have but little chance to get back what he ought not to have been compelled to pay, rather than subject a wife to the danger of starvation, if a brutal husband makes oath denying the fact of marriage, which may turn out to be false.

But the question is not presented by this case. The petition makes a distinct allegation of the marriage, and puts the *gravamen*
(220) on the allegation that the defendant has repudiated the petitioner, and is not only living in adultery with another woman, but has gone so far as to marry her, and live openly with her as his wife in

the city of Wilmington, and that (with a view of putting away the petitioner and getting rid of her as his wife, after living with her in New York, Baltimore and Wilmington openly as such, and recognizing her and their infant child in the relation of husband and father for several years), he acted towards her in a brutal and harsh manner, and actually committed upon her a dangerous assault with a knife, so that she had to seek protection of her person and life by taking out a peace warrant against him, until she was driven to desperation, and was forced to agree to accept of an allowance of $10 a month and take their child and go back to the city of New York, sometime after which he married Miss Catherine Joiner, and is openly living with her as his wife!

For the purpose of this motion for alimony *pendente lite,* we are confined to the allegations of the petition, and we are to take them as true; so there is no issue as to the fact of marriage or no marriage, and "the matter set forth is not only sufficient to entitle the petitioner to a decree for alimony," but the case discovers a degree of hardened villainy seldom met with in the annals of crime.

When the defendant has an opportunity of being heard, we presume he will deny the fact of marriage; and the trial will decide either that the petitioner has committed perjury in regard to matters about which it will be easy to convict her, or else that she is an injured and persecuted woman.

It was further insisted that the delay for seven years after the defendant married Catherine Joiner and lived with her openly as his wife, is a bar to this application, in the absence of any allegations to account for it; and *Whittington v. Whittington,* 19 N. C., 68, is relied on. In that case it is held that a delay for any length of time after the six months required by the statute, ought to be accounted for, (221) and suit, especially on the part of the husband, although no time is fixed as a precise bar, should be brought within so short a time as to show that he is acting on the wrong itself, and not merely because he desires a divorce for some ulterior purpose; and that long delay unaccounted for is evidence of *connivance,* and shows that the complaint is not made "in sincerity and truth for the causes set forth in the petition."

The draftsman of this petition seems not to have been aware of the necessity of accounting for the delay, so as to rebut the presumption of connivance; but we think the petition, although in a very disconnected and inartificial manner, discloses facts which are so far sufficient to account for the delay as to rebut the presumption of connivance. After the petitioner went back to New York, she could not claim this State as the place of her residence, and, in order to maintain a petition for a divorce, it was necessary for her to come back and live here three years. *Schonwald v. Schonwald,* 55 N. C., 367.

This petition is filed in 1857, and sets out that the defendant commenced living in adultery with Catherine Joiner seven years before that date; so her residence in New York accounts for three years of the time, and the statute required a delay of six months, which makes half of the time, supposing that she came on here to live soon after she heard of her husband's second marriage; but besides she sues *in forma pauperis,* and swears that she has no means of support for herself and child, and the court is obliged to take notice of the fact that it is very difficult for one so poor to institute and carry on a proceeding of this kind without great delay. Witness this case! commenced in 1857; the order setting it for hearing set aside in 1867; and the interlocutory decree refusing to allow alimony, sent to this court by leave of the judge to appeal without security, and then note the difference (222) between a husband and a wife! What motive had she to connive at her husband's unfaithfulness? The delay must have been on account of her inability to sue.

There is error; decretal order reversed; and ordered that the petitioner be allowed alimony *pendente lite* of such reasonable amount as may in the discretion of the court below seem just, under all the circumstances of the case.

PER CURIAM. Order accordingly.

Cited: Pain v. Pain, 80 N. C., 324; *Gordon v. Gordon,* 88 N. C., 53; *Morris v. Morris,* 89 N. C., 113.

JUDSON KILPATRICK and others v. WILLIAM H. HARRIS.

Where a bill was filed by the purchasers for a specific performance of a contract to sell land, which suggested that the bargainor could not make a good title, and prayed that until such was made the bargainor should be enjoined from enforcing a judgment obtained by him for the purchase-money; and thereupon the defendant by answer tendered a deed which was filed therewith and was alleged to convey a good title: *Held,* that the course of the court was *not* either to dissolve the injunction or to continue it to the hearing, but to continue it until a report should come in from the Master upon a reference to him as to the sufficiency of the title so tendered.

MOTION to dissolve an injunction, heard before *Fowle, J.,* at Spring Term, 1867, of NEW HANOVER.

The complainants set forth that the defendant had obtained and was enforcing against them a judgment at law upon a bond given for part of the purchase money of a tract of land which he had covenanted to convey to them "in a few days, at most within a reasonable time"; that they had demanded title to be made, and the defendant upon one pre-

text or another had refused to comply with his contract; that they (223) were informed and believed that he could not make an indefeasible title, and thereupon prayed for a specific performance, and in the meantime for an injunction, and for other relief.

Upon this they had obtained at chambers a preliminary injunction.

The defendant, after giving some account of his reasons for not complying before, tendered to the complainants a deed for the land bargained to them, averring that he had good and indefeasible title thereto. The deed was filed with the answer. Upon the coming in of this answer his Honor, upon motion, ordered the injunction to be dissolved, and the complainants appealed.

Strange, for the appellants.
Bragg, contra.

BATTLE, J. The main allegation upon which the plaintiffs base their claim for injunctive relief is, that the defendant had not made and is not able to make to them a good title for the real estate mentioned in the bill. This allegation as to the ability to make a good title, is positively denied by the answer, and the defendant therein sets forth an abstract of his title, avers it to be a good and indefeasible one, and tenders what he says is a sufficient deed, to be delivered upon the payment of the purchase money. His Honor in the court below, deeming this a positive and unequivocal denial of the ground of the plaintiff's equity, on motion of the defendant's counsel, dissolved the injunction which had been granted upon the filing of the bill. In this we think his Honor erred, for that he ought to have continued the injunction, not until the hearing but until there could be a reference to the Master and a report from him as to the sufficiency of the defendant's title. That such is the English practice is shown by Adams Equity, 84. A similar practice prevails in this State, as appears from *Gentry v.* (224) *Hamilton,* 38 N. C., 376, in which the court says: "It is a general rule in a suit for specific performance in which the single question is whether the vendor can make a good title, that the court at the present day directs a reference to the Master to inquire into the title, and this even without the consent of the other party. *Brook v. Clarke,* 1 Swan., 551; *Shelton's case,* 1 Ves. and B., 519. Atkinson, on 'Title,' 226, says that either party to the suit is, as a matter of right, entitled to have a reference upon the title."

The interlocutory order dissolving the injunction must be reversed, and the case remanded for further proceedings in the court below.

PER CURIAM. Reversed.

Cited: Leach v. Johnson, 114 N. C., 88.

JAMES J. PRICE v. T. H. GASKINS, Ex'r. of D. R. Whitford.

Where an answer admitted that a deed for land, absolute upon its face, had been made as charged in the bill upon a parol trust that it should be a security for the payment of a sum of money, but relied upon the lapse of ten years since its execution as a defense against an enforcement of such contract: *Held*, that as the complainant had all the while been in possession of the land, the defense was not valid.

(Observation upon the burden of proof, and upon the presumptions and facts of the case.)

BILL praying for a reconveyance of land and for other relief, filed to Spring Term, 1866, of CRAVEN, and set for hearing upon bill, answer and proofs at Spring Term, 1867, and transferred to this court.

(225) The bill stated that in 1854 the complainant had purchased of one Reel a tract of land (describing it), and given a bond with one Solomons and the defendant's testator as sureties, and received a deed; that afterwards Whitford took up the note, and it was agreed that complainant should convey the land to him as security for the price, but that, owing to his being an ignorant man, the deed was made an absolute one. After setting forth that the complainant had been in possession of the land ever since the conveyance from Reel, and stating some negotiations with Whitford which are not important to the understanding of the opinion, the bill set forth a tender of the money due to Whitford and his refusal to receive it.

The answer admitted that the deed was intended as a security for the money paid by Whitford to Reel, but insisted that the lapse of time was a bar to the claim, and besides that there had been an express abandonment of the claim by the complainant.

Some evidence was taken by both parties, but it is not necessary to set it forth.

Haughton, for the complainant.

No counsel *contra*.

PEARSON, C. J. The bill is filed to have a deed for land absolute on its face declared to be only a security for the payment of money, on the allegation of a parol agreement to that effect. The agreement is admitted by the defendant, and he puts his refusal to reconvey upon payment of the principal and interest on two grounds:

1. That the matter has stood over for more than ten years, which raises a presumption that the plaintiff had abandoned his equity. This ground is fully met by the fact that the plaintiff has during all that time continued in possession of the land; so there is nothing for the

(226) presumption to act on, and if there was any presumption it would be the other way. Abandonment of an equity can only be presumed when the party holding the legal title has been in possession.

2. The defendant further insists that there has been an express abandonment, for that the plaintiff finding he was not able to pay the money, agreed that he would give up his equity, and the evidence of the debt was therefore canceled by consent of the parties. The onus of proving this express abandonment is upon the defendant; and, after a careful examination of the evidence in the cause, the court declares that the defendant has not proved the allegation.

It is not deemed necessary to go into a discussion of the evidence. We will merely observe that it would require very strong evidence to bring us to the conclusion that, after being in possession for so many years, the plaintiff, no compulsory process having been taken out against him, such as an action of ejectment or suit for the debt, had agreed in 1865 to surrender his right of redemption without any stipulation as to his being allowed to remain in possession during the rest of his lifetime, he being then old and infirm, simply because he was not able then to pay the debt and felt that he ought either to pay it or give up his right to the land; especially as the land is worth more than the debt and accumulated interest, as we infer from the eagerness of the defendant to hold on to it.

The Master will report the amount due for principal and interest up to the time of the tender in November, 1865; and there will be a decree that, upon that amount being paid into office for the use of the defendant, he execute a deed to the plaintiff, the deed to be approved of by the Master. The plaintiff is allowed his costs.

PER CURIAM. Order accordingly.

(227)

MARY S. WHITAKER v. LEWIS T. BOND.

1. Where a complainant can obtain the money desired under a bill already filed by him, it is improper to commence another suit therefor.
2. (Application of the rule, that except in a few cases an injunction can be issued only as auxiliary to some primary equity.)

MOTION to dissolve an injunction, heard before *Shipp, J.*, at Spring Term, 1867, of BERTIE.

The bill alleged that the defendant, as trustee, had exposed to public sale a tract of land, and that the complainant became the last and highest bidder therefor; that the defendant refused to execute a conveyance; and the complainant had theretofore filed a bill for specific performance, which was still pending; that since the filing of such bill the defendant had commenced an action of ejectment against her, and threatened to turn her out, etc., etc.

Under this she had obtained a preliminary injunction, which, upon

the coming in of the answer, the defendant moved to dissolve. The court refused to dissolve, and the defendant appealed.

Winston, for the appellant.
Gilliam, contra.

BATTLE, J. It has been repeatedly said by this court that except in a few cases, such as to stay waste or to prevent irreparable injury, an injunction can be issued only as auxiliary to some primary equity. *Stockton v. Briggs,* 58 N. C., 309; *Schofield v. Van Bokkelen, Ib.,* 342; *McRae v. Railroad Company, Ib.,* 395. In the present case the bill states indeed a primary equity, but does not seek to set it up, for (228) the reason that another bill had been filed, and was still pending, for the purpose of effectuating that object. In that suit the plaintiff might have obtained an order for staying the action of ejectment at law until the hearing, so that there was no necessity whatever for the present proceeding. The defendant ought not to be harassed by two suits, when the plaintiff might have obtained all the relief to which she was entitled in one. It must be declared, therefore, that the present bill was improperly filed, and the injunction improvidently granted. See *Rogers v. Holt, ante,* 108.

The interlocutory order overruling the motion to dissolve the injunction must be reversed with costs, and the cause remanded for further proceedings in the court below.

PER CURIAM. Order accordingly.

(229)

HOOK, SKINNER & CO. v. THOMAS R. FENTRESS and others.

1. One effect of the doing away with execution by *ca. sa.* is to originate a jurisdiction in equity to compel the application of legal choses in action to the satisfaction of debts. As preliminary to its exercise in any case the court will require: 1st, That the debt shall be established by a judgment at law, and 2d, That the want of property subject to *fi. fa.* shall be shown by a *return* of *nulla bona,* or by other sufficient proof.
2. Whether in exercising this jurisdiction other creditors will be allowed to come in and make themselves parties, and take a share of the fund, *quaere.*
3. A vendor of land who retains the title and allows the vendee to go into possession, may at any time take possession, or on notice given may require those in possession to pay the rents to him, to be applied to keep down the interest and, if any surplus, to the discharge of the principal.
4. Where the tenant of one who claimed under a bond for title from A, had, by virtue of a sublease, become entitled to certain rents which he had promised to transfer to the obligee in the bond, in order to be by him applied in discharging the debt still owing to A for the purchase money: *Held,* that a bill filed after such promise had been made, would not enable A to intercept these rents and appropriate them to a debt owing by the tenant to himself.

BILL filed in 1865, before *Fowle, Provisional Judge,* under an ordinance of the Convention of that year, and at Spring Term, 1866, transferred to the Court of Equity for WAKE. Judgment *pro confesso* had previously been taken against the defendants Randall and Bowen.

At Fall Term, 1866, the cause was set for hearing upon the bill and answer of Fentress and the proofs, and transferred to the Supreme Court by consent.

The facts were that the complainants had sold a valuable house and lot in Raleigh to one Robson, a resident of Mississippi, and had given him a bond for title, a considerable part of the purchase money being unpaid; Robson had purchased for the benefit of the wife and family of the defendant Fentress, who was insolvent, and the Fentress family resided in it; also that Robson was willing at the time of his purchase that Mrs. Fentress, if she chose, might be substituted to the (230) advantages of his bargain; in 1865 Fentress leased a portion of the house to Randall and Bowen, the other defendants, and at the time when this bill was filed they owed several hundred dollars for rent; this rent by contract was made payable to Fentress, but he testified that he had always considered himself as acting for Robson in that matter; and it was shown that afterwards, and before the bill had been filed, an authorized agent of Robson's had called upon him and demanded that the rents when paid should be turned over to him to be applied towards the purchase money, and that he had promised that they should be; to the same effect was a correspondence by letter between Robson and Fentress, which also occurred before the bill was filed.

Haywood, for the complainants.
Moore, for the defendant Fentress.

PEARSON, C. J. We agree to the proposition assumed by Mr. Haywood, that the effect of the act of the Legislature which takes from creditors the right to have execution by writ of *capias ad satisfaciendum,* is to originate a jurisdiction in equity by which (233) debtors will be compelled to apply legal choses in action to the discharge of their debts. This jurisdiction rests on the ground that there would "otherwise be a failure of justice." Wherever there is a right there is a remedy, and if a party be "remediless at law," it is the province of the courts of equity to give relief. Two things are necessary to induce the court to take jurisdiction. The fact of indebtedness must be established by a judgment at law; for that is a pure legal question. The fact that the debtor has no property which can be reached by the writ of *fieri facias* must be established by the return of *nulla bona,* or, under special circumstances, by some other sufficient proof. (See the authorities cited on the argument.) Whether in the exercise of this jurisdiction

the court, on the maxim "equality is equity," will allow other creditors to be made parties, and come in for a distribution of the fund, is a question well worthy of consideration.

We also agree to the proposition assumed by Mr. Moore, that a vendor of land, who has let the purchaser into possession and retains the legal title as a security for the payment of the purchase money, occupies the relation of a mortgagee when the mortgagor is in possession, and has the right to take possession at any time and go into the pernancy of the profits, and may, on notice given, require the tenants to pay the rent to him to be applied to keep down the interest, and any surplus to the discharge of principal. (See the authorities cited on the argument.) Whether there is a distinction in cases of imperfect mortgage; that is, the mortgage of an *equitable* estate, or a sale by a vendor who has not obtained the legal title, is a question not presented by this case, even supposing that Robson is under obligations to allow Mrs. Fentress to have the property on payment of the purchase money with interest.

(234) And upon this we are not at liberty to intimate an opinion; for we put our decision on the ground that Fentress, in renting the property, either acted as the agent of Robson, or, if acting then for himself and intending to put the rents to his own use, that his subsequent letters to Robson and his admissions and assurances to the agent of Robson, *before the plaintiffs filed their bill,* had the effect of an equitable assignment of the rents and an appropriation of them to the liquidation of the balance of purchase money due by Robson to the plaintiffs; and consequently that they have no right to intercept the fund and apply it to another debt owing by Fentress to them, as is the object of this bill.

PER CURIAM. Bill dismissed with costs.

Cited: Powell v. Howell, 63 N. C., 284; *Dunn v. Tillery,* 79 N. C., 499; *Hinson v. Smith,* 118 N. C., 507.

ROBERT J. EMERSON and others v. WILLIAM P. MALLETT.

1. A payment in Confederate treasury notes to a Clerk and Master, in December, 1863, of the amount of a bond given upon a sale of land for partition, does not discharge the bond; but the obligor is entitled to a credit for the *value* of the notes at the time of payment, and the Clerk and Master is chargeable with such value.
2. An officer with authority to collect, and without instructions to the contrary, might, before the year 1863, properly receive Confederate notes in payment of debts contracted before the war. No *rule* can be laid down with reference to the collection of such debts during that year, but after 1863 he was not justifiable in receiving Confederate notes.

RULE upon the defendant, as purchaser of a tract of land sold under a decree of the Court of Equity, tried before *Warren, J.*, at Spring Term, 1867, of ORANGE.

The facts as reported to the court by the Clerk and Master were (235) as follows:

The complainants, as heirs at law of Isaac Hudson, filed an *ex parte* petition at Fall Term, 1859, of the Court of Equity, for the sale of a mill and tract of land near Chapel Hill, belonging to the estate of the intestate. A sale was ordered at that term, and at Spring Term, 1860, it was reported that the defendant and one Walker had become the purchasers at the price of $2,430, and given bond with good security, payable at twelve months, for the purchase money. The sale was confirmed, and at Spring Term, 1861, the entry "Order to collect," etc., was made upon the docket. The order was repeated at Fall Term. On 2 March, 1861, the defendant paid to A. J. McDade, administrator of Isaac Hudson, and one of the petitioners (in right of his wife), $125, as part of the purchase money, and filed the receipt for the amount with the Clerk and Master. On 26 December, 1863, the defendant paid into office $2,752.24, the balance of principal and interest of the bond, in Confederate treasury notes. The Clerk and Master accepted these notes, surrendered the bond, and executed a deed to the defendant, Walker having assigned his interest to him. The petitioners were not informed of the payment until after the transaction, and they refused to receive the Confederate notes when so informed.

The defendant was notified in February, 1867, that at the approaching term a rule would be moved requiring him to show cause why the proceedings in regard to the alleged payment and the execution of the deed should not be set aside, and an order made for the payment of the price of the land by the defendant and his sureties.

It was declared by the court that the payment of the Confederate treasury notes was no payment, and that the deed was executed without lawful authority; and a decree was rendered that the defendant should, under a penalty of contempt, pay into court on or before (236) the first day of next term, the balance of the purchase money, after allowing the credit of $125 paid to McDade, and deposit in the office the deed from the Clerk and Master, by 1 May, 1867, as a security for the payment.

The defendant appealed.

Moore and *Batle,* for the appellant.
Graham, contra.

READE, J. In *Atkin v. Mooney,* 61 N. C., 31, it was said that collecting officer was authorized to receive, without instructions to the con-

trary, whatever was current in the payment of such debts as he had to collect; but that there was a limit to his discretion, and that he would not be authorized to receive funds so depreciated as that it would amount to notice that they would not be received. And that case, which was a *certiorari* at law, was ordered to be put upon the trial docket, in order that it might be ascertained whether the fund received by the officer was, at the time of its reception (August, 1863), current with prudent business men in the payment of such debts as he had to collect. Whether an officer was justified in receiving Confederate treasury notes must depend upon the circumstances of each particular case, and no inflexible rule can be laid down. Probably it may aid investigation to say that, as a general rule, an officer might have received them up to 1863, and ought not to have received them after 1863, upon ante-war debts; and that 1863 is debatable ground. Where an officer received them when he ought not, they were a payment of the debt to the amount of their value only. The remainder of the debt is unpaid, and the officer is liable for their value at the time they were received.

If, in this case, the Clerk and Master of Orange County ought (237) not to have received the money in December, 1863, then he will be chargeable with the value of the treasury notes at that time, and the bond given for the land will be satisfied to that amount, and the remainder will still be due. The payment of $125 to one of the plaintiffs will also be allowed.

So much of the decretal order appealed from as declares the payment made to the Clerk and Master in Confederate treasury notes on 26 December, 1863, void, and no payment at all, is erroneous. It was a payment to the amount of the value of the Confederate treasury notes at that time. *Phillips v. Hooker,* 193, *ante.* What that value was ought to be ascertained by reference to a commissioner, with instructions to report special matters at the instance of either party. And, as the Clerk and Master of Orange County is interested, he ought to have notice.

There is error in the order appealed from to the extent declared.

PER CURIAM. Decree accordingly.

Cited: Gibbs v. Gibbs, 61 N. C., 472; *Beard v. Hall,* 63 N. C., 41; *Sudderth v. McCombs,* 65 N. C., 188; *Whitford v. Foy, Ib.,* 272; *Greenlee v. Sudderth, Ib.,* 473; *Baird v. Hall,* 67 N. C., 233; *Utley v. Young,* 68 N. C., 392; *Purvis v. Jackson,* 69 N. C., 480; *Larkins v. Murphy,* 71 N. C., 561; *Walls v. Sluder,* 72 N. C., 437; *Longmire v. Herndon, Ib.,* 633; *Dockery v. French,* 73 N. C., 426; *Lord v. Beard,* 79 N. C., 11; *Melvin v. Stevens,* 84 N. C., 82.

Dist.: Covington v. Ingram, 64 N. C., 125.

(238)

A. H. BOYD and others v. WILLIAM J. MURRAY and others.

1. Where a sheriff, under a *ven. ex.* having relation prior to a certain deed in trust, sold land which had been conveyed in such deed to secure creditors, and upon being indemnified allowed the trustee to retain the surplus beyond what the process in his hands called for; and before the return day other like writs, having similar relations, were placed in his hands upon which he returned, "To hand too late to sell": *Held*, that the creditors under the later writs had a right to join in a bill to subject such surplus to the satisfaction of their debts.
2. *Also*, that the sheriff, having made such a *return*, could not be compelled *by a rule* to bring in the money.
3. The section 5 of the Ordinance of the Convention of 1866 (Stay Law) does not affect writs of *ven. ex.*

BILL seeking to subject a fund, filed to Spring Term, 1867, of ALAMANCE, and at that term set for hearing upon bill and answer and transmitted to this court by consent.

The bill alleged that one Harden had obtained judgment in 1861 against one Watson, and that execution was thereupon issued and immediately levied upon a certain tract of land belonging to said Watson and returned to the next term of the court; that no other process was taken out until 1866, when a *ven. ex.* was placed in the hands of the defendant Murray as sheriff of Alamance, and that he sold the land thereunder to the trustee for the price of $5,000; that before such process had been placed in his hands Watson had conveyed the land in trust to secure certain creditors, who, with the trustee, were the other defendants, and also the said Murray, and that he took from the trustee and those secured (other than himself) a bond of indemnity and thereupon himself advanced the money due to Harden under the process, and suffered the trustee to retain all the purchase money; also that (239) at various terms of the court in 1859, 1860 and 1861 the complainants had severally recovered judgments (in all for nearly three thousand dollars) against said Watson, and that immediately thereafter executions had been levied upon the same land; that nothing further was done until after the above sale by the sheriff and before the return day of the process under which he had sold, when writs of *ven. ex.* upon each of those levies were placed in his hand, and that he returned them "To hand too late to sell." The bill charged that the defendants had combined to defeat the complainants of their rights, and asked for an account of the surplus which was in the hands of the trustee, and for general relief.

The joint answer of the defendants admitted in general the facts stated in the bill, alleging, however, that before any process in favor of the complainants had been placed in Murray's hands, a deed had been made by him to the trustee as purchaser under the process of Harden,

and the surplus money accounted for to him; that the trustee on procuring the sheriff's deed had resold; that the purchase money was not yet due, and that he submitted to hold it under the directions of the court.

(240) *Phillips & Battle,* for the complainant.
Grahm, for the defendants.

PEARSON, C. J. The defendant Murray, who sold the land as sheriff on *19 November, 1866,* made return on the several writs of *venditioni exponas* sued out by the plaintiffs and which came to his hands on 20 November, 1866, "To hand too late to sell," and allowed the defendant Boyd, who purchased the land at the price of $5,000, after paying off the *venditioni exponas* under which it was sold, to retain the balance of the purchase money, to be applied to the discharge of certain debts set out in a deed of trust executed by Watson, the debtor, to defendant Boyd in July, 1866, taking a bond of indemnity. The bill seeks to *follow this fund,* and have it applied to the discharge of the debts due the plaintiffs respectively, for which the writs of *venditioni exponas* had issued to complete the levies made on writs of *fieri facias* in 1861, on the ground of the fraud and collusion between the sheriff and the other defendants in the misapplication of the fund, the sheriff being one of the creditors secured in the deed of trust and taking indemnity.

The defendants object, in the first place, that the plaintiffs have mistaken their remedy, which was by *rule* in a court of law to compel the sheriff to bring in the money.

This remedy is cut off by the return of the sheriff, "To hand too late to sell," which would be a full answer to the rule and drive the plaintiffs to their actions for a *false return.*

It is settled that when an officer misapplies the fund, it may be followed in a Court of Equity and subjected to the discharge of the demands to which it was properly applicable. *Bunting v. Ricks,* 22 N. C., 130.

(241) It is objected, in the second place, the judgments on which the writs of *venditioni exponas* issued were dormant, and such writs ought not to have issued without notice to the defendant in the judgments. These writs were not void, and could only be avoided at the instance of the party against whom they issued; and the sheriff was bound to obey them. *Dawson v. Shepard,* 15 N. C., 497; *Oxley v. Mizle,* 7 N. C., 250. It is held in *Smith v. Spencer,* 25 N. C., 256, that notice to the debtor is not necessary. We are not called upon in this case to say whether that decision will be followed or not; for this is no application of the *debtor* to set aside the writs; and, at all events, there is nothing to defeat the lien created by the levy, by which the land was

taken in *custodia legis* and set apart for the satisfaction of the judgments.

It is objected, in the third place, that under the ordinance of the Convention of 1866, section 5, the writs of *venditioni exponas* were void and issued against law. That question is fully discussed, *Mardre v. Felton,* 61 N. C., 327; and it is held that the ordinance does not apply to writs of *venditioni exponas,* and is confined to the ordinary writs of execution when there has not been a levy.

The plaintiffs are entitled to the relief prayed for.

PER CURIAM. Decree for the plaintiffs.

(242)

GEO. FOUST v. PETER SHOFFNER and DANIEL SHOFFNER.

One who has accepted *a parol promise* for the conveyance of land, can not, upon being compelled at law to pay the notes given for the purchase money, waive his claim to specific performance, and compel a repayment of such money by the bargainors, *who submit to perform the contract.*

BILL for the repayment of money, filed to Fall Term, 1860, of RANDOLPH, and set for hearing upon bill, answer and proofs, at Spring Term, 1867, and transmitted to this court.

The bill alleged that the complainant had contracted with the defendants verbally for a tract of land, and afterwards had been compelled by suit to pay the notes given for the purchase money; that he was advised that the contract was void, because it was not in writing, and that therefore he could not *ask* a Court of Equity to decree its specific performance; that owing to his poverty he had been unable to obtain an injunction against the judgment at law; and thereupon the bill prayed for repayment of the money, and for specific relief.

The joint answer admitted the agreement, and submitted to perform it.

No counsel for the complainant.
Dick, for the defendants.

PEARSON, C. J. There can be no doubt when one gives his note as the price of a tract of land, and takes no bond for title, but relies upon the verbal promise of the vendor to make a deed, that if the vendor collects the note by judgment, and then refuses to make title, and takes advantage of the Statute of Frauds, a Court of Equity will not allow him to keep the money, but will compel him to refund, on the ground that the note was obtained by a fraudulent misrepresentation, and a false promise; and in such case, the purchaser may maintain a bill, (243)

and require the vendor either to comply with the confidence reposed in him and make title, or else refund the money. *Albea v. Griffin,* 22 N. C., 9.

The plaintiff in this case, however, seeks to avoid the contract for the defendants, instead of waiting to see whether they will take advantage of the Statute of Frauds; and the defendants, by their answers, aver a willingness to execute title, and comply with their verbal undertaking in respect to the land. This fully meets any equity on the part of the plaintiff.

PER CURIAM. Bill dismissed.

Cited: Green v. R. R., 77 N. C., 99; *Syme v. Smith,* 92 N. C., 339; *Magee v. Blankenship,* 95 N. C., 570; *Loughran v. Giles,* 110 N. C., 425; *Improvement Company v. Guthrie,* 116 N. C., 384; *Brown v. Hobbs,* 154 N. C., 555.

N. J. BARHAM and wife SUSAN L. BARHAM v. R. H. GREGORY and THOS. H. MORROW, Ex'rs of Drewry S. Morrow.

1. In a suit for a legacy to the sole and separate use of a *feme covert*, the husband is not a proper party plaintiff.
2. It being admitted in the answer of executors sued for a pecuniary legacy that there are assets sufficient to pay the complainant and the *other* pecuniary legatees, the latter are not necessary parties.
3. Where it is contended by the executors that a pecuniary legacy is payable in Confederate notes on hand at the death of the testator, the residuary legatees should be made parties in a bill by the pecuniary legatee seeking the payment of his legacy (at par) in the currency of the United States.
4. Where a man of large estate, who died in 1864 without children, bequeathed to a sister-in-law a legacy of $1,000: *Held,* that the legatee was entitled to payment in lawful currency of the United States; notwithstanding that he had on hand, at his death, Confederate notes sufficient in amount to pay that and the other pecuniary legacies.

BILL for an account and payment of a legacy, filed at Fall Term, 1866, of GRANVILLE, and at Spring Term, 1867, set for hearing upon (244) bill and answer, and transferred to this court.

The bill states that Drewry S. Morrow, the testator of the defendants, died in January, 1864, seized and possessed of a large estate, real and personal; that by his will, dated in May, 1863, he bequeathed to the complainant, Susan L. Barham (who was his sister in law) $1,000, "for her sole, separate and exclusive use, excluding the *jus mariti* of her present or any future husband," and that the defendants, who qualified as executors at February Term, 1864, of the County Court of Granville,

had received assets sufficient to pay the debts and legacies; and charges a refusal on the part of the defendants to pay the legacy to the complainant, Susan.

The will referred to, besides the legacy to Susan L. Barham, contains devises and bequests of a specific character, and also several *other* pecuniary legacies to relatives of the testator. The residue of his property is devised and bequeathed to a niece and certain nephews, among whom is the defendant Thomas H. Morrow.

The answer admits the material allegations of the bill, but says that the testator at his death, had on hand about $9,000 in Confederate currency, and that he designed the pecuniary legacies to be paid out of that money; that the complainant, Susan, soon after the death of the testator, through her son and agent, signified a willingness to accept such money in payment of her legacy, and directed the same to be invested in other Confederate securities; and that some of the other pecuniary legatees have accepted such money. The defendants say further, that they have delivered over most of the property to the legatees to whom it was specifically given, because they supposed there was money enough on hand to pay all the pecuniary legacies. They insist that the legacy to the complainant, Susan, was payable in Confederate money, and that the complainants shall suffer the loss from its becoming worthless. The answer admitted further that the de- (245) fendants have bonds and notes on hand sufficient, if they could now be collected, to pay the claim of the complainants.

The defendants insist that the residuary legatees ought to have been made parties.

Graham and *Edwards,* for the complainants.
Moore, for the defendants.

PEARSON, C. J. The bill seeks to recover a legacy given by the will of Drewry S. Morrow to the *feme* plaintiff, in these words: "I give and bequeath to my sister-in-law, Susan L. Barham, for her sole, separate and exclusive use, excluding the *jus mariti* of her present or any future husband, the sum of one thousand dollars."

On the argument three preliminary objections were made: 1st. The *feme* plaintiff must sue by next friend. This we think is well taken. As it now stands, the bill is that of the husband, and a decree will be no bar to another bill in the name of the wife by next friend, for the reason that the fund is secured to the separate use of the wife, and the husband is not at liberty to sue for and recover it as an ordinary legacy. 2d. The other pecuniary legatees are necessary parties, as the bill asks for an account of the estate. The other pecuniary legatees standing on the same footing ought to have been made parties, so as to bind

them by the account, and subject them to a ratable abatement in the event of a deficiency of assets to pay all; but this objection is obviated by the admission of the answer, that the executors have an ample fund provided they are allowed time to collect the notes due to the intestate. 3d. The residuary legatees are necessary parties ordinarily in a suit for a pecuniary legacy. The residuary legatees are not necessary parties, but, under the peculiar circumstances of this case, we think they (247) should be parties, for they are the persons directly interested in the question raised by the bill and answer; that is, whether the pecuniary legacies should be paid off in Confederate treasury notes, leaving a ratable part for the residuary relatives; or should be paid in good money, leaving the Confederate treasury notes to fall into the residue? The executors have no interest in this question, but are stakeholders, and the parties interested are not before the court. This objection is taken in the answer. Upon an intimation of this opinion by the court, the defendants consented that the bill should be amended so as to remove these objections, upon the payment of costs, as if the bill were dismissed, which terms were accepted and the case was then argued upon the main question.

It was insisted by the plaintiff that *"one thousand dollars"* means that amount in specie, *i. e.,* United States money, a currency recognized by the government of the United States as the representative of money, and that, "so far as the court can see in this case, there has at no time been any other currency in this country than lawful money of the United States."

It was insisted for the defendants that, in putting a construction upon this will, which *speaks* in 1864, the time of the death of the testator, the court is bound to take notice of the fact that at that time Confederate treasury notes constituted the currency of the State of North Carolina, and must take the testator to mean *one thousand dollars in Confederate treasury notes.* In aid of this construction the learned counsel relied upon these special facts; that is, the testator gives other pecuniary legacies amounting in all to $9,200; he had on hand at his death Confederate treasury notes to the amount of $8,800, and was indebted not exceeding $100; and by another clause of his will he gives "all of my crop, stock, plantation tools, money and provisions on hand, and debts due me at my death, after paying and satisfying the (248) legacies and legatees hereinbefore mentioned, and all other property not hereinbefore mentioned, I give and bequeath to my nephews," etc.

These special facts do not aid in the construction one way or the other; for the obvious reply is, if he meant that the pecuniary legacies should be paid out of the Confederate treasury notes on hand, the

amounts being nearly the same, why charge expressly his crop, stock, plantation tools and debts due to him? So we have a general question of construction on the words "one thousand dollars," used by a testator who died domiciled in this State in 1864.

It is a well settled rule of law that pecuniary legacies are to be paid in the currency of the country where the testator had his domicile, in the absence of anything to show a different meaning. *Saunders v. Drake,* 2 Atk., 404. The rule, nothing is a legal tender in payment of *debts* except gold and silver coin, does not apply to *legacies.* The courts are bound, in putting a construction upon wills and other instruments, to take notice of the facts, as a part of public history, that in 1864 our State was at war with the government of the United States, and that the people of North Carolina, in their ordinary conversation and business transactions spoke and acted as if the State had separated from the Union, and that we did in fact use other currency than the lawful money of the United States; and it is manifest that, in order to arrive at the true meaning of words, we must take into consideration all of the circumstances which surround the man at the time he uses the words. If, therefore, the testator had died in 1861 or 1862, at a time when Confederate treasury notes were recognized and used as the representative of money, and were received in the payment of debts contracted before the war by creditors, sheriffs and collecting agents, so as to constitute a currency for the country, although somewhat depreciated, we would hold that the legacy could be satisfied by the (249) payment of an amount equal to the value of one thousand dollars in Confederate treasury notes at the time of his death.

But by the aid of the same knowledge (of the public history of the times), we know the fact that Confederate treasury notes had ceased to be a currency. No man would receive them in payment of debts contracted before the war; a sheriff or other collecting officer was not at liberty to take them in payment, and if he did so and made an acquittance he was liable for the full amount, without notice on the part of his principal not to receive such paper. *Atkin v. Mooney,* 61 N. C., 31. In short, Confederate paper had then ceased to be a currency, and was only used as a substitute when articles were rated at 10, 20 and 50 times their value *in money.* A country without a currency is an anomaly, but such was the fact. So we can not entertain the idea for a moment that the testator, who was a man of very large estate and had no children, in giving these pecuniary legacies to his sister-in-law and other near relatives, meant to give them Confederate treasury notes, without supposing that he intended to mock them!

The testator is careful to provide that this one thousand dollars, payable, as is said, in Confederate treasury notes, which would not buy

more than ten barrels of flour, shall be "for her sole, separate and exclusive use, excluding the *jus mariti* of her present or any future husband." This provision is absurd, unless he meant that the legacy should be paid in good money.

The court declares its opinion to be that the plaintiff, Mrs. Barham, is entitled to one thousand dollars in the currency of the United States. In consideration of the fact admitted by the answer, that the executors have paid over to the residuary legatees all of the stock, plantation tools, etc., retaining only the notes due to the testator, upon which (250) this legacy is charged, and which have been bearing interest, we think the plaintiff is entitled to interest on her legacy, to begin one year from the death of the testator, for the residuary legatees have no right to expect to be gainers by the delay in paying the legacy.

There will be a reference to the Master to inquire whether the defendants, the executors, have collected, or by reasonable diligence might have collected, of the notes due the testator an amount sufficient to pay the plaintiff's legacy with interest; and the cause will stand for further directions.

PER CURIAM. Decree accordingly.

Cited: Wilson v. Powell, 86 N. C., 233.

ABIGAIL HOWZE v. WILLIAM W. GREEN and others.

1. A complainant, even if permitted to sue *in forma pauperis,* is required to give bond upon obtaining an injunction. But if an injunction is issued and objection is not made for several years (in this case *six*), the defendant will be presumed to have waived the irregularity.
2. Upon affidavit that the complainant in a bill praying an injunction against a *writ of possession* in *ejectment* is committing waste, the court, at the instance of the defendant, will make an order in the cause staying the waste.

MOTION to dissolve an injunction, heard before *Barnes, J.,* at Spring Term, 1867, of FRANKLIN.

An injunction, according to the prayer of the bill, staying proceedings in an action of ejectment, was granted by *Saunders, J.,* in June, 1860. The complainant was permitted to sue *in forma pauperis,* and his (251) Honor did not require her to give bond to indemnify the defendant against loss by reason of the wrongful suing out of the injunction.

The record shows no objection to the want of a bond at the return term, nor subsequently until Spring Term, 1867, when a motion to dissolve was made and the want of a bond assigned as a ground therefor.

The motion was overruled, and the defendant appealed.

Davis, and *Rogers & Batchelor,* for the appellant.
Moore, contra.

READE, J. We are of the opinion that the injunction ought not to have issued without bond. The statute provides that no injunction shall issue except upon security. Rev. Code, ch. 32, sec. 14. And the statute allowing a suit *in forma pauperis* applies to costs, and does not embrace an injunction. But the defendant may waive the irregularity. And the delay of the defendant for six years to move a dissolution of the injunction authorized the court to infer a waiver on the part of the defendant. So an appeal bond is necessary in cases of appeal, but in *Wallace v. Corbitt,* 26 N. C., 45, after a delay of three years to move to dismiss for want of a bond, the court presumed a waiver of the right; and in *Arrington v. Smith,* 26 N. C., 59, the same was presumed after a delay of two years. In the case before us the record shows that no motion was made until after six years. It was indeed stated at the bar that the motion was made at the coming in of the answer. The record, however, does not show it, and if it did it would not alter the case, because a waiver would be presumed from the delay to *call up* the motion.

It was alleged as a reason for the motion that the plaintiff was committing waste upon the land in controversy. That allegation, if supported by affidavits, would have been sufficient ground for an order in the cause to restrain the plaintiff from committing (252) waste.

We think that his Honor had a discretion to refuse the motion to dissolve under the circumstances.

PER CURIAM. There is no error.

SAMUEL BOBBITT and others v. TIPPOO S. BROWNLOW and another.

1. A bill had been filed by a creditor *not secured* in a deed-in-trust, to subject *the surplus* of the property so conveyed to the payment of his debt, and under an order in the cause the clerk had reported that such *property* was amply sufficient to pay all the debts, including that of the plaintiff: *Held,* that a decree that the trustee *should pay to the plaintiff his debt,* was *erroneous;* and that the proper decree would have been that the trustee *should sell enough of the property* to satisfy the judgment.
2. By *Pearson, C. J., arguendo.* If the report had stated that the trustee had on hand *cash* "amply sufficient," etc., a decree against the trustee individually would have been proper. *Also,* if the plaintiff had been *secured* in the deed-in-trust the decree might have been correct.

BOBBITT *v.* BROWNLOW.

BILL to review a decree in this court, filed to January Term, 1867.

The complainant alleged that the defendant Brownlow had filed a bill in the Court of Equity for WARREN, at Spring Term, 1860, showing that he had been cosurety with T. I. Judkins for T. H. Christmas, and afterwards had been compelled to pay the whole debt; that Christmas was totally insolvent, and Judkins had conveyed his property to the present complainant in trust to secure certain claims which were just, but were not large enough to exhaust the property conveyed, and
(253) thereupon prayed that such surplus should be applied to the satisfaction of so much of that debt as was due from Judkins. The complainant also alleged that after answers had been filed and proofs taken, the suit was transferred to this court, that under an order the clerk, at December Term, 1864, reported that "the trustee, Samuel Bobbitt, admits that the property belonging to the trust fund is amply sufficient to pay all the debts, including that of the plaintiff Brownlow," and that thereupon a decree was made at that term ordering "that the defendant Samuel Bobbitt pay to the plaintiff Tippoo S. Brownlow the sum of $815.07," etc.

This decree was alleged to be erroneous, so far as it subjected the present complainant *individually,* and the prayer of the present bill was that it might be reviewed, reversed, and set aside.

To this bill the defendants demurred.

(254) *Bragg* and *Eaton,* for the complainants.
Moore, for the defendants.

PEARSON, C. J. Brownlow's debt was not secured by the deed of trust, and the object of the original bill was to obtain a decree to authorize and require the trustee to sell property and pay his debt, on the allegation that there was more than enough property conveyed in the deed to discharge all of the debts secured by it.

If the Master at June Term, 1864, had reported that the trustee had in hand *cash* sufficient to pay the debt of Brownlow, after discharging all of the debts secured by the deed, a decree against the trustee individually, that he pay the debt, would have been proper; for as he had the money in hand an individual liability would be implied, on the same principle as in an action at law for "money had and received."

As the Master reports not that the trustee has money in hand, but that he had property belonging to the trust fund sufficient to
(255) satisfy the judgment of Brownlow, after discharging all of the debts secured by the deed of trust, the decree is erroneous; for there was nothing to create an individual liability, and the decree ought to have been as in *Harrison v. Battle,* 16 N. C., 537, that the trustee sell enough of the property to satisfy the judgment.

It was the duty of the trustee, after selling enough property to pay off the debts named in the trust, to reconvey the rest to Judkins, and a decree of the kind indicated was necessary to authorize the trustee to sell enough of the surplus to satisfy Brownlow's judgment.

It is otherwise in regard to debts named in the trust, for in respect to them the trustee is fully empowered and has undertaken to make sale and pay them; and if he neglect to do so he is in default, and a decree will be made against him individually, that he pay the debt. So in the case of executors and administrators. All of the personal estate is vested in them for the payment of debts, and to that end they have ample power and it is their duty to make sale and discharge the debts, and a neglect to do so creates an individual liability, and the decree is "to pay," and it will be enforced *de bonis propriis*.

The decree in this case was framed without adverting to the distinction; indeed but for the political death of the slaves it would have made no difference, and we presume the error never would have been noticed. As it is, however, the difference may be very great, and the plaintiff is entitled to have the error corrected at the cost of the defendants. The decree is reversed and the defendant in the original bill may have therein a reference for an account of the trust fund, and the amount that has been received or ought to have been received by the trustee on account of sales, profits by way of hires and interest, etc., and what amount, if any, is in the hands of the trustee applicable to the judgment of Brownlow.

PER CURIAM. Decree accordingly.

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(256)

EDWIN P. HALL and others v. JOSEPHINE R. GILLESPIE.

The following item in a will, viz: "I give and bequeath to nephew E. P. H. all my land, etc.; and the following negroes, Bill, etc., and their increase, to take them in possession and have the use of them after my decease, but not to be at his disposal, but for the use of his children, heirs of his own body and no others whatever:" *Held*, to confine the trust for the children to the slaves, and to confer upon E. P. H. an absolute estate in the land. *Especially* as E. P. H. was already in possession of the land before the testator's death.

MOTION to dissolve an injunction, heard before *Gilliam, J.*, at Spring Term, 1867, of MECKLENBURG.

The bill alleged that various persons had recovered judgments against the complainant, Edwin P. Hall, upon certain debts, and had levied their executions upon a tract of land of which he and the other complainants were in possession, and having sold the same the defendant had become its purchaser, and thereupon had brought an action of

ejectment against said Edwin, and having obtained judgment was about to turn the complainants out; that the land in question belonged to said Edwin only as trustee for the other complainants, who were his children, it having been bequeathed to them under the following item of the will of one Edwin Potts, deceased, viz.:

"2d. I give and bequeath to nephew Edwin P. Hall all my land, starting at the Beatty's Ford road and running so as to include said E. P. Hall's Spring and Ferrell's Spring, and running a straight line to Jane Blakely's line; and the following negroes: Bill, Phœbe, Nelly and Rufus and their increase, to take them in possession and have the use of them after my decease; but not to be at his disposal, but for the use of his children, heirs of his own body, and no others whatever."

The bill prayed for an injunction and for other relief.

The answer alleged that the item in question gave to the complainant, Edwin, an absolute beneficial estate in the tract of land in question.

His Honor *pro forma* overruled the motion made upon the
(257) coming in of the answer for a dissolution of the injunction, and the defendant appealed.

Vance & Dowd, for the appellant.
Osborne & Barringer, contra.

READE, J. The case involves the construction of the following clause in the will of Edwin Potts: "I give and bequeath to nephew E. P. Hall all my lands starting at the Beatty's Ford road running so as to include E. P. Hall's spring and Ferrell's spring, and running a straight line to Jane Blakeley's line; and the following negroes, Bill, etc., to take them in possession and have the use of them after my decease; but not to be at his disposal, but for the use of his children, heirs of his own body, and no others whatever."

The question is whether the land, as well as the slaves, is given to Edwin P. Hall in trust for his children, or whether the land is given to him absolutely. The grammatical construction evidently limits the trust to the slaves, and gives the land to E. P. Hall absolutely. There is nothing to control that construction, and therefore it must prevail.

It will be observed that the clause directs him "to take them in possession and have the use of them after my decease"; but it is stated in the pleading that he had the possession of the land at the date of the will. The pronoun "them" evidently refers to the slaves and not to the land.

There is error in refusing to dissolve the injunction. This opinion will be certified to the court below, to the end that the injunction may be dissolved, etc.

PER CURIAM. Error.

(258)

WM. D. HARRINGTON and wife MARGARET v. MALCOLM A. McLEAN, Ext'r. of Neill McLean, and M. J. McDuffie, Adm'r. of Sarah McLean.

1. A demurrer for *matters of substance* should be general, and not set out the grounds of objection. A demurrer for *matters of form* should set out grounds, but not an argument to sustain the objection.
2. A bill by one claiming property as remainderman, under a marriage agreement between his parents, is not required to set out a will of the father professing to dispose of the property; and the legatees in the will should not be made defendants, the executor representing the adverse interest under the will.
3. The complainant having qualified as one of the executors of the will before he knew of the existence of the marriage agreement, is not estopped from filing a bill against his co-executor for property in the hands of the latter, but claimed by the complainant under the agreement.
4. The claimant being a tenant in common of the property with his co-executor, has his remedy in equity and not at law.

BILL for specific performance of a marriage agreement in respect to certain slaves, and an account of their hires, filed to Spring Term, 1861, of HARNETT, and, a demurrer having been filed, transmitted by consent to this court from Fall Term, 1864.

The bill states that in 1827 Neill McLean and Sarah McNeill were married, having executed a marriage agreement (set out as part of the bill), in which it was covenanted that said Sarah should "have and hold to her own use two negroes, Robin and Sophia, and all of Sophia's increase her lifetime—and the said Sarah McNeill's children should have them after her." Neill McLean survived his wife (who died in October, 1856), and left a will bequeathing most of the negroes to his children by a former wife, and appointing as his executors the defendant M. A. McLean and the complainant, Wm. D. Harrington, who had married the complainant, Margaret, the testator's only child by his wife Sarah; the complainant, W. D. Harrington, was igno- (259) rant of the existence of the said marriage agreement, and qualified as executor of Neill McLean, and collected the assets and paid off the debts of the estate; in December, 1858, the said agreement was found among the papers of one of the witnesses who had recently died; at December Term, 1858, of the County Court of Harnett, the defendant M. A. McLean also qualified as executor of Neill McLean, and has held the slaves under the will of the testator; at September Term, 1860, the defendant McDuffie qualified as administrator of Sarah McLean.

The prayer of the bill is, that the slaves be delivered to the complainants, for an account of the hires since October, 1856, and for further relief.

The demurrer to the bill set out several grounds of objection, with a statement of reasons to support them. These grounds are sufficiently stated in the opinion.

Badger, for the complainant.
N. McKay, for the defendants.

PEARSON, C. J. In regard to *matters of substance* a demurrer in equity should be general; that is, it should not set out the grounds of objection, or go into an argument. The proper place for all this is at the hearing; and its introduction into the demurrer tends to prolixity and confusion and an unnecessary accumulation of costs. In regard to *matters of form,* they should be set out, but not argumentatively, for the purpose of giving the plaintiff an opportunity of amending on terms; and unless defects in mere form are set out, they are not noticed at the hearing.

This much is premised, for the purpose of explaining why some of the points made on the argument are not referred to in this opinion.

The bill is filed for a specific performance of a marriage agreement in respect to certain slaves, and for an account of hires and
(260) profits. The equity as to the slaves is at an end by their political death, and the case is now confined to the account of hires and profits up to their emancipation. There is a demurrer, and *four* causes are assigned.

1st. The bill does not set out the will of Neill McLean.

As the plaintiffs do not claim under the will, it was not proper to set it out in the bill. If it had been set out the bill would have been informal, and liable to special demurrer for unnecessary prolixity and an useless accumulation of costs.

2d. The children of Neill McLean by his first wife are not made parties.

Executors represent the rights and interests of the legatees, and are the only actors in defending suits in which claims adverse to the title of the testator are set up. So the children by the first wife are not necessary parties, and the bill would have been informal and liable to special demurrer if they had been made parties.

3d. Harrington, who qualified as one of the executors of Neill McLean, and is joint executor with defendant Malcom McLean, is not made a defendant, and no process is prayed against him. Harrington is a plaintiff, and of course could not also have been made a defendant.

4th. Harrington, having voluntarily qualified as one of the executors, is estopped from filing this bill against his co-executor for the purpose of defeating a will which he is bound to maintain and execute.

In support of this objection *Mendenhall v. Mendenhall,* 53 N. C., 287, was relied on. In that case it is held that a widow having qualified as executrix of her husband, could not afterwards dissent from the will and claim dower and a distributive share of his personal estate. For

such claims, being *under* her husband, were inconsistent with the act of qualifying as his executrix. Here Harrington is not seeking to set up a claim *under* his testator, but is seeking to set up a claim of his wife *against* the testator, of which claim he had no notice until (261) after he had qualified, and which claim she derives from her mother under an agreement, in fraud of which the testator had appropriated certain slaves to himself, and attempts, by his will, to give a portion to his children by his first wife. Note the diversity.

On the argument it was insisted that Harrington, as executor, having the legal title, must sue at law and not in equity. It is sufficient to say he and his coexecutor, the defendant Malcom McLean, hold the legal title as tenants in common, and of course the remedy is in equity.

The other point, in regard to putting the plaintiffs to their election, either to claim under the will or against it, does not arise upon this demurrer. Whether the plaintiffs can be put to their election by a cross-bill alleging the fact that legacies are given to Mrs. Harrington is a matter into which we do not enter.

PER CURIAM. Demurrer overruled.

Cited: Smith v. Bryson, post, 269; *Syme v. Badger,* 92 N. C., 713; *Tripp v. Nobles,* 136 N. C., 110.

WILLIAM G. YOUNG and others v. THE TRUSTEES OF DAVIDSON COLLEGE and others.

1. The sums charged upon "the more valuable dividends," in partitions of lands under the Rev. Code, c. 82, are charges, not upon the persons of the owners of such dividends, but *upon the land alone.*
2. A prayer to marshal certain funds refused because the paramount charge was upon one fund only.

BILL to marshal certain funds, and for an injunction, filed to Spring Term, 1867, of ROWAN, and then set for argument upon bill and demurrer and transferred to this court. (262)

The bill states that the Trustees of Davidson College, together with Joseph F. Chambers and another, in 1863, were tenants in common of a valuable tract of land in Rowan County, which, by a decree of the County Court of that county at November Term, 1853, was divided among them in severalty, the dividend of Chambers being by the report and decree charged with $1,000, to be paid to the dividend of the Trustees, for equality. Before the petition a treaty of purchase had been made between Chambers and the complainant, Young, and this was completed by a deed executed 19 December, 1863, the former binding

himself to remove all incumbrances. From February Term, 1867, of Rowan County Court a writ of *ven. ex.* with a *fi. fa.* clause attached, was issued in order to enforce the charge of $1,000. On Saturday of that term Chambers executed a deed in trust conveying all of his property for the benefit of certain creditors.

The other statements of the bill are not material.

The prayer was for a declaration that the estate conveyed by Chambers in trust was, equally with that conveyed by him to Young, subject to the payment of the $1,000; that the Trustees should be put to an election as to which of these funds they would subject to their debt, and that in case they elected to pursue the land conveyed to Young the latter might be substituted to their rights against the estate conveyed in trust, etc.

To this the defendants filed a general demurrer.

Boyden & Bailey, for the complainants.
Osborne & Barringer, and *Wilson,* for the defendants.

BATTLE, J. The equitable doctrine of marshaling arises where the owner of property subject to a charge had previously subjected it, together with another estate, to a permanent charge, and the property thus doubly charged is inadequate to satisfy both the claims. Adams's Eq., 271. In the case of debtor and creditors the equity is not binding on the paramount creditor, for no equity can be created against him by the fact that some one else has taken an imperfect security. But it is in equity against the debtor himself, that the accidental resort of the paramount creditor to the doubly charged estate, and the consequent exhaustion of that security, shall not enable him to get back the second estate discharged of both debts. If, therefore, the paramount creditor resorts to the doubly charged estate the puisne creditor will be substituted to his rights, and will be satisfied out of the other fund to the extent to which his own may be exhausted. *Ibid,* 272.

It is manifest from this statement of the doctrine that the paramount charge must be upon two funds. If the paramount charge be upon one of the funds only, there can be no room for the application of the doctrine. The main inquiry in the case now before us must, therefore, be whether, in the division of an estate, a sum of money imposed for equality of partition upon the larger dividend is a charge in favor
(264) of the smaller, upon the land alone, or is a debt which may be enforced against the owner of such larger dividend by the ordinary remedies which the law affords against debtors. The solution of this inquiry depends upon the proper construction of the 82d chapter of the Revised Code, entitled "Partition." The first section of the act, after prescribing the mode in which real estate held by tenants in com-

mon is to be divided, declares that the commissioners shall be "empowered to charge the more valuable dividends with such sums, to be paid to the dividends of inferior value, as they shall judge necessary, in order to make an equitable division." The 3d and 4th sections provide that "the sums due from the more valuable dividends shall bear interest until paid"; that if some of the tenants in common "are obliged to be charged with money to the dividends of inferior value, then the money shall not be payable until the person, if a minor, shall arrive at the age of twenty-one years"; and that "the guardian of the minor, to whom a more valuable dividend shall fall, shall pay such sums whenever assets shall come into his hands; and if it shall appear that the guardian had assets which he did not apply, he shall pay out of his own proper estate any interest which shall have accrued in consequence of such failure." These provisions in relation to minors are expressed in somewhat different terms in the chapeer on "Partition" in the Revised Statutes, secs. 3 and 4. In them it is said that "if the minor heirs or tenants in common, to whom are assigned the more valuable dividends, are obliged to be charged with a sum or sums of money to be paid to the dividend or dividends of inferior value, then and in that case the sum or sums so charged on the dividend or dividends shall not be paid until the heirs or tenants in common shall arrive at the age of twenty-one years." Then follows a declaration that "The sum or sums so due from the more valuable dividends shall bear an interest of 6 per centum per annum until paid: *Provided always,* that the guardian or guardians of such minor or minors, to whom the more valuable (265) dividend or dividends shall fall, shall at all times be at liberty and is required to pay such sum or sums, whenever assets shall come into his hands sufficient to discharge the same," etc. "The power to charge the more valuable dividend or dividends with such sum or sums as they shall judge necessary, to be paid to the dividend or dividends of inferior value, in order to make an equitable division," is conferred upon the commissioners who make the division in substantially and almost literally the same terms by the first section (ch. 85) of the Revised Statutes as it is by the corresponding section of the Revised Code.

In the construction of the above cited clauses of chapter 85 of the Revised Statutes, which were taken from the Act of 1787 (ch. 274 of the Revised Code of 1820), it was decided, in *Jones v. Sherwood,* 22 N. C., 179, that the land is the debtor, and the sole debtor, for the charge of money made upon it for equality of partition, and that, even when a note is given by the owner of the land to secure the charge, the land will still continue to be the primary debtor, and the note will be regarded as a collateral security only. The opinion of the court in which this

principle is asserted is one of great ability, and the decision itself is sustained by the subsequent case of *Sutton v. Edwards,* 40 N. C., 425.

It must then be taken to have been established law that where a charge was made upon the more valuable dividend for equality of partition, upon the division of land under the provisions of the Revised Statutes, the land charged was the sole debtor. The counsel for the plaintiffs contend that this law is changed by the Revised Code, and the expression in the 3d section of the act, that when some of the tenants in common are "obliged to be charged with money to be paid to the dividends of inferior value, then the money shall not be payable until the person charged, if a minor, shall arrive at the age of
(266) twenty-one years," is relied upon to establish the position. The words "so charged upon the dividend or dividends," in the corresponding part of the Revised Statutes, are not to be found in the clause above quoted from the Revised Code, and the counsel contend that the expression, "the person charged," without the additional clause that the charge is "upon the dividend or dividends," indicates that the charge is upon the person as well as upon the land. We are satisfied that such was not the intention of the Legislature, but that the words of the Revised Code, as well as those of the Revised Statutes, must be construed to mean nothing more than that the minor is to be charged in respect to the dividend of his land only. The first section of the act does not authorize any other charge, and all the substquent sections must be construed with reference to that. In that part of the act which provides for the partition of the lands of tenants in common lying in different States, it is plainly expressed "that the sum due from the greater dividend shall be a charge upon the land into whose hands soever it may come, although it may be taken without notice," and there is not the slightest intimation of any charge upon the person. It would be a strange construction if that which was evidently intended for the ease and benefit of the minor should be held to impose a debt upon his person, as well as a charge upon his land. The act meant to fix a charge upon the land, and upon that only, and, in doing so, it carries into effect the most exact justice between the parties to the partition. When the dividends are of unequal value it is manifest that the owner of the more valuable dividend has in his hands a part of the share of another co-owner. That part can not be obtained specifically in land, and it must therefore of necessity be taken in money of the value of the land. It is indeed a part of the land converted for the occasion into the shape of money. Where the party to whom it is
(267) to be paid applies for it, he must go to the land of which it is a part, and natural justice dictates that he should be restricted to that source alone. When, from the nature of the real estate, it can not

be divided without imposing too heavy a charge upon the more valuable dividend, a charge which can not be raised out of it without great inconvenience to the owner, then the whole estate ought to be sold for the purpose of partition; and that we find is provided for in the 6th section of the act.

If this course of reasoning be correct, and it seems to us to be so, it puts an end to the question of marshaling, because it shows that the owner of the dividend of inferior value has a charge upon only one fund, to wit, the land forming the more valuable dividend.

In this view it becomes unnecessary to examine the numerous authorities referred to by the learned counsel for the plaintiffs. The defendant has but one fund to resort to, and, as that is paramount to any claim or equity of the plaintiffs, this bill can not be maintained.

The demurrer must be sustained, and the

PER CURIAM. Bill dismissed with costs.

Cited: Halso v. Cole, 82 N. C., 163.

C. D. SMITH v. JAS. H. BRYSON, Adm'r. of W. W. NOLEN, Dec'd.

One of two partners having died, and the survivor and a third person having been appointed administrators on his estate, a bill filed by such surviving partner against his co-administrator for a settlement of the affairs of the firm is demurrable, and will be dismissed.

BILL for a settlement, filed to Spring Term, 1867, of MACON.

The bill was filed for an account and settlement of the affairs of the firm of Smith & Nolen. The plaintiff is the surviving (268) partner, and the defendant one of the administrators of the deceased partner, W. W. Nolen, and the bill charges, among other things, that Nolen misapplied the effects of the firm, and appropriated large sums to his own use without rendering any account therefor.

It is set out in the bill that "Nolen died intestate in October, 18.., leaving your orator surviving partner of Smith & Nolen, and that, at the Court of Pleas and Quarter Sessions for the county of Macon, at .....session, 18.., your orator and the defendant James H. Bryson were appointed administrators of the estate of the said Nolen, and duly qualified as such."

At the return term the defendant filed a general demurrer, which was set down for argument, and the cause transmitted to this court.

No counsel for the plaintiff.

Moore, for the defendant.

PEARSON, C. J. The plaintiff, as surviving partner, asks for an account against Bryson, who is one of the administrators, and against *himself,* who is the other administrator of the deceased partner. In other words, the plaintiff takes position upon both sides of the case! and when the account is to be taken, he will represent his own interest as plaintiff, and also have a right to represent his deceased part-
(269) ner. It is apparent that an account can not be ordered under such circumstances, especially as the bill makes grave charges of fraud on the part of the deceased, of whom the plaintiff is one of the representatives! The only mode of proceeding for the plaintiff is to apply to the County Court to revoke the letters of administration, so that his deceased partner may have something like a fair showing. *Griffin v. Vanheythuysen,* 4 Eng. L. and E., 25, is in point. There a *cestui que trust* administered upon the estate of one of the trustees, and jointly with the other *cestui que trust* sued the surviving trustees, charging a misapplication of the trust funds by the deceased trustee. The Vice-Chancellor says: "The decree would involve an account of the estate of Vanheythuysen received by the plaintiff Griffin. Now, how could such an account be taken, as between Griffin and his co-plaintiffs in the suit? There is a direct conflict of interest between Griffin as representative of Vanheythuysen and his coplaintiffs. The principle of the objection is, that the suit was so constituted that the account could not be taken," etc.

This case differs from *Harrington v. McLean, ante,* 258, in many respects. There the primary object of the bill was to have a specific performance of marriage articles in favor of the *feme* plaintiff in respect to certain slaves, and although the primary object failed by the political death of the slaves, it was allowed to be carried on for an account of the hires of such part of the slaves as had been in the possession of the defendant; and, although Harrington, one of the plaintiffs, was the coexecutor of Neill McLean, with the other defendant, Malcom McLean, yet it was alleged and proved that, at the time he qualified, he was ignorant of the existence of the marriage articles under which his wife derived her title.

PER CURIAM. Bill dismissed with costs.

Cited: Gay v. Grant, 101 N. C., 213.

(270)

JOHN KINCAID and ARCHIBALD KINCAID, Ex'rs, etc., v. J. W. CONLY and wife, and others.

1. A court of equity below has *exclusive jurisdiction* of a bill to impeach a decree of the Supreme Court for fraud and surprise; and such bill may be filed without the leave of the Supreme Court.
2. A bill having been filed, in 1864, against executors to obtain a construction of a clause in the testator's will, but containing the necessary prayer for an account and settlement, a reference in the Supreme Court (to which the cause had been transferred) was ordered and a report made at December Term, 1864, without notice to the defendants and after the death of their counsel, and thereupon a decree was made against the defendants for the amount in their hands, which included a large sum of Confederate money: *Held*, a proper case for an injunction upon a bill to impeach the decree.

BILL to impeach a decree in the Supreme Court and for an injunction, filed to Fall Term, 1866, of BURKE.

The injunction was granted, and upon the coming in of the answers at Spring Term, 1867, *Buxton, J.*, presiding, the defendants moved to dissolve. His Honor, *pro forma,* refused the motion and continued the injunction; whereupon the defendants appealed.

The opinion renders a statements of the case unnecessary.

Moore, for the appellants.
Bynum and *Folk, contra.*

BATTLE, J. The bill was filed in the Court of Equity for Burke County, for the purpose of impeaching a final decree of this court, upon the ground that it was obtained by fraud and surprise upon the present complainants, and for matters of a public nature which have since occurred, and which would render its enforcement unjust and oppressive. Upon the filing of the bill an injunction was granted, whereupon the defendants filed their answers, and moved for a dissolution of the injunction, which being refused, and an order made that it should be continued until the hearing, the defendants appealed to this court.

In the argument here the counsel for the defendants contends that the motion to dissolve ought to have been allowed, and he bases his argument upon several grounds:

1. It is insisted that the Court of Equity for Burke County (274) had no jurisdiction to entertain a bill for reviewing a decree of the Supreme Court, or to impeach it for fraud or surprise, or for any other matter stated in the bill; and, in support of this position, *Bible Society v. Hollister,* 54 N. C., 10, and many other authorities are relied upon. If this were a bill to review a decree of this court for error of law appearing in the decree, there can be no doubt that it could not be

sustained, but it purports to be a bill of a very different character, to wit, one to impeach a decree of this court for fraud and surprise; and as such we think the Court of Equity below not only had jurisdiction, but is the only court which did have it. By reference to chapter 32 of Revised Code, entitled "Courts of Equity," it will be seen that to them is confided full Chancery powers and authority, and they are the only courts of the State which have original jurisdiction in the exercise of such powers and authority. A bill to impeach a decree is an original bill, while one to review a decree is, strictly speaking, not so, but is treated of in the books as a bill in the nature of an original bill, being an incident to some former suit. See *Bible Society v. Hollister, ubi supra,* Mitf. Pl., 138 (marg. p. 93); Adams Eq., 419. Bills of review may now be filed in the Supreme Court for the purpose of reviewing its own final decrees (see Rev. Code, ch. 33, sec. 19), which could not have been done when the above cited case of *Bible Society v. Hollister* was decided. A bill to impeach a decree being strictly original, must be brought in that court which has original jurisdiction of such bills. There is no more reason why it may not be filed in the Court of Equity below to impeach a decree of the Supreme Court than to impeach the decree of any other court. Being an original bill, the defendant must put in an answer, to which a replication may be filed, and this will render the taking of proof necessary, which can only be done in
(275) the Court of Equity below, and can not be done in the Supreme Court as at present constituted. See Rev. Code, ch. 33. It is admitted that the Court of Equity below may enjoin a judgment at law of the Supreme Court, as was done in *Patton v. Marr,* 44 N. C., 377; and there can be no more incongruity in the impeachment of a decree of this court by a proceeding in the Court of Equity below, than in the enjoining of one of its judgments at law. The interference of a Court of Equity is absolutely necessary to prevent a party from taking advantage of a fraud, because, after a final decree in equity, as well as after a final judgment at law, the Supreme Court has no means to afford an adequate remedy. We conclude, then, that the Court of Equity for Burke County did have jurisdiction of the cause, and that the injunction ought not be dissolved upon the grounds taken by the defendants' counsel in his first and fourth objections.

2. The bill is not one for newly discovered testimony, as is assumed in the counsel's second objection, and for that reason the objection misses its aim, and is unavailing.

3. A bill to impeach a decree for fraud and surprise being an original bill, may be filed without the leave of the court. Mitf. Pl., 138 (mar., p. 93). This disposes of the objection that the leave of the court, and, in this case, the leave of the Supreme Court ought to have been obtained before the bill was filed.

4. The fourth objection relates to the jurisdiction of the court where the bill was filed, and has already been noticed and disposed of.

5. The *fifth* objection to the order continuing the injunction is, that all the material allegations of the bill are fully and positively denied by the answers of the defendants. The only statements of the bill which it is necessary to notice in this connection are: That the parties could and would have settled all the matters in relation to the estate of Robt. Kincaid, the plaintiff's testator, without suit, but for a claim set up by J. W. Conly, who contended that he was entitled to a share of the (276) estate as the administrator of his first wife, Patsey Conly, which the other legatees denied, and that the bill was filed solely for the purpose of having that question settled by a decree of the Court of Equity; that with that view a bill was filed in the Court of Equity for Burke County at the Spring Term of 1864, when the answers were put in and the cause immediately, by the consent of all the parties, transferred to the Supreme Court; that an interlocutory decree was made at that court at the ensuing June Term in favor of the claim of J. W. Conly to a share, in right of his deceased wife; that at the next succeeding term of that court the case was brought on to be heard upon further directions, whereupon a reference for an account was ordered, upon which a report was made returned, confirmed and a final decree passed; that this was all done at the same term without notice to the present plaintiffs, and in the absence of themselves and their counsel; that, as defendants in that suit, they had employed an eminent member of the bar to draw their answers, who told them that, as the suit was filed solely for the purpose of getting a construction of the will of their testator, it was unnecessary for them to give it any further attention; that in the interval between the two terms of the Supreme Court above mentioned their counsel was killed in the late war, and that they, believing that the suit had accomplished its purpose by settling the question of construction, and that they and the other parties would be able to settle all the other matters themselves, did not deem it necessary to employ other counsel; that, before the filing of the bill, they had taken Confederate treasury notes in payment of debts due their testator, some of which they had funded in Confederate bonds, and all this was done with the full knowledge, consent and approbation of all the parties interested in the estate of their testator; and that, by the result of the late war, since the decree was made, these notes and bonds (277) had become of no value. Many of these allegations are sufficiently denied in the answers. But it is not denied that the sole object of the suit was what it was stated in the bill to have been, but it is alleged that an account and settlement were also demanded by the bill and submitted to by the executors. That is true, but it can not be

allowed to have much influence in the present controversy, because a prayer for such account and settlement formed a necessary part of the bill in order to give the court jurisdiction to hear and determine the question of construction. The statement of the death of the counsel is admitted, but it is alleged that the executors had ample time to employ other counsel. In ordinary times the executors could have taken no benefit from their want of counsel, but the state of the country during the latter half of the year 1864, when business of every kind, except what pertained to war, was nearly suspended, and anxiety and alarm pervaded the whole State (of all which we must take judicial notice), must be taken into consideration in deciding upon the conduct of the executors. The fact that the Confederate funds were of some value when they were received by the executors, and that since the decree, by reason of a great public event, they became entirely worthless, is admitted. It is denied, however, that the funds were taken with the consent and approbation of the present defendants, or at least of all of them. In considering the answers, taking the denials and admissions all together, we think that enough appears from them to show that the executors were, under the extraordinary circumstances in which they were placed, taken by surprise by the final decree which was entered in this court, and that it would be a fraud to have it enforced against them. We are further of opinion that they, of all the parties to the controversy, ought not to be the only sufferers by the event of the war,

(278) which annihilated the Confederate notes and bonds in their hands, unless upon the final hearing of the case it may appear that they were in default.

6. This ground of objection is the same with the last, except that it applies to a part of the defendants only. We will not give it a particular notice, because we think that the principles which furnish an answer to the last objection are sufficiently comprehensive to cover this. The principles, being mainly upon facts and events of a public nature, apply with as much force to the married and minor defendants as to the others, and we can not admit any distinction between them.

The view which we have taken of the case renders it unnecessary for us to comment upon the numerous cases and authorities referred to by the counsel on both sides in the learned arguments which they have submitted to us, and by the aid of which our labors have been much lightened.

The order of the Court of Equity below is

PER CURIAM. Affirmed.

Cited: Kincade v. Conley, 64 N. C., 389; *Grant v. Edwards,* 88 N. C., 248; S. c., 90 N. C., 31; *Farrar v. Staton,* 101 N. C., 84.

JOHN W. EARL v. WILLIAM T. BRYAN.

Where land was sold *by the acre*, and the vendor fraudulently represented the tract to contain a greater number of acres than it actually contained, the purchaser is entitled to relief against the collection of so much of his note for the purchase-money as is for the excess.

BILL for an injunction, etc., filed to Spring Term, 1859, of NASH, and an answer having been filed and proofs taken, transmitted by consent to this court from Fall Term, 1866.

The facts sufficiently appear in the opinion.

Moore, for the complainant. (279)

No counsel for the defendant.

READE, J. We are satisfied by the evidence that the defendant sold to the plaintiff the tract of land at $12 per acre, and induced the plaintiff to believe that there were 470 acres, when, in fact, there were not more than 405 acres; that the defendant had good reason to believe, at the time of the sale, that there were but 405 acres, and that he was deceiving the plaintiff. Against this fraud the plaintiff is clearly entitled to be relieved.

The deficiency of 65 acres at $12 per acre amounts to $780. The collection of this amount of the defendant's judgment at law, with interest from the time it fell due, will be perpetually enjoined.

The plaintiff having paid the money into office, the aforesaid sum, with the interest which has accumulated, will be paid to him.

PER CURIAM. Decree accordingly.

Cited: Knight v. Houghtaling, 85 N. C., 34.

JAMES HARPER, Ext'r. of Henry Sumpter, v. JOHN SUDDERTH and others.

The legatees, under a clause of a will giving property to "the heirs and legal representatives of my deceased sister," etc. (followed by clauses giving respectively the children of a deceased brother "an equal share," and the son of a nephew "a share,") are the children of the deceased sisters, and take *per stirpes.*

BILL for the construction of a will, filed to Fall Term, 1864, of CALDWELL, and afterwards transferred, by consent, to this court.

The testator died without issue. The will, after giving his estate to his wife for life, proceeds: "3d. My will and desire is, (280) that after the death of my beloved wife, my property shall be disposed of in the following manner, to wit: I give and bequeath to the

heirs and legal representatives of my deceased sisters, Patty Sudderth, Betty Ramsey and Polly Loving; 4th. My will and desire is, that my brother Thomas Sumpter's children are to have an equal share of my estate, except, etc.; 5th. My will and desire is, Henry Sumpter Taylor, son of Henry Taylor, shall have an equal share."

Moore, for the complainants.
Folk, for the defendants.

READE, J. The only question involved is whether the legatees in the third clause of the will take *per stirpes* or *per capita*. We think they take *per stirpes*. We lay much stress upon the fact that the legatees, nieces and nephews are designated as the "representatives" of their deceased parent. It is apparent also from the fourth and fifth clauses that the testator meant that the representatives of his brothers and sisters (by which he meant not their administrators, but their children), should take the share which their parent would have taken. In the fourth clause he directs that the children of his brother, Thomas, are to have "an equal share"; and in the fifth clause he directs that the son of a nephew shall have "an equal share of his estate." From these facts we think it appears that the testator meant that the children should *represent* their parents, and take such share as the parent would have taken if living and there had been an intestacy.

There may be a decree in conformity with this opinion. The costs to be paid out of the estate.

PER CURIAM. Decree accordingly.

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(281)

ALEXANDER MITCHELL and son v. WILLIAM P. MOORE.

1. Where the transcript in an equity cause contained only the following entries, "Injunction executed, answer filed, continued, defendant appeals to the Supreme Court," the court, upon motion, dismissed the appeal.
2. The Judge in the court below is not authorized to send up a *statement* in equity cases.

BILL, brought up by appeal (by the defendants) from an order made by *Mitchell, J.*, at Spring Term, 1867, of CRAVEN.

The opinion renders a further statement unnecessary.

Manly & Houghton, for the appellants.
Graham and *Strong, contra.*

READE, J. The case was considered in this court on a motion by the plaintiffs to dismiss the appeal.

The record shows nothing but the name of the case and the following entries: "Injunction executed; Answer filed; Continued; Defendant appeals to the Supreme Court."

An appeal from an interlocutory order is allowed by Rev. Code, ch. 4, sec. 23; but it must be an order affecting the merits of the cause. An order of continuance is not such an order; and yet that is the only order on the record. From that order the defendant appealed.

In *Graham v. Skinner,* 57 N. C., 94, it is said: "There may be indeed some orders of a discretionary kind, which do not affect the merits of the cause; as, for instance, an order for its continuance, from which no appeal would be entertained by the Supreme Court."

Accompanying the record, however, is a statement of the case by the presiding Judge, in which he says that the defendant moved to dissolve the injunction, which motion was refused and his Honor (282) continued the cause. If this statement could be considered by this court, it would still not appear whether the appeal was from the order refusing to dissolve the injunction, or from the order of continuance. But we can not consider the Judge's statement, because a bill of exceptions, or case stated by the presiding Judge in the nature of a bill of exceptions, as is usual in appeals at law, is unknown to and inadmissible in an appeal, or any proceeding in the nature of an appeal, in a Court of Chancery. The learning on this subject may be found in *Graham v. Skinner, supra.*

The motion to dismiss the appeal is allowed with costs.

PER CURIAM. Appeal dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

JANUARY TERM, 1868

JAMES M. WHEDBEE, Ex'r., v. WILLIAM R. SHANNONHOUSE and others.

1. A legacy to slaves upon their future contingent emancipation (provided for in the will) is not against public policy, even though a part of the fund so given is to be made up of their own earnings.
2. Where a will contemplated an emancipation coupled with removal to Liberia or some such place, and provided a certain fund to be used to cover the expenses of such removal and also to supply clothing and implements of husbandry, and added that if any part of such fund were left, it should be divided among the slaves emancipated: *Held*, that as in the event they were emancipated without a removal by the results of the late war, such slaves were entitled to the fund *undiminished* by expenses, etc.
3. The will for emancipation having been defeated as to a part of the slaves by the dissent of the widow: *Held*, that as the fund was bequeathed to the slaves *as a class*, those who fitted the description at the time of division, took it all and there was no lapse.
4. *Semble*, that the slaves who were reduced to their former condition by the dissent of the widow are, as things have turned out, entitled to a share of the fund.

BILL to have a will construed, filed to Fall Term, 1867, of PASQUOTANK, and then set for hearing upon bill and answers and transferred to this court.

The complainant was the executor, and the defendants were (284) the heirs-at-law, devisees and legatees of James P. Whedbee, whose will had been proved in Perquimans County Court in 1853; and the bill was filed to obtain a construction of that will in various respects.

The material parts of the will were, that the wife, who was also named as sole executrix, should have the use of all of his estate during her natural life or widowhood, and in the event of her marriage, then such

interest therein as she would have had if the deceased had died intestate; at her marriage or death all of his estate was to be taken possession of by certain persons who were then to become his executors, and certain parts specified were to be sold, and the proceeds divided into seven parts, of which, after disposing of six parts, he gave the last as follows:

"And one-seventh to be expended together with the several funds that may be raised by my wife as directed to be raised in items fourth and fifth, in fitting out and removing and settling all of my negroes except Demas, Jonah and old man Jack (whom I shall provide for hereafter) to Liberia or some other free foreign colony, as it is my wish that they shall be liberated and sent there. And I have made this bequest to them in order that this part of my will in relation to them may be effectually carried out to all intents and purposes as it is desired to do. And should any of the bequests be left after fitting said negroes out with all necessary clothing and implements of husbandry necessary for them to carry, etc., and expenses of removing, etc., then and in that case, for the balance of said fund to be divided among them having due regard to merit, old age and infirmity, and paid over to them in such a manner as they will be certain to get the same when they reach their place of destination, and in that case if any of them (which it is reasonable to suppose) should not be capable of receiving and managing (285) their fund in a provident, wise and safe manner, then and in that case to appoint them a guardian who will be certain to do them justice. And I especially desire the American Colonization Society to have an eye to this bequest so that my negroes may in nowise be defrauded out of the bounty intended for them, unless defeated as hereinafter provided in the ninth (9th) clause of this will."

The *ninth clause* of the will, reciting the fact that the testator then had no children, made various changes in the disposal of his estate in case he should leave children at his death.

The tenth clause gave to certain persons all of the estate "not herein disposed of, or which shall fail by reason of lapse or otherwise."

There was a codicil, revoking a legacy of one of the above seventh parts, which had been given to one James Shannonhouse, and adding it to the share above given to the negroes.

The bill stated that the testator died without children, and that his widow dissented from the will, and shortly afterwards married again and had her share of the estate (including slaves) allotted to her; that the other executors renounced, and he alone had qualified; that as executor he had sold those parts of the estate which were designated in the will as for sale (amounting to $98,000); that the breaking out of the late war had interrupted his plans for sending away the slaves that had been liberated, and that the results of that war, together with the

death, disappearance, etc., of the slaves had greatly embarrassed him in the discharge of his duties; that the residuary legatees claimed that as no removal of the slaves was necessary now, they were entitled to the money which had been provided by the testator to cover the expenses of such removal, etc. The prayer was for instructions, etc.

(286) Separate answers were put in (1) for the residuary legatees; (2) the heirs and next of kin; and (3) for the freedmen.

Smith and *Bragg,* for the residuary legatees.
W. A. Moore, for the freedmen.

PEARSON, C. J. Although it be conceded that, as the testator died before the war, the will should be construed according to the

(287) idea of public policy then acted on by our courts, still the position that the provision for emancipation being *prospective* is illegal, and consequently that the legacy given to the slaves was void, is not supported by any authority or principle.

The whole subject is so fully discussed in *Myers v. Williams,* 58 N. C., 362, as to make it useless to elaborate it further. It is there taken as settled, that a provision for emancipation after the termination of a life estate is not against public policy. The fact that a large fund was to be made up in part by their future earnings does not affect the question.

Assuming therefore that, if the war had not occurred, and if the widow of the testator had died without marrying again, the slaves would have been emancipated in the manner provided for by the will, and would have taken the legacy, the question is: Do these facts separately, or in connection, have the effect of depriving them of the legacy or any part of it?

One of the results of the war was to effect the emancipation of slaves without the cost of transportation to Liberia, or other free countries, and the controversy between the claimants is, to whose benefit shall this saving accrue?

Upon a general view, it would seem that this collateral advantage caused by what, as between these parties, was a mere accident, should be a "windfall," or piece of good luck to the freedmen; because they are the immediate object of the testator's bounty in regard to the legacy under consideration rather than to the persons who are in no respect the objects of this bounty. Especially should this be the case in the absence of any indication of an intention on the part of the testator that the legacy given to his slaves was in anywise to depend on the manner in which their emancipation should be effected. *Haley v. Haley, ante,* 180. There is nothing in the will to show that the

application of a part of the fund to the payment of expenses (288) of transportation was to be of "the essence of the gift," and make a condition. On the contrary, this direction may be ascribed entirely to the fact that, at the time, there was no other mode of emancipation except by removal from the State, and affords no ground for an implication that the testator desired that the slaves should remove from the State; indeed, judging by the many cases in which the court have been called on to enforce this provision of the law, there can be no doubt that, as a general rule, testators have submitted to this requirement unwillingly, and would gladly have been relieved from it.

Taking a more particular view of the case, it was said on the argument, "This legacy is given as *the means* of effecting the emancipation of the slaves. That object has been accomplished by the general emancipation, which was a result of the war, so there is no occasion to resort to the means, and for that reason the legacy fails."

If there was anything in the will to show that the legacy was given simply as a means to effect an object, and that the slaves were the objects of the testator's bounty to that extent only—as for instance, if the testator had directed so much of this one-seventh part of his estate to be applied to defray the expenses of transportation, as was necessary for that purpose, and that the balance of the fund should be paid over to A, B and C, there would have been much force in the argument, and the case would have fallen within the principle adopted in *Liverman v. Carter,* 39 N. C., 59. There the testator appropriated $100 to the use of schooling and educating *a boy,* with a limitation over to A, in case the money was not used for that purpose. The boy arrived at age, married, and had two children before the testator died; and it was held that the legacy passed over to A, on the ground that the special application (289) was a condition precedent, and the limitation over showed that the testator intended its use in that mode to be of the essence of the gift to the boy. But, in our case, one-seventh part of the estate, increased by the codicil to two-sevenths, is given to the slaves as a distinct bequest; a part to be applied to pay expenses of transportation; a part to meet expenses of buying farming utensils and settling them; and *the balance of the funds to be paid over to the slaves;* so that, instead of a limitation over to a third person of the fund, or any part of it, being made under any circumstances, or in any event, the whole of it is given to the slaves, and it is an absolute bequest under the principle recognized as the general rule in *Liverman v. Carter, supra,* and settled by many cases. *Nevile v. Nevile,* 2 Vern., 430; *Barlow v. Grant,* 1 Vern., 254; *Barton v. Cocke,* 5 Vesey, 461; *Cope v. Wilmot,* Amb., 704. The principle is this: When there is no limitation over, directions in regard to the application of the fund, *e. g.,* "to enable

him to complete his education," or, "to study law," or, "to buy a library," are taken as merely "advisory," and suggestive of the motive for making the gift, and of the opinion of the testator as to the best mode of using it, but the legacy is absolute—and it is only held to be conditional when there is a limitation over to a third person, in case the fund should not be used in the manner directed.

There is a large class of cases in which the principle is carried further, and applied to legacies where express words of condition are used; for instance, a legacy to a wife, but in case of marriage the legacy is to be void; or to a daughter, but if she should marry under the age of twenty-one, without the consent of her mother, the legacy shall be forfeited"; or a clause of this kind, "should any one or more of my legatees contest this will, the provision I have made for them is to be void and of no effect." In all of these cases, in the absence of a limitation
(290) over, such words are taken as no more than an expression of an earnest request or a strong remonstrance, and are technically termed words *"in terrorem,"* and the legacies are absolute. It is only when what is given is, in default of the first taker, given over to a third person, that the nature of a conditional limitation is fixed upon it, so as to become a part of the essence of the gift, whereby it may be defeated. See 1 Jarman on Wills, 538, and other text writers, where all the cases are cited.

It is said, in the second place, that in regard to that portion of the fund which would have fallen to those of the slaves who were again reduced to slavery by the legacy to the widow in the event of her marriage, and who were assigned to her as her portion of the testator's estate, the legacy fails, for at the time when it was to vest (to wit, upon her marriage), they were not capable of taking, and this incapacity to take is not aided by the fact that they were subsequently emancipated, so that this part of the fund passed either to the residuary legatees or to the next of kin.

If the legacy had been given to the slaves *nominatim,* or as individuals, this conclusion would have been true, but a complete answer to it is, that the legacy is given to the slaves *as a class,* and such of them as answer the description and make up the class are entitled to the whole fund. This is settled: *ex. gr.,* a legacy to the children of A, and some of them die in the lifetime of the testator; there is no lapse, and such as answer the description at his death take the whole; or, if the division be postponed until a future event, as the falling in of a life estate, all who answer the description at that time are entitled to the *whole* fund.

This disposes of the case except as between the freedmen. The pleadings do not raise any matter of controversy as to them, and we are relieved from the necessity of deciding, whether, upon principles of

equity, those of them who were so fortunate as not to be reduced to slavery a second time by the effect of the widow's dissent from (291) the will, or by her second marriage, could be heard, or allowed to take the ground that those upon whom the misfortune fell should be further injured by being thereby excluded from a right to participate in a fund, which the testator intended for them all; but it may not be amiss to say, it is a settled principle in equity that where two or more are liable to a common burden, and the whole falls upon one, he is entitled to contribution from the others; and it would seem that according to natural justice, the others could not by reason of his misfortune, in having the burden fall on him, make that a ground of further prejudice, because the burden was common, and, but for accident, it might have fallen on them. There will be a decree according to this opinion; costs to be paid out of the fund.

PER CURIAM. Decree accordingly.

Cited: Robinson v. McIver, 63 N. C., 650; *Todd v. Trott,* 64 N. C., 282; *Michael v. Hunt,* 83 N. C., 347; *Jervis v. Lewellyn,* 130 N. C., 617.

(292)

CHARLES LATHAM and others v. THOMAS E. SKINNER and others.

A vendor of lands having delivered a deed in fee to certain purchasers who were partners, upon their executing personal notes for the purchase-money, a sealed instrument was delivered some weeks afterwards by the purchasers to the vendor, which *expressed* no valuable consideration, but referred to the sale, and stated a wish to secure to the vendor the payment of the bonds, and thereupon provided that in case of failure by the purchasers to make payment as their notes fell due, the vendor "should have such a lien [in and to such tract] and to that extent as will save him harmless":

1. *Held,* that there being no valuable consideration, the paper could not, in any event, be set up either as giving a lien, or as a contract to give a lien.
2. *Also,* the partnership having been subsequently dissolved, that the outgoing partner who had taken a bond from his co-partners to indemnify him against the firm debts, had thereafter no equity to subject the partnership funds to the payment of the debt to the vendor; and therefore, that the vendor had none through him.
3. The relief administered in equity must be limited to that sought by the frame of the bill.
4. Whether there may be an *express* "vendor's lien" in this, *Quære?*

BILL *to declare and enforce a lien,* filed to Fall Term, 1867, of WASHINGTON, and at that term set for hearing upon bill, answers and replication—the defendants admitting the due execution of certain exhibits filed with the bill. The cause was thereupon transmitted to this court.

The bill was filed by Charles Latham, S. H. McRae and A. M. Lewis, and stated that a sale of certain land therein described had been made by McRae to Lewis, Thomas E. Skinner and Charles W. Skinner, Jr., on 4 May, 1859, and that a deed in fee was accordingly executed,
(293) and the purchasers gave their notes for the price; that upon 14 June, 1859, the purchasers, to secure the payment of their notes, executed to McRae a trust deed or mortgage, or deed in the nature thereof, conveying and intending to convey to him a lien upon the land sold, which trust deed was upon 25 November, 1859, duly recorded in the Register's office of Washington County.

A copy of that trust deed was appended, and was as follows:

Whereas, on the 4th day of May, A. D. 1859, a bargain and sale were entered into and agreed upon by and between Sherwood H. McRae, of the one part, and Thomas E. Skinner, Charles W. Skinner and A. M. Lewis, of the other part, in regard to a tract of land in the county of Washington, N. C., containing 6,049 acres, more or less, as *per* boundary, etc., in a deed executed by the said S. H. McRae to the said Skinners and Lewis bearing date of 4 May, 1859, for the consideration therein set forth. And whereas, the said Thomas E. Skinner, Charles W. Skinner and A. M. Lewis have executed to the said S. H. McRae their notes in three installments or payments, with the amount of eight thousand sixty-two dollars and sixty-two and two-thirds cents each, the first being due 1 January, 1861, the second on 1 January, 1862, and the third and last on 1 January, 1863; and whereas, it is desirable by the said Skinners and Lewis to secure to the said S. H. McRae the payment of these several recited notes as demanded thereby; therefore *witnesseth,* that the said Thomas E. Skinner, Charles W. Skinner and A. M. Lewis doth for themselves, their heirs, executors, administrators, etc., a lien and indemnity in and to the said tract of land to that extent, and for the purpose of securing and making effectual the payment of the purchase money, with legal interest, as per contract and notes; and in case of failure of the said Skinners and Lewis and their rep-
(294) resentatives, to make the said payments as per said notes at or within a reasonable time according as they fall due, then and in that case the said McRae shall have such a lien and to that extent as will save him harmless in securing the said purchase money and no more. In which case this obligation to be void. Given under our hands and seals, this 14 June, A. D. 1859.

A. M. LEWIS. [Seal.]
THOS. E. SKINNER. [Seal.]
C. W. SKINNER. [Seal.]

The bill then proceeded to state that on the same day that McRae's deed to them was dated, the Skinners and Lewis entered into articles of

partnership which recited the purchase and constituted the land a part of the partnership fund; and that this partnership continued until 26 April, 1860, when it was dissolved as to Lewis, and a bond was executed between the former partners which, amongst other things, recited the existence of firm debts and expenses, and engaged the Skinners to indemnify Lewis against them (except as to $500 of expenses, which he agreed to lose), and particularly against the purchase money due to McRae, and bound Lewis, whenever such debts should be discharged, to convey his one-third part in the land to the Skinners. The bill also set forth that two of the notes for the purchase money of the land were still unpaid, and that Lewis was still liable for them.

It then alleged that on 5 September, 1866, the Skinners conveyed all their interest in the land in trust to secure certain individual debts of their own; and that on 4 October, 1866, Thomas E. Skinner made a further conveyance of his interest therein to secure certain individual debts of his own. Also that complainants had applied to the Skinners to pay to Latham (as assignee of McRae), the notes remaining due, or to release their equity of redemption, etc., and comply (295) with the agreement of 26 April, 1860, but without success.

The prayer for relief was that the respective liens upon the lands should be ascertained and declared; that those lands should be sold in satisfaction of such liens, and for further relief; and process was prayed for against the Skinners and the trustees under the deeds of September and October, 1866.

The opinion of the court renders it unnecessary to state the contents of the answer.

W. A. Moore, and *Phillips & Battle,* for the complainants.
Bragg and *Smith, contra.*

PEARSON, C. J. The general scope of the bill is to subject the land set out in the pleadings to the payment of the notes given to the plaintiff McRae by the defendants Thomas and Charles Skinner, (297) and the plaintiff Lewis, on the ground that the instrument executed to McRae by Thomas and Charles Skinner and Lewis, dated 14 June, 1859, is a mortgage or "an instrument in the nature of a mortgage," and has the legal effect of creating a lien on the land for the payment of the debt secured by the notes. The bill, in the second place, alleges the existence of a copartnership between Thomas and Charles Skinner and Lewis in respect to the land, that the debt was a copartnership debt, and seeks to set up an equity to have it paid by the land, under and by force of the equity of Lewis as one of the partners in reference to the individual debts due by the defendants Thomas and

Charles Skinner to the other defendants. The difficulty in the case grows out of the nondescript character of the instrument, dated 14 June, 1859. It is not a mortgage, or "an instrument in the nature of a mortgage," that is, as understood in the books, a conveyance to a third person in trust to secure a debt, nor can it in any way have the legal effect to create a lien. The most that it can amount to is a promise that McRae shall have a lien on this land to secure his debt. When the legal estate is transferred, the party passing it may create a use by simple declaration, or he may reserve a power to create a use afterwards by a declaration, or he may give to a third person a power to declare the uses. But if the legal estate is not transferred a use can only be created by a bargain based on a valuable consideration, which is said to raise the use, or by covenant to stand seized, based on a good consideration, to wit, natural affection. This is familiar learning. See Sanders on "Uses and Trusts."

(298) The same principle applies to trusts, to wit, uses not coming within the operation of the Stat. 27, Hen. VIII. For this reason it is held that a power of appointment, or a power of sale, can not be created by deed of bargain and sale, or a covenant to stand seized. These powers are, in effect, a mere delegation to a third person of the right to raise a use or trust by declaration, and the party can not himself create a use of trust by mere declaration, unless he transfers the legal estate. This doctrine is discussed and explained in *Smith v. Smith,* 46 N. C., 135.

The instrument under discussion does not transfer the legal title. A lien is a trust, consequently a lien can not be created by a mere declaration, unless the legal estate be transferred. So this instrument can not have the effect of creating a lien or trust, although it would seem to have been the intention of the parties to do so. It is a *naked* declaration of a trust, and the bill, so far as it seeks to enforce a subsisting lien, must fail—for under the most benignant application of the rule, *"ut res magis valeat quam pereat,"* the instrument can not be allowed to have the effect of creating a trust without a violation of the settled principles of equity jurisdiction.

The point taken on the argument, that although the vendor's lien for the purchase money has not been adopted by our courts, yet that has reference to an implied lien, and does not exclude an *express* lien—is not presented by the facts; for the deed of McRae is an absolute one, and does not contain a declaration of any trust in favor of the grantor to secure the purchase money, which we suppose might have been done, and might have amounted to an express lien. But it is useless to speculate on the matter, as there is no such trust declared, and no express reservation of a lien.

But it is said, suppose the instrument does not create a lien, it may, under the doctrine of specific performance, be carried into effect as an *agreement to give a lien.* There are two objections to this position; in the first place the bill is not framed with that view. It (299) does not allege the instrument to be an agreement to give a lien, and the court must confine itself to the allegations in the pleadings—otherwise we are "at sea." But, suppose this difficulty out of the way, a Court of Equity never interferes to compel the specific performance of an agreement unless it be supported by a valuable consideration. Here there is no consideration; it is *nudum pactum,* for McRae had executed title to the land and accepted the notes of the purchasers. The debt therefore was a matter personal, and although it originated as the price of the land, it was no longer connected with it, and stood on the same footing with any other debt. *Miller v. Miller, ante,* 85. In other words, the consideration was past. There is no new consideration alleged, no abatement of the debt, no extension of the time of payment. And the instrument seems to have been executed simply because, to use the language of the parties, "whereas it is desirable by the said Skinner and Lewis to secure to the said McRae the payment of the several notes," etc.

On the footing of the copartnership entered into by Thomas and Charles Skinner and Lewis in respect to the purchase of this land, whereby the debt become a copartnership debt, the plaintiff McRae might have worked out an equity, through the plaintiff Lewis, to have this debt satisfied by the land as a partnership fund, in preference to the individual creditors of the parties, but for the fact that by the deed of 26 April, 1860, the copartnership dissolved and Lewis withdrew from the firm, assigned all the partnership fund over to Charles Skinner and Thomas Skinner, and agreed to submit to a loss of $500 in consideration of their covenant to indemnify him against the debts and liabilities of the firm, and to secure the performance of this covenant reserved to himself his *"individual share of one-third of the tract of land."* With this security he was content, and is at liberty to (300) make the most of it. *Potts v. Blackwell,* 56 N. C., 449; S. c., 57 N. C., 58. By a bill properly framed he may enforce the specific performance of this covenant for indemnity, and may obtain a decree that Thomas and Charles Skinner pay off and satisfy the debts of the firm, and that his individual one-third of the land shall be applied to that purpose; but beyond this one-third the decree will be merely personal against Thomas and Charles Skinner, and can not be made to attach to the other *two-thirds;* for he has given over these two-thirds to Thomas and Charles Skinner, relying on their personal obligations, and on his individual one-third of the land as a security; of course,

therefore, they were left at liberty to dispose of the two-thirds, and could dispose of them either to pay off the liabilities of the late firm, or to pay their individual debts, as they should see proper. In other words Lewis retained no right to control the disposition of these two-thirds, and the consideration moving him to this arrangement was the personal understanding of Charles and Thomas Skinner to save him harmless from the debts of the firm.

PER CURIAM. Bill dismissed with costs.

Cited: Blevins v. Barker, 75 N. C., 437.

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(301)

T. W. TURLEY v. J. P. NOWELL.

1. In suits for specific performance, in the absence of allegations of fraud or imposition, the court will not review decisions made by the parties as to the comparative values of the property in question and the article in which it was paid for.
2. Contracts, the condition of which is Confederate money, are not therefore illegal.

BILL for a specific performance of a contract to convey land, filed to Spring Term, 1866, of CLEVELAND, and set for hearing and transferred to this court at Fall Term, 1867.

The bill sought a specific performance of the following contract:

"Received, Shelby, N. C., December 1, 1864, from T. W. Turley, six thousand dollars in Confederate notes, in full of the house and lot in the town of Shelby, being the same on which I now reside, which I have sold to the said Turley and for which I will execute a warranty deed as soon as presented. J. P. NOWELL."

The contract was admitted by the defendant, but he declined to perform it upon the ground that at the time when the property was sold it was worth at least one thousand dollars "in good money," and that the scrip received by him under the contract was not worth, by the *scale,* more than one hundred and seventy dollars; and that very soon after the contract was made he became satisfied of this, and offered to the plaintiff to pay back what he had received, also to make a deed if he would pay him a reasonable sum for the same, etc.

(302) There was a replication, but no proofs; and the cause was set down upon bill, answer and exhibits.

Bynum, and *Phillips & Battle,* for the plaintiff.
Merrimon, contra.

PEARSON, C. J. The plaintiff is entitled to a specific performance of the contract. The parties were their own judges as to the value of the property and the value of Confederate notes, and there is no allegation of fraud or imposition. Indeed the only ground on which the defendant resists the equity of the plaintiff is the fact that by the result of the war Confederate notes became of no value, but he needed such notes at the time he made the contract, accepted them in payment for the land, and must abide the loss.

That the contract was not illegal is settled. *Phillips v. Hooker, ante,* 193.

PER CURIAM. Decree for the plaintiff.

(303)

HENRY LEWIS and others v. E. W. WILKINS, Ex'r., etc.

1. Where an agreement was entered into between the owner of a farm and another person, by which the former was to furnish the farm to the latter for two years with the stock of hogs and cattle upon it, and mules, provisions and farming implements; and the latter was to give his personal attention to the farming operations, have the entire control of the farm and furnish the twenty-two laborers that were required; and thereupon the two were to share equally the produce of the farm: *Held,* that the agreement constituted an agricultural partnership, that the share going to the owner of the farm was not *rent;* and that the relation between the parties was not that of landlord and tenant; *and therefore,*
2. *Held, further,* that upon the death of the owner of the farm before the expiration of the two years, his *share* which accrued thereafter did not go to the devisees of the farm, but was included under a bequest to another, of "the crop, stock and farming utensils, and all other perishable property on said farm."
3. The doctrine that rent follows the reversion applies in favor of devisees of the reversion, as well where it is directed to be sold and the proceeds divided amongst them, as where it is given specifically.

BILL, filed to Fall Term, 1867, of NORTHAMPTON, and at that time set for hearing upon bill and answer, and transmitted to this court.

The complainants were the children of Ellen Lewis, deceased, and the children of William M. Wilkins, deceased, by his second marriage, and the defendant was the executor of Edmund Wilkins, deceased, late of the county of NORTHAMPTON.

The testator died 20 January, 1867, and by his will, which was afterwards duly proved, among other things devised certain lands called "*The Meadows,* to be sold upon a credit, and the proceeds of the sale

(together with the slaves on said farm) to be equally divided, one-half to the children of my niece, Ellen Lewis, and the other half to
(304) the children of my brother, Dr. W. W. Wilkins, by his second marriage." By a subsequent clause he gave as follows: "I will the crop, stock and farming utensils and all other perishable and personal property, except the negro slaves, on said farm in the Meadows and the Peele lands in District No. 10 aforesaid, and the proceeds of said sales of all said crop, stock and perishable and personal property in said District No. 10, except the negro slaves as aforesaid in District No. 10, together with all debts due me and money deposited and all my railroad company bonds and stocks after paying all just debts, I give and bequeath to my said nephew, F. W. Wilkins, whom I hereby appoint my whole and sole executor of this my last will and testament. This 19th day of August, 1861."

On 1 January, 1866, the testator entered into the following contract with one Thomas C. Parker:

"These articles of agreement made, etc., witness that the said Wilkins is to furnish to the said Parker the farm known as the Meadows, for two years from this date. The stock of cattle and hogs are to remain on said farm, and said Parker is to have one-half of the milk and butter made on said farm, but no other interest or part of the proceeds of said cattle, and at the end of each year the fattened hogs are to be equally divided between the said Parker and said Wilkins, and the said Wilkins is to furnish thirteen good mules for the two years; and in case of the death of one or more, others are to be bought at joint expenses to supply their places and to belong to said Wilkins at the expiration of said lease; and for the present year 4,500 pounds of pork and 306 barrels of corn, and long forage sufficient to feed all the stock; and should there be a sufficiency made on the farm of corn, pork and long forage the present year, 1866, then out of the said Wilkins' share he shall furnish the same articles, and the same articles and the same amount for
(305) the year 1867. The said Wilkins to furnish all the necessary farming implements for conducting said farm for the year aforesaid. And the said Parker does agree on his part to furnish twenty-two able bodied laborers to work on said farm and to give the farm his whole and entire personal attention and skill, and at the expiration of the two years specified to surrender the farm in good condition, except dams and river fences, and the entire stock of cattle, and stock-hogs, and should the farm not yield a sufficiency in corn, pork and long forage to make the quantity aforementioned, either in the years 1866 or 1867, then the said Parker is to make up the deficiency. And the said Parker doth further agree to pay all taxes on the real estate of said farm and half of the taxes on the fat hogs killed, the said Wilkins paying

all the other taxes chargeable on the said farm. It is agreed between the parties that when the products are ready for market the said Wilkins and Parker shall equally divided share and share alike. It is further understood that said Parker shall have entire and absolute control and management of the farm, and should there be any difference or misunderstanding between said Wilkins and Parker, they are to refer it to three disinterested parties, each one selecting one and the two selecting a third, and their decision to be binding. And it is further agreed and stipulated between the said Wilkins and Parker that if either violates these articles of agreement, or any part thereof, the party so violating shall forfeit any pay over to the other party the sum of five thousand dollars. In witness," etc.

The bill alleged that, in the course of carrying out the contract between the testator and Parker, the crops for 1866 had been divided between them as agreed upon, but that the crops for 1867, consisting of corn, wheat and cotton, were still undivided, and that the defendant claimed that the share of the testator therein devolved (306) upon *him* in virtue of the second clause of the will above set out, whereas *they* were advised that the said productions are *rent,* and so go with the land as devised to them under the first clause (above).

The prayer was that it might be declared that the complainants are entitled to the proceeds of the sales of said lands, and for further relief, etc.

The answer submitted to any decree that might be made; but denied that the crops in question are *rent,* inasmuch as they were made to a large extent by the teams, agricultural implements, supplies of provisions, etc., that by the will were given to the defendant, and thus are either his only, or belong to him and the complainants in the ratio of their respective contributions of the means used in producing them, etc.

Moore, for the complainants.
Bragg, contra. (307)

PEARSON, C. J. We agree with Mr. Moore that "rent service" passes with the reversion as incident thereto, and that a purchaser, devisee or heir, taking a reversion after a life estate or a term of years, becomes entitled to the rent which afterwards accrues.

We also concur in the position that when a reversion is by will directed to be sold, and the price divided among several, as in our case, the purchaser of the reversion would be entitled to the rent. This fact would increase the amount for which the reversion would sell, and add that amount to the fund for division; so, the devisees, to whom the fund is given, would get the rent, and the case does not differ from one

where there is a direct devise of the reversion; indeed the devisees, when an actual partition could be made without prejudice, would be allowed an election to take the land instead of the money.

We also agree that "rent service" need not be payable in money, but may be payable as well in grain, or beef cattle or the like. In
(308) the one case it is called "black rent," in the other "white rent," that is, "silver rent." We agree also that "black rent" need not be a certain amount of grain, etc., but the amount may be left for the time uncertain, to be fixed by the crop which the tenant actually makes, as one-fourth or one-third, which the tenant is to render or deliver to the landlord as rent.

But we do not concur in the position that the legal effect of the contract entered into by Wilkins and Parker was to establish the relation of landlord and tenant, so as to make the part of the crop, to which Wilkins was entitled, "rent service," which would follow the reversion as an incident thereto.

On the contrary, it is merely an arrangement made by Mr. Wilkins to enable him the more conveniently to *carry on his farm,* after his slaves were set free. If he had besides furnishing the horses, mules and other things, also agreed to furnish the hands and let Parker have a part of the crop for his services as overseer, the idea of "rent service" would never have suggested itself, and we are unable to see how the circumstance that Parker agreed to furnish the hands can at all vary the case. In the latter case as in the former, the value of the things furnished by Wilkins, in addition to the use of the land, are so blended that the relative value of each can not be estimated by any data furnished by the articles of agreement, and there is no amount either certain or which can be made certain, to be rendered as a return for the use of the land, which is necessary in order to constitute "rent service"; nor is Wilkins' half of the fatted hogs, nor his half of the crops, to be rendered and delivered by Parker to Wilkins—but the hogs and the crops are to be equally divided by them, share and share alike, thus making a sort of agricultural partnership, which is to continue for two years, and which does not constitute the relation of landlord and tenant; although Parker, by furnishing the hands and agreeing to pay
(309) a part of the expenses of the farm, placed himself upon somewhat higher ground than a mere "cropper," and was to have the exclusive direction and control of the farming operations.

We therefore declare our opinion to be that the crop raised on "the Meadows" in 1867 does not belong to the plaintiffs and devisees, but, that it passes to the defendant under the bequest, viz.: "I wish the crop, stock and farming utensils, and all other perishable property and personal property on said farm, etc., to belong to my nephew, E. W.

Wilkins." If the testator had furnished the hands, besides the other things, and paid the overseer himself, the defendant would have been entitled to the whole crop. As it is, he only gets the one-half of the crop, because the testator had adopted a different mode of carrying on his farm, whereby he was only to have half of the crop, and his partner, Parker, was to have the other half.

Although the articles of agreement between Wilkins and Parker presented no serious difficulty as to its construction, we have discussed it somewhat fully because we are aware that, in the present condition of the country, contracts to carry on farming operations in a way similar to this are very generally resorted to, and, to prevent litigation, it is well to point out wherein they are plainly distinguishable from "leases and terms for years."

There will be a decree in conformity to this opinion.

PER CURIAM. Decree accordingly.

Cited: *S. v. Burwell,* 63 N. C., 663; *Reynolds v. Pool,* 84 N. C., 39; *Curtis v. Cash, Ibid.,* 43; *Lawrence v. Weeks,* 107 N. C., 123.

(310)

GEORGE W. MAY v. WESLEY HANKS and others.

1. One who is put upon inquiry by certain facts within his knowledge, is affected with notice of everything that such inquiry would have discovered.
2. In the absence of deliberate fraud upon the part of the owner the title to an equitable estate in land is not bound by his conduct as creating *an estoppel-in-pais.*
3. Courts of equity will not relieve a party unless his proofs support his allegations, and the latter state a case entitled to relief.

BILL for specific performance, etc., filed to Fall Term, 1863, of CHATHAM, and at Fall Term, 1866, set for hearing upon pleadings and proofs, and transmitted to this court.

The facts were that in 1856 the plaintiff bought of Mr. Rencher the land mentioned in the pleadings, at the price of $443.60, for which he executed to Rencher his note, and thereupon took from him a bond to make title on payment of the purchase money; that afterwards, in November, 1856, the plaintiff having failed to pay the purchase money, and it being necessary for Mr. Rencher to be absent from the State for several years, it was agreed that the latter should execute a deed for the land to the defendant Hanks upon his signing the note as surety for May, and executing to Rencher a bond to make title to the plaintiff on the payment of the purchase money with the interest—all of which

was accordingly done; that afterwards, in 1858, Hanks, becoming much embarrassed, executed a deed to one Jackson in trust to sell and pay off certain creditors of Hanks. In this deed, contrary to the (311) trust and confidence reposed in him by Mr. Rencher and the plaintiff, and in direct violation thereof, Hanks included the land mentioned in the pleadings, and it was sold by Jackson, the trustee, and bought by the defendants Harman H. Burke and Millikin. At the time of this sale, the defendants Harman H. Burke and Millikin had full notice of the equity of the plaintiff and of Mr. Rencher, and of the breach of trust which had been committed by Hanks, and which they were aiding him to consummate.

Haughton, for the complainants.
Phillips & Battle, contra.

PEARSON, C. J. (After stating the facts as above.) The defendant William C. Burke had notice, either express or by having his attention called to such facts and circumstances as ought to have put any prudent and conscientious man upon inquiry, so that he is affected with notice.

The plaintiff is entitled to compensation from Hanks for the breach of trust, if he is able to make it, and also from the other defend- (312) ants, Harman H. Burke and Millikin, for the aid and countenance given by them to Hanks; and also has an equity to follow the land into the hands of the other defendant, W. C. Burke, and call for a conveyance from him, together with an account of the *mesne* profits, if he has received any, so that the plaintiff may have his land on payment of the purchase money, unless the defendant, W. C. Burke, has set out matter in his answer sufficient to repel the equity of the plaintiff, by *alleging* and *proving* a transfer or abandonment of the plaintiff's equitable estate to him before he bought the land from his codefendants, Harman H. Burke and Millikin. This is the only question in the case, and the difficulty about that is not only the want of proof, but the absence of all sufficient allegations in the pleadings; and we must again call the attention of members of the bar to the point, that proof without allegation is no better than allegation without proof. Hanks files a separate answer, and Harman H. Burke, Millikin and W. C. Burke file a joint answer, and seem disposed to embark in the same bottom. The only allegation of a transfer or abandonment of the plaintiff's right in favor of the defendant W. C. Burke is in these words: "These defendants, further answering, say that the said H. H. Burke and Millikin did convey the land to W. C. Burke, as set forth in plaintiff's bill, and that said land, when it came to be run off, was surveyed by Nathaniel Clegg, at the request both of May and the defendant W. C.

Burke, and that the plaintiff May was present as one of the *chain carriers,* and assented thereto, and set up no claim to the land; and that last August, one year ago, the plaintiff May offered the defendant W. C. Burke $1,000 for the land mentioned in the will, and set up no claim to it."

So there is not the slightest allegation of any transfer or abandonment of the plaintiff's equitable estate, in favor of the defendant, W. C. Burke, *at any time prior* to his purchase from his codefendants, Harman H. Burke and Millikin; and all we have afterwards (313) is the fact that the plaintiff was present, and acted as chain carrier in running off this land from other land in which the mother of May owned the fee simple, whereas in this she only owned a life estate, and that May set up *no claim to the land,* and actually offered $1,000 for it some time afterwards. So the pleadings show only an *ex post facto* estoppel in regard to land!

Upon the proof we find, although it was hardly necessary to go into them, that after Harman H. Burke and Millikin got a conveyance for the land from Jackson, W. C. Burke applied to them to buy. They told him they could not sell, *"as May was entitled to the refusal."* Why, and how? should have been Burke's inquiry; and their reply would have been: "Hanks is cheating him out of his land. We are implicated in the fraud, and wish to let him have the land if he is able to give as much as we can get from anyone else." However, W. C. Burke applies to May, who, in effect, tells him that Hanks and H. H. Burke and Millikin have defrauded him out of the land; that he is not able to help himself; that he might have paid up what he is to give Rencher, but these accumulated difficulties were too much for him; he could not stand it; that if the land was to be sold, he would rather W. C. Burke should have it than anyone else, etc. And W. C. Burke, taking advantage of the distress of his neighbor, and the helpless condition to which he had been reduced by the conduct of his codefendants, buys the land from them; and now, in a Court of Equity, insists that May should not be allowed to set up his equitable estate.

Had W. C. Burke paid May, say fifty or one hundred dollars, and taken a transfer of his equity in writing, Burke could only have held the title as security for the money advanced. As, however, he paid nothing, and took no writing or note or memorandum of the contract by May to transfer or abandon his interest in the land, the (314) transaction is void under the statute of frauds.

When the courts are called upon to apply the doctrine of equitable estoppel on the ground of a transfer, or waiver, or license to sell, either expressly or by implication from the conduct of the party, then if the subject be land, as in *Pickard v. Sears,* 33 E. C. L., 117, cited in

West v. Tilghman, 31 N. C., 166, the statute of frauds will apply; but when the aid of the courts is invoked on the ground of direct *fraud* in fact, as in *Sanderson v. Ballance,* 55 N. C., 322; *Blackwood v. Jones,* 57 N. C., 54, where one party *knowingly* and intentionally misleads another, although the subject be land, relief will be given, on the ground that otherwise the statute of frauds will be made the instrument of fraud.

There will be a decree for the plaintiff in conformity to this opinion, and the cause will stand for further directions, should a sale of the land become necessary or should Mr. Rencher become a necessary party, that he may be bound by the decree in regard to the balance due for purchase money.

PER CURIAM. Order accordingly.

Cited: Brendle v. Heron, 88 N. C., 387; *Hill v. R. R.,* 143 N. C., 566; *Wynn v. Grant,* 166 N. C., 45.

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(315)

CHARLES J. GEE and others v. PETER R. HINES.

1. Where it appears upon the face of a bill (or petition having the requisites of an original bill) that the relief sought may be had in a cause already pending, the bill is demurrable and will be dismissed.
2. Such bill will not be treated as *notice of a motion in the original cause.*

BILL against a purchaser of land sold under a decree in a former petition, filed to Fall Term, 1867, of HALIFAX. A general demurrer being put in and set down for argument, the cause was transferred to this court.

The bill was filed as an *interlocutory petition,* and sets forth that some of the plaintiffs in the present cause, at Spring Term, 1860, of HALIFAX, filed a petition against the others as tenants in common with them, for the sale of a tract of land; that the land was sold under a decree of the court, and the defendant, Peter R. Hines, became the purchaser; that he gave his bonds for the purchase money, payable in June and December, 1861; that the bonds still remain unpaid, but that the title to the land has not been conveyed to the defendant; that he was admitted into possession and has been committing waste on the land. The prayer was that the land be resold unless the defendant shall pay the money into the office, and in case of resale that the defendant be required to account for his occupation and waste, and for further relief.

(316) *Moore,* for the plaintiffs.
Rogers & Batchelor, contra.

PEARSON, C. J. There is nothing to distinguish this case from *Rogers v. Holt, ante,* 108, and the other cases cited in support of the demurrer.

These authorities are decisive.

We can not without confounding all idea of equity pleading adopt the suggestion of Mr. Moore, that this bill (for it has all of the requisites of an original both in form and substance), may be treated as a mere notice of a *motion* in a cause.

Let the demurrer be allowed and the

PER CURIAM. Bill dismissed.

Cited: Baird v. Baird, post, 322; *Lord v. Beard,* 79 N. C., 11.

(317)

NATHANIEL H. BAIRD v. HENRY R. BAIRD, LARKIN BROOKS, and others.

1. A *lis pendens* being notice to all the world, a sale of land which is the subject of a suit in equity, before a decree is rendered, will not be regarded, and the land may be sold under an execution issued upon the decree when rendered.
2. In such case a supplemental bill to enforce the decree in the original suit, making the purchaser of the land a party, is unnecessary, and will be dismissed upon demurrer.

BILL, in the nature of a supplemental bill, filed to Spring Term, 1867, of PERSON. A demurrer having been put in was set down for argument at Fall Term, 1867, when the demurrer was overruled by *Mitchell, J.,* and the defendants appealed.

At Spring Term, 1858, of PERSON, an *ex parte* petition was filed by the plaintiff N. H. Baird, the defendant, Henry R. Baird, and others, devisees and legatees of William Baird (who died in the year 1857), praying for a valuation by commissioners of certain lands conveyed by the testator to the petitioners by deeds of gift in his lifetime, and for a partition of slaves bequeathed in his will in accordance with the following provision: "I direct that all the residue of my estate be equally divided between my sons, John, etc. (naming them), with the understanding that each is to account for what I have advanced to each in my lifetime, so as to make all as nearly equal as possible. I have been negligent in keeping accounts of advancements, and I trust they will do justice among themselves," etc. Commissioners were appointed according to the prayer of the petition, and at (318) Fall Term, 1859, they made their report, stating the valuation of the several tracts of land, and charging the more valuable with the

payment of certain sums to render the shares equal. Exceptions to the report were filed by Henry R. Baird, and it was set aside and other commissioners were appointed. They made their report, which was of a similar character to the other, to a subsequent term, and exceptions to it were filed by John Baird and Nathaniel H. Baird. The cause was continued to Spring Term, 1867, when the exceptions were withdrawn and the report confirmed. The decree confirming the report, in accordance therewith, ordered Henry R. Baird (one of the defendants in this cause) to pay to Nathaniel H. Baird (the plaintiff) the sum of $1,940.84⅓, to make the share of the latter equal, etc.

The present bill recites these proceedings and states that of 1,788 acres conveyed to the defendant H. R. Baird by his father, William Baird, by deed of gift in his lifetime, H. R. Baird had sold portions before the death of his father and also that after his death (by deed dated....), he conveyed to the defendant John Baird 200 acres, and (by deed of trust, dated 26 September, 1866), to the defendant Larkin Brooks 600 acres upon trust to secure the payment of certain debts due to Josephus Younger and others, who were made defendants. It was also alleged that the *cestui que trust* sued out attachments against the defendant H. R. Baird in the year 1866, but prior to the date of the deed to Larkin Brooks, and had them levied on a portion of the 1,788-acre tract, and that at September Term, 1866, of the County Court of Person judgments therein were rendered against H. R. Baird, but that no sale had been made.

The prayer of the bill is that the defendant be enjoined from selling the land conveyed to him under the deed in trust, that the *cestuis* (319) *que trust* may be enjoined from levying their executions upon and selling any part of the original tract of H. R. Baird; that the said tract, or so much thereof as might be required, should be sold under an order of the court, and the proceeds applied to the payment of the sum charged by the former decree in favor of the plaintiff against the defendant H. R. Baird; and for further relief.

Phillips & Battle, for the appellant.
Graham, contra.

BATTLE, J. After a careful examination of this case we are unable to perceive any principle, upon which the bill can be sustained. It is said by the counsel for the plaintiff to be a supplemental bill, filed for the purpose of having a former decree executed. With that view is there the slightest necessity for it? We think not. The proceedings in the two causes show that by a decree made in the first cause, at the Spring Term, 1867, of the Court of Equity for PERSON, a certain

sum of money was charged upon a certain tract of land belonging to the defendant Henry R. Baird in favor of another tract belonging to the plaintiff, and was ordered to be paid by the former to the latter. While the suit was pending, a part of the land of Henry R. Baird was by him assigned to some of the other defendants, and the present suit to execute the decree was brought to the next succeeding term of the court. It seems to be based upon the supposition that the lands of the defendant Henry R. Baird, in the hands of his assignees, could not be reached by any process of the court, without a supplemental bill to bring them in as parties. In that we are of opinion that it erred. The alleged lien was upon the land, and as the assignees acquired their title to it by purchase while the former suit was going on, the decree which was finally made in it could be enforced at once without making them parties. The plaintiff had the right to have fruits of his (322) decree soon after it was rendered, by any means which the law allowed to make it most effectual. If it were necessary to proceed against the land itself, which was charged with the payment of the money, the land might be taken and sold no matter into whose hands it had come while the suit was pending. As to the effect of a *lis pendens,* see Adams Equity, 157, and the cases referred to in note 2 of the American edition.

It having been thus shown that the present suit was entirely unnecessary to give to the plaintiff the full effect of the former decree, it follows that the bill can not be maintained, but must be dismissed. See *Rogers v. Holt, ante,* 108, and *Gee v. Hines, ante,* 315.

In coming to the conclusion at which we have arrived, it will be perceived that we have taken it for granted that the plaintiff is right in giving to the decree in the former suit the same effect that it would have had as a decree for partition under the Rev. Code, ch. 82, sec. 1, in which a dividend of greater value is charged with a sum of money in favor of a dividend of inferior value, for equality of partition. It is manifestly unnecessary for us to decide whether it is so or not, for if it be not so, then of course the bill will not lie, because it is based solely upon the correctness of the contrary supposition.

PER CURIAM. Bill dismissed with costs.

Cited: Todd v. Outlaw, 79 N. C., 240; *Daniel v. Hodges,* 87 N. C., 100; *Morgan v. Bostic,* 132 N. C., 751; *Timber Co. v. Wilson,* 151 N. C., 157.

(323)

R. O. LEDBETTER v. JOHN ANDERSON and others.

The interest of one who holds lands under a bond for title, the price not having been fully paid, is not subject to sale under execution; *therefore*, a purchaser at such a sale has no equity to file a bill against the parties to the bond, proffering to pay the money due thereon and asking that upon such payment he may have a title.

BILL filed to Fall Term, 1862, of RUTHERFORD, and at Fall Term, 1866, set for hearing upon the pleadings and proofs, and transmitted to this court.

The complainant alleged that he had purchased at execution sale the interest of the defendant Anderson in a certain tract of land, and had received a sheriff's deed therefor; that Anderson's interest was by virtue of a bond for title from the defendant Frazer; that he had offered to pay Frazer the balance due to him upon such bond, and now brings the same into court for the same purpose; that Frazer and Anderson had conspired to defraud him, etc.

The prayer was that Frazer be compelled to take the money and make a title, or that the land be sold for the plaintiff's indemnity, and for other relief.

The answers admitted that Anderson's title was under a bond from Frazer, and that a large portion of the purchase money was still due. After other statements which are immaterial here, they denied the charge of conspiracy, and submitted to the court whether the bill disclosed any equity, etc.

No counsel for the complainant.
Merrimon, contra.

(324) READE, J. From the bill, as well as from the answers, it appears that the defendant Anderson had only a bond for title to the land levied upon by the sheriff under whose sale the plaintiff purchased, and that Anderson had paid only a part of the purchase money. It is well settled that a purchaser of land holding only a bond for title, without having paid the *whole* of the purchase money, has no such interest in the land as is subject to execution. The plaintiff, therefore obtained no title by his purchase.

The case is not altered by his offering to pay the balance due, nor by his bringing the money into court. Having acquired no interest in the land, his offering to pay for it is no more than if he were to offer a certain price for any other tract of land and then file a bill to obtain a title.

PER CURIAM. Bill dismissed with costs.

Cited: May v. Getty, 140 N. C., 319.

(325)

BARNETT BRIANT and others v. JOSEPH CORPENING and others.

1. One who asks to have an absolute deed corrected into a mortgage, must *allege* and *prove* that a clause of redemption was omitted, by reason of *ignorance, mistake, fraud* or *undue advantage* taken of the bargainor; therefore,
2. No relief will be given where the only allegations are, that the bargainor executed the deed in absolute form, "but intended simply as a mortgage, *as will more fully appear by the proofs*"; and, that the contract was that the defendant, "having paid the debt to H, took the deed absolute on its face but agreed to make a title bond at a subsequent day to the plaintiffs, conditioned to re-convey on the payment of the debt," etc.

BILL, filed to Spring Term, 1866, of CALDWELL; answers having been filed, and replication taken, at Fall Term, 1867, it was set for hearing upon the pleadings and proofs and transmitted to this court.

As the cause went off upon a question of pleading, it is not necessary to make a *statement.*

Malone and *Bynum,* for the complainants.
Folk, contra.

BATTLE, J. The bill is filed for the purpose of converting a deed absolute on its face into a mortgage. To accomplish this, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage taken of the bargainor. There is no such allegation in the present bill. In one place it is stated that the plaintiff "executed a deed of conveyance for the above described land to defendant Corpening absolute upon its face, but intended simply as a mortgage, as will more fully appear by the proofs." (326) To this is added that "plaintiffs show that it was the contract and agreement of the parties that defendant Corpening, having paid the debt to Harper, took the deed absolute on its face, but agreed to make a title bond at a subsequent day to the plaintiffs, conditioned to reconvey on the payment of the debt, interest, etc., on the judgment in favor of Harper."

These are all the allegations on the subject, and not one of them amounts to a statement that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage. The necessity for such an allegation is shown in *Brown v. Carson,* 45 N. C., 272, and by several other cases in 3 Bat. Dig., Tit. Mortgage.

The defect in the bill for the want of proper allegations is not at all obviated by the statement that the facts "will more fully appear by the proof." A bill seeking relief in equity must contain all the necessary allegations, and then the proofs must correspond with and support the

allegations, or there can be no decree in the plaintiff's favor. See Abstracts in 3 Bat. Dig., Tit. Pleading, Subdiv. XIII.

It is unnecessary to go into an examination of the answer or the proofs, as the bill does not state a sufficient case for the relief which it seeks; and it must therefore be

PER CURIAM. Dismissed with costs.

Cited: Link v. Link, 90 N. C., 239; *White v. R. R.,* 110 N. C., 461; *Sprague v. Bond,* 115 N. C., 532; *Porter v. White,* 128 N. C., 44.

(327)

WILLIAM SHAVER v. JOHN SHOEMAKER and JOSEPH GENTILE.

1. A having made a bond for title to certain land to B, the latter contracted by bond to sell the same to C, and gave him possession: *Held,* that it was not competent thereupon for A and B to rescind their contract so as to deprive C of his equity—which, as he had already paid B, was, to obtain a conveyance from A upon paying him whatever was due to him upon his contract with B.
2. The *antedating* of an instrument, in a case where it did not appear to have been done with a fraudulent purpose, and where it had done no harm to others, punished only by refusing costs to the party involved in it.
3. A description of land as—A tract in Iredell County, containing 30 acres, adjoining the lands of William Shaver, Caldwell and others: *Held,* to be sufficient in a contract to convey.

BILL filed to Fall Term, 1858, of IREDELL—at Fall Term, 1864, set for hearing upon pleadings and proofs, and at Spring Term, 1867, transmitted to the Supreme Court.

The defendant Shoemaker sold to the defendant Gentile the tract of land in controversy, and executed to him the following bond for title: "Know all men by these presents, that I, John Shoemaker, of North Carolina, Iredell, am held and firmly bound unto Joseph Gentile in the sum of sixty dollars, to which payment I bind myself, my heirs and assigns, on condition that if the said John Shoemaker fail to make the said Joseph Gentile a good and lawful deed to a certain tract of land in the county or Iredell, containing thirty acres, adjoining the lands of William Shaver, Caldwell and others, when the said Joseph Gentile pays the said John Shoemaker the sum of thirty dollars—then the above bond to be paid, otherwise to remain in full force and virtue.

In witness whereof I have hereto set my hand and seal. 20
(328) February, 1854. John Shoemaker. [Seal.]" Subsequently Gentile sold the said land to the plaintiff, who took possession. Upon that sale Gentile, instead of making to the plaintiff a title bond, handed over to him the aforesaid bond which the defendant Shoemaker

had made to him. Gentile had not paid Shoemaker; and, subsequently to his sale to the plaintiff and after the plaintiff had paid for the land, he and Shoemaker agreed to rescind their trade, Shoemaker agreeing to take back the land and give up to Gentile the bond which he had for the price. But before that rescission, and about a year after he had sold to the plaintiff, he executed to the plaintiff precisely such a title bond as Shoemaker had executed to him, except that the consideration was ninety-five dollars, and the date was 15 November, 1855. But this bond was really executed about a year after it bears date, and was attested by the plaintiff's son, and was dated back to agree with the time when Gentile first agreed to sell the bond to the plaintiff.

Furches, for the complainant.
Clement, contra.

READE, J. (After stating the facts as above.) By the sale from Shoemaker to Gentile the latter took an equity in the land, and by the sale from Gentile to the plaintiff that equity passed to the latter. And the subsequent release by Gentile to the defendant Shoemaker did not affect the prior equity of the plaintiff, of which the defendant Shoemaker had notice.

It does not appear that Gentile ever paid Shoemaker for the land, so that the original price of thirty dollars and interest is still due. It does appear that the plaintiff paid Gentile for the land, but as Shoemaker has never been paid, he is entitled to be paid by the plaintiff before the latter can call upon him for the title. Whenever, therefore, the plaintiff shall pay the defendant Shoemaker the sum of thirty dollars, with interest from 20 February, 1854, or shall pay the (329) same into court for his benefit, the defendant shall make to the plaintiff a good and sufficient title to the land in controversy.

The objection was taken that the land is not so described in the title bond, as that a specific performance can be decreed. It is true that the description is not very full, but we think it sufficient.

It is evident that the plaintiff put a false date to the title bond which he took from Gentile; and if this had worked any injury to the defendant Shoemaker, it would have been sufficient to defeat the plaintiff's claim to the aid of this court in enforcing a specific performance. As it is, we so far discountenance the transaction as to give the plaintiff no cost.

There may be a decree in conformity with this opinion.

PER CURIAM. Decree for the plaintiff.

Cited: Pemberton v. McRae, 75 N. C., 499; *Barnes v. McCullers,* 108 N. C., 54.

(330)

LUCY GRISSOM and others v. ELBA L. PARISH and others.

A devise of land to A for life, and then to "be sold and the money arising therefrom equally divided between the then surviving children of A"—creates such an interest in the children as vests only at the death of A: *therefore*, a conveyance thereof made during A's lifetime by the husbands of two of the children who in the event survived, passed nothing, and their wives, at the death of A, were entitled to take the land specifically or to have it sold, as they might elect.

BILL for an injunction, etc., filed to Fall Term, 1867, of GRANVILLE. A demurrer having then been put in, it was set down for argument, and the case transmitted to this court.

The complainants were the only children who survived their mother, one Elizabeth Hester, who died in Granville County in 1864. They showed that one Thomas Reeks, who died in 1802, had devised a tract of land to his wife for life, and after that to the said Elizabeth Hester for life, "and at her decease my will and desire is that the said two hundred acres of land shall be sold, and the money arising therefrom shall be equally divided between the then surviving children of her, the said Elizabeth Hester"; that they were the only children who so survived, and that they were in possession of the said land. They also set forth that the defendants claimed that one of themselves, Elba Parish, was entitled to the land as assignee of the husbands of the complainants, under deeds executed in the lifetime of Elizabeth Hester, and to which complainants were not parties; and under such claim threatened to dispossess them and have the land sold; that the husband of the complainant, Lucy, had died in the lifetime of Mrs. Hester,
(331) and that Alexander Clark, the husband of the other complainant, was living and a party defendant to the bill. They also stated that they were advised that they had a right to elect to receive the land without a sale, and that they did so elect. The prayer was for an injunction, and for further relief.

No counsel for the complainants.
Edwards, contra.

READE, J. The devise to Elizabeth Hester for life remainder to such of her children as should be living at her death, did not vest any estate in the plaintiffs (her daughters) during her life, because it was uncertain whether they or either of them would survive her. Their interest was contingent, and was not, and could not have been, reduced into possession by their husbands in the lifetime of their mother. Therefore, at the time when their husbands attempted to convey the

lands to Parish, they had nothing to convey, and their deed con- (332) veyed nothing. *Arrington v. Yarborough,* 54 N. C., 72.

The plaintiffs have the right to elect to take the land instead of the proceeds of sale.

PER CURIAM. Demurrer overruled with costs.

Cited: Williams v. Hassell, 74 N. C., 436.

C. P. SMITH v. DAVID COBLE.

1. Where a note was endorsed and delivered upon a parol agreement that it should be security for money then borrowed of the endorsee by the endorser, a court of equity will enforce such agreement and enjoin an execution (here a *ca. sa.*) obtained at law by the endorsee.
2. To such a suit in equity the surety upon the *ca. sa.* bond is not a necessary party.

BILL, filed to Fall Term, 1863, of GUILFORD. At that term a demurrer was put in and set down for argument, and at Spring Term, 1867, the cause was transmitted to this court.

The bill stated that in 1859 the plaintiff borrowed of the defendant *four dollars,* and thereupon deposited with him a note upon one Causey for about sixty dollars, and at his request indorsed the said note—it being understood and agreed between them, however, that it was only a security for the repayment of the money borrowed; that afterwards the plaintiff tendered to the defendant such money, and requested him to give up the note, which the defendant refused to do, claiming that he had bought it; that afterwards the defendant had warranted him upon his indorsement, and obtained a judgment against him, (333) and subsequently had had him arrested under a *ca. sa.;* that he gave bond for his appearance under that execution with one W. M. Young as his surety, and that subsequently a judgment had been taken against them for not appearing, etc.

The prayer was for an injunction, and for other relief.

The defendant demurred for want of equity, and specially because Young was not made a party.

Phillips & Battle, for the complainant.

No counsel *contra.*

READE, J. If the allegations in the bill are true—and the demurrer admits that they are, the plaintiff's equity is to have the bond mentioned in the bill declared to be a pledge or security for the sum of $4, lent by the defendant to the plaintiff, and, upon the payment of that

sum, with interest, by the plaintiff to the defendant, to have a perpetual injunction against the *fieri facias,* which the defendant has sued out against the plaintiff and his surety, Young; and also to have the defendant deliver up the bond to the plaintiff with the defendant's indorsement without recourse; or, if the defendant has collected the amount of the bond out of the obligor, then the plaintiff is entitled to an account.

The objection that the plaintiff's surety, Young, is not, and ought to be, a party plaintiff, can not be sustained.

The demurrer is overruled with costs. The injunction will be continued until the hearing.

PER CURIAM. Demurrer overruled.

(334)

ROBERT M. HENRY v. WILLIAM L. HENRY.

1. Words, however disparaging or abusive, are not *scandalous* in equity pleading, unless they be also *impertinent.*
2. Where a bill was filed for the specific performance of an alleged contract, and instead of merely setting out the contract, and alleging its non-execution as a ground for the prayer, it recited, by way of inducement, a train of circumstances, which went to show ingratitude and baseness on the part of the defendant in refusing to execute the contract: *Held,* that an answer which set up as a defense, that the contract was a forgery by the plaintiff, was not liable to exception for *scandal,* for detailing circumstances corroborative of the averment.
3. In such a case, the court *suggested* that the bill be amended by striking out the statement of circumstantial evidence, and that thereupon the defendant put in a plea denying the execution of the contract, so that an issue might be directed for trial by a jury at law.

BILL for specific execution of a contract, and for an account, filed to Fall Term, 1864, of BUNCOMBE. The cause was continued from term to term until Spring Term, 1866, when an answer was put in. Exceptions to the answer were filed and referred to a commissioner, who reported recommending that they be sustained. His Honor, *Shipp, J.,* at Fall Term, 1866, sustained the exceptions, and the defendant appealed.

The bill stated that the plaintiff and defendant are brothers; that their father, Robert Henry, a very old man, before his death in 1863, owned a large estate, real and personal, and that their mother also had a separate estate of considerable value; that in the year 1850 their father contemplated disposing of his property by will, and actually executed what purported to be a will; that he intimated to the plaintiff and defendant what he intended for them respectively; and the defend-

(335) ant became dissatisfied and complained to the plaintiff that the latter had received, or would receive, more in value than himself;

that thereupon the plaintiff, for the sake of harmony and from brotherly affection, proposed to the defendant that they should become joint and equal owners of all property that they had received, or might thereafter receive, from their parents; that the defendant, thinking he would be the gainer by such arrangement, readily consented and articles of agreement to that effect, under seal, were duly executed by them. These articles purported to be executed 6 September, 1850, and were set out as a part of the bill.

The bill proceeded to state that the plaintiff was actively engaged in the practice of his profession, as an attorney-at-law, at Asheville, Waynesville and Franklin, from the date of the contract until a short time before the death of his father, when he became a member of the Confederate army; that the defendant resided most of the time with his father, and by some means became quite a favorite with him; that he exercised control over his mind, and used his money and other property at will, etc. A detailed statement was then made of the sale by the defendant of valuable slaves and tracts of land belonging to his father, and the bill charged that the proceeds (together with the rent of the Sulphur Springs and other valuable property belonging to the father), were invested in railroad stock in South Carolina, and lands lying in different counties, for the defendant's benefit; that he subsequently obtained from his father deeds for the Sulphur Springs property and several slaves, and that he also received valuable gifts from his mother, while the plaintiff had received but little property or money from either parent. It was further charged that many of these transactions were fraudulent, and that the defendant used the influence he had acquired with his father to prejudice him against the plaintiff, and had caused him to change his will and exclude the plaintiff from any (336) share in his estate; that it was the defendant's fraudulent design to get possession of as much of the estate of his parents as he could, and leave the State; that since the death of their father the plaintiff had demanded a settlement of the defendant, on the basis of the contract, and the latter refused to settle with him.

The answer denied that the contract set out in the bill was executed by the defendant, or that he knew of the pretended existence of such contract until after the death of his father; and to meet the allegations in the bill it contained circumstantial statements as to the character and conduct of the plaintiff.

There were five exceptions filed to the answer, but being of the same general character with the first that only is set out.

"The plaintiff by his counsel comes and excepts to the defendant's answer, for that it is irrelevant, scandalous and impertinent in this, for that it is stated—1st. That respondent never would have made such a

contract, *as it was always understood in the family since respondent's earliest recollection, that his father denied that complainant was his child,* and always, after about 1852, he charged that the complainant *defrauded him by raising a note to which the said Robert Henry* had entrusted him with his signature, for $300 *to discount in the Asheville Branch Bank of Cape Fear,* to $900, and thus subjected him to the payment of $600 *more than he had ever agreed to.*

No counsel for appellant.
Merrimon, contra.

PEARSON, C. J. Words, however disparaging or abusive, are not considered *scandalous,* in equity pleading, unless they be also (337) "impertinent"; that is, irrelevant to the case and put in for the mere purpose of scandal.

Tested by this rule, none of the exceptions to the answer ought to have been sustained. For the sake of illustration take the first exception: The bill set out by way of inducement, and to show the motive for making the contract which it seeks to set up, that at one time the plaintiff was his father's favorite, and had well founded expectations of receiving the greater part of his father's estate. To meet this allegation, and to support the averment that the contract was a "forgery," or had been obtained by fraud and imposition, it was certainly relevant, to use the words excepted to, viz.: "as it was always understood in the family, since respondent's earliest recollection, that his father denied that complainant was his child"; and also the words in regard to "raising" the note, by which the father believed the complainant had been guilty of a gross fraud. The same remark is applicable to all the other matters excepted to. Although they are abusive and disparaging, they are not impertinent, but are relevant and responsive to the allegations of the bill. If the plaintiff had simply set out the contract, alleged its due execution and asked for a decree to have it specifically executed, and to that end, for an account, etc., the exceptions to the answer would have been well taken. But the bill, by way of inducement, and for the purpose of corroborating by circumstantial evidence the allegation of the due execution of the alleged contract, goes into particulars, and sets forth a train of circumstances, which, if true, make out a case of ingratitude and baseness on the part of the defendant, in refusing to give effect to the contract. To meet this very plausible case made by the bill, the defendant, in his turn, goes into particulars, and sets (338) out many circumstances tending to corroborate his averment, that the contract was a forgery, or was obtained by fraud and imposition. All of these particulars are relevant, and tend to support his

denial of the due execution of the supposed contract; so that the plaintiff is to blame for introducing into the bill matter of circumstantial evidence, and the defendant is well warranted in replying to it in the same way.

We can only account for the ruling of his Honor, by supposing that his attention was confined to the answer, which is certainly, *per se*, as abusive as it can be, and did not avert to the fact that the several matters set out in the bill call for a full response on the part of the defendant, and imposed upon him the necessity of going into the case according to his view of it.

We feel at liberty to suggest that even now it would expedite the cause for the plaintiff to amend by striking out all of the bill which amounts to a mere recital of circumstantial evidence, so as to put it upon the allegation of the due execution of the contract. Then the defendant can withdraw his answer, and put in a plea denying the execution of the contract; whereupon, according to the practice and course of the court, an issue will be framed to be tried by a jury in a court of law, where all this circumstantial evidence on both sides may be offered to the jury to be passed upon.

We think it proper to make this suggestion, because if the case should be sent up to be heard in this court upon a mass of depositions, in regard to circumstances tending to corroborate or weaken the direct evidence as to the due execution of the contract, by the course of this court an issue will be made up to be tried by a jury in the county where the bill is filed; and it is better to save trouble and expense of taking depositions, as the issue will be tried upon the examination of witnesses before the jury.

The order sustaining the exception to the answer is (339)

PER CURIAM. Reversed.

THOMAS R. TRAMMELL and others v. JONATHAN FORD.

Under Rev. Code, ch. 32, s. 3, r. 5, it is error to set down a cause for hearing until the second term after replication is filed, whether the testimony proposed to be offered by the defendant be material or otherwise.

BILL to correct a deed, filed Spring Term, 1867, of MACON, when an answer was put in and replication thereto taken. At Fall Term, 1867, the cause was set for hearing and heard by *Buxton, J.*, who rendered a decree in favor of the plaintiff. The defendant appealed.

The bill set forth that in 1855 the defendant agreed to purchase a tract of land from the ancestor of the plaintiffs at $10 per acre; that in

accordance with the contract a survey was had, and payment made and a deed executed according thereto; that the tract contained near double the quantity of land paid for, and that the error was caused by a mistake or fraud. The answer denied fraud, and that the defendant was aware of any mistake, and relied upon the lapse of time since the execution of the deed as a bar.

At the same term an order of survey was made, and at the next term the surveyors filed their report showing that the deed embraced 15½ acres more than appeared from the former survey. The de-
(340) fendant asked leave to take testimony to show that his bargainor knew of "the excess of quantity of land sold" a short time after the execution of the deed. His Honor refused, because the answer contained no allegation to that effect, and set the cause for hearing.

Phillips & Battle, for the appellant.
Merrimon, contra.

BATTLE, J. His Honor erred in not allowing the defendant until the second term after issue was joined by the putting in of a replication to the answer, to take testimony, and in setting the cause down for hearing, hearing it and making a decree at the first term after the joining of such issue. See Rev. Code, ch. 32, sec. 3, rule 5.

The order appealed from must be

PER CURIAM. Reversed.

(341)

EDWARD CONIGLAND v. THE N. C. MUTUAL LIFE INSURANCE COMPANY.

1. The *failure* of a mutual insurance company does not constitute a "failure of consideration," so as to defeat an action upon a premium note given by a person insured therein.
2. Such a company after its insolvency loses the power of insisting upon forfeitures of stock by its members for non-payment or otherwise.
3. If such a company before insolvency treat a member who has failed to pay as if he were still a member, this is a waiver of the right to declare his stock forfeited for the non-payment.
4. A resolution by such a company to wind up its affairs is equivalent to an assessment of 100 per cent on the premium notes in order to enable it to meet its liabilities, etc.
5. The holders of policies in insolvent mutual insurance companies can not, when sued upon their premium notes, claim that the *values* of their policies (supposing that the same can be ascertained?) shall be set off in equity against their liabilities.

BILL, filed to Spring Term, 1867, of HALIFAX, and at same term set for hearing, by consent, upon pleadings and exhibits, and transmitted to the Supreme Court.

The complainant alleged that the defendant was a Mutual Insurance Company chartered by the General Assembly, and that by its charter all who insured in it became members; that in 1853 he had taken out a policy upon his own life, agreeing to pay one-half of the annual premium in cash and the other by note; that he complied with his contract until and including 3 August, 1865, whereby he continued to be a member, according to the by-laws, "for the period of forty days after 3 August, 1866"; that in July, 1866, he received from the company notice to renew his annual premium, and also notice to pay a (342) certain assessment, declared in September, 1865, and payable 1 April, 1866, upon the amount of his note given for successive premiums (as above); that he declined to do either, upon the ground that the company was insolvent and unable to comply with its policy, adding that he intended to file a bill and have it wound up—and that the company responded by calling his attention to its own action of 6 August, 1866, and expressing a wish that he would not embarrass its action.

The bill charged that the company was insolvent hopelessly and largely, at the time of his refusal to pay as above; that in divers particulars specified it had been mismanaged, and that its action on 6 August, 1866, was a resolution to wind up and to close its existence; but that nevertheless suit had been brought against him for the amount assessed as above, etc. The prayer was for an account and an injunction.

The answer admitted that the complainant had been a member of the company, and had continued so until 1 April, 1866, but it insisted that the forfeiture of his membership, which was due upon the nonpayment of the assessment then payable, was waived by the company *only upon condition,* viz.: that he would pay the assessment by a subsequent day named by it (1 October, 1866); and that upon his failure so to pay, the forfeiture had taken place at the time first mentioned. It is also denied that it was insolvent before 6 August, 1866, except so far as made so by an inability to collect its resources, owing to a refusal by its members to pay, and to the stay-laws, etc. The charges of mismanagement were also denied, and the condition of the company was attributed entirely to the results of the recent war.

The answer also admitted that a resolution to wind up had (343) been passed upon 6 August, 1866.

Rogers & Batchelor, for the appellant.
Bragg, contra.

PEARSON, C. J. A buys of B ten bales of cotton, informing him that his purpose is to ship to Liverpool on speculation, pays one-half of

the price in cash, and gives his note for balance; the cotton is lost on the voyage by the "perils of the sea." Would it enter into any man's head to conceive that A could in equity enjoin the collection of the note, upon the ground that the cotton was lost, that there was a *total failure of consideration?* Too much learning sometimes smothers the case and excludes a plain, common-sense view, upon which its merits depend.

How does our case differ from the cotton case? The plaintiff got what he bargained for—"a policy of insurance," which, as his counsel says, is a "thing of value." Did he expect or imagine that the company, of which he became a member, was bound to warrant to him and to all the other members its own solvency? That was a "peril of the sea," with which the vendor was in no wise concerned. The purchaser has lost his cotton; but how that can be a failure of consideration can not be conceived. He has the same right to recover back the money which he paid as a part of the price as to object to the payment of his note; and, in effect, it was the same as if he had paid the whole price in cash, and then borrowed one-half of the money, by giving his note on interest; so the notion of a failure of consideration is out of the question.

We also think the position taken by the defendant, that the plaintiff, by failing to pay the assessment of 20 per cent and by failing (344) to renew, has forfeited his policy, and, although bound to pay the promised note, is not any longer entitled to his policy, and has ceased by the forfeiture to be a member of the company, is not tenable. The truth is the defendant waived the right to insist upon the forfeiture; and the correspondence abundantly shows that, after the company found that the plaintiff could not be moved from the position he had taken and was determined to test the question, it concluded that it was the part of wisdom to give in to it, and accordingly, at the meeting, 6 August, 1866, it was resolved to wind up the affairs of the company; and thereupon all of its members, with one or two exceptions, declined to pay the assessment or to renew. The effect of which was to put the company in such a condition that it could not longer insist upon forfeitures. So we are satisfied that the plaintiff continued to be a member of the company, and as such entitled to raise the question as to whether he could be forced to pay the numerous notes. Indeed it seems to have been the purpose on both sides fairly to present the point as to a failure of consideration, for the determination of the court, as well as any other matter affecting the respective rights of the plaintiff and the company.

But while relieving the plaintiff from the effect of the supposed forfeiture, and conceding to him the right of still being a member of the company, we must impose on him the condition of treating the resolution of 6 August, 1866, to wind up the affairs of the company, as having

the legal effect of an assessment of 100 per centum on the premium notes; in other words, as calling for the payment of the full amount, in order to carry into effect the resolution of the company, and enable it to meet its liabilities and divide its excess, if any.

But it was said for the plaintiff, in the second place, suppose the company has the right to collect the premium notes, the (345) plaintiff is entitled, by way of equitable set off, to have the value of his policy estimated, and the amount credited, so that he shall only be forced to pay the residue. Here an insuperable difficulty presents itself. How can the value of the plaintiff's policy be estimated? Under the rule *"id certum est quod certum reddi potest,"* the value could be fixed by well known rules, *provided the company was solvent*—"There is the rub." If, according to the first position taken of a failure of consideration, the company be wholly insolvent, then the policy is of no value, and there is nothing to constitute an equitable set off; and whether the company be or be not wholly insolvent, can only be ascertained by allowing it to collect all of the individual notes, as they are termed, and all of the premium notes that can be made available. This fund will be first applicable to the discharge of the liabilities of the company. The excess, if any, will be applicable to the outstanding policies; and thereby the value of each policy, when the holder pays up (for of course all defaulting will be excluded), can be fixed. The subject can not be dealt with in any other manner.

It was said on the argument this mode of winding up the concern will give to those who are so fortunate as to have died an undue preference over those merely who are still living. The preference can in no sense be termed an *undue* one. In respect to them the contingency has happened—the debts are absolute, whereas those who are living have no debts, but a mere right to participate in the division of the excess of assets, should there be any after a payment of all debts and liabilities.

The idea of any particular hardships upon the living members rests on the fallacy that, while entering into the company with the expectation of mutual insurance in the event of *death*, they seem not to have had in view the possibility of mutual loss in the event of (346) *insolvency*.

PER CURIAM. Bill dismissed.

Cited: Insurance Company v. Powell, 71 N. C., 398.

THE STATE *ex rel.* JOHN F. HOKE v. WILLIAM McGALLIARD, Admr., etc.

1. One who acted under color of an appointment by the Governor (made by virtue of Rev. Code, c. 99, s. 14, *but after its repeal*), having brought suit in the name of the State against a defaulting tax payer: *Held*, to be no ground for dismissing it *at the instance of the defendant*, that it purported to be filed "on the relation" of such person.
2. Distinction stated between suits in the name of the State to the use of a citizen, where the latter is the real party, and such suits where the State alone is interested, and some citizen is named in connection with it merely for the purpose of securing costs.

BILL filed to Spring Term, 1867, of LINCOLN, and at Fall Term set for hearing upon bill, answer and replication—an account having previously been taken without prejudice.

The bill was in the name of "the State of North Carolina on the relation of John F. Hoke," and alleged that the defendant was administrator of one Alexander Wilson, who had died in 1862 intestate, without wife or children or the issue of such, and leaving a large estate, real and personal; that there was a considerable "collateral tax" due to the
(347) State from such estate, and that the defendant had failed to do his duty in making returns, etc., as required by the Revenue Law.

The prayer was for an account, payment, and for further relief.

The answer admitted that a tax was due from the estate of Wilson, but denied that the defendant was responsible for the tax upon the real estate; or that he could be called upon for that upon the personalty, until after the estate should be settled.

Phillips & Battle, for the complainant.
Bynum, contra.

READE, J. The objection was taken in this court that the bill can not be maintained *upon the relation of Hoke*—that it should have been *upon the relation of the Solicitor for that district.* The Revenue Law, Rev. Code, ch. 99, sec. 14, authorizes the Governor to appoint a commissioner for each judicial district to institute and conduct suits against delinquent taxpayers. Under that law the Governor appointed J. F. Hoke, Esq., several years ago, and again in 1866. But by the Revenue Act of 1859, and subsequent revenue acts that law is repealed, and it is made the duty of the Attorney-General and the Solicitors of the several judicial districts, upon the information of the sheriffs, to institute and conduct such suits. It will be seen, therefore, that Mr. Hoke had no authority under his appointment. We suppose that the repealing acts were not called to the Governor's attention. It is to be considered how far the fact that Mr. Hoke is a mere volunteer affects the case.

It will be observed that the suit is not in the name of the State to the use of Hoke, and that he has no interest therein. (348) In this it differs from suits in the name of the State, upon official bonds of sheriffs, constables, administrators and the like, where the relator is the real plaintiff. This suit is in the name of the State, *and for the use of the State,* upon the relation or information of Hoke. And if the State think proper to institute a suit upon the relation of any third person, it is not seen how the defendant can object. The office of relator in a suit is, to be answerable for costs, and to be otherwise convenient in the progress of the cause.

In England, in all cases which immediately concern the crown, the officers proceed upon their own authority without the intervention of any other person; but in cases in which the crown is not immediately concerned, they proceed upon the relation of some person whose name is inserted in the bill, and is termed relator. This person in reality sustains and directs the suit, and is answerable to the court and the parties for the propriety of the proceedings; but he cannot take any step in his own name independently of the Attorney-General. 1 Dan. Ch. Prac., 3.

This suit immediately concerns the crown, *i. e.,* the State. And without an act appointing any one to the duty, it would be the duty of the Attorney-General and Solicitors to conduct the suit, and a relator would be unnecessary. And when the act is express in making it the duty of the Attorney-General and Solicitors, there is, of course, no doubt about it. And although the suit is upon the relation of Hoke, yet he can do nothing without the sanction of the Solicitor for that district, who has the right to control it and strike Hoke's name from the suit, or otherwise control it as if Hoke's name were not there. Hoke's relation to the suit makes him responsible for the costs, without giving him any control over it whatever. But still *the defendant* has no right to complain, for it is a suit against him in the name and to the use of the State. Whether the defendant in a separate (349) proceeding against Hoke would have any remedy against him is a question which we are not called upon to decide. It would seem from his *color* of authority that he was acting in good faith.

The defendant is liable for the tax upon the personal property, but he is not liable for the tax upon the land of his intestate. *S. v. Brevard, ante,* 141.

It will be referred to the Master to correct the report in that particular, and then there will be a decree for the amount with costs, including the allowance to the Master for reforming the report.

PER CURIAM. Decree accordingly.

EDWARD S. MARSH for himself and others v. JAMES R. GRIST, Adm'r of Allen Grist, Deceased.

Courts of equity are not bound by the statute allowing executors and administrators nine months to plead.

CREDITORS' BILL, filed to Spring Term, 1867, of BEAUFORT. The defendant, having been appointed administrator in the preceding month of March, moved that he be allowed nine months to plead. *Mitchell, J.,* overruled the motion, and no answer being put in, rendered a (350) decree *pro confesso.* Whereupon the defendant appealed. No further statement is necessary.

Fowle & Badger, for the appellant.
Rodman and *Carter, contra.*

READE, J. The statute allowing executors and administrators nine months to plead, does not apply to Courts of Equity. "Statutes which confer rights or regulate contracts must be observed by all courts, but those which regulate matters of practice or the course of proceeding have never been considered as applying to Courts of Equity unless specially mentioned. The reason is, that those courts have peculiar jurisdiction and a course of proceeding subject to be modified by the Chancellor to suit the justice of each case." *Sandridge v. Spurgen,* 37 N. C., 269.

There is no error. The defendant must pay the costs of this court.

PER CURIAM. Decree accordingly.

(351)

JAMES M. B. HUNT and wife, and others, v. WILLIAM M. SNEED and wife, and others.

One who files a bill to obtain an injunction against a suit at law, must in general submit to *a judgment* in such suit; the only exception being where the complainant prays for a discovery to aid him in his defense at law.

BILL, seeking to enjoin a partition of land *at law,* filed to Fall Term, 1866, of GRANVILLE. At Spring Term, 1867, an answer was filed, and the defendants *moved* that the plaintiff be required to submit to a judgment of partition in the proceedings at law, with a stay of all proceedings thereupon until the further order of this court; and that the injunction already obtained be dissolved to that extent. This motion was disallowed, and the defendants appeal to this court.

Edwards, for the appellants.
Venable, contra.

READE, J. The only question is whether the plaintiffs in this suit ought to have been required to submit to a judgment in the suit at law? Such is certainly the general rule. We are not aware of any exception to it unless where the complainant alleges that the answer will discover facts which will aid him in his defense at law. *Williams v. Sadler,* 57 N. C., 378.

The strong statement in the bill of the complainant's equity is quite sufficient to warrant the injunction against the execution of the judgment at law; but there is no statement of facts to take the (352) cause out of the general rule.

The defendants, therefore, were entitled to an allowance of their motion to have the injunction so far modified as to require the complainants to submit to a judgment, and his Honor's refusal to allow the motion was error.

It was insisted in this court for the complainants that, inasmuch as the Court of Equity and the Court of Law have concurrent jurisdiction in cases of partition, and inasmuch as the Court of Equity has ample powers over the subject, the present cause absorbs or draws to it the suit at law, and all the rights of the parties can be settled in this suit; so that there is no necessity that the suit at law shall continue. Probably that would be so if this were a bill for partition, as the suit at law is. For then, in any event, partition would be ordered. For instance, if the suit at law were for partition by metes and bounds, as it is, and this bill were for partition by sale and division of the proceeds—there would be partition at all events, the only question being as to the mode. But this bill is not for partition, but to prevent partition! So that if the complainants have a decree it will prevent such partition, and end both suits in their favor; but if the defendants obtain a decree here, they will be entitled to a partition at law—to prevent any impediment to which, they are entitled to a judgment in their suit at law before being liable *to defend* this suit.

This opinion will be certified to the court below, to the end that the injunction be modified according to the motion of the defendants, and thereupon be continued until the hearing.

PER CURIAM. Ordered accordingly.

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(353)

JAMES WALLER, Ex'r., etc., v. WILLIAM FORSYTHE, Ex'r., etc.

Where a testator gave land and slaves to his daughter *Nancy Waller* for life, and then "to be equally divided between the children of the said Nancy Waller and my sons, William and John:" *Held*, that at the death of Nancy the property was to be divided *per capita* between William, John, and the children of Nancy.

BILL for an account and settlement of an estate, etc., filed to Fall Term, 1860, of GRANVILLE, and at Fall Term, 1867, transmitted upon the pleadings to this court.

The only question made was upon the construction of a clause in the will of the testator of the defendant, which was as follows: "I give and bequeath to my beloved son William one dollar; to my son James' heirs one dollar; to my son Samuel one dollar; to my son John one dollar; to my son Thomas one dollar; to my son Philip one dollar; to my daughter Nancy Waller three negroes—Tony, Gillis and Horace, and eighty acres of land, it being my part of Aaron Oakley's hundred acres in or under the will of Joseph Oakley, deceased, father of the said Aaron, if she plentifully support her mother, Ferebee, my beloved wife, which I leave in and under her care, in good diet, lodging and apparel during her natural life or widowhood, and then the property, at the death of my beloved wife and the said Nancy Waller, or intermarriage, *to be equally divided between the children of the said Nancy Waller and my sons, William and John.*"

Edwards, for the complainants.

(354) *Phillips & Battle, contra.*

PEARSON, C. J. The division must be *per capita.* Each of the children of Nancy take a share equal to the shares of John and William, the sons of the testator. This is the general rule, which has been acted upon by the courts, and in our case there is nothing special to take it out of the general rule.

There will be a decree according to this opinion; costs to be paid out of the fund.

PER CURIAM. Decree accordingly.

Cited: Thomas v. Lines, 83 N. C., 199; *Howell v. Tyler,* 91 N. C., 212; *Culp v. Lee,* 109 N. C., 677.

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(355)

JOHN S. WILKINS v. RICHARD P. FINCH, Adm'r., etc.

Courts of equity in this State will not entertain jurisdiction of a bill against an executor or administrator to enforce payment of a legal demand at the suit of a single creditor; and upon demurrer such a bill will be dismissed.

BILL filed to Fall Term, 1867, of WAKE, at which term a demurrer was put in and set down for argument, and the cause transmitted to this court.

The bill stated that the plaintiff in January, 1861, obtained judgment before a Justice of the Peace of a single bond for $74.16, duly executed 5 January, 1858; that he had requested payment of said judgment from the defendant since his qualification as administrator, and he had failed to pay the same.

It was charged that the defendant had taken into possession personal effects of his intestate to an amount sufficient to pay the debts, and that there was real estate belonging to the estate sufficient to meet any possible deficiency. The prayer was for an account of the plaintiff's demand, that the defendant should be required to admit assets, or that an account be taken thereof; and if the personalty should prove insufficient, that the defendant be required to institute proceedings to make assets of the real estate; and for payment.

Haywood, for the plaintiff.
Phillips & Battle, contra.

PEARSON, C. J. This is a bill by a single creditor against an administrator. It seeks to have a legal demand established, an account of the assets and a decree for payment in the course of adminis- (356) tration. No special ground is alleged for applying to a Court of Equity. The bill is one of the "first impression" in this State.

Such a jurisdiction is exercised in the Court of Equity in England, but we see from the books that it is rarely resorted to. It is put on the ground of *"discovery* and *account,"* and the doctrine that when the court has got hold of the case, it will go on and give relief and not send the parties to a court of law. This doctrine is very questionable and unsatisfactory, and there are many grave objections even in England to the exercise of the jurisdiction. If one creditor be at liberty to file a bill of the kind, then may another, and so another. Thus, instead of preventing a multiplicity of suits, the number may be increased *ad infinitum,* and the estate is consumed by costs. Again, unless the executor or administrator confesses assets, it is necessary to have an account. If assets be confessed, it shows there was no occasion to resort to a court of equity. If it be necessary to have an account, no one is bound by it except the parties; and there is a direct violation of the well settled principle that in taking an account, Court of Equity requires all persons concerned in interest to be made parties, so as to be bound by the decree, and put an end to the matter.

The objection that this injunction creates a multiplicity of suits, is not met by the fact that should a number of single creditors severally file such bills, the courts has power to order a consolidation, for the costs of all of these bills will have been incurred, and must in the end be paid

out of the estate. Nor is the objection, that the account if taken in the suit of one creditor does not bind the others, met by the fact that should an account of the assets become necessary, the court may require the plaintiff to turn it into a "creditors' bill," so as to call them all in.

For the answer is *cui bono* file such a bill? Why not file a credi-
(357) tors' bill at the start, so that upon a decree *quod computet* all actions at law may be stopped, and the whole estate be settled in one suit?

Besides these objections to entertaining jurisdiction in this State, we have this additional consideration. There is a statute which empowers the courts of law to require the production of books and papers, and another statute which makes parties to actions at law competent and compellable to give evidence; so one of the grounds on which the jurisdiction in equity is based, to wit, discovery, is entirely taken away by legislation in this State. Again, there is a statute which in most cases empowers the courts of law, in suits against executors, administrators, guardians, etc., where the matters pleaded may make it necessary that an account shall be taken in order to a due administration of the cause, at the appearance term or at any time in the progress of the cause, in its discretion, to refer the taking of such account to such commissioners as the parties may select; if they can not agree in the selection, then the court may refer it to the clerk or any other person as commissioner; and such commissioners shall state an account, *under the same rules and regulations as are provided for stating accounts in courts of equity, etc.* So the other ground on which the jurisdiction in equity is based, to wit, "account," is almost entirely taken away by legislation in this State. If to all of this it be added, that although in one or two cases, in the opinions delivered by Judges of this court, the fact that this jurisdiction obtains in the Courts of Equity in England is alluded to, still there never has been a bill of the kind entertained by our court since its institution in 1818, a period of fifty years—we feel well warranted by the action of the court and the reasoning by which it is sup-
ported in *Allen v. Allen,* 41 N. C., 293, in reference to a "wife's
(358) claim for a settlement," in holding that this jurisdiction of equity at the suit of a single creditor, has never obtained in this State, and will not now be entertained. So, in the language of the court in *McKinnon v. McDonald,* 57 N. C., 1. We thus reject another of those refined doctrines of equity jurisprudence which render the English system so entirely artificial and complicated, and add "the jurisdiction to enforce payment of a legal demand at the suit of a single creditor against an executor and administrator" to the list of "part performance," "the lien of a vendor for the purchase money," "the wife's equity for a settlement," and the "wife's right to pin money."

It is not necessary to notice the question made as to the want of an averment that the debt claimed by the plaintiff was contracted upon a valuable consideration.

Demurrer allowed.

PER CURIAM. Bill dismissed.

Cited: *Moore v. Miller, post,* 365; *Smith v. Brown,* 101 N. C., 354.

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B. F. MOORE v. ANNIE W. MILLER, Ex'trix, and others.

1. The Act (R. C., c. 46, s. 31), which provides that "the *appointing* any person executor shall not be a discharge of any debt or demand due from him to the testator," includes cases where the executor *acts* under the appointment, as well as those where he does not.
2. A bill seeking to compel an executor to execute a general *power* to sell real estate for the payment of debts, can not be maintained without making the devisees of such estate parties.
3. A creditor can not, merely as such, sustain a bill against an executor, seeking to have his debt paid.

BILL, filed to Fall Term, 1867, of WAKE; at the same term a demurrer was filed and set down for argument, and at December Special Term, 1867, the cause was transmitted to the Supreme Court by consent.

The complainant was a bond creditor of Thomas C. Miller, deceased, and the defendants were Annie W. Miller, executrix of said deceased, and William E. Boudinot, surviving executor of Dr. F. J. Hill, deceased.

The bill alleged that Mr. Miller had been appointed and qualified, and had acted as one of the executors of Dr. Hill, and that at the death of his testator he was indebted to him by bond in a large amount; that this debt, as a part of the residue of his estate, had been bequeathed by Dr. Hill to his widow, and afterwards at her death was by her bequeathed in trust for the sole and separate use of the defendant Annie, then the wife of Thomas C. Miller; that before completing the execution of Dr. Hill's will, Mr. Miller had died leaving an estate of realty and personalty sufficient to pay his own bond debts, but insuffi- (360) cient to pay also his debts due by simple contract; that the defendant Annie, as executrix, by virtue of a power of sale given her in the will, was selling land belonging to the estate of said Thomas, and applying the proceeds and other assets to the payment of the debt claimed by the defendant Boudinot as surviving executor of Dr. Hill, whereas she and Boudinot both had notice that the complainant held a debt of higher dignity, *i. e.,* the one which is the subject of this suit, and that such debt would be defeated by such misapplication of assets.

The prayer was that Mrs. Miller should admit assets, or failing that, that Boudinot should account for and pay over for the complainant what he had received as above, and that Mrs. Miller should account with the complainant, either as executrix or personally, for any balance of his debt unpaid; also that a receiver should be appointed. An alternative prayer—in the event Boudinot should not be held liable, was that Mrs. Miller should admit assets, or come to an account for the personalty and the realty of her testator, and if the former should not be sufficient, should be ordered to sell land and pay the debt, and that a receiver should be appointed, to whom Mrs. Miller should deliver up the assets in her hand, and account for her *devastavit,* and in the meantime that she should be enjoined from further intermeddling, and removed from her office as executrix; and for further relief, etc.

To this bill the defendants filed a joint general demurrer.

Haywood, for the complainant.

(362) *Bragg, contra.*

PEARSON, C. J. The case turns upon the construction of the Act of 1794, Rev. Code, ch. 46, sec. 31. "The appointing any person executor shall not be a discharge of any debt or demand due from him to the testator." This is short, and seems at first blush to be very clear; but when considered in reference to the law as previously understood, and the great learning which has been brought to bear on it, we confess the question of construction presents some difficulty.

At common law, if a creditor is appointed administrator or executor of his debtor, he not only has a right to retain, in preference to any other creditor of equal degree, on the ground that his right of action is suspended, but he is presumed to retain the moment he receives assets, and the debt is extinguished, so that he can not apply the assets to another debt and sue another obligor on the debt due to himself. *Chaffin v. Hanes,* 15 N. C., 103.

On the same principle when a debtor is appointed administrator or executor of the creditor, the action is suspended, and the administrator or executor is chargeable with the debts as assets, on the pre-

(363) sumption that he has paid himself; but in regard to an administrator it was held that the debt was not *extinguished,* as the appointment was *by act of law,* unless in point of fact he had brought the debt into account and had applied it in the course of administration. Otherwise after his death the debt was not extinguished, and his personal representative or another bound for the same debt, might be sued for it. In regard to an executor, however, not only the action was suspended, but the *debt was extinguished* or *discharged,* on the ground

that the appointment was *by the act of the party,* and if a party suspends his right of action, it is gone forever, and after the death of the executor the debt could be recovered neither from his personal representative nor any other who was sued for the debt, either as co-obligor or as surety. If one named executor by his creditor did not qualify, but renounced, there was no suspension of the action or discharge of the debt, except in the single instance where another besides the debtor was named executor—in which case, although he renounced, yet if the other qualified, that inured to the benefit of the debtor, as he could come in and qualify at any time afterwards; and not only the action was in such case suspended, but the debt was extinguished.

We think the construction contended for by Mr. Haywood is too narrow, and that the distinction which he took, between appointing one executor and his acting as such, was not in the mind of the law makers, but the word *appointing* an executor was used in a general sense, and can not be restricted, so as to mean simply *naming* one executor without reference to his qualification; for this would make the act, except in the single instance where more than one are named executors and the debtor does not qualify, inoperative and useless. So that construction would remedy a particular instance of the evil, and leave the general mischief unprovided for, besides imputing to the Legislature ignorance of the fact that the mere naming or appointing one executor (364) who does not qualify and act as such, did not operate as a discharge of the debt.

We believe the intention of the statute was to remedy the general mischief, by abolishing the distinction taken at common law between the effect of the *act of the law* and the *act of the party* in the appointing of administrators and executors, and to put them on the same footing; that is, that in regard to both there is a suspension of the action, but the debt is not to be extinguished in regard to either. So that after the death of one executor, his personal representative, or his co-obligors or sureties may be sued, as in case of an administrator, and the debt will retain its original character in the administration of the assets.

It follows that the main scope of the bill, which is to charge Mrs. Miller with a *devastavit* in paying the assets to the defendant Boudinot as upon a bond debt, and to charge him with complicity by reason of the insolvency of Mrs. Miller, fails for, as we have seen, the debt due by Miller and his sureties to Dr. Hill still retains its dignity as a specialty debt, which Mrs. Miller had a right to prefer over other bond debts until the right to make preference in favor of one creditor in equal degree by voluntary payment is put an end to by action, or a creditor's bill and a decree *quod computet.*

It also follows that the bill must be dismissed; for so far as it seeks to compel Mrs. Miller to execute the general power to sell the real estate for the payment of debts, that relief can not be given unless the devisees are made parties, and allowed an opportunity of showing that the personal estate is sufficient; and so far as it is a bill by a single bond creditor to have his debt established and an account of the
(365) assets, and a decree for the payment of his debt in the due course of administration, it is disposed of by *Wilkins v. Finch, ante,* 355. Demurrer allowed.

PER CURIAM. Bill dismissed.

Cited: Taylor v. Miller, post, 366; *Ruffin v. Harrison,* 81 N. C., 215; *Smith v. Brown,* 101 N. C., 354.

JOHN D. TAYLOR, and another, v. ANNIE W. MILLER, Ex'trix, and WM. E. BOUDINOT, Ex'tr.

Sureties upon a bond may file a bill of *exoneration,* without being compelled previously to pay off such bond—but such equity is merely *collateral,* and does not place them in a better condition as against their principal, than if they held his bond for the amount for which they are liable.

BILL, filed to Fall Term, 1867, of WAKE; a joint general demurrer having at that term been put in, was set down for argument, and at December Special Term thereafter the cause was, by consent, transmitted to this court.

The complainants were sureties upon a bond due by Thomas C. Miller, the testator of the defendant Annie, as principal, and suit was pending against them thereupon. The other allegations in the bill were similar to those contained in the case of *Moore v. Miller,* which immediately precedes this.

The prayer was for exoneration, and was in other respects like that in the former case.

Haywood, for the complainants.
Bragg, contra.

(366) PEARSON, C. J. This case differs from *Moore v. Miller, ante,* 359, only in this: The plaintiffs as sureties seek for exoneration without being compelled beforehand to pay up the debt. That equity in favor of sureties is settled, but it is merely collateral, and can not be allowed the effect of putting them in a better condition than if they

had paid the debt. Had they done so, by force of the Act of 1829, they would have been entitled to the dignity of *bond creditors* and no more. So they are to stand on the same footing as any other bond creditor, and can claim no superior equity simply from the fact that they have not been compelled to discharge their original liability, and as we have just seen that Mr. Moore, a bond creditor, can not maintain a bill, it follows that they can not.

Demurrer allowed.

PER CURIAM. Bill dismissed.

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AGREEMENT:

See Contract.

ALIMONY:

1. Upon appeals from interlocutory orders granting alimony *pendente lite*, the Supreme Court founds its decree on a re-examination of the petition only. *Lynch v. Lynch*, 46.
2. Where such petition alleges adultery, it is a sufficient foundation for the order appealed from. *Ibid.*
3. Whether alimony *pendente lite* shall be allowed *at all*, is a matter of law; *how much* shall be allowed is a matter of discretion. *Schonwald v. Schonwald*, 215.
4. An appeal lies from an order refusing such alimony, under Rev. Code, c. 39, s. 15. *Ibid.*
5. The Superior Courts may allow appeals in such cases without security, under the Rev. Code, c. 4, s. 23. *Ibid.*
6. In North Carolina it is not necessary, as in England, to decide the question of marriage or no marriage, before passing upon the right to alimony, *pendente lite*. *Ibid.*
7. In deciding upon such right, the court is confined to a consideration of the petition in the cause. *Ibid.*
8. A delay of seven years in filing a petition is sufficiently accounted for by the allegations, that at the happening of the matters relied upon for a divorce the petitioner was a non-resident of the State, and that she is now a pauper. *Ibid.*

ANTEDATING AN INSTRUMENT:

The antedating of an instrument, in a case where it did not appear to have been done with a fraudulent purpose and where it had done no harm to others, punished only by refusing costs to the party involved in it. *Shaver v. Shoemaker*, 327.

APPEALS:

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ATTACHMENT:

1. A bill seeking an attachment on account of a single claim, is not multifarious because it prays that such attachment issue against property in the hands of various persons, or because it seeks from such persons an account of their respective dealings with the debtor. *Alexander v. Taylor*, 36.
2. Where, in such a bill, process (but not relief) had also been prayed for against the executor of the surety to the debt, and a judgment *pro confesso* had been taken against them: *Held*, that although the bill would have been dismissed as to them if they had demurred, no other defendants could complain of their misjoinder. *Ibid.*
3. The debtor in an attachment suit in equity has no status in court until he has appeared and replevied, in accordance with Rev. Code, c. 7, s. 25. *Ibid.*
4. An attachment in equity will lie against the principal, even though the remedy at law against this surety has not been exhausted. *Ibid.*

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BOND FOR TITLE:

1. The interest of one who holds lands under a bond for title, the price not having been fully paid, is not subject to sale under execution; therefore, a purchaser at such a sale has no equity to file a bill against the parties to the bond, proffering to pay the money due thereon and asking that upon such payment he may have a title. *Ledbetter v. Anderson*, 323.
2. A having made a bond for title to certain land to B, the latter contracted by bond to sell the same to C, and gave him possession: *Held*, that it was not competent thereupon for A and B to rescind their contract so as to deprive C of his equity—which, as he had already paid B, was, to obtain a conveyance from A upon paying him whatever was due to him upon his contract with B. *Shaver v. Shoemaker*, 327.

See Contracts; Frauds, Statute of—1, 4.

CERTIORARI:

Where a suitor in the Court of Equity for Person County made up his mind to appeal from an order, before Thursday of the term, and was prevented from doing so by the previous departure of the Judge: *Held*, that it was a proper case for a *certiorari*. *Reade v. Hamlin*, 128.

CHOSES IN ACTION:

See Jurisdiction, 5, 6.

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See Judicial Sales.

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See Corporations; Confederate Money, 1, 2, 3, 6.

CONSTITUTION:

See Judicial Sales.

CONFEDERATE MONEY:

1. The fact that the consideration of an agreement (made in 1862) was Confederate Treasury Notes, does not invalidate it; contracts upon such consideration being ratified by an ordinance of the convention (Ordinances 1865, p. 56), and cc. 38 and 39, Laws 1866, which do not conflict with the Constitution of the United States. *Phillips v. Hooker*, 193.
2. By PEARSON, C. J. In 1862 Confederate treasury notes being the only circulating medium in the State, ordinary dealings in them were not accompanied with criminal intent to aid the rebellion, and were therefore not illegal and void. This rule applies to executory as well as executed contracts. *Ibid.*
3. By READE, J. A contract is not void merely because there is something immoral or illegal in its surroundings or connection; therefore, the issuing of Confederate treasury notes was illegal, but the use of them after they were issued, was not illegal. *Ibid.*
4. A payment in Confederate treasury notes to a Clerk and Master, in December, 1863, of the amount of a bond given upon a sale of land for partition, does not discharge the bond; but the obligor is entitled to a credit for the value of the notes at the time of payment, and the Clerk and Master is chargeable with such value. *Emerson v. Mallett*, 234.

CONFEDERATE MONEY—*Continued.*

5. An officer with authority to collect, and without instructions to the contrary, might before the year 1863 properly receive Confederate notes in payment of debts contracted before the war. No rule can be laid down with reference to the collection of such debts during that year, but after 1863 he was not justifiable in receiving Confederate notes. *Ibid.*
6. Contracts, the consideration of which was Confederate money, are not therefore illegal. *Turley v. Nowell*, 301.

See Trusts and Trustees.

CONTRACT:

1. A contract gave to the parties "the right to determine what work is necessary to be done, for the purpose of enlarging, etc., the said canal, etc.; and he or they shall be fully empowered to do the said work or have the same done, and the said parties shall bear and pay the reasonable expense and the burden of the said work, in the following proportions, etc.: *Held*,
   (1.) That the parties were bound thereby, not to do the work or have it done, but to pay a ratable part of such expenses as one or more of them may incur.
   (2.) That, supposing the parties had undertaken to do the work, the court could not enforce a specific performance, because there is no mode of which the court can avail itself for determining what work is necessary; that question being, by the contract, left to the decision of some one or more of the parties. *Cobb v. Cromwell*, 18.
2. So long as a contract for the sale of land remains executory on both sides, the vendor has the same right to enforce a specific performance of it against the purchaser, as the latter has against him. *Springs v. Sanders*, 67.
3. Therefore, in such a case the vendor may maintain a bill against the vendee, to enforce the payment of the purchase money. *Ibid.*
4. Where it is proved or admitted that one bought and took title to land under a *parol* agreement with another to hold it subject to the right of the latter to repay the purchase money and have the land conveyed to him, such agreement will be enforced. *Cohn v. Chapman*, 92.
5. Where the evidence satisfies a court that a person from whom a specific performance is sought entered into the contract in question without understanding it, such performance will not be enforced. *Pendleton v. Dalton*, 119.
6. Where the owner of a one-third interest in land conveyed that interest to the owner of the other two-thirds, and took a covenant from the bargainee that he would sell the tract to the best advantage and pay the bargainor one-fourth of the proceeds, but would not sell unless such one-fourth would amount to $1,500, and in case no sale should be effected in six months, would reconvey to the bargainor, or pay him $1,300; and a sale was not effected till after the lapse of six months: *Held*, that the obligation to sell had ceased, and the bargainor could only claim a reconveyance of his former interest in the land, or $1,500, at the election of bargainee. *Hargrave v. Smith*, 165.
7. Where a bill was filed by the purchasers for a specific performance of a contract to sell land, which suggested that the bargainor could not make a good title and prayed that until such was made the bargainor should be enjoined from enforcing a judgment obtained by him for the purchase-money; and thereupon the defendant by answer tendered a deed which was filed therewith and was alleged to convey a good title: *Held*, that the course of the court was not either to dissolve the injunction or to continue it to the hearing, but to continue it

CONTRACT—*Continued.*

until a report should come in from the Master upon a reference to him as to the sufficiency of the title so tendered. *Kilpatrick v. Harris*, 222.

8. In suits for specific performance, in the absence of allegations of fraud or imposition, the court will not review decisions made by the parties as to the comparative values of the property in question and of the article in which it was paid for. *Turley v. Nowell*, 301.
9. Contracts, the consideration of which is Confederate money are not therefore illegal. *Ibid.*
10. Where an agreement was entered into between the owner of a farm and another person, by which the former was to furnish the farm to the latter for two years with the stock of hogs and cattle upon it, and mules, provisions and farming implements; and the latter was to give his personal attention to the farming operations, have the entire control of the farm and furnish the twenty-two laborers that were required; and thereupon the two were to share equally the produce of the farm: *Held*, that the agreement constituted an agricultural partnership; that the share going to the owner of the farm was rent; and that the relation between the parties was not that of landlord and tenant; and therefore, *held further*, that upon the death of the owner of the farm before the expiration of the two years, his share which accrued thereafter did not go to the devisees of the farm, but was included under a bequest to another, of "the crop, stock and farming utensils, and all other perishable property on said farm." *Lewis v. Wilkins*, 303.
11. Where a note was endorsed and delivered upon a parol agreement that it should be security for money then borrowed of the endorsee by the endorser, a court of equity will enforce such agreement and enjoin an execution (here a *ca. sa.*) obtained at law by the endorsee. *Smith v. Coble*, 332.
12. To such a suit in equity the surety upon the *ca. sa.* bond is not a necessary party. *Ibid.*

See Frauds, Statute of.

CORPORATIONS:

1. The failure of a mutual insurance company does not constitute a "failure of consideration," so as to defeat an action upon a premium note given by a person insured therein. *Conigland v. Ins. Co.*, 341.
2. Such a company after its insolvency loses the power of insisting upon forfeitures of stock by its members for non-payment or otherwise. *Ibid.*
3. If such a company before insolvency treat a member who has failed to pay as if he were still a member, this is a waiver of the right to declare his stock forfeited for the non-payment. *Ibid.*
4. A resolution by such a company to wind up its affairs is equivalent to an assessment of 100 per cent on the premium notes in order to enable it to meet its liabilities, etc. *Ibid.*
5. The holders of policies in insolvent mutual insurance companies can not, when sued upon their premium notes, claim that the values of their policies (supposing that the same can be ascertained?) shall be set off in equity against their liabilities. *Ibid.*

COSTS:

1. Where a bill had been filed to rescind a deed of release and quit-claim for a slave, on an allegation of fraud: upon the emancipation of the slave by act of law, the court declined to hear the cause and ordered the bill to be dismissed without prejudice and that each party should pay his own costs, as if the suit had abated. *Kidd v. Morrison*, 31.

COSTS—*Continued.*

2. An administrator will not ordinarily be allowed costs in a cause constituted by him for the purpose of having the instructions of the court upon questions which with reasonable certainty may be solved by counsel; nor where they are incurred by making unnecessary parties. *Colson v. Martin*, 125.
3. Partial allowance of costs in such a cause under peculiar circumstances. *Ibid.*

See Antedating an Instrument.

DEED, CONSTRUCTION OF:

1. Where real and personal property was given to A in trust for his wife and their children, with power to apply the proceeds to the maintenance, etc., of the *cestui que trusts*, and as the children should come to maturity to advance them, and also to devise the property to his wife and such of his children as he should deem right (60 N. C., 575): *Held*,
(1.) That, upon the death of any such children in A's life-time, their several shares in the property vested in their real and personal representative, subject to any execution thereafter of the said power.
(2.) That under the power to devise, inasmuch as some of the children survived him, he could not devise to a granchild. *Carson v. Carson*, 57.

DEED, CANCELLATION AND CORRECTION OF:

See Fraud.

DEVISEE:

See Legacy.

DIVORCE:

See Alimony.

DOWER:

See Widow, 1.

EMANCIPATION:

1. A question having been made whether one who, upon a purchase of a slave at a sale by a Clerk and Master, had paid cash instead of giving bond, as required by the order of sale, could not be compelled to comply with that order; it was held that inasmuch as one incident to the relief sought would be to give an option to the defendant to have the biddings opened again, the intervening abolition of slavery rendered it unnecessary to decide the question. *Broughton v. Askew*, 21.
2. A testator, who died in 1864, by will dated in 1857, gave their freedom to certain slaves; and then by subsequent clauses also gave "to the above-named liberated slaves" property both real and personal: *Held*, (BATTLE, J., dissenting), that by the effect of the recent emancipation, such gift was valid. *Hayley v. Hayley*, 180.
3. Also, by the Court, that emancipation was the primary, and the method thereof but a secondary, object with the testator. *Ibid.*
4. Also, by PEARSON, C. J., and READE, J., that waiving all questions as to the time and manner in which emancipation was effected, the testator, from his knowledge of the issue which at the time of his death was notoriously involved in the result of the war then existing, must now be presumed to have intended that if such war resulted in emancipation the gifts should take effect, otherwise not. And, that such intention was not against any public policy which the State can now recognize. And that the contingency was not too remote. *Ibid.*

EMANCIPATION—*Continued.*

5. By BATTLE, J., that the Proclamation of President Lincoln could have no effect in liberating slaves where they did not come under the control of the armies of the United States, as these did not until after the death of the testator. *Ibid.*
6. Also, that the phrase "liberated slaves," unexplained, included only slaves that were such at the death of the testator. *Ibid.*
7. A legacy to slaves upon their future contingent emancipation (provided for in the will) is not against public policy, even though a part of the fund so given is to be made up of their own earnings. *Whedbee v. Shannonhouse*, 283.
8. Where a will contemplated an emancipation coupled with removal to Liberia or some such place, and provided a certain fund to be used to cover the expenses of such removal and also to supply clothing and implements of husbandry, and added that if any part of such fund were left, it should be divided among the slaves emancipated: *Held*, that as in the event they were emancipated without a removal by the results of the late war, such slaves were entitled to the fund undiminished by expenses, etc. *Ibid.*
9. The will for emancipation having been defeated as to a part of the slaves by the dissent of the widow: *Held*, that as the fund was bequeathed to the slaves as a class, those who fitted the description at the time of division took it all and there was no lapse. *Ibid.*
10. Semble, that the slaves who were reduced to the former condition by the dissent of the widow are, as things have turned out, entitled to a share of the fund. *Ibid.*

ESTOPPEL:

See Notice, 2.

EVIDENCE:

1. The rule that entries in the books of a firm are evidence against all of the parties, is true only of those made whilst the firm is doing business; therefore, entries so made by a partner who is winding up the partnership under a transfer to him for that purpose, are not *per se* evidence for him against co-partner. *Clements v. Mitchell*, 3.
2. Declarations of a bargainor impeaching a conveyance, made after its execution, are not admissible in evidence. *Burroughs v. Jenkins*, 33.

See Legacy.

EXECUTION:

1. Where a sheriff, under a *ven. ex.* having relation prior to a certain deed in trust, sold land which had been conveyed in such deed to secure creditors, and upon being indemnified allowed the trustee to retain the surplus beyond what the process in his hands called for; and before the return day other like writs, having similar relation, were placed in his hands, upon which he returned, "To hand too late to sell:" *Held*, that the creditors under the later writs had a right to join in a bill to subject such surplus to the satisfaction of their debts. *Boyd v. Murray*, 238.
2. Also, that the sheriff, having made such a return, could not be compelled by a rule to bring in the money. *Ibid.*
3. Section 5 of Ordinance of Convention of 1866 (Stay Law), does not affect writs of *ven. ex. Ibid.*
4. The interest of one who holds land under a bond for title, the price not having been paid, is not subject to sale under execution. *Ledbetter v. Anderson*, 323.

See Choses in Action; Bond for Title, 1.

EXECUTORS AND ADMINISTRATORS:

1. An administrator is not bound to follow the assets of his intestate into another State; but he should hold the persons in whose hands such assets are to an account for them, if they prefer a claim against the estate in his hands. *Colson v. Martin*, 125.
2. The complainant having qualified as one of the executors of the will before he knew of the existence of a marriage agreement, is not estopped from filing a bill against his co-executor for property in the hands of the latter, but claimed by the complainant under the agreement. *Harrington v. McLean*, 258.
3. Courts of equity are not bound by the statute allowing executors and administrators nine months to plead. *Marsh v. Grist*, 349.
4. R. C., c. 46, s. 31, which provides that "the appointing any person executor shall not be a discharge of any debt or demand due from him to the testator," includes cases where the executor acts under the appointment, as well as those where he does not. *Moore v. Miller*, 359.
5. A bill seeking to compel an executor to execute a general power to sell real estate for the payment of debts, can not be maintained without making the devisees of such estate parties. *Ibid.*
6. A creditor can not, merely as such, sustain a bill against an executor, seeking to have his debt paid. *Ibid.*

See Taxes.

EXONERATION:

See Surety and Principal.

FRAUD:

1. In order to set aside a conveyance that is very advantageous to the bargainee, it is necessary to allege and prove, either the existence of those confidential relations between the parties on account of which public policy will not allow such a transaction to stand, or actual exercise by the bargainee of undue influence, circumvention or fraud. *Burroughs v. Jenkins*, 33.
2. A mistake in a deed will be corrected, only upon the terms that the person applying therefor will give effect to such counter equities in favor of the bargainor as may arise out of the transaction. *Coleman v. Coleman*, 43.
3. The rule, a man must come into equity with clean hands, does not apply to a case in which the complainant seeks to set aside conveyances made by himself with a view to evade the Confiscation Acts of the Confederate government. *Blossom v. VanAmringe*, 133.
4. One of a number of transactions in a course of business is not, without special reason, to be isolated from the general account of such business. *Ibid.*
5. Where property was bought at a public sale of which the conditions were that payments should be made in "good current bank money," and a purchaser gave his note for the amount of his purchase in general terms, without adding "good current bank money," because he was assured it was implied: *Held*, that equity would correct the mistake, and supply the omission. *Womack v. Eacker*, 161.
6. Where a creditor was paid a smaller sum than was due, and without reading it signed a receipt written by one in whom he confided, and expressed to be in full of his claim though not so understood by him: *Held*, a proper case for a court of equity to relieve by correcting the receipt. *Elliott v. Logan*, 163.
7. Where a son, having acquired control over an old and imbecile father, in the absence of other friends of the father and otherwise under suspicious circumstances, obtained a deed for all the father's lands

FRAUD—*Continued.*

at an inadequate price, and gave his note for the amount, a court of equity at the suit of the other heirs will order the deed to be cancelled. *Hartley v. Estis*, 167.

8. Where land was sold by the acre, and the vendor fraudulently represented the tract to contain a greater number of acres than it actually contained, the purchaser is entitled to relief against the collection of so much of his note for the purchase money as is for the excess. *Earl v. Bryan*, 278.
9. One who asks to have an absolute deed corrected into a mortgage, must allege and prove that a clause of redemption was omitted, by reason of ignorance, mistake, fraud or undue advantage taken of the bargainor. *Briant v. Corpening*, 325.
10. Therefore, no relief will be given where the only allegations are, that the bargainor executed the deed in absolute form, "but intended simply as a mortgage, as will more fully appear by the proofs"?—and, that the contract was that the defendant, "having paid the debt to H, took the deed absolute on its face, but agreed to make a title bond at a subsequent day to the plaintiffs, conditioned to reconvey on the payment of the debt," etc. *Ibid.*

FRAUDS, STATUTE OF:

1. A memorandum of a contract to convey the land of a principal signed by an agent in his own name is a compliance with the statute of frauds, if it be expressed that the contract was made for the principal. *Phillips v. Hooker*, 193.
2. A memorandum setting forth that the agent agreed for "Mrs. H. to make a deed for her house and lot north of Kinston," to the plaintiff, is not void as being too vague and indefinite—it being admitted by Mrs. H. (the defendant), in her answer, that she owned but one house lot in the county, and that the agent had been authorized to sell her house and lot; and she is bound to convey in fee simple. *Ibid.*
3. One who has accepted a parol promise for the conveyance of land, can not, upon being compelled at law to pay the notes given for the purchase money waive his claim to specific performance, and compel a repayment of such money by the bargainors who submit to perform the contract. *Foust v. Shoffner*, 242.
4. A description of land as—A tract in Iredell County, containing 30 acres, adjoining the lands of William Shaver, Caldwell, and others: *Held*, to be sufficient in a contract to convey. *Shaver v. Shoemaker*, 327.

HUSBAND AND WIFE:

1. If one, who has a general power over an estate, exercises it for purposes regarded as secondary, a court of equity will hold such estate as thereby rendered liable to all the usual incidents of property. *Rogers v. Hinton*, 101.
2. Therefore, where a *feme covert*, who had a separate estate, with a general power of appointing the same by deed or will, disposed of such estate to various devisees and legatees, subjecting expressly only a portion of it to the payment of her debts: *Held*, that her creditors had a right to resort to the whole estate for their satisfaction. *Ibid.*
3. Where a married woman, entitled to personal property in remainder after a life estate, dies before the tenant for life, upon the death of such tenant her administrator will take it for the benefit of her husband. If her husband then die leaving an executor, the latter will take the beneficial interest. *Colson v. Martin*, 125.
4. Articles of separation between husband and wife, whether entered into before or after the separation, are against law and public policy, and therefore void. *Collins v. Collins*, 153.

IN FORMA PAUPERIS.

See Practice, 4.

INJUNCTION:

1. Where there is reason to apprehend that the subject of controversy in equity will be destroyed or removed, or otherwise disposed of by the defendant pending the suit, so that the complainant may lose the fruit of his recovery or be hindered and delayed in obtaining it, the court, in aid of the primary equity, will secure the fund by the writ of sequestration or the writs of sequestration and injunction, until the main equity is adjudicated at the hearing of the cause. *Parker v. Grammer*, 28.

2. The rule, that in injunction causes all the defendants must answer before a dissolution will be ordered, will not be enforced where the party not answering is not charged with any particular knowledge of the material facts alleged; and more particularly where no steps have been taken to bring such party into court. *Ijams v. Ijams*, 39.

3. Where a bill avers that the defendant threatens to sell the article in dispute and send it beyond the limits of the State, and the answer admits the averment, with the explanation that the defendant does not intend to deprive complainants of such rights thereto or to its proceeds as the law shall assign them: *Held*, to be a fit case for continuing an injunction. *Reynolds v. McKenzie*, 50.

4. Courts of equity grant special injunctions against trespass with reluctance; and only in cases where but for such interference the injury would be irreparable, or where no redress can be had at law. *Thompson v. McNair*, 121.

5. Therefore where it was shown that the defendant was insolvent, an injunction against his cutting pine timber, splitting lightwood and making tar was dissolved. *Ibid.*

6. An allegation in an answer that the trespasses complained of were committed by the defendant in connection with two other persons who were solvent, will be considered by the court as important upon the motion to dissolve. *Ibid.*

7. An injunction will not be continued merely because one of the defendants has not answered, if the case show that the answer could not be material to the point upon which the injunction is claimed. *Ibid.*

8. Upon motion to dissolve a special injunction on the coming in of the answer: *Held*, that as there was upon the whole probable cause in regard to the primary equity, and also ground for a reasonable apprehension as to the security of the fund, the injunction should be continued to the hearing. *Blossom v. Van Amringe*, 133.

9. Upon such motion the answer of one of several defendants may be used as an affidavit in support of the bill. *Ibid.*

10. Where it was alleged in a bill that the complainant, who was old and ignorant, had been induced by fears of prosecution, excited by the defendants (one of them a government official and a supposed friend), to transfer bonds and notes of a large amount to them at a price less than half their value, secured by a bond that is still unpaid though long overdue, and that the defendants are insolvent; which allegations were only partially denied by the answers: *Held*, upon a motion to dissolve an injunction against the collection or transfer of the notes, to be proper to look into the whole case, and it appearing that the complainant had probable grounds for relief, to continue the injunction to the hearing. *Key v. Dobson*, 170.

INJUNCTION—*Continued.*

11. One who files a bill to obtain an injunction against a suit at law must in general submit to a judgment in such suit; the only exception being where the complainant prays for a discovery to aid him in his defense at law. *Hunt v. Sneed*, 351.

See Partners, 8, 9.

INTEREST:

When interest upon an account is charged upon a wrong principle, if no substantial damage is done to either party the court will not disturb it. *Phelan v. Hutchison*, 116.

JUDGES, PROVISIONAL:

See Jurisdiction, 1, 2.

JUDICIAL SALES:

1. A sale of land under a petition in the name of an infant having been confirmed, the court ordered the Master to collect the note when due, and, upon payment, to make title; at another term, the court ordered the Master to pay the note over to the infant's guardian; this was done, and the Master made title to the purchaser; on a petition by the infant after coming of age, praying that the land might still be held subject to the payment of the purchase money: *Held*, that the deed by the Master was irregular and invalid, and that the petitioner was entitled to the relief which he desired. *Singletary v. Whitaker*, 77.
2. Any court which orderes a judicial sale, has the power to make a decree for the money after a ten-days' notice thereof. *Cotton, ex parte*, 79.
3. The statutory provision to that effect (Code, c. 41, s. 129), is constitutional, and as regards courts of equity, merely substitutes notice and execution for the original power of proceeding by attachment. *Ibid.*
4. Where the note given at a sale was given to a former Clerk and Master: *Held*, that a decree in the name of the present Clerk and Master was valid. *Ibid.*
5. A suit upon a note made to a former Clerk and Master by his name and office, need not be brought in his name. It were more safe to bring it in the name of the State. *Ibid.*
6. Where a commissioner, appointed by a court of equity to sell land "for cash," (in conformity with a representation that it would be best to sell for "ready money,") received in payment Confederate treasury notes, the sale was set aside. *McNeill v. Shaw*, 91.
7. One who purchases land at a sale by a Clerk and Master, made under a petition by the representatives of a person bound by a parol agreement to hold in trust for another, can not, before payment of the purchase money, or execution of title, claim to be either a purchaser for valuable consideration, or a purchaser without notice. *Cohn v. Chapman*, 92.
8. Where all the persons who have any interest in the land, whether vested, contingent or executory, ar *in esse*, and are before the court, the court may make an order of sale. *Houston v. Houston*, 95.
9. Where any members of a class to which an executory devise is limited, are *in esse*, a court of equity in North Carolina will, upon a proper case being made, order a sale of the land devised; otherwise, where no such members are *in esse*. *Dodd, ex parte*, 97.

See Emancipation, 1.

JURISDICTION:

1. The offices in the courts of law having, in November, 1865, become vacant by the result of the late war, the Provisional Judges (who by an ordinance of the Convention had power to exercise at chambers all such authorities as by the laws of the State are conferred on Judges at chambers) were authorized to exercise jurisdiction in cases in which, when the courts of law are open, equity has no jurisdiction. *Reynolds v. McKenzie*, 50.
2. Being so authorized, neither they nor the courts which succeed them lose jurisdiction of a cause entertained during such vacancy, by the reinstatement of the ordinary tribunals in their usual jurisdiction. *Ibid.*
3. Courts of equity are not ousted of their jurisdiction in regard to subjects which by statute have been committed to the jurisdiction of courts of law, unless there be in such statute express language or clear intendment therefor. *Oliveria v. University*, 69.
4. One who claims in his own right a thing that is in the hands of his co-executor, who claims it as belonging to their testator, being a tenant in common of the property with such co-executor, has his remedy in equity and not at law. *Harrington v. McLean*, 258.
5. One effect of the doing away with execution by *ca. sa.* is to originate a jurisdiction in equity to compel the application of legal choses in action to the satisfaction of debts. As preliminary to its exercise in any case the court will require: 1st, That the debt shall be established by a judgment at law, and 2d, That the want of property subject to a *fi. fa.* shall be shown by a return of *nulla bona*, or by other sufficient proof. *Hook v. Fentress*, 229.
6. Whether in exercising this jurisdiction other creditors will be allowed to come in and make themselves parties and take a share of the fund, *quære*. *Ibid.*
7. A court of equity below has exclusive jurisdiction of a bill to impeach a decree of the Supreme Court for fraud and surprise; and such bill may be filed without the leave of the Supreme Court. *Kincaid v. Conly*, 220.
8. Courts of equity in this State will not entertain jurisdiction of a bill against an executor or administrator to enforce payment of a legal demand at the suit of a single creditor; and upon demurrer such a bill will be dismissed. *Wilkins v. Finch*, 355. S. P., *Moore v. Miller*, 359.
9. A bill having been filed in 1864 against executors to obtain a construction of a clause in a will, but containing the necessary prayer for an account and settlement, in the Supreme Court (to which the cause had been transferred) a reference was ordered and a report made at December Term, 1864, without notice to the defendants and after the death of their counsel, and thereupon a decree was made against the defendants for the amount in their hands, which included a large sum of Confederate money: *Held*, a proper case for an injunction, upon a bill to impeach the decree. *Kincaid v. Conly*, 270.
10. Relief administered in equity must be limited to that sought by the frame of the bill. *Latham v. Skinner*, 292.
11. Courts of equity will not relieve a party unless his proofs support his allegations, and the latter state a case entitled to relief. *May v. Hanks*, 310.

See Executors and Administrators.

LAPSE OF TIME:

Where an answer admitted that a deed for land, absolute upon its face, had been made as charged in the bill, upon a parol trust that it should be a security for the payment of a sum of money, but relied

LAPSE OF TIME—*Continued.*

upon the lapse of ten years since its execution as a defense against an enforcement of such cotract: *Held*, that, as the complainant had all the while been in possession of the land, the defense was not valid. *Price v. Gaskins*, 224.

See Alimony, 8.

LEGACY:

1. Where a residue in a will was given to John, Elizabeth, Edward, and Robert, "four children of L. S. and P. E. Webb," and John died in the lifetime of the testatrix: *Held*, that his share did not survive to the other residuary legatees, but was undisposed of, and went to the next of kin. *Winston v. Webb*, 1.
2. Distinction between the cases where there is a lapse of a share in a residue given "to the children of a certain person to be equally divided between them" as a class, and where there is such a lapse in a residue given to be equally divided among such children *nominatim*, stated by BATTLE, J. *Ibid.*
3. A testator gave to his wife money, slaves, etc., and afterwards by a residuary clause directed "that the balance of his property be sold and the money arising therefrom be equally divided amongst all the legatees named in the will, except the Masons:" *Held*,
(a) That the residuary clause included such articles in the lapsed legacy as are the subjects of sales at auction, but not such articles (either lapsed or otherwise undisposed of) as are not subject of such sales.
(b) That persons referred to in other parts of the will only as "children of," etc., are included in such residuary clause equally with persons actually named in such parts.
(c) That the division directed by the residuary clause is a division *per capita*.
(d) That the word "legatees" in the residuary clause included the wife, and that her share in the residue having lapsed does not go to the other residuary legatees, but is undisposed of and goes to the next of kin. *Hastings v. Earp*, 5.
4. A bequest, that certain chattels "in the possession of my son John shall be divided between his children that may be living at his death," does not, by implication, confer a life estate upon John, but such interest for life falls into the residue. *Ibid.*
5. A testator provided as follows: "I lend unto my beloved wife Mary G. Sawyer all of my real and personal estate, to have and to hold the same during her natural life, and at her death I give the same to be equally divided between the heirs of my beloved wife, Mary G. Sawyer and my heirs-at-law:" *Held*, upon the death of the wife, that:
(a) The rule of distribution *per stirpes* governs as well the division between the "heirs" of the wife, and "heirs at law" of the testator, as that of the portion given to the latter class, among themselves.
(b) Technical words, in the absence of explanation upon the face of a will, will be taken in a technical sense.
(c) A word repeated in the same clause of a will must, at each repetition, have the same meaning attached to it.
(d) Where a direction is given for the equal division of a fund among several named persons, and "the heirs" of another person and it appears that by "heirs" is meant children, such division must be *per capita;* but when the word "heirs" must include not only children, but grandchildren, etc., then the division must be *per stirpes*. *Grandy v. Sawyer*, 8.
6. Where a testator used the following expressions: "I give and bequeath unto my wife Sarah all of the property that I possess at the time of

LEGACY—*Continued.*

my death, consisting of all my real estate of all kinds, and all my money, notes and accounts, after paying all my just debts;" "My father and mother are to have the land lying on the southeast side of the Reedy branch, of the tract of land where they now live, and the stock, household and kitchen furniture at that place;" and mentioned no other things in his will, although he died in possession of fifteen or more slaves, and of horses, cattle, crops, etc.: *Held*, that the wife was constituted universal legatee except as to what was expressly given to the father and mother. *Bunting v. Harris*, 11.

By PEARSON, C. J., *arguendo:*

(a) The words used in different wills are so different, and the circumstances of testators in regard to property and the objects of bounty are so various, that it is almost impossible to find one case upon such subjects that ought to govern another.

(b) In doubtful questions of construction something must be yielded to the contemporaneous action of the parties concerned. *Ibid.*

7. The following words: "I give to my beloved wife, etc., the sum of $20,000, to be paid, etc., in eight annual installments, the first to be due twelve months after the date of death, and to be paid as follows, to wit: one note of hand on E. S., for the sum of $1,000, and one on same for $500, each of them bearing interest at 7 per cent, the balance of said installment to be paid in money at any time when my said wife may desire; the remaining installments to be paid annually thereafter from the proceeds arising from the sales of the produce of my farm:" *Held*, to create a general pecuniary legacy so far that it did not fail upon a failure of the fund to which it is referred, but is to be paid out of the general assets. *Mitchener v. Atkinson*, 23.

8. The rule, latent ambiguities in wills may be explained by parol evidence, approved of and applied ("Linebarger Plantation.") *Kincaid v. Lowe*, 42.

9. A testator directed "that the shares * * * which my son Presley, etc., are entitled to under this will * * * as well as their equal dividend of my estate not bequeathed, be retained by * * * trustees., etc., for them during their lives, and at the decease of any one of them the property * * * to return to his, her or their brothers and sisters:" *Held*, that upon the death of one of the tenants for life, her share devolved upon such of her brothers and sisters as survived her, together with the representatives of such as had died since the death of the testator. *Mayhew v. Davidson*, 47.

Also, that Presley's interest in such share is not subject to the trust which affects the property originally given to him. *Ibid.*

10. Where a testator directed that two of the shares into which he devided his estate "shall be in negro property, which shall be designated by the executors to this will:" *Held*, that such legacies were demonstrative, and therefore that upon the emancipation of the slaves the legatees thereof lost them, and could not look to other parts of the estate for indemnity. *Johnson v. Osborne*, 59.

11. A clause, annexed to a devise in fee, providing that in case either of the devisees "shall sell or encumber his land with any sort of lien, by way of mortgage or otherwise," before attaining the age of thirty-five years, then the devise should be void, is invalid. *Twitty v. Camp*, 61.

12. Where a testator, having devised certain property to his wife, ordered that after her death, the remainder should "be divided amongst our next of kin," and died leaving no persons who were at once next of kin to both: *Held*, that the property should be divided into two equal parts and be given, one to the next of kin of the testator, the other to the next of kin of his wife." *Cooper v. Cannon*, 83.

LEGACY—*Continued.*

13. A legacy of property "to be sold at my wife's death and equally divided among all my children," is vested; and therefore the representatives of such children as survived the testator and died before the wife are entitled to shares. *Falls v. McCulloch*, 140.

14. Where it appeared that the sole motive with a testator, for leaving the greater part of his estate to a son, was, that the latter should live with him and help him pay his debts and also treat his parents with "humanity and kindness," and such son died in the lifetime of the testator: *Held*, that the devise lapsed; also, that the son's interest in the condition was not "real or personal estate" within the statute, (Code, c. 119, s. 28), which gives such estate to the issue of a son dying under such circumstances. *Lefler v. Rowland*, 143.

15. Where a testator recommended one to the humanity of his executors, and added that he left in their hands the interest on a certain fund for the support of the person so recommended, during his life, and upon his death the surplus, if any, to go over to another: *Held*, that the clause was imperative, and gave to such persons a right to a support for life under it. *Chambers v. Davis*, 152.

16. When it appears, from other parts of a will, that the testator understood the distinction between "children" and issue more remote, grandchildren and great-grandchildren can not be included in a division directed to be made among children. *Boylan v. Boylan*, 160.

17. Where a man of large estate, who died in 1864 without children, bequeathed to a sister-in-law a legacy of $1,000: *Held*, that the legatee was entitled to payment in lawful currency of the United States; notwithstanding that the testator had on hand at his death Confederate notes sufficient in amount to pay that and the other pecuniary legacies. *Barham v. Gregory*, 243.

18. The following item in a will, "I give and bequeath to nephew E. P. H. all my land, etc.; and the following negroes: Bill, etc., and their increase, to take them in possession and have the use of them after my decease but not to be at his disposal but for the use of his children, heirs of his own body, and no others whatever:" *Held*, to confine the trust for the children to the slaves, and to confer upon E. P. H. an absolute estate in the land. Especially as E. P. H. was already in possession of the land before the testator's death. *Hall v. Gillespie*, 256.

19. Under a clause of a will giving property to "the heirs and legal representatives of my deceased sister," etc., (followed by clauses giving respectively the children of a deceased brother "an equal share," and the son of a nephew "a share,") the legatees are the children of the deceased sisters, and take *per stirpes*. *Harper v. Sudderth*, 279.

20. A devise of land to A for life, and then to "be sold and the money arising therefrom equally divided between the then surviving children of A,"—creates such an interest in the children as vests only at the death of A; therefore, a conveyance thereof made during A's lifetime by the husbands of two of the children who in the event survived, passed nothing, and their wives, at the death of A, were entitled to take the land specifically, or to have it sold, as they might elect. *Grissom v. Parrish*, 330.

21. Where a testator gave land and slaves to his daughter Nancy Waller for life, and then "to be equally divided between the children of the said Nancy Waller and my sons William and John:" *Held*, that at the death of Nancy the property was to be divided *per capita* between William, John, and the children of Nancy. *Walter v. Forsythe*, 353.

LESSOR AND LESSEE:
See Vendor and Purchaser, 5.

LIEN:
See Vendor and Purchaser, 1, 6, 7.

LIS PENDENS:
1. Where a bill recited that a petition for a sale of land had been filed and was still pending in the same court and that the money was still due by the purchaser, and prayed that, inasmuch as the price at such sale was at an extravagant rate, being based upon Confederate paper money, the purchaser and his sureties might be decreed to pay its reasonable value, etc.: *Held*, that as this relief was no other than might have been had in the petition then pending, the bill would not be entertained; also, that, as the bill showed upon its face that the relief might have been had in the former proceeding, the objection was well taken by demurrer. *Rogers v. Holt*, 108.
2. Where a complainant can obtain the money desired under a bill already filed by him, it is improper to commence another suit therefor. *Whitaker v. Bond*, 227.
3. Where it appears upon the face of a bill (or petition having the requisites of an original bill) that the relief sought may be had in a cause already pending, the bill is demurrable and will be dismissed. *Gee v. Hines*, 315.
4. Such bill will not be treated as notice of a motion in the original cause. *Ibid.*
5. A *lis pendens* being notice to all the world, a sale of land which is the subject of a suit in equity, before a decree is rendered, will not be regarded, and the land may be sold under an execution issued upon the decree when rendered. *Baird v. Baird*, 317.
6. In such case a supplemental bill to enforce the decree in the original suit, making the purchaser of the land a party, is unnecessary, and will be dismissed upon demurrer. *Ibid.*

MARSHALING:
A prayer to marshal certain funds will be refused where the paramount charge is upon one fund only. *Young v. Davidson College*, 261.

NOTICE:
1. One who is put upon inquiry by certain facts within his knowledge, is affected with notice of everything that such inquiry would have discovered. *May v. Hanks*, 310.
2. In the absence of deliberate fraud upon the part of the owner the title to an equitable estate in land is not bound by his conduct, as creating an *estoppel-in-pais*. *Ibid.*

PARTITION:
The sums charged upon "the more valuable dividends," in partitions of lands under the Rev. Code, c. 82, are charges, not upon the persons of the owners of such dividends, but upon the land alone. *Young v. Davidson College*, 261.

PARTNERS:
1. A partner, who undertakes to wind up the business, stands in the place of an executor, and therefore can establish disbursements only by vouchers properly authenticated. *Clements v. Mitchell*, 3.
2. Real estate owned by a partnership is not regarded in this State as personalty. *Ferguson v. Hass*, 113.

PARTNERS—*Continued.*

3. A partner who, upon a dissolution of the firm, undertakes to collect the debts, is bound only to the diligence of a collecting agent, and so is responsible for all that it can be shown that he collected, or might with reasonable diligence have collected. It is an error to throw upon him the burden of proving what accounts in his hands were bad. *Phelan v. Hutchison*, 116.
4. In taking a partnership account, items of debt by the partners to the firm are to be deducted out of the shares of such partners respectively and not out of the assets of the firm. *Ibid.*
5. *Quaere*, whether the principle established in *Boyd v. Hawkins*, 17 N. C., 329, as regards commissions to trustees, etc., be not applicable to a surviving partner who settles up the partnership business. *Ibid.*
6. A transfer, in terms absolute, of all the effects of a firm, (consisting of goods and choses in action of an unascertained value) having been made in the firm name by one partner without the consent of his co-partner, for a certain sum, being the amount of the firm debts: *Held*, not to be obsolute, but only a security for the firm debts. *High v. Lack*, 175.
7. Also held, that any surplus after payment of the firm debts belonged to the individual members of the firm. *Ibid.*
8. Therefore, an injunction granted at the instance of the non-assenting partner should be continued to the hearing, and in the meantime a receiver should be appointed. *Ibid.*
9. Where a partnership at its dissolution was much in debt, and the estate of the deceased partner was insolvent: *Held*, that the fact that a tract of land owned in common by the partners was probably a part of the firm assets was sufficient ground for an injunction in favor of the surviving partner, forbidding the administrator of the deceased partner from proceeding under an order to sell such land by license from the County Court, in order to pay the separate debts of his intestate. *Williams v. Moore*, 211.
10. One of two partners having died and the survivor and a third person having been appointed administrators on his estate, a bill filed by such surviving partner against his co-administrator for a settlement of the affairs of the firm, is demurrable and will be dismissed. *Smith v. Bryson*, 267.

See Contract, 10; Evidence, 1; Vendor and Purchaser, 6, 7.

PLEADING:

1. A bill had been filed to obtain a discovery in aid of a plea of usury, and the defendant demurred thereto; afterwards, c. 24, 1865-'6, repealing the former act upon usury, and c. 43, 1865-'6, upon the subject of evidence, were passed: *Held*, that the bill should be dismissed with costs. McDowell v. Maultsby, 16.
2. It is not necessary to make the administrator of the deceased a party to a bill preferred by the next of kin against the University, to recover property which had improperly been paid over to that institution. *Oliveira v. University*, 69.
3. Where a bill charged that the defendant had bought land upon a parol agreement that another (the deceased husband of one of the complainants, and the ancestor of the others), should share in such purchase: *Held*, that the administrator of that other person was not a necessary party to such bill. *Ferguson v. Hass*, 113.
4. Although the language of a bill may not be technical and precise, yet if upon looking through it enough appear to warrant relief, it will not be dismissed. *Ibid.*

PLEADING—*Continued.*

5. In a suit for a legacy to the sole and separate use of a *feme covert*, the husband is not a proper party plaintiff. *Barham v. Gregory*, 243.
6. It being admitted in the answer of executors sued for a pecuniary legacy that there are assets sufficient to pay the complainant and the other pecuniary legatees, the latter are not necessary parties. *Ibid.*
7. Where it is contended by the executors that a pecuniary legacy is payable in Confederate notes on hand at the death of the testator, the residuary legatees should be made parties in a bill by the pecuniary legatee seeking the payment of his legacy (at par) in the currency of the United States. *Ibid.*
8. A demurrer for matters of substance should be general, and not set out the grounds of objection. A demurrer for matters of form should set out the grounds, but not an argument to sustain the objection. *Harrington v. McLean*, 258.
9. A bill by one claiming property as remainderman, under a marriage agreement between his parents, is not required to set out a will of the father professing to dispose of property; and the legatees in the will should not be made defendants, the executor representing the adverse interest under the will. *Ibid.*
10. Words, however disparaging or abusive, are not scandalous in equity pleading, unless they be also impertinent. *Henry v. Henry*, 334.
11. Where a bill was filed for the specific performance of an alleged contract, and instead of merely setting out the contract, and alleging its non-execution as a ground for the prayer, it recited, by way of inducement, a train of circumstances which went to show ingratitude and baseness on the part of the defendant in refusing to execute the contract: *Held*, that an answer which set up as a defense, that the contract was a forgery by the plaintiff, was not liable to exception for scandal, for detailing circumstances corroborative of the averment. *Ibid.*
12. In such a case, the court suggested that the bill be amended by striking out the statement of circumstantial evidence, and that thereupon the defendant put in a plea denying the execution of the contract, so that an issue might be directed for trial by a jury at law. *Ibid.*
13. One who acted under color of an appointment by the Governor (made by virtue of Rev. Code, c. 99, s. 14, but after its repeal), having brought suit in the name of the State against a defaulting taxpayer: *Held*, to be no ground for dismissing it at the instance of the defendant, that it purported to be filed "on the relation" of such person. *S. v. McGalliard*, 346.
14. Distinction stated between suits in the name of the State to the use of a citizen where the latter is the real party, and such suits where the State alone is interested and some citizen is named in connection with it merely for the purpose of securing costs. *Ibid.*
15. Courts of equity are not bound by the statute allowing executors and administrators nine months to plead. *Marsh v. Grist*, 349.

See *Lis Pendens;* Practice; Trust, 4.

POWERS:

See Husband and Wife, 1, 2.

PRACTICE:

1. Where the defendant in a petition for divorce and alimony, not having been served with process, was present in court at the term when the petition was filed, and made objection personally to any order granting alimony; it was held, that such presence and action did not give

PRACTICE—*Continued.*

to the cause the character of a *lis pendens;* and, therefore, that at such stage no order for alimony could be made. *Simmons v. Simmons*, 63.

2. Where a bill named certain persons, and prayed that they might be made defendants without expressly praying for process against them: *Held*, to be a sufficient designation of them as parties, especially as they all appeared and joined in the demurrer. *Ferguson v. Hass*, 113.
3. Where a bill was prolix, argumentative and inartificial, and was demurred to on that account: *Held*, that the proper order was, for its reformation in these respects in the court below, at the costs of the complainants. *Ibid.*
4. A complainant, even where permitted to sue *in forma pauperis*, is required to give bond upon obtaining an injunction. But if an injunction be issued and objection is not made for several years (in this case six), the defendant will be presumed to have waived the irregularity. *Howe v. Green*, 250.
5. Upon affidavit that the complainant, in a bill praying an injunction against a writ of possession in ejectment, is committing waste, the court at the instance of the defendant, will make an order in the cause staying the waste. *Ibid.*
6. Where the transcript in an equity cause contained only the following entries, "Injunction executed, Answer filed, Continued, Defendant appeals to the Supreme Court," the court, upon motion, dismissed the appeal. *Mitchell v. Moore*, 281.
7. The Judge in the court below is not authorized to send up a statement in equity cases. *Ibid.*
8. Under Rev. Code, c. 32, s. 3, r. 5, it is error to set down a cause for hearing until the second term after replication is filed, whether the testimony proposed to be offered by the defendant be material or otherwise. *Trammel v. Ford*, 339.

See Attachment, 1; Fraud; Injunction; Judicial Sales; Jurisdiction; Interest; *Lis Pendens.*

PURCHASER:

See Vendor and Purchaser.

REVERSION:

The doctrine that rent follows the reversion applies in favor of devisees of the reversion, as well where it is directed to be sold and the proceeds divided amongst them, as where it is given specifically. *Lewis v. Wilkins*, 303.

SALES:

See Judicial Sales.

SEQUESTRATION:

See Injunction, 1.

SHERIFF, RETURN OF:

The mere affidavit of the party upon whom a notice was alleged in the sheriff's return to have been served, is in the absence of proof, no ground for reviewing a declaration, in a decree, that it satisfactorily appeared to the court that such return was true. *Cotten, ex parte*, 79.

SPECIFIC PERFORMANCE:

See Contracts; Vendor and Purchaser.

STAY LAW:

See Execution, 3.

SUPPLEMENTAL BILL:

See *Lis Pendens.*

SURETY AND PRINCIPAL:

1. Sureties can sustain a bill to have a debt paid by their principal or out of the estate, before they have been compelled to pay the debt. *Thigpen v. Price*, 146.
2. Sureties upon a bond may file a bill of exoneration, without being compelled previously to pay off such bond; but such equity is merely collateral, and does not place them in a better condition as against their principal, than if they held his bond for the amount for which they are liable. *Taylor v. Miller*, 365.

See Attachment, 2. 4.

TAXES:

1. An executor is not liable, as such, for collateral tax to the State upon a devise of land to himself, though he be liable as an individual. *S. v. Brevard*, 141.
2. An executor, in this State, is not responsible for collateral taxes upon the property of his testator situate in another State at the death of the testator. *Ibid.*
3. If an executor is required to make good valueless currency in his hands on settlement with the legatees, the State is entitled to its tax on the amount. *Ibid.*

See Pleading, 13.

TRUSTS AND TRUSTEES:

1. Where a creditor has exhausted legal remedies without avail, he may have the assistance of equity in subjecting to his claim the trust funds of his debtor—as here, an interest in an estate in the hands of an administrator. *Bennick v. Bennick*, 45.
2. Where a trustee, holding land as security for a creditor residing in Pennsylvania, had been compelled by a decree in a Confederate Court to sell and pay the proceeds to one of its officers: *Held*, that such creditor could still subject the land to debt, whilst in the hands of a purchaser with notice. *Ward v. Brandt*, 71.
3. Also, that the remedy in such case is not to order the deed to the purchaser to be delivered up for cancellation, but to declare such purchaser affected by the trust. *Ibid.*
4. The prayer of the bill being for a cancellation of the deed and for general relief, the court, declining to grant the former part of the prayer, under the latter declared the purchaser to be a trustee. *Ibid.*
5. One in possession under a purchase of a resulting trust in land, conveyed to a trustee to secure creditors or sureties, does not hold adversely to the trustee and *cestui que trusts*. *Thigpen v. Price*, 146.
6. Where one of the obligors upon a bond for $102 given in 1858, became insolvent in 1861, and the other in 1865, having been in failing circumstances for two or more years before, the trustee was held not to be responsible for negligence as to collection. *Donnell v. Donnell*, 148.
7. Upon taking an account between a *cestui que trust* and trustee: *Held*, (a) That the former could not in 1866 raise any question as to the value of Confederate treasury notes received by him, being *sui juris*, without objection in 1863, 1864, and 1865. *Ibid.*

TRUSTS AND TRUSTEES—*Continued.*

(b) Where both principal and surety upon a bond given in 1857 for $2,500, were then and still are solvent, and there was no necessity for its collection, the trustee was held responsible for collecting it in February, 1863, in Confederate notes and individual notes made after 1861. *Ibid.*

(c) The trustee was responsible for collecting more of the interest upon the bonds in his hands than was necessary for the maintenance and support of his *cestui que trust*. *Ibid.*

8. A bill had been filed by a creditor not secured in a deed-in-trust, to subject the surplus of the property so conveyed to the payment of his debt, and under an order in the cause the clerk had reported that such property was amply sufficient to pay all the debts, including that of the plaintiff: *Held*, that a decree that the trustee should pay to the plaintiff his debt, was erroneous; and that the proper decree would have been that the trustee should sell enough of the property to satisfy the judgment. *Bobbitt v. Brownlow*, 252.
9. By PEARSON, C. J., *arguendo*. If the report had stated that the trustee had on hand cash "amply sufficient," etc., a decree against the trustee individually would have been proper. *Ibid.*
10. Also, if the plaintiff had been secured in the deed-in-trust the decree might have been correct. *Ibid.*

VENDITIONI EXPONAS:

See Execution, 1, 2, 3.

VENDOR AND PURCHASER:

1. Where a vendor had executed a full title to the land sold, taxing from the vendee a personal bond with two sureties for the purchase money, upon the insolvency and death of the vendee and one of the sureties, and a sale of the land by the devisee of the vendee to a purchaser with notice: *Held*, that the other surety could not subject the land for his indemnification upon the bond. *Miller v. Miller*, 85.
2. An order for the specific performance of an executory contract for sale of land, when applied for by the vendor, includes: a reference for an account to fix the balance due for principal and interest of purchase money, and a decree for a sale of the land to pay such balance, unless at a day certain the vendee pays into court the said amount, and will accept the deed of the vendor, or make objection to his title and ask for a reference as to that. *Reade v. Hamlin*, 128.
3. Where, in a suit for specific performance brought by a vendor of land, it appeared that the property was being suffered by the vendee, who was in possession, to go to waste, and had thus already become an insufficient security for the price outstanding and the bargainor had made reasonable proposition for a rescission of the contract, and an arbitration of differences: *Held*, that it was proper to appoint a receiver of the property. *Ibid.*
4. A vendor of land who retains the title and allows the vendee to go into possession, may at any time take possession, or on notice given may require those in possession to pay the rents to him, to be applied to keep down the interest and, if any surplus, to the discharge of the principal. *Hook, v. Fentress*, 229.
5. Where the tenant of one who claimed under a bond for title from A, had by virtue of a sub-lease, become entitled to certain rents which he had promised to transfer to the obligee in the bond, in order to be by him applied in discharging the debt still owing to A for the purchase money: *Held*, that a bill filed after such promise had been made, would not enable A to intercept these rents and appropriate them to a debt owing by the tenant to himself. *Ibid.*

VENDOR AND PURCHASER—*Continued.*

6. A vendor of lands having delivered a deed in fee to certain purchasers, who were partners, upon their executing personal notes for the purchase money, a sealed instrument was delivered some weeks afterwards by the purchaser to the vendor, which expressed no valuable consideration, but referred to the sale, and stated a wish to secure to the vendor the payment of the bonds, and thereupon provided that in case of failure by the purchasers to make payment as their notes fell due, the vendor "should have such a lien (in and to such tract) and to that extent as will save him harmless:" *Held*, that, there being no valuable consideration, the paper could not, in any event, be set up either as giving a lien, or as a contract to give a lien. *Latham v. Skinner*, 292.
7. Also, the partnership having been subsequently dissolved, that the outgoing partner, who had taken a bond from his copartners to indemnify him against the firm debts, had thereafter no equity to subject the partnership funds to the payment of the debt to the vendor; and therefore that the vendor had none through him. *Ibid.*

WASTE:

See Pleading, 1, 2.

WIDOW:

1. The fact, that a widow elects to take under a will, does not constitute her a purchaser as regards the legacies therein. *Mitchiner v. Atkinson*, 23.
2. The distinction between dower in England, etc., and the same right in North Carolina, stated by PEARSON, C. J., in reference to the above doctrine. *Ibid.*
3. A widow who takes under a will in North Carolina is barred of dower in the lands included in such will because of her election, and not under an idea that she has received a consideration therefor. *Ibid.*

WILLS:

See Legacy; Emancipation.