ANNOTATIONS INCLUDE 168 N. C.

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VOL. 43

EQUITY CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1851
JUNE AND AUGUST TERMS, 1852

BY JAMES IREDELL
(Vol. 8.)

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

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CASES REPORTED

CASES CITED

EQUITY CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1851

JOHN C. ATKINS v. FRANCIS J. KRON ET AL.*

1. In estimating the relative value of a life-estate and a remainder or reversion in real property, there is no general rule which can be properly applied in this State. Every case must depend upon its own peculiar circumstances, to be weighed and adjudged on a reference to the Clerk.
2. If exceptions are taken to the report, the Court will only look to the evidence produced before the Clerk; and, if not satisfied, will refer the case back for other and fuller proof.
3. The best mode, in cases of this kind, when the parties are upon an equal footing, so far as regards the protection of their interests, is to have a sale of the premises, after which the relative estimate can be easily made.

RUFFIN, C. J. Under the interlocutory order made at the last (2) term in this cause, 37 N. C., 424, the master has reported that Francis Augustus De la Mothe and Mary C. Kron were not qualified to hold land in this State at the death of the testator.

To that the counsel for the Forestiers have excepted, because, in 1824 Mrs. Kron made a declaration in this court of her intention to become a citizen, and Francis A. De la Mothe made a similar declaration in 1840.

The exception must be overruled. The testator died in 1838, and therefore clearly the brother could not take land when the testator died and the legacy to him could be charged on land. But if he had made his declaration as Mrs. Kron did it would not make them citizens. The

*This opinion was delivered at December Term, 1843, of this Court, upon exceptions to the master's report, but being accidentally overlooked at the time, has not heretofore been published.

alienage continues after the declaration until the order for naturalization, which, indeed, has not yet been made. Nor could these persons hold land under the fourth section of our State Constitution, since it does not appear that they had taken the oath of allegiance to the State.

In setting a value upon the real and personal estates, so as to apportion between them the common charges on them, the master found the value of the fee simple in possession of the land assigned for the dower of the testator's widow to be $2,600; and that the value of the life estate is $1,650, and of the reversion $950, on which latter sum Mrs. Kron's children are to contribute, in respect to this part of the land, with the personalty, towards the payment of the legacies and expenses chargeable thereon.

To this part of the report the Forestiers have also excepted, "because the sum deducted from the estimated value of the real estate, on account of the encumbrance of the dower, is unreasonably large."

The master states in the report that the widow is 34 years old, and that he estimated her life at twenty-nine years; and that, so doing, he assumes the sum of $950 to be the value of the reversion, because (3) that sum and the interest thereon at 6 per cent for twenty-nine years will amount to $2,600.

The Court is really at a loss to say whether the value of it or the reversion is too low or not. The rule, indeed, by which the master arrived at his result is not satisfactory, nor can we say that there is any other that can be laid down. If we could be sure from our own knowledge upon such questions, or if the exceptants had shown by evidence that probably the deduction for dower was too much, and, consequently, their reversion valued too low, and had moved for another inquiry, it would be ordered. The truth is that we have to encounter many and great difficulties here in estimating the relative values of a life estate in land and of the dry reversion expectant thereon. There is more or less uncertainty everywhere, as it depends upon a life. But from long and careful observation, averages have been struck in particular countries which enable persons skilled in such matters to make, in their calculations, such probable approaches to actual results that they suppose, taking a large number of lives together, they can deal respecting their duration, rather upon the basis of mathematics than of chances. It is in that way that tables of longevity are constructed and the value of life annuities calculated. And in those countries, when land has a fixed price not varying indeed, but with the value of money in different ages, and when all land readily finds a tenant, and generally an improving one, at a rent that does not fluctuate perceptibly within the period of one life, the value of a life estate may be estimated from the existing income with nearly the same confidence that a personal annuity may be.

Hence, in the same country, its value, or the rule of valuing it, may vary with different eras in the condition of the country. Formerly, the average in England was one-third for the life estate and two-thirds for the reversion. But, as was observed by us in *Jones v.* (4) *Sherrard,* 19 N. C., 179, and on the authority of the case there cited, that rule has been decidedly condemned in more recent times. Now, no arbitrary proportion is taken, but it is referred to the master to inquire of the actual values, estimating that of the life estate upon the principle of life annuities, and therefore having regard to the rate of interest, the annual value of the land, and the age, state of health, and the habits of the tenants for life. To calculate the value even upon those data is not an office of the Judge, but belongs to a distinct profession: Upon the opinions given by which the Court acts, as evidence, in the same measure as in any other case, depending on a question of science. The judge is not an actuary, nor bound to assume the functions of that personage. It is much safer to proceed on the opinions of the profession than on any the Court should undertake to form for itself. Now, it is obvious that the reliance to which those calculations are entitled depends on the degree of certainty in the different elements which enter into it. These are the probable duration of life: which depends on the salubrity of the climate, and the age, health, and habits of the person; then, the *annual income* of the estate for the term of years, which has been fixed on as the measure of the life; and, lastly, the consideration—whether the price of land be stationary or rising or falling in the country, and whether the fertility of the particular tract will be increased or diminished by the intermediate culture or the like, so that the fee simple in possession will be intrinsically worth, when it shall fall in, as much as it is now, or more or less.

In the most of Europe, and perhaps in some parts of this country, the annual income received in the form of rent may be anticipated almost as certainly as interest on capital in money. The price, also, of the fee in possession is much the same, take the country (5) throughout, in the end, as at the beginning of the same life. But in all those particulars there is the utmost uncertainty here, an uncertainty so great that no general rule for estimating the value of those different interests can be laid down which would not do great injustice in perhaps more than half the cases which might arise. The income from land is seldom divided by way of rent, but of crops from the cultivation of the owner, and hence the profits depend much upon what other capital the tenant has besides the land. Those profits, for a course of years to come, cannot be computed with any confidence. Besides, it is a fallacy to assume that the intrinsic value of the land or the market value will be the same at the beginning and end of the life estate. We

know that depends on such a variety of circumstances that there can be no positive rule. A rice swamp and other alluvial flats, being all cleared and prepared for successful culture and of extraordinary fertility, may be so considered. But in the hill country, and where tobacco or cotton are the crops, under the usual system of tillage by the greater part of our citizens, or even of those who are called prudent and successful planters, we know that in twenty-five or thirty years a plantation of ordinary size is so nearly cleared of its timber and reduced by continued and exhaustive cropping and detrition as often not to be worth half what it was. There is a material difference in this respect between different parts of the State, as they may be level or broken, and according to the different crops that are cultivated; and also as they may be healthy or unhealthy, and thus favorable to long life or the reverse. Therefore, while we cannot say the rule adopted by the master is right in this case, we do not see that it is not as unexceptionable as any other, as a general rule. Not being familiar with such subjects and not having pro-

(6) fessional actuaries among us, we have, as far as opportunity served, sought assistance from the opinions of sensible persons conversant with the value of lands and the modes here of treating those under culture. We learn that there have been but few sales of those interests separately, unless under the disadvantage of being under execution. Persons do not like to deal in them on account of their uncertainty. Generally, when sales are decreed for the purpose of partition in families the widow has agreed to a sale of her dower with the inheritance and to take the interest on one-third of the purchase money, or they have fixed upon a gross sum for her without being nice as to the amount or adjusting it upon any known principle. From such gentlemen as have known of such sales or have turned their thoughts to the subject we get the impression that in this State a reversion expectant upon the death of a healthy woman in middle life and in ordinary circumstances is rated at one-third of the whole fee. But no one speaks with confidence, as of his own experience or as conveying what he deems a general opinion, for few have spent a thought on it. It has so happened in this case that the master has hit on nearly the same proportion, which is, probably, as nigh the mark as any other that could be laid down without particular evidence directed to this very land and these persons. If, indeed, the opinions of persons were taken who are acquainted with the land, its topographical peculiarities, the course of husbandry, and the like, and the condition, age and health of the tenant for life, we could not act on them with the assurance of doing the exact justice that courts may who have the aid of men versed in the subject as a profession. But as such opinions are the best lights accessible to us, they would govern us if they had been offered. The parties

excepting have, however, laid before us no evidence of the par- (7)
ticular circumstances of this land, its nature, probable annual value, the quantity of wooded and cleared land, the usual course of cropping, the nature or value of the buildings, or any other particular, nor even the opinion of any persons acquainted with it, on which the Court might found some sort of opinion on the allegation in the exception, "that the value fixed on the dower is unreasonably large." At the same time, the party does not ask for a further inquiry on the subject, as we are given to understand, that for other reasons a decision of the cause at this term is of more importance to each of the claimants than any sum that either could gain upon this point of the controversy. The object, therefore, of the exception is to obtain from the Court a different valuation of these interests upon a general principle and without particular evidence. It must be seen the Court cannot fix one. The exception does not question the duration of the life at twenty-nine years, but merely complains of the result at which the master has arrived, without showing what ought to have been the result or by what process it should have been reached, and without any evidence to aid us in the investigation. If these parties were tenants for life, and reversioners, perhaps the best mode would be to say to them: let the values about which you dispute be tested by actual sale, as was finally done by consent in *Jones v. Sherrard,* then each could take care of his own interest. But here the party who says the reversion is valued too low is an alien and could not bid at the sale, and the reversioners are infants, who, also, could not bid and whose interests might be sacrificed. Allowing the life of the widow to be twenty-nine years and considering the want of capital here and how few men would put out money which was to come in again twenty-nine years hence in the form of what is called a worn-out plantation, we think it as probable as many persons might think the master has estimated the reversion too high as too low. But we do not (8)
pretend to judge, for the reasons already given. And, as the parties do not ask for another reference on the point, but only for a decision of the Court upon the question in its present state, the exception must be overruled.

The master reports that some of the title papers of the lands were lost by the burning of a house in which they were deposited by the executor, and he deducts from the estimated value of the land the sum of $150 for the expense of supplying them. The master has made this deduction without evidence of the actual expense, and we think without any ground in law. It does not appear that any expense has been incurred, nor is there any suggestion of any adverse claim that is likely to disturb the present quiet possession of those claiming under the testator. But if there should be, we are not aware that the expenses of the litigation or

of preparation for it can be provided in this way. The third exception must, therefore, be allowed, and the accounts must be corrected accordingly. When so corrected the report will be confirmed and a decree be entered in conformity to it.

PER CURIAM. Decreed accordingly.

(9)

MUNGO P. PURNELL v. JOHN R. J. DANIEL.

Where a bill of injunction is filed to prevent irreparable injury, and the case as it appears on the bill, is a proper one for the interference of the Court, if any of the material facts are denied in the answer, the Court will not dissolve the injunction upon the bill and answer alone, but hold it over until proofs are taken or the matters in dispute, if questions of law, are decided in a Court of law.

APPEAL from an order of the Court of Equity of HALIFAX, at Fall Term, 1851, CALDWELL, J.

The case is stated in the opinion of the Court.

Moore for the plaintiff.

Bragg for the defendant.

PEARSON, J. The plaintiff alleges that he is the owner of a tract of land bounded on the west by the main run (which is the run farthest to the west) of Elk Marsh Swamp; that by means of a dam some two or three feet high, commencing at the high land and running through the swamp to the main and then down, not passing the main run, but cutting across a bend or elbow some two hundred and fifty yards, along which latter part of the dam there is a ditch or canal on the west side about ten feet wide and four feet deep, he can give vent to the water in aid of the main run; the water has been inclosed and a large body of valuable low ground rendered fit for cultivation, and that he and those under whom he claims have enjoyed this easement of throwing the water over to the west side of the dam, by which, having a vent on that side, the land on the east side inclosed by the dam has been protected for the last twenty years, during all of which time they have had the land (10) in cultivation and made, annually, large crops of corn. He further alleges that the defendant, who is the owner of the land on the west side of the main run, is about to make a dam from the high land on his side through the swamp to the main run and then cut a ditch and make a dam parallel with the plaintiff's ditch, and about six feet from it, across the bend or elbow of the main run, which part of main run will thereby be shut up and all the water of the swamp will have to pass through the two ditches, and all be confined within the space between the two dams (about twenty-six feet), which he alleges will not be large enough for it to vent itself, and, consequently, his (the

plaintiff's) dam will be washed away, as it will be particularly exposed because of the manner in which the defendant designs to locate his dam, running through the swamp—for the current of the stream will thus be thrown so as to strike his (the plaintiff's) dam in an "obtuse angle." He alleges further that although the land in the bend or elbow of the main run, some three acres, belongs to him, yet the defendant, contrary to his remonstrances, persists in his intention to cut his ditch through it, and has actually commenced operations and has his hands at work cutting the ditch on the land of the plaintiff. The prayer is for a perpetual injunction.

The defendant admits that it is his intention to construct the dam and cut the ditch, as the plaintiff alleges. He also admits that the plaintiff and those under whom he claims have been in the enjoyment of the easement of throwing the water over on the west side of the dam for the last twenty years; but he alleges that the space between the two dams will, as he believes, be sufficient to give vent to the water, except in freshets higher than is common. As to the allegation of the plaintiff that the location which he intends to give his dam will cause the current of the stream to strike the plaintiff's dam in an obtuse (11) angle, whereby it would be most exposed to injury, he says nothing. He also alleges that he has been informed that the *eastern run,* which passes through the plaintiff's field, was the *main run,* and, therefore, the title of the plaintiff ought to stop there. But he admits that by long possession the plaintiff's title has been extended to this dam and ditch; and if the eastern run is not "the main run," then he alleges that the "main run" is where the plaintiff's ditch was situated, for that it was not in fact a ditch, but a mere embankment along the side of the main run, and what is called by the plaintiff the main, or western run, and is now apparently so, was a mere "washout," or channel, made by the force of the current, and was not the main run called for by the plaintiff's deeds.

This is not the case of an ordinary or common injunction in aid of and secondary to another equity, but it is *the point in the cause*—it is to prevent irreparable injury, as is alleged, and to dissolve the injunction decides the case, for to dissolve it allows the act to be done. By way of illustration, take the case of an injunction to stay waste in cutting down ornamental or shade trees. If the injunction be dissolved on bill and answer and the trees are cut down the damage is done, for the trees cannot be made to grow again.

To dissolve this injunction before hearing the cause on proof the defendant must show that the plaintiff has no case fit to be heard; and if, from the answer, it appear that there is any question of doubt on a matter that should be further inquired into the injunction will be continued until the hearing.

We presume the defendant did not advert to the distinction between the different kinds of injunctions, or he would not have appealed,
(12) and would not have moved for a dissolution of the injunction until he had established his title *at law*. In this case both of the two points upon which it turns are left doubtful. The plaintiff alleges that if the dam and ditch of the defendant be made as he intends to make them there will not be space enough between the two dams to give vent to the water of the swamp and his land will be flooded. The defendant is of opinion that this is not true, except in cases of extraordinary freshets, such as the plaintiff has been liable to sustain damage from heretofore, and thereupon he insists that he is in no wise encroaching on the plaintiff's easement, supposing him to be entitled to it.

How are we to decide this question without proof?

Again, the plaintiff alleges that the defendant is cutting his ditch through land which belongs to him (the plaintiff). The defendant denies this altogether in an argumentative manner, insisting that, supposing by force of the long possession and the statute of limitations the plaintiff has acquired title up to his ditch, yet he has no right to claim any further, for he (the defendant) has been informed, and believes, that the ditch is cut on the bank of the western run of the swamp and that what the plaintiff says is the main run, by which he sets up title to the two or three acres in the bend or elbow, is only a "washout"—artificial channel made by freshets. Here, then, we have a disputed question of boundary. How can we decide it without proof?

We concur with the Court below, the injunction ought to be continued until the hearing. In the meantime question of boundary may be settled in the action of ejectment, and at all events, if the case ever comes before us again, we hope there will be an accurate survey and a chart showing the location of the swamp and of the plaintiff's dam
(13) and the site of the contemplated dam and ditch of the defendant, and that we will be furnished with some data by which to be enabled to form an opinion whether the easement of the plaintiff, if he has one, will be encroached on. Upon these points, as the case is now before us, this Court can make no order, but it can be done in the Court below, and thereby the question: does the plaintiff possess an easement, and if so to what extent? can be definitely determined.

PER CURIAM. Affirmed.

Approved: Capehart v. Mhoon, 45 N. C., 34; *McNeely v. Steele, id.*, 244; *Lloyd v. Heath*, 45 N. C., 42; *Ashe v. Johnson*, 55 N. C., 154; *Troy v. Norment, id.*, 321; *Gause v. Perkins*, 56 N. C., 182; *Solomon v. Sewerage Co.*, 133 N. C., 149; *Cobb v. Clegg*, 137 N. C., 159, 161; *Zeiger v. Stephenson*, 153 N. C., 530; *Person v. Person*, 154 N. C., 454.

Distinguished: Thompson v. Williams, 54 N. C., 178; *Dunkart v. Rinehart*, 87 N. C., 228.

CHARLES REED v. ANDREW KINNAMAN ET AL.

A purchaser at a Sheriff's sale cannot protect himself against an Equity, on the ground that he had not notice; for the Sheriff can sell, and the purchaser acquire nothing but the interest in the estate which the defendant in the execution had, as it then existed.

APPEAL from an interlocutory decree of the Court of Equity of FORSYTH, at Fall Term, 1850, MANLY, J.

The case is stated in the opinion delivered in this Court.

Morehead for the plaintiff.
Gilmer and *Miller* for the defendant. (14)

PEARSON, J. The equity of the plaintiff is this: He owed a debt of about $90, for which the defendant Kinnaman had been for many years his surety, holding a mortgage upon a tract of land on which the plaintiff levied for security. In 1844 the plaintiff received his note and substituted the defendant Snider as his surety on the note in place of Kinnaman, and intended to execute to Snider a mortgage on the same land for security, but by the ignorance or mistake of the draftsman, one John C. Blum, the deed was drawn so as to convey an absolute estate, and was not in the form of a mortgage. Afterwards, Snider became entangled; his property was sold under execution, and, among other things, the tract of land on which the plaintiff resided was sold as the property of Snider, and was purchased by the defendant Kinnaman, who is seeking to oust the plaintiff by an action of ejectment.

The bill prays to have the deed to Snider reformed and converted into a mortgage, and that Kinnaman be enjoined from taking possession.

The answer of Kinnaman admits that he had for many years been the surety of the plaintiff for the debt and held a mortgage on the land. It does not admit that the conveyance to Snider was intended as a mortgage and sets out an argumentative denial of the allegation, but rests the defense mainly on the ground that he is a purchaser at sheriff's sale for full value and without notice of the fact that the conveyance to Snider was intended to be a mortgage, and was by mistake drawn in the shape of an absolute deed, if such should be proven to have been the fact. It admits, however, that the plaintiff was in possession at the time of the sheriff's sale, and had been living on the land for the last forty years. The defendant Snider, who is the son-in-law of the plaintiff, admits the allegations of the bill.

A motion to dissolve the injunction upon the bill and answers (15) was allowed in the Court below, and the plaintiff appealed.

We do not concur in the view taken by his Honor. The case rests upon the allegation of a mistake in drafting the deed to Snider. This

is the *point in the case.* The defendant Kinnaman, of course, could not deny it positively, because he was not privy to the transaction and the injunction ought to have been continued until the hearing, so as to give the plaintiff an opportunity of proving it.

We presume his Honor acted on the idea that Kinnaman was a purchaser for value, and *positively denied notice,* and did not advert to the principle that a *purchaser at sheriff's sale* cannot protect himself against an equity because he did not have notice. The distinction is well settled. If a mortgagee or trustee conveys the land to a purchaser for value and without notice, the latter holds discharged of the trust, for he has an "equal equity," and the consequences of the breach of confidence on the part of the trustee should fall on the *cestui que trust* who confided in him, rather than on an innocent third person. In sales made by sheriffs under the power given by statute the case is altogether different. The statute subjects only the estate and interest of the debtor to the payment of his debts, and this is all which it confers on the sheriff power to sell. Of course, the purchaser who represents the creditor cannot acquire more than belonged to the debtor, for that was all that was intended by the statute to be made liable for his debts and all that the sheriff had power to convey. There is, then, in such cases no breach of confidence on the part of the trustee which makes it necessary in order to protect an innocent third person to throw the loss on the *cestui que trust,* and he has a right to say: I have a prior equity, and it is
(16) against both law and conscience to sell my estate to pay the debts of another.

The distinction is well settled by the authorities and, we believe, upon sound and correct reasoning.

PER CURIAM. Reversed.

Cited: Thigpen v. Pitt, 54 N. C., 69; *Brothers v. Harrill,* 55 N. C., 211.

MATTHEW PAGE v. JETHRO D. GOODMAN, ET AL.

The Act of 1812, Rev. Stat., ch. 45, sec. 4, authorizing the sale of trust estates by execution, only relates to trusts, which would be enforced between the *cestui que trust* and trustee—an honest trust—and not one infected with fraud, in respect to which the Court would not act at the instance of either party.

CAUSE removed from the Court of Equity of CHOWAN, at Spring Term, 1850.

The case is fully stated in the opinion delivered in this Court.

(17) *Heath* for the plaintiff.
Smith for the defendant.

RUFFIN, C. J. In 1834, Charles Creecy, of Chowan, intermarried with Edith Goodman, a daughter of William Goodman, of Gates. In 1837, Creecy, being indebted to several persons to an amount considerably more than he was able to pay, made a conveyance to a trustee of all his visible property to be sold, and the proceeds applied to certain debts specified; and towards the end of that year there was a sale, and after the proceeds were applied a balance of seven or eight thousand dollars of his debts remained unpaid, and judgments were subsequently taken by several of the creditors. At the sale one Norcom purchased the farm on which Creecy lived, and William Goodman purchased a negro woman and a work horse, and it was agreed between Norcom and Goodman that they would work the farm in 1838 on their joint account, under the superintendence of Creecy as overseer; and on his part, Goodman was to put in the said negro woman and another from his slaves at home and two small white boys, who were the nephews of Creecy and lived with him, and two work horses, and they were jointly to supply the plantation. The crop was made, and at the end of the year Norcom took his half of it and then purchased the other half from Creecy as the agent of Goodman, who was very infirm, and gave his bond therefor, payable to Goodman, for $542.50, which Creecy shortly after delivered to Goodman in Gates. In March, 1839, Creecy made a contract with Richard Paxton for the purchase of a tract of land in Chowan containing 77½ acres, at the price of $852.50, which was then paid in the said bond of Norcom, and another of one Elliott for $310, (18) payable also to Goodman, and Paxton conveyed to Goodman and delivered the deed to Creecy; and he, Creecy, took possession of the land and resided thereon up to the year 1843. By his will, dated 4 October, 1839, and a codicil dated in May, 1841, William Goodman devised a certain part of his estate, including the land bought from Paxton, to his only son, Jethro D. Goodman, in trust for the separate use of his only daughter, Edith, during her coverture; and if she should survive her husband, in trust, then, to convey the same to her absolutely; or if she should die before him, in trust for any child or children she might leave surviving her; and if there should be no such child, then for other purposes mentioned. William Goodman afterwards died, and in May, 1843, the tract of land was sold under executions on the judgments against Creecy and purchased by the plaintiff Page at the price of $30, and the sheriff made him a deed therefor. At that time Creecy had absconded, and Jethro D. Goodman, the trustee, had a tenant in possession against whom and the trustee Page brought an ejectment; and in September, 1843, he also filed this bill against Goodman, the trustee, and Creecy and the executor of William Goodman.

The bill charges that the whole consideration paid to Paxton for the

land belonged to Creecy, and that he and William Goodman procured the deed to be made to Goodman with the intent to defraud the judgment and other creditors of Creecy and enable Creecy to enjoy the land, and it states several circumstances tending to show that Goodman did not for a time treat the land as his own. The prayer is that the defendants may be decreed to surrender the possession and convey the land to the plaintiff, and for general relief.

(19) Each of the defendants answered. Creecy admits the allegations in the bill to be true and submits to the decree prayed for. The answers of the other two defendants state that Creecy and his wife lived unhappily at the time of the purchase of the land from Paxton, and that the father had no intention to bestow anything on Creecy, but was induced to authorize Creecy to make the purchase for him and in his name in order to provide a home for his daughter, as Creecy would not remove to Gates and William Goodman was too infirm to leave home. They state that William Goodman paid Creecy in cash the sum of $160 for the hire of his two nephews in 1838 and for his part of Creecy's wages as overseer, besides advancing other sums to defray the expenses of the plantation, and, therefore, that the crop did not belong to Creecy, but all belonged to Goodman; and they aver that the whole price was paid with funds belonging to Goodman, and deny positively the fraudulent intent charged in the bill, or any trust whatever, for the benefit of Creecy, directly or indirectly. The evidence tends strongly to sustain the answer of the trustee and Mrs. Creecy throughout, and it fully establishes that at least $310 of the purchase money paid to Paxton belonged to William Goodman, and that Creecy had no other connection therewith than to carry it from Goodman to Paxton. But the Court does not consider it necessary to give any particular consideration to the evidence or to make a declaration that Norcom's debt of $542.50, which formed a part of the price, belonged to Goodman or to Creecy, because, admitting it to have been Creecy's, and also that all the allegations of the bill as to the covinous intention of those parties are well founded, still the opinion of the Court is against the bill. Creecy's judgment creditors might have had relief on those facts if they had filed their bill to

(20) have Creecy's interest in the premises declared and sold under a decree of the Court of Equity for their satisfaction instead of proceeding to a sale under the execution at law.

But Creecy had no such interest in the land as was subject to execution, according to the repeated decisions of the Court and the necessity the plaintiff has found for coming into this Court, instead of proceeding with his ejectment plainly shows it. If Creecy had an interest in the land it would be by way of secret trust in fraud of his creditors. That is what the plaintiff says in the bill is the truth of the case. But that

did not make the land liable to be sold on the executions under the statute, 13 Eliz., because the title of the land had never been in Creecy or conveyed by him. He never had more than a trust in the land, and although the act of 1812 authorizes a sale of a trust upon execution against the *cestui que trust,* yet that means an honest trust, which at the suit of the *cestui que trust* would be upheld and executed by the decree of a Court of Equity, and not one infected with fraud, in respect to which the Court would not act at the instance of either party. In other words, the act of 1812 authorizes execution of a trust which would be enforced between the *cestui que trust* and the trustee. As the bill states the case, undoubtedly Creecy could have had no relief against Goodman, and, therefore, the plaintiff, as the purchaser of Creecy's title, is no better off. These principles, however, require no further elucidation, as they were fully discussed in *Dobson v. Erwin,* 18 N. C., 569, and repeated and applied in *Gowing v. Rich,* 23 N. C., 553, and in other cases, etc., affirmed at the present term in the opinion delivered by my brother PEARSON in *Rhem v. Tull,* 35 N. C., 57. As the plaintiff got nothing by the sheriff's sale he cannot, as purchaser merely and without having the creditors before the Court, maintain his bill at all, (21) but it must be dismissed with costs to the defendant Goodman.

PER CURIAM. Decree accordingly.

Cited: Worth v. York, 35 N. C., 209; *Thigpen v. Pitt,* 54 N. C., 55; *Parris v. Thompson,* 46 N. C., 59; *Nelson v. Hughes,* 55 N. C., 39; *Taylor v. Dawson,* 56 N. C., 90; *Smitherman v. Allen,* 59 N. C., 18; *Dixon v. Dixon,* 81 N. C., 327; *Everett v. Raby,* 104 N. C., 480; *Thurber v. LaRoque,* 105 N. C., 319; *Guthrie v. Bacon,* 107 N. C., 338.

OWEN HOLMES v. JOHN P. HAWES, ET AL.

Where two parties agree to dissolve their copartnership, and divide according to their separate interests, etc., and the division is made, the property allotted to each becomes his separate property, and neither of them, upon his liability for the debts, or his payment of them, has any lien upon the property which he agreed the other might take, as his separate property. He has no remedy, therefore, in equity.

APPEAL from the interlocutory order of the Court of Equity for NEW HANOVER, at Spring Term, 1850, SETTLE, J.

W. H. Haywood for the plaintiff.
Iredell for the defendants.

RUFFIN, C. J. The plaintiff and the defendant John R. Hawes entered into partnership for the purchase and sale of merchandise in Jan-

uary, 1848, and continued the business until 15 November, 1848, when, by mutual consent, it was dissolved on the following terms: The stock, consisting of merchandise on hand, estimated at $26,625, was
(22) equally to be divided between the parties, and each of them agreed to pay one-half of the debts which the firm owed. The division was made accordingly, and each party then took his half of the goods and debts as his own. On 16 June, 1849, Hawes made a deed to Thomas D. Mears by which he conveyed certain lands and slaves, and assigned a number of debts due by bond, note, or account, consisting partly of the debts assigned to him upon the dissolution and partly of the sales of the merchandise he then received upon trust to pay, in the first place, a debt of $4,922.16 to L. Latimer; and, in the next place, a debt of $1,685.63 to Edward A. Hawes; and then one-half of the debts of Holmes & Hawes, and the surplus to the bargainor.

The bill was filed in December, 1849, against John R. Hawes, Mears, Latimer, and Edward A. Hawes; and it states that at the dissolution of the partnership it was indebted to certain persons mentioned, who afterwards instituted suit against the plaintiff and John R. Hawes and obtained judgments, and that John R. Hawes had no visible estate on which execution could be served, but had conveyed and assigned all he had by the deed of trust, and that, consequently, the plaintiff would be compelled to pay the whole of the judgment unless he could have a part of the funds so assigned applied to that purpose. It states, further, that the other property conveyed has been sold by the trustee and proved insufficient to discharge the sum due Latimer and Edward A. Hawes, and that the trustee intends to collect and apply toward those demands the sums due upon the debts transferred to John R. Hawes at the dissolution or created by the sales of the goods then allotted to him as his share of the joint effects; and it insists that those debts constitute a fund which is first applicable to the payment of Hawes' half of the partnership debts, and prays that it may be so declared and the accounts
(23) of the several debts taken, and the fund so applied, and in the meantime that the trustee be enjoined from applying any part of the proceeds of those debts to the demands of the preferred creditors, Latimer and Edward A. Hawes.

An injunction was granted upon the bill as prayed for, and upon the coming in of the answers a motion to dissolve the injunction was denied and, amongst other things, it was ordered to stand to the hearing, and from that part of the decree the defendants were allowed to appeal. The answer of John R. Hawes states that he had paid upon other debts of the firm his full proportion of all the debts, and the others insist that the plaintiff has no preferable right to satisfaction or relief out of that part of the effects transferred to John R. Hawes at the dissolution.

If the question turned upon that part of the answer which relates to the amounts the two partners paid or were respectively liable to pay the injunction would, of course, be continued until the facts had been ascertained by an inquiry. But the point made by the appeal does not at all depend on that. On the contrary, the bill is founded on a wrong principle and the injunction ought not to have been originally granted, and consequently ought not to have been continued. The principle of the bill is that after the dissolution and the division of the effects and debts between the partners they still continued partnership property, or *quasi* partnership property, until the debts of the partnership were all paid. That might be questioned, even as between creditors of the firm and the several partners and those claiming under them, when the dissolution and division were *bona fide*. *Ex parte Ruffin,* 6 Ves., 109; *Clement v. Foster,* 38 N. C., 213. But this is a very different question, being between the partners themselves, admitting Hawes, assignee, to stand in his shoes exactly, for, undoubtedly, two partners, as between themselves, may agree to dissolve and divide according to their re- (24) spective interests, etc., and when the division is made, the property allotted to each becomes his separate property, and one of them upon his liability for the debts or his payment of them, has no lien upon that portion which he agreed the other might take as his separate property. The rights of the parties stand on the strength of their agreement and division, and one of them cannot set up a claim inconsistent with his contract, but he ought to have provided for the event that has happened before he parted from his control over the effects. If so plain a principle requires authority, *Lingen v. Simpson,* 1 Sim. and Stu., 600, is directly in point. The decree was therefore erroneous and the injunction should be dissolved with costs in this Court.

PER CURIAM. Ordered accordingly.

Approved: Potts v. Blackwell, 57 N. C., 69.

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(25)

WILLIAM MAXWELL v. ALBERT MAXWELL.

1. When the estate devised is a legal one, and the question of construction, disputed between the parties, is a legal one, a bill for partition of land will not lie.
2. Nor can a bill for partition of land be sustained which states a legal controversy between the plaintiff and the defendant.
3. A bill for partition of land should allege a seisin or possession in the defendant, and in the plaintiffs themselves.

MAXWELL *v.* MAXWELL.

CAUSE transmitted from the Court of Equity of GUILFORD, at Fall Term, 1851.

Gilmer and *Miller* for the plaintiffs.
Morehead for the defendants.

RUFFIN, C. J. James Maxwell and Alexander Maxwell were brothers and bachelors, advanced in life, and they resided together, and owning each in fee a tract of land containing about two hundred acres, and owning jointly fifteen slaves and stocks of horses, cattle and other chattels, each made his will at the same time, viz., on 21 December, 1846. James died very soon thereafter, and his will was proved in February, 1847. Alexander died in 1849, and afterwards his will was proved in August of that year.

The will of James Maxwell contains, among others, the following clauses: "In the third place, I give and devise to my nephew, Samuel Maxwell, all my land and real estate, to have and to hold to him and his heirs. In the fourth place, I give and bequeath to my nephew, Albert Maxwell, of the State of Missouri, the sum of five hundred dollars, to be paid out of my money now lent out. In the fifth place, I give and bequeath to my nephew, Samuel Maxwell, all the residue of my
(26) estate, consisting of an undivided half of fifteen negroes and their future increase, and all my stock of horses, cattle, sheep, and hogs, and household and kitchen furniture, and all my other property of every description, provided he marries and has lawful issue; but in the event of his dying without lawful issue, then to him for only the term of his natural life; and in case my said nephew Samuel dies without leaving lawful issue him surviving, I give and bequeath one-half of all the property given to him in this last clause of my will and its future increase to my nephew Albert Maxwell, to have and to hold to him and his heirs forever, and the other half I give and bequeath to the brothers and sisters of the aforesaid Samuel Maxwell living at his death and the lawful issue of such as are then dead, to be equally divided between them."

The will of Alexander Maxwell contains, among others, the following clauses: "In the third place, I give and devise to my nephew, Samuel Maxwell, all my land and real estate, to have and to hold to him and his heirs. In the fourth place, I give and bequeath to my nephew, Albert Maxwell, of the State of Missouri, the sum of five hundred dollars, to be paid out of my money now lent out. In the fifth place, I give and bequeath to my nephew, Samuel Maxwell, all the residue of my estate, consisting of an undivided half of fifteen negroes and their future increase, and all my stock of horses, cattle, sheep, and hogs, and household

and kitchen furniture, and all my other property of every description, provided he marries and has lawful issue; but in the event of dying without lawful issue, then to him for only the term of his natural life. And in case my said nephew Samuel should die leaving no lawful issue him surviving, my will and desire are that one-half of all the above named property, together with its increase, should go to my nephew, Albert Maxwell, to have and to hold to the said Albert, his heirs and assigns forever, and the other half to be equally divided among (27) the brothers and sisters of the said Samuel Maxwell then living and the issue of such as may be dead."

The devisee, Samuel Maxwell, survived both of his uncles, but died intestate without having been married, and the bill is brought against the nephew, Albert Maxwell, by the brothers and sisters and the children of a deceased sister of Samuel, who are his heirs at law. It states that by force of the devises in the wills the title to the lands of the two testators respectively vested absolutely in Samuel Maxwell in fee, and that they wish to have partition thereof, and to that end that a sale of the land is necessary, but that the plaintiffs cannot effect such a sale or partition because the defendant sets up a title under the wills to one undivided half of the lands. The prayer is that the rights of the plaintiffs and the defendant in the lands may be ascertained and declared and a sale of the premises decreed and the proceeds divided between the parties according to their respective rights thus ascertained.

The answer insists that upon a proper construction of the will of the uncles the defendant is entitled to one-half of the land left by each of them, and it submits that if the defendant should be found to be thus entitled there should be a partition, and that for that purpose a sale should be decreed.

If the relief depended entirely upon the construction of the devises there would be no doubt in decreeing for the plaintiffs. The limitation over to the nephew Albert in the will of the testator James is expressly restricted to "one-half of the property given to him (Samuel) in this last clause of my will." That relates exclusively to the residue of the personal estate, and Albert was to take no interest in the real estate of James in any event.

The construction of the will of Alexander is equally plain. It (28) is, of course, to be made on its own terms and without reference to the provisions of the other. It is not as explicitly restricted as the other in respect to the subject of the limitation over. But the sense is the same. The gift of the land is made, in the first place, by a distinct and independent clause. It is simply a gift in fee without any qualification. It purports to be in itself a perfect gift of the whole real estate. Then, in the fifth clause, the residue, consisting of personalty, is also

given to Samuel, not, however, in absolute estate immediately, but with a proviso that it should be absolute in case he left issue surviving him, but if he should not leave issue living at his death that he should enjoy for his life only; and then that after his death one-half of the property should go to the nephew Albert. The words used in this part of the clause are not exactly the same as those of the other will: "one-half of the property given in this clause," but only "one-half of the above named property." Yet the construction must be the same, for apart from the consideration that the land had been given absolutely in a previous independent clause, it is plain, upon the terms and scope of the fifth clause, that the subject of the limitations over therein is the property mentioned in that clause, and nothing more. It must be so, for the reason that the limitation over is so connected with the proviso defeating the gift to Samuel as to show clearly that nothing more was to go over, but what should be divested out of Samuel by force of the proviso, and that is annexed and necessarily restricted to the residue consisting of personalty.

But although no doubt is entertained of the right of the plaintiffs to the land, they cannot have a decree. The estate devised is a legal one, and the question as to the construction of the will is purely legal. The controversy between the plaintiffs and the defendant is determinable at law and not within the jurisdiction of this Court. It has not (29) been deemed improper to express our opinion on the title, as it is so clear, and further litigation may probably be prevented. But the Court does not assume its definite decision with a view to a decree on that basis, as that decision is properly to be made by a court of law. The bill, indeed, prays partition, and the decreeing partition of legal estates in land is one of the established heads of equitable jurisdiction, but not in a suit constituted like this. The statute allows joint tenants or tenants in common to unite in a petition for a partition, and the decree will, of course, be according to the statement therein of the title and possession in which all the parties concur. But here the proceeding is by bill, which states a controversy with the defendant and prays relief against him. There can be no decree for partition as between the plaintiffs themselves, except as it may be incidental to the relief decreed against the defendant, for as he is the only defendant, if the bill be dismissed as to him, the cause and all the parties would be out of court at once. Such must be the case here, for when it is found that he has a title to any part of the premises as a partition suit it must fail. Indeed, the bill denies the defendant's title and is repugnant upon its face in praying partition with one whose title is thus wholly denied. Moreover, the bill is silent upon the point of a seisin or possession in the defendant and does not even allege any in the plaintiffs themselves. It does

not, therefore, appear that a decree for partition between any of the parties would be proper, and it does appear upon the bill that no partition between the plaintiffs and the defendant can be made, consequently the bill must be

PER CURIAM. Dismissed with costs.

Cited: Simpson v. Wallace, 83 N. C., 480; *Miller ex parte,* 90 N. C., 629; *Wood v. Sugg,* 91 N. C., 98, 99; *Osborne v. Mull, id.,* 207.

(30)

STEPHEN FORBES v. ANN SMITH, ET AL.

Where a creditor has a lien upon a life estate, either in slaves or money, held by a trustee in trust for the debtor, the Court may order a sale of such life interest in satisfaction of the claim.

MOTIONS upon master's report. See case reported, 41 N. C., 380.

J. H. Bryan, J. W. Bryan and *Iredell* for plaintiff.
W. H. Haywood for the defendants.

RUFFIN, C. J. The master reported, on the inquiry directed at the hearing, that the fund in the hands of Mrs. Smith as trustee, in lieu of the real estate sold, and to which the defendant Shackleford is entitled as tenant by the curtesy, consists of certain slaves and of the sum of $500 in money, the proceeds of the sale of another slave. Upon the report, the defendant moved to dissolve the injunction against proceeding on the judgments at law, submitting to a decree to pay to the plaintiff annually the interest on the $500 and the hires and profits of the slaves; and the plaintiff, on the other hand, moved for a decree directing the defendant to sell the estate for Shackleford's life in those slaves, in the first instance on execution, when taken out.

The Court is of opinion that neither motion is precisely correct, although the act of 1812 makes trusts in personal property liable to execution against the *cestui que trust,* yet it is settled that the case of a trust of personal chattels for one for life and then in trust for others is not within it, as the trustee's legal title must be preserved entire for the security of those entitled under the ulterior limitations. *Dick* (31) *v. Pitchford,* 21 N. C., 480; *Battle v. Petway,* 27 N. C., 576. But although an execution will not reach the slaves, yet they and also the money, or rather Shackleford's beneficial interest in those funds as his equitable property, may, and ought to be, sold under a decree of this Court. The sale is necessary to enable the plaintiff to ascertain his demand against Shackleford after he shall have paid the debt. He is not

obliged to pay the debt and wait for the partial reimbursement arising from the annual income of the property during Shackleford's life, but he may require an immediate sale, under the direction of the Court, of his interest for whatever it will bring, so as to have it applied in a lump to the reduction of the debt. As to his interest in the money it is only selling out an annuity of $30 for the life of Shackleford, and in respect of the slaves the contingency is the double one, depending on the lives of both Shackleford and the negroes, which, of course, will be duly considered by bidders. The defendant Mrs. Smith, or, if she prefer it, some other commissioner, must be directed to make sales of those interests after twenty days notice for ready money, and after applying the proceeds in discharge of the judgment at law the injunction should be dissolved for the residue. It will be understood, of course, that the purchasers of the slaves will not get the legal title, but that it will remain in the trustee, and the purchasers stand towards her in the relation of *cestui que trust,* with liberty to come to an arrangement with her as to the possession of the slaves or to apply to the Court of Equity for redress, as any *other cestui que trust* might.

PER CURIAM. Decreed accordingly.

(32)

JOSIAH THOMPSON, ET AL., v. JOHN NEWLIN.

1. The principles formerly laid down in this case, 41 N. C., 380, affirmed on a rehearing of the decretal order then made.
2. Even where a will expresses a trust that slaves shall be sent to a foreign country, there would be nothing illegal in that, even if it were illegal to direct their emancipation abroad without complying with our act on the subject of emancipation of slaves, because it would be intended the meaning was that the law was to be complied with.
3. A general direction in a will is to be taken as intended to be consistent with the law.
4. Subsequent acts of the trustee cannot affect the intention.
5. A trust in a will that slaves should be taken out of this State, for the purpose of emancipation, is not forbidden by the laws of this State, nor is it against the policy of the law, nor the public interest, but is lawful and valid.

THIS cause came on on a petition for rehearing the decretal order made in the cause at December Term, 1849, 41 N. C., 380.

Norwood and *W. H. Haywood* for the plaintiff.
J. H. Bryan for the defendant.

RUFFIN, C. J. The bill was filed in August, 1843, and states: That Sarah Freeman died in 1839, and that the defendant Newlin, in August, 1839, propounded for probate a script as her will, which the plaintiff

and Richard Freeman, her surviving husband and a defendant in this suit, caveated, but that, after much litigation in different courts it was finally established as a will of her personal estate; that the personal estate consisted of money and bonds to a large amount and thirty-five or forty slaves, and that by the will the whole personal estate (33) was bequeathed to the defendant Newlin as sole legatee and he was appointed the executor; that Newlin was a member of the Quaker society, and it was well known to the testatrix that he would not hold slaves and was opposed, on religious principles, to slavery, and that she designed for that reason to will the slaves to him in order that they might be kept by him in a state of qualified slavery, and that those views and purposes were communicated by her to Newlin, and that he undertook to carry them out; that although the bequests in the will to Newlin are absolute in their terms, yet they were in fact made not for the benefit of Newlin, but for the benefit of the slaves, and upon an unlawful, secret trust, that he should be, apparently, their owner, but should suffer them to enjoy the privileges of freedom, contrary to the policy of the law, and apply the other profits of the estate to their use and benefit. It states, further, that the will was made by virtue of a power in marriage articles between Freeman and his wife, which excluded him from her property and limited it to her next of kin in case she made no disposition, and that the plaintiffs are her next of kin. The prayer is that Newlin may discover the trusts on which the bequests were made to him, that they may be declared void, and a trust declared to result to the plaintiffs, and for an account and distribution.

The answer of Newlin admits the marriage articles to the effect set forth in the bill and of the contents of the will, of the tenor set forth, the caveat, and its final decision in 1842; that the personal estate consisted of twenty-nine slaves and cash and debts to the amount of six or eight thousand dollars. It admits, or states, that the defendant had frequent conversations with Mrs. Freeman upon the subject of her slaves, and she uniformly expressed a desire to have them emancipated, and consulted him as to the best mode of effecting her purpose. "That (34) when about to make her will she was fully apprised that the negroes could not remain in North Carolina as free persons; that she was also fully aware that she might express a trust in her will for the benefit of the slaves by which, according to law, they might be sent out of this State to any other State or country, by which they might enjoy their freedom; or, if she preferred it, that the said trust might be created without being expressed in the will by confiding her purpose to a friend, which would be as effectual in law as if it were expressed in the will. That the testatrix preferred to confide to the defendant her earnest wish without expressing it in her will; and she did accordingly request him

to take the necessary steps to carry her wishes into effect; that although she seemed to prefer Liberia to any other place of destination for them, yet she left to the defendant's discretion the place and manner of transporting the slaves to some other place than North Carolina; and that so zealous was she on the subject that about a year before her death she instructed the defendant, who was her general agent in the management of her money, to collect a sufficient sum and make preparations for then sending the slaves out of this State. But not long afterwards she recalled the instructions because, she said, some of them must stay to wait on her, as she was old and infirm, and she was not willing to send some without all. That the defendant agreed to accept the trust, and did so with the determined purpose of executing it to the best of his ability, and that in that purpose he had at no time been shaken, although he had kept it to himself and had never communicated it to any person until he did so to his counsel while engaged in drawing his answer, and that for the pertinacity of the plaintiffs in prosecuting suit after suit against him in relation to the property, he would long since have executed the
(35) trust by sending the said slaves out of the State. That he had at no time any understanding with Sarah Freeman, either express or implied, to commit any infraction of the laws of this State, and that he does not know nor believe that she entertained any purpose to evade the law by continuing the slaves in a state of qualified slavery, and that he never entertained or conceived any such purpose." The answer further states "that the other property was given to this defendant by the testatrix, in part, for the purpose of carrying into execution the trusts hereinbefore stated—which must needs be expensive not only in procuring the transportation of the negroes, but in making some provision for them—and, in part, to make ample compensation to this defendant for the trouble and expense to which he must be subjected in carrying into effect the wishes of the testatrix." The answer concludes by stating that "this defendant hath thus fully stated the facts within his knowledge and declared the trust imposed on him by the testatrix, and his acceptance thereof, and he saith that it is his purpose to execute the same according to the laws of the State, and in pursuance of this purpose he submits to be directed in the manner of carrying out the purposes of the testatrix by this Court, if it be deemed material to do so."

The cause was heard in this Court at December Term, 1849, *Thompson v. Newlin,* 41 N. C., 380, when the will is set forth and a declaration was then made that the slaves were bequeathed by the testatrix to the defendant Newlin upon a secret trust for their emancipation, and that it was intended by the testatrix and the defendant that the said slaves should not be kept in this State, but be lawfully emancipated, transported to Liberia or some free State, and there enjoy their freedom, and that

such intention and bequest was not contrary to, but sustained (36) by, the law; and further that the testatrix confided in the defendant Newlin, and was by him induced to believe that he would in a reasonable time take the necessary and lawful steps to carry her said intention into effect, and that he in fact assumed the said trust and thereby became bound to execute the same; and for as much as the defendant submitted in his answer to carry the said trust into effect under the directions of the Court, according to law, it was further declared that he ought to emancipate them by filing a petition for that purpose in the Superior Court of law, and giving bonds pursuant to the statute in such case provided, and that one year thereafter would be reasonably sufficient for effecting that object. All other equities were reserved until the expiration of that period, and then either party was at liberty to move for further directions.

At December Term, 1850, on the motion of the plaintiffs, the clerk was directed to inquire what proceedings had been taken by the defendant for emancipating the slaves. The report states that the defendant had not filed a petition in the Superior Court nor given bonds as mentioned in the decretal order, but that he had emancipated the slaves by removing them in September, 1850, to Logan County, in the State of Ohio, and there duly executing a deed of emancipation and having the same proved and recorded; and the clerk annexed to the report the examination of the defendant on interrogatories, in which he stated that he was advised by eminent counsel that this mode of emancipation was equally effectual and within the trust, as that prescribed in the statute, and that it was preferable, as he believed, because he had reasons to apprehend that if the emancipation took place in this State by giving bond some of the plaintiffs or other persons might detain some of the negroes in this State by secret means, or seduce them back, after they had been once carried away, so as thereby to forfeit his bond (37) and subject them again to slavery; that he had no other reasons for proceeding in this mode, and had no purpose to evade the law of the State or intend any contempt of the Court; that the negroes were all willing to go to Ohio and be emancipated and live there, and that it was not contrary to the law of Ohio for them to do so, but consistent therewith, as he believed on the information of many persons in that State and the advice of some counsel there.

The plaintiffs then filed a petition to rehear the order of December, 1849, and brought it on to be argued, with a motion founded on the report to declare that the defendant ought not to have further time to obtain an order for emancipation in this State, and that by reason of his not complying with the former order as to the mode of emancipation the

defendant was a trustee for the next of kin and bound to distribute the slaves and other personal estate among them.

If the opinion of the Court were not against the plaintiffs on other points it might be well worthy of consideration whether, supposing the trusts for emancipation and providing for the slaves to be unlawful and void, the defendant Newlin would not be entitled, beneficially, to the whole property, according to the terms of the trust set out in the answer, and thus the next of kin be excluded? He says the bequests were made to him, not only upon the trust to have the negroes set free and defray the expenses of their removal and settlement, but, as to any surplus over and above answering these purposes, for himself as an ample compensation to him for his agency in the transaction. Now, as Lord ELDON observed in *King v. Dennison,* 1 Ves. and Beam., 260, there seems to be a plain distinction between a disposition of the legal estate to one for the mere purpose of discharging particular trusts and nothing more, (38) and one in which there is an intention that the beneficial interest shall be taken with reference to that part not given on the particular trusts; in the former, if the trusts do not, in their execution, exhaust the whole, so much of the beneficial interest as is not exhausted belongs to him; in the latter, if the whole be not exhausted by the particular purpose, the surplus goes to the devisee. The reason is that in one case the whole gift was in trust without any benefit being intended to the donee of the legal estate, whereas in the other the devisee takes the surplus, because it was intended to be given to him. In that case it was so held on a devise, and much more would it be so in reference to personalty, since next of kin are less favored than the heir, and especially as there is here an express residuary gift to the defendant Newlin of the whole personal property in the largest terms. It is true that the residue itself was given partly in trust, and that may possibly make a difference, though no reason for it is perceived, as no certain part or share of it was in trust, but the legatee was to keep beneficially, whatever should not be needed for the other particular purposes. But the Court does not determine the point, since it was not discussed at the bar, and it is thought more useful to place the decision on the more general and important questions involved in it.

The question raised on the rehearing is that the Court erred in declaring the nature of the trust intended by the testatrix, namely, that it was that the slaves should be lawfully emancipated and transported to some other free country or State, whereas it was that they should not be emancipated here, but be sent away, in evasion of law, and be emancipated abroad without giving bonds that they should not return into this State, which latter trust is supposed to be against law and void, and then that a trust results to the plaintiffs. And the question made by the plain-

tiffs' motion, founded on the report, is that, supposing the dec- (39) laration of the trust was, in point of fact, correct, yet as the defendant did not proceed in conformity with the order, in the execution of it he should not now have liberty to do so, but be made immediately answerable for the slaves or their value as being yet in a state of servitude, or put beyond the reach of the plaintiffs by the defendant, contrary to his duty and the law.

It is not certain that either of those points can be raised on the bill as it is framed. It alleges no trust for emancipation here or elsewhere, and consequently does not impeach any such trust as being in any respect illegal. On the contrary, it charges that the bequests were on trust that the defendant should keep the negroes, not for his benefit, but for theirs, in a state of qualified slavery. It would seem that case is answered when it is found that there was no such trust as that charged. But assuming the bill to be sufficient and, indeed, that it contained express charges of such trusts and purposes as are now imputed to the testatrix, it seems to the Court that those charges are not established, but that the declaration of the trust in the decretal order was the only one that could have been judicially made. It is to be observed that there are no means of arriving at the trusts on which these gifts were made but the answer itself. On the face of the will no trust appears, but the donations are out and out to the defendant. But he admits certain trusts and says they were the true and only trusts. Can others be imputed? Upon what ground and to what extent? Supposing evidence to be admissible in such a case to contradict the will and the answer, there is none of any sort to the fact that the trust was different from that set forth in the answer, or that there was any trust at all. It may be conjectured from the religious principles of this defendant and other collateral circumstances that there was some sort of trust for emancipation (40) somewhere or holding the negroes as *quasi free* here. But there is, undoubtedly, nothing on which any particular trust can be established but that admitted in the answer. Why should not that be credited? It would have been as easy and as honest in the defendant to deny a trust altogether and assert a beneficial legacy in himself, which would have been conclusive, *Ralston v. Telfair,* 17 N. C., 255, as to have denied the true trust and set up a false one. Indeed, the temptation to the former was much the stronger, as he had a personal interest in that and none in the latter. Now, the answer states explicitly that the intention was to carry the negroes out of the State to Liberia or some free State, and, without specifying any particular mode of effecting the emancipation as contemplated by either of the parties, it avers that there was no intention "to commit an infraction of the laws of this State" in any respect. It is said, however, that the secrecy of the trust and the defendant's subse-

quent acts in the mode of executing it prove the contrary, and that it was the purpose from the beginning not to obtain the emancipation according to our law, but to carry the slaves elsewhere for emancipation. But those do not seem fair and just conclusions of facts, if the terms of the will and answer could be controlled by such matter *dehors*. It is not easy to see why the testatrix did not express the trust in her will. But it is hard to hold that the creation of it in confidence between herself and the defendant, for a charity of this kind, proves a purpose to evade and defraud the law of the country. She might not have wished it to be known during her life, or the parties might have distrusted their ability to express it in the will so as to be legal and effectual, while her wishes might be perfectly understood by her friend to whom she was will-
(41) ing to confide the office of carrying them out, trusting, therefore, to the sanctions of his conscience, rather than to the coercion of the law.

But whatever might be her motive, the answer is distinct that she intended no violation of the law of this State, and the validity of the trust depends upon her intentions and not upon the subsequent acts of the defendant, whether in performance or in breach of the trusts as meant by her. If it be said she had no intention that the defendant should give the bonds required by our law so as to obtain emancipation here, it may be yielded without prejudice to the correctness of the decretal declaration, for we suppose the testatrix had no particular intention as to the mode of emancipation, and, indeed, it is possible that she was ignorant how it might be effected, here or elsewhere. Her purposes were merely that her slaves should be emancipated, and that they should be effectually emancipated according to law, whatever that might be, including their removal from this State at all events. In those purposes nothing immoral or unlawful is seen, although the testatrix did not go on to say in so many words that the defendant should procure the emancipation by pursuing the steps pointed out by the statute passed in this State in the year 1830, for if the will had expressed the trust that the negroes should be free, and the executor should carry them to a particular country and settle them there, there would be nothing illegal in that, even if it were illegal to direct the emancipation abroad, because, nothing appearing to the contrary in the will, it would be entitled to the favorable construction of meaning an emancipation consistently with the law, and, therefore, if the giving bonds and procuring a license here to emancipate be in law essential to the emancipation it would be inferred that, according to the trust, it was so intended. A trust of the kind now before us,
(42) when ascertained, is of precisely the same obligation and entitled and subject to the same interpretation as if it were expressed in the will, which principle, indeed, is the foundation of this bill. As

far, then, as the intention of the testatrix can be collected, the emancipation of the slaves was to be legally effected, for the direction that they should be carried out of the State was nothing more than the law itself required, and the only question, with reference to the point under consideration, is whether her direction was that they should be carried away without or after emancipation here. Now, upon that there is the general principle just mentioned that a general direction is to be taken as intended to be consistent with the law, and there is also the positive assertion in the answer that in this case the fact was according to that presumption, which shows that the declaration was right that the testatrix intended that the slaves should not be kept in this State, but be lawfully emancipated and transferred to some free State to enjoy their freedom there. The subsequent acts of the defendant cannot vary the fact as to the intentions of the testatrix nor his obligation to observe them. Up to the decretal order the defendant certainly acted in conformity with the trust admitted by him, and, indeed, the answer contained a submission to execute the trust under the direction of the Court, as being a part of his duty under the trust, thus confirming the presumption as to the purposes of the testatrix arising from the other considerations. The conduct of the defendant since that time does not show the nature of the trust to have been different originally, nor change the rights of the negroes, nor create any in the next of kin of the testatrix, for if a lawful emancipation was intended by the testatrix, and that which the defendant has effected be unlawful, then it is true the defendant has been guilty of a breach of trust, but that cannot destroy the rights of the *cestui que trust* nor vest the property in the next of kin, from whom the testatrix took it away, by a lawful disposition. Admitting, therefore, that the defendant may have exposed himself to the penalty of a con- (43) tempt by not proceeding under the decree, according to his submission, yet that does not affect the question between him and the plaintiff. Nay, admitting that the emancipation were not as yet legally effected, nevertheless, supposing a lawful trust to have been intended as declared and now held, the plaintiffs are cut off at all events, for there can be no doubt that in some way the defendant, having accepted the trust, may be compelled to execute it in behalf of the negroes as *cestui que trust,* and, therefore, the plaintiffs cannot maintain this suit. The Court will not allow a lawful trust to fail by the laches of the trustee or for the want of one. In *Hope v. Johnson,* 2 Yerg., 123, a testator in Tennessee directed his land there to be sold and the proceeds laid out in land in Indiana and the right vested in his slaves, naming them, to whom he gave their freedom, and the settling of them in Indiana under the direction of his executors; and a bill was filed by the heirs and next of kin to restrain the executors from selling the land and removing the

slaves, on the grounds that the provisions for emancipation and the purchase of land for the slaves were void. But the bill was dismissed and Judge HAYWOOD, in delivering the opinion of the Court, said that when the mind of the testator to emancipate was made known in his will it was the duty of the executor to make use of all such legal means as should be effectual for the completion of his purpose. Indeed, it is a settled rule that a trustee, having accepted, cannot withdraw from the duty, but must go on to perform the trust; and it is said the rule has no exception. *Worth v. McAden,* 21 N. C., 199; Lewin on Trusts, 260. It may be asked, then, why this bill was not dismissed on the hearing? There is no hesitation in saying that would have been the proper course,
(44) especially as the opinion was then distinctly intimated that the rights of the next of kin were extinguished. But it was thought, incorrectly, probably, that the Court might act on the submission of the defendant to proceed in the emancipation under the direction of the Court, and an inclination was manifestly felt that it should be done in conformity to the particular provisions of our law. For that reason such directions were given, and, of course, the rights of the next of kin, if any, were saved until it should be seen whether the defendant pursued those directions or failed to do so. It was rather irregularly attempting to do by an order in this Court what would properly have been the subject of a suit by the negroes, or on their behalf, against the defendant to enforce the trust. But that cannot alter the rights of these parties between themselves, and as the trust found is held to be legally valid the plaintiffs have no interest, and the bill must be dismissed.

The case has hitherto been considered as if the testatrix had no particular intention that the slaves should be carried immediately out of the State for emancipation abroad, as that, it is apprehended, must be judicially understood to be the fact; consequently, enough has been said for the decision of the present suit. But as the question must often arise in other cases and has been very fully argued in this, and it is important that the state of the law on such a point should be known, it is thought to be proper to state the opinion formed by the Court on the supposition that the trust really was, as contended on the part of the plaintiffs, that the defendant should carry the slaves out of this State to be emancipated without applying for their emancipation here. On that point the Court holds the law to be also against the plaintiffs, because that trust is not expressly forbidden by the law of this State, nor is it against the policy of the law nor the public interest, but is lawful and valid.
(45) The point is not a new one in this State nor in our sister States in which slavery exists and laws also regulating the mode of emancipation similar to our own. In *Cameron v. Commissioners,* 36 N. C., 436, the slaves were sent by the executors to Africa without pre-

vious emancipation, and the Court held that gifts to them in the will were good and decreed their payment to them as free persons. In the opinion of the Court it is stated that "our law and policy alike forbid the manumission of slaves to reside amongst us, but they never did forbid the removal of them to a free country, in order to their residence there as free people"; and as one evidence that such was the policy of the law, reference was had to the act of 1830, as promoting and encouraging their emancipation, so that they be removed and kept without the State. The whole subject has been before the Court a few years previous in *White v. White,* 18 N. C., 260, and the opinion delivered was not hastily but deliberately formed, and the whole Court concurred in it. The point came up again directly in *Cox v. Williams,* 39 N. C., 15, when the same judgment was pronounced and the reasons more fully stated. Upon that occasion, also, the Court, after a change in one of the judges, was unanimous, both as to the argument and the conclusion. Then the policy of our law as collected from the only legitimate source—our Legislature—was said to be opposed to the residence of freed negroes in this State, but it had never been to restrain the owner of the slaves from removing them from this State, either for servitude or freedom elsewhere, and it was further said that in no case in which it had been held that the direction for emancipation was void, from *Haywood v. Craven,* 4 N. C., 360, down, had the deed or will directed that the emancipation should take effect abroad. That has been said to be in- (46) accurate, and the case of *Pendleton v. Blount,* 21 N. C., 491, is supposed to show it to be so. But it is only apparently so from the imperfect statement of the will and is really another example of the correctness of what was said in *Cox v. Williams, supra.* For the will there directed the negroes to be hired here, and their hires to constitute a fund in the hands of the executor for their benefit, and furthermore that this should be kept up perpetually by the executor and his executor or administrator, unless "at *any time hereafter* any of the negroes or any of *their increase* should desire to go to Africa or a free State," and in that case the executor was to give such slave his or her proportion of the fund. It was, therefore, a case of indefinite *quasi* freedom here for existing and future generations of the slaves, and was plainly an evasion of our law against the emancipation of persons who reside here. It is perfectly true, then, that no trust has been declared void, but when the purpose was apparent that the negroes could remain here, in which case, as we do not adopt the rule *cy pres* and could not order them to be carried abroad, the disposition must necessarily fail. In all those in which the direction was to send them out of the State to live as free persons the disposition has been supported. Against that it is argued that it evades the act of 1830, inasmuch as the public loses the security required by the act against

the return of the slaves, and, moreover, that it is contrary to the enactment that no slave shall be set free but according to the provisions of the act. But the argument is answered in this: that it supposes the power of emancipation is a privilege granted by the statute, and therefore exists only *sub modo,* whereas the true principle is that the power of the owner to give and the capacity of the slave to receive freedom exist in nature, and therefore may be used in every case and every way, except those in which it is forbidden by law. The statute, therefore,
(47) effectually bars emancipation here, except in the manner pointed out in it, and one who wishes to gain for his slave the liberty to stay here for a period after emancipation must conform to the statute. But neither in its terms nor in its spirit does it prohibit a *bona fide* removal of slaves to another State for the sake of their freedom. Its title is "An act to *regulate* the emancipation of slaves *in this State*"; and it has no clause or word affecting any person or thing extraterritorial, excepting only that it requires a slave emancipated here to remove and stay out of the State under the heavy penalty of being sold as a slave. Now, it may be—it is not for us to say how—that a slave carried abroad under the will of one of our citizens for emancipation would upon returning fall into the category of slaves emancipated here; but that has nothing to do with the rights of the owner or next of kin to such slaves, which would invest them with a beneficial interest in one class of them more than in the other; and whether they might be sold or not on returning is not material to the inquiry as to the validity of the emancipation actually effected abroad with the *bona fide* intention of a residence abroad, and while such residence continues. To such a case the statute has no application, for it is to be observed that it puts emancipation by the owner, and by the owner's executor, under the direction of the will exactly upon the same footing, except as to the executor's liability to creditors. Now, no one has ever supposed that an owner of a slave was prohibited by our law from carrying his slave, in his lifetime, to Africa or to Ohio for the purpose of granting him freedom; and if he who has a slave in his own right can do so, and his act be valid, so can one acting *in auter droit* in execution of a trust. The statute does
(48) not make the act of either void, and such must be the plain provision of a statute in order to have that effect.

When this point was again brought into question in this case after the former decisions of the Court it became the duty of the Court to look to the adjudications of our sister States similarly situated with ourselves for aid in sustaining our judgments or discovering our error. The research has been made and been successful in finding several adjudications accordant with ours, and no one to the contrary. The first found is *Frazier v. Frazier,* 10 S. C., 304, which was decided in South Carolina

in 1835, and the case was this: In that State there was a statute that no slave should be emancipated but by act of the Legislature. A testator directed his slaves to be set free, and provided a fund to enable them to go to St. Domingo to be colonized. The next of kin filed a bill against the executor, claiming the negroes and fund. It was dismissed, the Court holding these propositions: That, notwithstanding the extensive terms used in the act, the case was not within it, because an owner might remove his slaves from the State for any purpose he pleased, and he might therefore authorize his executor to do so, unless prohibited by statute; and because the evil against which the act was directed was the increase of free negroes in the State, and the removal of slaves belonging to her citizens and their emancipation out of her borders was no injury to her; hence the Court concluded that the right of the owner to authorize his executor to carry his slaves out of the State could only be restricted by a statute expressly making such a testamentary disposition void. 2 Hill Ch., 305. In 1840, the question came before the Court of errors and appeals of Mississippi upon appeal from the Chancellor in *Ross v. Vertrees* and *Ross v. Duncan,* 1 Freeman Ch., 587, and 5 Howard, 305. Ross directed by express provision in his will that certain of his slaves should be sent to Africa, under the superintend- (49) ence of the American Colonization Society, to reside there as free persons, and he gave parts of his estate as provision for them. Then Mrs. Reed, a daughter of Ross, by her will, gave all her estates, real and personal, to the defendants, including her interest in her father's estate, if his will should be held invalid, upon a secret trust (set forth in a letter written by her to the defendants contemporaneously with the execution of the will) that the defendants should carry all her slaves to Liberia, there to remain free. The next of kin filed bills against the legatees and executors claiming the estate upon the ground that the dispositions were contrary to the law and policy of Mississippi, and void, and that a trust resulted. The statute of Mississippi was, "that it shall not be lawful for any person being the owner of slaves to emancipate them unless by his or her last will and testament, duly attested, etc., and unless, also, it be proved that such slaves have performed some meritorious act for the benefit of such owner, or some distinguished service for the benefit of the State; and such last will shall not have validity until sanctioned by the Legislature, nor until the owner shall have complied with the conditions specified in such act." Yet the trusts of both wills were, after most elaborate arguments, upheld and both bills dismissed, notwithstanding there had been no legislative sanction of either will. The grounds taken by both Courts were precisely those shortly stated in *Cox v. Williams,* that the prohibition of emancipation was a regulation of internal police, and the statute was to be construed in

reference to that object, and therefore confined to a local operation within the State or to such acts done out of the State as were intended to have their effect in it; that the right to manumit a slave is perfect at common law, and that the statute did not take it away, but only qualified
(50) it when exercised within the State; and that Mississippi had no concern with the manumission of slaves in other States, and did not assume a police jurisdiction in them, but only within her own borders; and, finally, that, therefore, the emancipation directed by the testators, though not made by virtue of the statute of Mississippi was not contrary to it. *Haywood v. Craven,* 4 N. C., 360, was much pressed on the Court in those cases, and it was properly put upon the ground that the will directed the emancipation to be by the laws of this State, and therefore that the negroes were to remain here, and in that way it was distinguished from a trust to carry slaves to Liberia, there to remain free. The question again came up in the same Court in 1846 in a different form. The executors of Ross refused to deliver the slaves to the Colonization Society or to sell the estate given for the negroes on the ground that the trusts were in fraud of the statute on the subject of manumission and against public policy, and therefore void. Upon the bill of the Colonization Society against the executors the trusts were again held to be lawful and valid and the slaves were decreed to be delivered to the society and the bequests for the benefit of the slaves declared void, as they had by the will an inchoate right of freedom and capacity to take, which became complete on their removal out of that State. *Wade v. American Colonization Society,* 7 Smedes and Marsh, 663. It seems, likewise, from a note that has been met with of a case in Georgia, that the same doctrine is there held as law. *Jordan v. Bradley,* Dudley, 170. But as the book containing the report of the case is not to be had here no reliance is placed on it. The other cases cited are so perfectly accordant with our own, both in the reasoning and conclusions, that the
(51) Court may, with the more confidence, reaffirm their correctness and place our present decision on their authority.

It is not doubted that it is perfectly competent to the Legislature to qualify the right of manumission, whether *inter vivos* or by will, by any regulations that may seem meet to that body, or even to make void any direction in a will of her citizens for the removal of her slaves from the State for the purpose of emancipation elsewhere. But mere legislative regulations for emancipation within the State cannot operate on trusts elsewhere, because they are neither within the words nor the policy of such enactments. It requires an express enactment or plain provision, in avoidance of such a testamentary disposition, before a Court can impose a restraint on a citizen by depriving him of the natural right of sending his slave where he can do us no hurt, that he may live and be free there.

The result is that the emancipation of the slaves is deemed effectual and proper, and the dispositions in their favor and that of the defendant Newlin held valid, and therefore the bill must be

PER CURIAM. Dismissed with costs.

Cited: Green v. Lane, post, 79; *Washington v. Blunt, post,* 255; *Redding v. Findley,* 57 N. C., 218; *Hogg v. Capehart,* 58 N. C., 72.

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(52)

JAMES N. PATTERSON, ADM'R, ETC., v. PEYTON HIGH, EX'R, ETC.

1. On the death of a *feme covert*, entitled to *choses* in action, administration should be taken out on her estate, for the purpose of paying her debts, if there be any, and for distributing the residue of her assets as the law directs.
2. The husband has a right to such administration, but he may assign his right to another.
3. It has long been the established law in this State, that the increase of slaves belongs to the remainderman, and not to the tenant for life of the mother.

CAUSE removed from the Court of Equity of ORANGE, at Fall Term, 1851.

The plaintiff in his bill set forth that John B. Shaw died in 1816, having left a last will and testament, of which, among others, he appointed John Shaw, who alone qualified, and the defendant Peyton High executors; that by the said will he bequeathed as follows: "I lend to my wife, Franky Shaw, during her natural life or widowhood, ten negroes" (naming them); and in another clause, "I give to my daughter Polly Morgan, after the death or marriage of my wife, one negro woman named Isabel, to her and her heirs forever." The bill further set forth that the said testator directed in and by his said will that after the death of his wife a large portion of his property should be divided among his children, of whom the said Polly was one. The bill further set forth that the said Polly Morgan was the wife of Lemuel Morgan, who is still living, and that she died after the death of the said testator and in the lifetime of the said Franky Shaw, the wife of the said testator, and that at the request of the said Lemuel Morgan administration on her (53) estate has been duly granted to the plaintiff. The bill further alleges that the said Franky Shaw above mentioned died in 1851, having during her life held possession, by the consent of the executors, of the property bequeathed to her by the will of the said John B. Shaw, including, among others, the said woman Isabel, who has now a large increase born since the death of the said testator. The bill further alleged

that all other persons named as executors in the will of the said John B. Shaw being dead, the defendant has qualified as the surviving executor, and has taken into his possession the said woman Isabel and her increase, as well as the rest of the estate to which the plaintiff's intestate was entitled under the said will in remainder after the death of the said Franky, and that he refuses to pay or deliver the same to the plaintiff. The bill concludes with the usual prayer for an account and relief.

The defendant in his answer admits all the facts set forth in the bill, but he avers that the said Polly Morgan left no children, and he is advised that in that event all the estate in remainder bequeathed to her by the said will, not having vested in her during her life, passed to her surviving brothers and sisters, and that therefore the plaintiff has no claim.

The cause was set forth for hearing upon bill and answer and, by consent of the parties, transferred to this Court.

Norwood for the plaintiff.
Saunders and *G. W. Haywood* for the defendant.

NASH, J. The plaintiff is entitled to the decree which he asks. John B. Shaw died in 1816, and by will gave to his wife, Franky Shaw, during her life or widowhood, a number of negroes, among whom was a (54) woman by the name of Isabel. By a subsequent clause he gives her absolutely, after the death or marriage of his wife, to his daughter Polly Morgan. The bequest, then, of Isabel was of a life estate in her to the widow, with a remainder to Polly Morgan. This was a vested remainder and in no way dependent upon Polly Morgan surviving her mother. It cannot be necessary to cite authorities to prove this.

By the clause, the last but one in his will, the testator directs that nine of the negroes given to his wife, together with other property, shall be sold and the proceeds divided among all his children. The widow, Mrs. Franky Shaw, died in 1851, and immediately thereafter the sale was made by the defendant High as executor of the will of John B. Shaw. This was also a vested remainder in the children of the testator, and the interest of Polly Morgan vested in her the possession, only awaiting the falling in of the life estate of Mrs. Morgan, who died in 1830. Her husband, Lemuel Morgan, is still alive. Upon the death of a *feme covert* her *choses* in action are to be reduced to possession by her personal representative for the purpose of paying her debts, if there be any, and for distributing the residue of the assets as the law directs. Her husband is entitled to take out administration upon her estate, and after discharging all just claims upon it holds the balance in his own right, the law deeming him her next of kin, or not compellable to make distribution. 2 Bl., 515.

Upon the death of Mrs. Morgan it was the right of her husband, Mr. Lemuel Morgan, to administer upon her estate; but during the existence of the widow of John B. Shaw it was not necessary, for there was nothing to administer upon. As soon, however, as that event took place, the necessity arose, and the present plaintiff, with the consent of her husband, was duly appointed. He is entitled to a decree for the (55) negro woman Isabel and all her increase since the death of John B. Shaw. It has long been the established law of this State that the increase of slaves belongs to the remainderman and not to the tenant for life of the mother. *Timms v. Potter,* 2 N. C., 234; *Glasgow v. Flowers, ib.,* 233, and *Erwin v. Kilpatrick,* 10 N. C., 456. He is entitled to an account of the hires of the negroes since the death of Mrs. Shaw, and is also entitled to receive from the defendant High the share of Mrs. Morgan in the sales of the slaves and other property in which the widow of the testator had a life interest.

It must be referred to the clerk to take an account of the hire of the negroes from the time specified and also of the amount of the sales made by the defendant.

PER CURIAM. Decreed accordingly.

GEORGE HILBORN v. EPHRAIM HESTER.

1. Although a husband is entitled exclusively to administration on his wife's estate, yet he cannot recover, as administrator, a *chose in action,* for which he had received full satisfaction previously to the grant of administration, unless it appears there are debts due from the wife's estate, and then an account will be directed.
2. So, if he has, intentionally, and with his privity and concurrence, permitted another to receive the amount of such *choses in action* of his deceased wife.

CAUSE removed from the Court of Equity of BLADEN, at Fall (56) Term, 1851.

John Hester died in 1819, in Bladen, having made his will, in which he made the following dispositions: "I will that my wife, Comfort, live on the plantation her lifetime, and also my negro Jane to wait on her for her lifetime, and that she be maintained out of the whole of the property. I give to my daughter Hannah a negro girl named Clarissa, and the balance of my negroes to be equally divided between all my children, except Hannah." He also left several tracts of land, which he devised to his different children, who were nine in number; and he appointed the defendant, his son Ephraim, the executor, and he proved the will. One of the children was named Mary, then the wife of the present plaintiff.

In February, 1820, the executor and the other children divided the slaves and other effects, except Jane, and the others, including the plaintiff, gave to the executor an obligation, in which they acknowledged they had received their shares of the estate and bound themselves to pay their proportions of any demands against the estate. Not long afterwards, but at what particular day does not appear, the plaintiff's wife died, leaving an only child named Eliza, very young. The executor assented to the legacy of Jane to the widow, who kept the slave in her possession on the plantation for eight or ten years, and until Jane had two children. Then a person took the two children, and Mrs. Hester brought detinue for them, and on the trial of the suit the present plaintiff was introduced as a witness for her, and on objection to his competency on the ground of his interest in the slaves, he swore that he had none, and that the share to which his deceased wife had been entitled then belonged to his daughter Eliza, and thereupon he was examined in chief and the negroes were recovered. Very shortly afterwards, Mrs. Hester having become very old and infirm was taken by her son, the defendant, to his house to reside, and she carried the three negroes with her, and she afterwards (57) lived in the defendant's family and was maintained by him until her death in 1837. In 1832 the plaintiff was arrested by a creditor, and took the oath of insolvency in Bladen without filing any schedule, and soon afterwards procured one Richard Lewis to be appointed guardian of his infant daughter Eliza and then he removed to Alabama and carried his daughter with him. After the death of Mrs. Hester, Lewis claimed on behalf of his ward a share of the negroes and some of the old furniture left by Mrs. Hester, and by the consent of the defendant and of the other children of the testator who were living here he, Lewis, administered on the estate of Mrs. Hester and sold Jane and her two children as his intestate's property for the sum of $1,528; and in 1840 he paid the sum of $50 as the share of the said Eliza, after deducting the charges, to Lemuel J. Lucas, who resided also in Alabama, and had intermarried with the plaintiff's daughter Eliza. The plaintiff afterwards came into this State and obtained administration of his deceased wife's estate and filed this bill in September, 1847, praying for an account of the residue of the testator's estate, and particularly of the profits and proceeds of the sale of Jane and her children.

The answer states that the defendant assented to the legacy of Jane, and thereby the property in her vested in the widow for her life, and the remainder vested in the children, except the testator's daughter Hannah, and thereupon insists that the defendant was not bound to take possession of the slaves as executor after the widow's death. It further states the facts already mentioned in respect to the plaintiff's denial of his own right to a share of the negroes, and his declaration and other acts show-

ing that it was his daughter's, and it avers that the money paid to Lucas was so paid with the knowledge and consent of the plaintiff for the share of the slave originally belonging to the plaintiff's wife. (58) It further states that Mrs. Hester became so infirm as to be incapable of labor, and the negro woman and her children also became expensive, and that the defendant was thereby induced to take them to his house and maintain them there; and it is insisted that if the defendant be held liable to account to the plaintiff at all there ought to be a proportional allowance for the expense of maintaining the mother and her negroes.

RUFFIN, C. J. It need not be considered whether the particular provisions of the will take the case out of the general rule that an assent to a legacy for life is also an assent to one in remainder, because upon other points the opinion of the Court is with the defendant.

The circumstances render it probable that at the division in 1820 there was an agreement that, instead of setting apart a fund for the maintenance of Mrs. Hester, she should have the whole property in the slave Jane. That supposition accounts naturally for the plaintiff twice renouncing on oath any interest in her, and for his thinking that his daughter would succeed to some interest under her grandmother, and therefore procuring, before he left the State, the appointment of a guardian for her here, who might, upon the death of the grandmother, get his daughter's share. But whether that be so or not—and the answer does not insist on it—those circumstances and the other evidence establish it as a fact, to the satisfaction of the Court, that a full share of the value of Jane and her children was received by the plaintiff's son-in-law as the share of his wife, with the privity and consent of the plaintiff and in fulfillment of his intention and the understanding of all concerned long existing. The fact, we think, cannot be doubted, especially when the plaintiff delayed for seven years to administer and bring suit after the money had been received by a member of his family, resident in the same part of the country with him. It is true that upon (59) the death of the plaintiff's wife her administrator alone legally represented her, so as to be entitled to her share of the negroes; and it is also true that payment to one not entitled will not excuse an executor from the demand of the proper person. Yet the force of the defense here set up is not thereby impaired in this Court, for if the payment had been to the plaintiff, the surviving husband, he could not, by afterwards taking administration, compel the executor to pay him a second time, because in fact the administration would be for his own benefit exclusively, and as soon as he got the money as administrator he would hold it to his own use, which he could not justly do with the money already in his

pocket. If there were any probability that there were any debts of the wife there might be a reason for an inquiry as to the amount and for a decree for enough to satisfy it. But after a *feme covert* has been dead about thirty years, without some suggestion to the contrary, it may be fairly presumed there is no demand against her estate. The defendant, indeed, says he might assert a charge on it for a contribution towards the maintenance of his mother in her last years, but that he prefers only as a deduction from the plaintiff's recovery, if he should make any in this suit. The plaintiff is, therefore, suing exclusively for his own personal benefit, and he could not recover if the money had been actually paid to him before he administered. In effect that was done, for if he assigned his claim to his daughter or, without an assignment, if he was intentionally the cause of the payment being made to her or her husband, and it was made with his privity and concurrence it is the same as if the money had gone into his own hands. The plaintiff would not, indeed, be concluded by the settlement made by the son-in-law, but might have an account, so as to charge the defendant with a further
(60) sum if he could. But it was admitted on the hearing that everything had been settled between these parties except the plaintiff's demand on account of the three slaves, and, as that is but a single item, and its amount clearly shown, and the payment of his proportion of it to Lucas fully established, there is no necessity for any inquiry, but the bill must be

PER CURIAM. Dismissed with costs.

THERESA WALLING ET AL. v. ANTHONY BURROUGHS ET ALS.

In an account between tenants in common of land, used for getting timber, the value of the timber, while growing, is to be taken as the rule of valuation.

CAUSE removed from the Court of Equity of MARTIN, at Fall Term, 1851.

The case is stated in the opinion of the Court.

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

NASH, J. The plaintiffs and defendants are tenants in common of a tract of swamp land, and the defendants, who are in possession,
(61) have cut down and carried to market a large quantity of timber growing on it. The bill is filed for an account. By a decree of the Court made by consent of the parties reference was had to the mas-

ter to state the account. A report was made to Spring Term, 1851, of the Court of Equity for Martin, to which each party excepted. It is unnecessary to consider any of the exceptions but the first made by the defendant, as that disposes of the case as it is now before us. That exception is: "That the defendants are charged with the value of the timber and some of the shingles as sold, deducting only the actual expenses of getting the same to market and not allowing the defendants anything for their risk and attention to the business, whereas the defendants insist that the proper charge against them would be a fair rent of the timber at the stump." This exception is allowed, and as it goes to the principle of the report, the cause is referred back to the master to take the account. The principle upon which such accounts are to be taken is stated and the authorities cited in *Bennett v. Thompson,* 35 N. C., 141, as to a trespasser. We do not deem it necessary to do more than to refer to that case. The principle is that the account is to be taken of the value of the timber while growing, as a rent for the timber, this case being between tenants in common.

PER CURIAM. Ordered accordingly.

Approved: Darden v. Cowper, 52 N. C., 211.

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(62)

JOHN N. INGRAM v. ROBERT KIRKPATRICK.

1. Where a deed of trust is given to secure two separate creditors, not being cosureties, one, who receives part payment of what is due him, is not bound to carry that into the trust account, unless, after deducting that payment, the trust property is more than sufficient to satisfy his debt.
2. When property is conveyed to a creditor, in trust to be sold for the benefit of himself and other credtors, the trustee is entitled to charge commissions for making the sale and disbursing the proceeds, and a commission of two and a half per cent is not too large.
3. A trustee is not generally liable for costs; but, where the contest relating to the execution of the trust involves his personal interests and the decision is against him, it is the general rule that he should pay the costs of the controversy.

THIS cause came on on exceptions to the report of the clerk. The nature of the exceptions is set forth in the opinion of the Court.

RUFFIN, C. J. This cause was before the Court for hearing at December Term, 1849, and is reported 41 N. C., 463. The clerk made his report to the present term on the inquiries then ordered, and therein finds the proceeds of the sale of all the effects conveyed in the deed of

trust made by Pittman to the defendant amounted to $2,445.17, and that thereout the defendant paid to the sheriff the sum of $860.94 in satisfaction of the debt and costs due on executions, having a lien on the property at the time the deed was made, leaving a balance of $1,584.23 applicable to the debts secured in the deed of trust. Besides that sum, the clerk charges the defendant with the sum of $193.21 under the following circumstances: Pittman had a demand on one Hudson, which he transferred to the defendant as a security for the defendant's liabilities
(63) for him, but at what time does not appear. The defendant instituted suit thereon in the name of Pittman on 30 June, 1843, and recovered judgment thereon in April, 1846, for $225.28 besides costs, and afterwards received the same. From that sum the clerk deducted interest from the time of the defendant's sale, which was in April, 1843, which left the net proceeds of the judgment as of April, 1843, the above sum of $193.21, with which the defendant is charged as a part of the trust fund, so as to make the aggregate of $1,777.40. On that sum an allowance of 2½ per cent is made for commissions, leaving the net amount applicable to the debts in the deed $1,733 on 17 April, 1843, and the debts are reported to have been $2,936.13 on that day.

Both of the parties except to the rate of the commissions. The plaintiff also excepts to any commission on the sums applicable to the debts for which the defendant was liable as surety; and the defendant further excepts for the omission to allow commissions on the sums paid to the sheriff on the executions. The Court sees no error in either of the points thus excepted to. It was for the defendant's own advantage that he made the sale, instead of the sheriff, for the satisfaction of the executions; and there is no reason why, by doing so, he should subject the fund to a double commission—one to the sheriff and one to himself—on that amount. The clerk has not allowed the defendant commissions on his debt as a disbursement, but only on the balance of the amount of sales; and the plaintiff has no reason to complain of that, as some one ought to be compensated for the trouble and responsibility of making the sales and receiving the money, and the rate allowed by the master is that given by law to sheriffs for similar services. Therefore, the first exception of each party is overruled.

(64) The defendant further excepts to the charge of $193.21 for the proceeds of the judgment against Hudson; and the plaintiff excepts because that charge is not $435, instead of $193.21. It may be remarked, in the first place, that the plaintiff's exception proceeds on a mistake as to the debt of Hudson. The recovery was only $225.28, and the residue of the $445 was for the plaintiff's costs in that suit, and, of course, would not be chargeable to the defendant in this account, as they only reimbursed his outlays in the prosecution of the suit, and the de-

fendant has no credit for those expenditures. But that is not material, as the Court holds that the plaintiff is not entitled to any part of the sum received from Hudson. These parties were not cosureties for any one of the debts, and the only connection is that one deed of trust for certain property was given as security for separate debts to them respectively. There was, therefore, nothing in law or conscience to prevent either of them from obtaining from the debtor at any time a separate or further indemnity against loss to himself. If, indeed, the defendant had got such a security to the full amount of his liabilities, equity would have required him to resort to that and leave the other for the plaintiff's benefit. But after the application of the defendant's share of the sales under the deed of trust and the whole of the Hudson money a considerable balance remains due to him; and certainly he is not bound to communicate to the plaintiff the benefit of his separate security in a way to defeat himself of any part of his demand. In this case, indeed, it does not appear that the claim on Hudson was assigned to the defendant until after the sales had been made under the deed of trust and the loss ascertained. But it is rather so to be inferred from the facts, as far as they can be seen; and if so, it was entirely competent to each party, even if they had been originally cosureties, to provide in any way he could for his separate satisfaction or security, since after the loss (65) each surety is a separate creditor for the amount paid by him out of his own funds. These parties, however, did not stand in that relation, but were separate creditors or sureties from the beginning, and the one was not bound in any degree to take care of the other. Therefore, the plaintiff's second exception is overruled, and that of the defendant allowed; and it is referred to the clerk to compute the sum due to the plaintiff upon the basis of his former report, corrected as now pointed out.

Although the defendant as trustee would not generally be chargeable with costs, yet in this case the controversy arose entirely upon a question as to his own personal interests under the deed, and as the result of that is against him he must, according to the general rule, pay the costs.

PER CURIAM. Ordered accordingly.

Approved: Cannon v. McCape, 114 N. C., 582.

(66)

COUNCIL WOOTEN, ET AL., v. JOHN E. BECTON, ET AL.

1. Where a testator directs, by his will, that "a negro woman and her future increase and issue" be sent out of this State to some free State, for the purpose of emancipation; *Held*, that the words "future increase and issue" should here include children, born between the making of the will and the death of the testator.

2. A trust in a will to carry slaves out of the State, for the purpose of being settled in a free State, as free persons, is a lawful and valid trust, which the executors are bound to perform. And this the executors may do, without any application to the Courts of this State—under our Statute.

CAUSE removed from the Court of Equity of LENOIR, at Fall Term, 1851.

W. H. Haywood for the plaintiff.
J. W. Bryan and *Donnell* for the defendant.

RUFFIN, C. J. Susan Jones made her will on 26 July, 1846, and therein bequeathed as follows: "I am anxious to reward the meritorious services of the following named slaves with the boon of freedom, namely: Phillis, Esther, Nancy, Patsy, Scott, John, Amsy, Pleasant, Fortuna, Mary, West, and Sarah, and all their future increase and issue; and I direct my executors to apply a sum, not exceeding three hundred dollars, to pay their passage and settle said slaves in some one of the free States." There are in the will a number of specific bequests to different persons, and a clause dividing the residue equally between four classes of persons. The testatrix died in the spring of 1848, and before her death one of the above mentioned women had a child born, named Pleasant, and since her death several others have been born.

(67) The bill is filed by the executors against the residuary legatees and the Attorney-General and prays that the rights of the slaves and of the other parties and the duties of the executors may be declared. It states that the executors are willing and desirous to carry into execution the provision for the emancipation of the slaves by carrying them out of this State and settling them in one of the free States into which it is lawful for them to go, but that they have been advised that it is doubtful whether they have a right to do so without having first had them emancipated in this State, and that they are willing to procure their emancipation here and give the bonds required by our law, provided they may be allowed to retain the estate of the testatrix in their hands as an indemnity against loss by reason of such bonds, but that otherwise they are not willing, unless compelled by law to do so. The bill states that in consequence of the delay in procuring the emancipation,

by reason of doubts upon those points, the residuary legatees claim that the disposition for emancipation hath become void or that it was so from the beginning, and insist on the immediate distribution of the residue according to the will, and that the slaves and the said sum of $300 fall into and form parts of the residue, and more especially the slaves born since the date of the will. The answers do not present any other facts, but merely raise the points of law presented on the will.

There is no difficulty in saying that the executors cannot apply to the purpose of effecting the emancipation of the slaves more than the sum specified in the will, and by consequence that they cannot retain more of the estate on that account. The children born since the death of the testatrix are within the words of the will as expressly as those named. With respect to one born between the making of the will and the death of the testatrix the rule is not so clear. Were it a disposition by way of legacy to some other person the Court would feel bound (68) by previous adjudications to hold that the child did not pass to the donee of the mother. But the conclusion is to the contrary, on the direction to emancipate "the issue and increase of a female," who is emancipated by name in the will. "Increase" is admitted in the cases to be *per se* an equivocal term, and therefore it is allowed that other things in the will may be looked to in order to give it a meaning effectuating the actual intention. The supposition is almost inconceivable that one should intend that a child born at any time after the will should remain in servitude, when, by the will, not only the mother, but her issue and increase, are to be emancipated; or that the intention should not have been directly the reverse—that such child should follow the mother and be free also. The purpose of the testatrix plainly denotes, as it seems to the Court, that "issue and increase" was meant to include all born after the making of the will.

The point respecting the mode of emancipation has been considered in *Thompson v. Newlin, ante,* 32, and the views of the Court so fully explained as to leave but little to be said on it now. If application be made to a court of North Carolina to direct emancipation, it must, as a matter of course, be done in conformity with the particular provisions of our statute on that subject. But this is not the court for emancipation, but only the court of construction, in which the will is expounded and the performance of its trusts enforced. In that character the Court must declare that the trust to carry the slaves out of the State for the purpose of being settled in a free State as free persons is a lawful and valid trust, and that the plaintiffs having undertaken the office of executors are bound to execute this as well as any other trust of the will. If, therefore, the emancipation could be effected only by pursuing the mode designated in our statute it would follow that the execu- (69)

tors would be obliged to resort to that mode, and the Court would also be obliged to enforce them to do so. But as emancipation may, in the opinion of the Court, be effected without violating our law or policy by transporting the slaves and their settling *bona fide* in a state of freedom in another country or State, the Court is bound to declare that the executors have an option as to which of the two modes they will adopt to execute the trust. In the one mode or the other it must be executed, and therefore the next of kin or residuary legatees of the testatrix have no interest in the slaves or the fund set apart for them, or rather so much of it as may be needed for the purpose mentioned, which, from the amount, must, we suppose, be the whole.

PER CURIAM. Declared accordingly.

Approved: Washington v. Blunt, post, 255; *Caffey v. Davis,* 54 N. C., 7; *Leary v. Nash,* 56 N. C., 358; *Redding v. Allen, id.,* 368.

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(70)

DAVID GREEN, ET AL., v. HARDY B. LANE, ET AL.

1. A person may send his slaves out of this State to be emancipated, provided the act is done with the *bona fide* intention that they shall remain out of the State; but if they be sent with a view that they shall be emancipated, and then return and reside in this State, this is in fraud of our laws, and the emancipation is void and of no effect.
2. A provision in a will, that slaves shall be sent out of the State to be emancipated and to remain permanently abroad, which is lawful, is revoked by a codicil, which devises to his executors a house and lot in this State, in trust for their residence here. The latter trust, thus revoking the former is, in itself, unlawful, and results to the next of kin.

CAUSE removed from the Court of Equity of CRAVEN, at Spring Term, 1851.

(74) *J. H. Bryan* and *Green* for the plaintiffs.
J. W. Bryan for the defendants.

RUFFIN, C. J. William S. Morris, of New Bern, made his will on 15 March, 1831, and therein appointed the defendant Lane the executor, and gave to his executor all his estates, except a negro woman named Patsy and her three children, Faucitt, Albert, and Freeman, in trust for the following purposes: First, to sell the same and collect the proceeds and other moneys due to the testator. "And, secondly, that as soon after my decease as practicable, and at all events within a year thereafter, my executor remove beyond the limits of this State, and with the intent of a permanent residence, to some State or country where emancipation is

unrestricted by law, the said Patsy, Harriett, Albert, and Freeman, and there cause them to be entirely emancipated. Thirdly, that my executor shall apply one-half of my money, debts due me, and the proceeds of the sales before directed, as a fund wherewith to effect the removal and emancipation as aforesaid of the said Patsy, Harriett, Albert, and Freeman, and to provide for them after emancipation in such form and manner as my executor shall judge best, as the means of their education, improvement and comfortable subsistence." And, fourthly, (75) that the other half be applied in certain other legacies.

By a codicil dated 30 May, 1838, the testator expressly republished his will, which, he says therein, was written by Judge Gaston, and appointed Hardy Whitford and John L. Durand executors; and he "devised to them or the survivor of them my piece of ground, with the improvements on the west side of Craven Street, between, etc., and also my household and kitchen furniture, my cow and calf and ten shares of the capital stock of the Merchants Bank of New Bern, to hold said real estate in fee simple, and said personal property absolutely, in trust, nevertheless, to permit my woman Patsy to use, occupy and enjoy the said piece of ground and the improvements and said furniture and cow and calf, and to have the dividends of said bank stock during the natural life of said Patsy, and after her decease in trust, to surrender up said real or personal estate to Harriett, Albert, and Freeman, the children of said Patsy, to be held by them in absolute property. *Item:* I desire my executors or the survivors of them to sell the lots Nos. 83 and 67 in the town of New Bern at public auction, and of the proceeds of the sale I give unto William Henry Morris, son of said Harriett and grandson of my woman Patsy, one thousand dollars," giving the residue of such proceeds to certain other persons.

The testator died in 1848, and Lane and Durand, the only surviving executors, proved the will. The bill was filed against them in 1850 by the legatees named in the will other than the negroes and by the heirs and next of kin of the testator for an account and payment of the legacies and the distribution of the surplus undisposed of, and praying that the dispositions for the emancipation of the slaves and for provisions for them may be declared unlawful and void, and that a trust in regard to the real estate may be held to result to the heirs and of (76) the personal estate to the next of kin.

The answer of the executors and trustees states that the boy Albert died before the testator, and "that in 1828 the testator carried the slaves Harriett and Freeman to the State of Pennsylvania, and there caused proceedings to be had for their emancipation, and did, according to the laws of Pennsylvania in such cases provided, emancipate and set free, as he was there advised, the said slaves and then returned with them to

his former residence in this State; and that from thence until his death the said Freeman and Harriett were in his possession and use; and that being advised after his return that the said proceedings were irregular and contrary to the policy of the laws of this State, and that said emancipation was void here and would probably be so declared at his death, the testator, under the advice of Judge Gaston, executed his will in 1831; and subsequently thereto the boy William Henry was born, who is mentioned in the codicil as the child of said Harriett." The answer submits whether under those facts Freeman and Harriett were not duly emancipated, and whether, therefore, William Henry was not free by birth.

The answer further states "that within the year after the testator's death and before the filing of the bill the defendants removed the negroes Patsy, Harriett, and Freeman to the State of Pennsylvania with the intent of a permanent residence in that State, the same being a State in which emancipation is unrestricted, and there caused them, the said Patsy, Harriett, and Freeman, to be entirely emancipated. And in that they say they did as they were advised and, as they believed, in the faithful discharge of the trust reposed in them by their testator it was their duty to do, and that if any other thing remains or is necessary to perfect the execution of said trust they are willing and ready,
(77) under the order and direction of the Court, to perform the same."

The answer then states the application of part of the funds of the estate to the removal and subsistence of the three negroes, Patsy, Harriett, and Freeman, and the payment of two years rent of the house and lot to Patsy.

The Court thinks the testator was well advised by Judge Gaston, then at the bar, that his proceedings in Pennsylvania, in 1828, would be deemed void here as having been in fraud of the law of this State. The proceedings, whatsoever they were, are not set forth in the answer, nor is any proof of them before the Court showing that at that time they were effectual even under the law of Pennsylvania. But admitting them to have been so, the Court is, nevertheless, of opinion that the courts of this State cannot give effect to them. It was an act by a citizen of North Carolina domiciled here, whereby he took slaves from this State and carried them into another State where slavery did not exist, in order that by the mere fact of being there, though only *in transitu*, they should become free, and then bringing them immediately to his domicil here and holding them here as slaves up to his death, twenty years, and disposing of them in his will as slaves. Of such an act the Court can only say that it is apparent that the pretended emancipation in Pennsylvania was really to have its effect in North Carolina, where the emancipation could not lawfully be made, and therefore that it was manifestly a fraud on our law, and the Court cannot, upon any principle of comity,

give effect to it. It presents a stronger case for the application of the principle that the courts of one country will not give effect to the acts of persons, and especially of its own citizens done in another country with the intent to violate or defeat the law of the former, than that of an unlawful marriage. Yet in *Williams v. Oaks,* 27 N. C., 535, the Court was obliged to hold that when our law denied to a person (78) for crime the capacity to marry, that law could not be evaded by such persons going into another State for the mere purpose of getting married there and immediately returning to this State. But upon the very question of emancipation of a slave by an act like that under consideration there is a direct adjudication by a highly respectable tribunal, that of the high Court of Errors and Appeals in Mississippi, in *Hinds v. Brazealle,* 2 Howard, 837. In that case a person took slaves to Ohio with the intention to emancipate them there and carry them back immediately to Mississippi; and in his will he ratified his deed of emancipation and gave real and personal estate to the negroes. Upon a bill by the heirs and next of kin against the executors it was held that the alleged emancipation in Ohio was in fraud of the law of Mississippi, and, therefore, it was held to be void there, and the negroes were declared to be slaves and the executors decreed to account for them and for the legacies to them. The opinion of the Court was delivered by Chief Justice SHARKEY, and the decree is sustained upon reasoning entirely satisfactory to our minds, indeed, on such grounds as are indispensable to protect the State from being overwhelmed with an African population in a state of *quasi* servitude and freedom, not giving any of the guaranties for the security of the public peace which the government prescribes for such persons when belonging to either the one caste or the other. Therefore, Harriett's son William Henry is a slave still, and the gift to him fails.

The other slaves are in the same condition, unless they be entitled to their manumission under the will and codicil, and the Court is of opinion that they are not. If the case stood on the will of 1831 it would be otherwise, as has been held in *Thompson v. Newlin, ante,* 32. But it does not, for it is the office of a codicil, not only to repub- (79) lish the will to which it is a codicil, but also to revoke it as far as it is inconsistent with it. In that respect there is a distinction between the effect of inconsistent provisions in the body of the will itself, in which case both have operation from one and the same act of publication, and such provisions in the original will and in a codicil, in which case those in the first are necessarily modified or revoked by the latter. That being so, it is apparent in this case that the testator must have changed his mind as to the residence of the negroes, and that when he made the codicil he intended that they should be free and remain here.

It must be so inferred, because in the codicil he devises the lot and improvements in New Bern to trustees in trust to *permit* Patsy, during her life, to use, *occupy,* and enjoy them, and that after her death for her children. That provision renders it plain that the testator either intended or, at least, was providing for the residence of those persons in this State, and it has been over and over again decided that the Court cannot, upon a provision with a view to their remaining here, decree the emancipation elsewhere on the doctrine of *cy pres,* but that the whole provision is void and the slaves remain slaves. *Haywood v. Craven,* 4 N. C., 360; *Pendleton v. Blount,* 21 N. C., 491; *Lemmond v. Peoples,* 41 N. C., 137. It must be declared, therefore, that the negroes Patsy, Harriett, and Freeman were the slaves of the testator at his death and that they are to be accounted for by the defendants as still being slaves, and also that the trusts created for their benefit in the will and codicil are not valid in law, but resulted.

PER CURIAM. Decree accordingly.

Approved: Joiner v. Joiner, 55 N. C., 71.

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(80)

HIRAM BRINSON, ADM'R, ETC., v. DAVID B. WHARTON ET AL.

A testator devised and bequeathed to his wife all the residue of his estate, "during her widowhood, and when she marries, then that all the remaining property, both real and personal, shall be equally divided between his children and beloved wife, share and share alike": *Held,* that this was a vested remainder in the children, and that, upon the death of the widow, without having married, the representatives of the children, who had died in her lifetime, were entitled to share equally with the surviving children.

CAUSE removed from the Court of Equity of JONES, at Fall Term, 1851.

The facts are stated in the opinion delivered in this Court.

J. H. Bryan and *Green* for the plaintiffs.
J. W. Bryan for the defendants.

NASH, J. Abraham Wharton died in 1809, leaving surviving him his widow, Sarah Wharton, and five children, namely, David and Elizabeth, the wife of John Dudley, who are defendants, and John, Sarah, and Cassandra, all of whom died intestate and without issue in the lifetime of the widow. The plaintiff Brinson is the administrator of John and Sarah, and the plaintiff Mason is the administrator of Cassandra. Abraham Wharton left a nuncupative will, which was duly proven, and

the widow, Sarah Wharton, qualified as executrix, took into her possession the personal estate, consisting of slaves, stock, etc., and kept the slaves and some few articles of the other property until her death.

The will contains this clause: "And then his will and desire was that his beloved wife, Sarah Wharton, should keep his children and all the residue of his property, both real and personal, during her widowhood; and when the said Sarah Wharton marries, then the will (81) and desire of the said Abraham Wharton was that all the remaining property, both real and personal, shall be equally divided between his children and beloved wife, share and share alike."

Sarah Wharton, the widow, did not marry again, and died in 1847; whereupon the defendant David Wharton took out letters of administration *de bonis non* upon the estate of his father, and he and the defendant Dudley, in right of his wife, Elizabeth, claim all of the slaves and their increase and the other chattels remaining on hand at the death of the widow, on the ground that they are the only children living at her death. The plaintiffs, who represent the three deceased children, insist upon having equal shares on the ground that the legacies vested in the intestates, *the time of enjoyment only being postponed,* and, consequently, was transmitted to the personal representatives.

We think it clear that the testator intended to give the property to his wife during her life, and then to his children, to be equally divided between them, with a proviso that if his wife should marry her particular estate in the whole should determine and she would be entitled to a "child's part." Under this construction, there can be no question that all of the children, at the death of the testator, took a present estate to be enjoyed in future, that is, after the determination of the estate given to the wife, subject only to the contingency of letting in the wife as to one share if the particular estate determined by her marriage. This contingency, not having happened, is out of the case, and it is the ordinary one of a gift to a widow for life and then to the children, to be equally divided. Of course, the share of each child upon his death devolved on the personal representative of such child, and the plaintiffs representing the three children who died in the lifetime of the (82) widow are entitled to an account and to partition.

PER CURIAM. Decreed accordingly.

Approved: Carson v. Carson, 62 N. C., 58; *Starnes v. Hill,* 112 N. C., 11; *Harris v. Russell,* 124 N. C., 554.

BENJAMIN F. KNIGHT v. REDMAN BUNN, ET AL.

The declaration and decretal order, made in this cause at December Term, 1850 (see 42 N. C., 77), affirmed on a petition to rehear.

No counsel for the plaintiff.

Moore and *Winston* for the defendants.

RUFFIN, C. J. This cause was heard a year ago, as reported in 42 N. C., 78, and has been reheard on the petition of the defendants W. Ricks and B. Ricks, the infant wards of D. A. T. Ricks, who, for their benefit, took the bond for $2,413.26, which is mentioned in the pleadings. After bestowing much attention on the arguments against the former declaration and reconsidering the whole matter, the opinion of the Court is that the decretal order must stand. The description in the deed of the note on which the supposed debt arose is so very special in many particulars as not to admit of our disregarding that par-
(83) ticular note and applying the fund in its stead to another not answering the description in any one particular, except that each note is said to be executed by Redman Bunn as principal. But it is argued that the debt is correctly described as a debt to John Ricks, and it is imputed as the error of the decree that it confounds the debt with the security for it, as if they were the same. The truth is that in this case they are the same. There was no existing debt to John Ricks. One had been owing to him, it is true, but he was dead, and the bond to him had been canceled and a new one taken by the guardian of his infant children, payable to himself, and with a different set of sureties. There is, moreover, no description of this debt otherwise than by the description of the security for it. The deed begins, indeed, by saying that the maker, Redman Bunn, was "indebted to divers persons hereinafter named and is desirous of securing the payment of said debts," and then "it directs the application of the trust fund," in the first place, to the payment of whatever amount may be due Rosa Ann Pitman from the said Redman as her guardian, amounting to between eleven and twelve thousand dollars, and to a note to John Ricks for about twenty-three hundred and fifty dollars, now in possession of D. A. T. Ricks, given several years since, to which Bennett Bunn, B. D. Battle, and Robert Ricks are sureties." The debt to Miss Pitman is described by the manner in which it arose and without any allusion to the security for it. But the one question is not in any manner described but by the security. When, therefore, it is said that the deed proposes to be "to secure the payment of debts," it must be asked, What debts, and to whom due? The answer is given by the deed that they are debts to divers persons "hereinafter

named," and that one of them is described as a debt on "a note (84) to John Ricks," with such and such sureties. It is clear, then, that according to the deed both the debt and the note were payable to John Ricks, while the fact is that neither the debt nor the note claimed by these parties was thus payable. In fine, the description happens by mistake to be inaccurate, and so entirely inaccurate that it cannot by any reasonable construction be made to embrace the demand due to these parties, and it is therefore a misfortune to which they must submit.

PER CURIAM. Petition to rehear dismissed.

WILLIAM SIMMONS, ET AL., v. SOLOMON HENDRICKS.

1. A Court of Equity will not take jurisdiction, simply to put a construction on a deed or devise of land; because that is a pure legal question. But when a case is properly in a Court of Equity, under some of its known and accustomed heads of jurisdiction, and a question of construction incidentally arises, the Court will determine it, it being necessary to do so in order to decide the cause.
2. Where a testator left to A "eighty acres of land, the place on which he lives, getting his complement on the north side," and to B "the remainder of the place on which A lives": *Held*, that A and B were so far tenants in common as to give jurisdiction to a Court of Equity to decree a partition, and, for that purpose, to establish a dividing line, having a survey made under the direction of the Clerk and Master.

APPEAL from the interlocutory decree of the Court of Equity (85) of RANDOLPH, at the Fall Term, 1850, BATTLE, J.

Mendenhall for the plaintiffs.
No counsel for the defendant.

PEARSON, J. The will of Tobias Hendricks contains this clause: "I will and bequeath unto my son Solomon 80 acres of land, the place on which he lives, getting his complement on the north side. I will and bequeath unto my daughter Mary the remainder of the place on which my son Solomon lives." Mary is the plaintiff, together with her husband and Alderd, an alleged purchaser under them, and Solomon is the defendant. The bill alleges that the tract contains about 130 acres, and the defendant refuses to make a division by running a straight line across the tract so as to take off 80 acres for him on the north side or to make one any other way. The prayer is that a partition may be made by a decree of this Court.

A demurrer was sustained in the court below. In this there is error.

It is said this bill is an application to a court of equity to put a con-

struction upon a devise, which, being purely a legal question, should be decided in an action of ejectment, and a court of equity has no jurisdiction.

We grant that a court of equity never has assumed jurisdiction *simply to construe a devise,* for it is in the nature of a conveyance. The title passes *directly* to the devisee. In this it differs from a will of personal estate, for a will does not pass a "chattel" directly to a legatee, but *mediately,* by first giving it to the executor, whose assent was necessary to vest the legal title. Hence, there is a trust or something in the nature of a trust, and upon that ground courts of common-law jurisdiction do not give a remedy for legacies, for which reason, and for
(86) the further reason that the right to a legacy always involves a matter of account, courts of equity have assumed jurisdiction to construe wills in regard to personal estate, so as to settle the balances and establish the right of legatees. A devisee has a plain legal right, and can by an action of ejectment obtain a construction of the devise, just as a bargainee can do in reference to a deed.

But courts of equity have always taken jurisdiction in cases of *partition,* and if in the exercise of that jurisdiction it becomes necessary, incidentally, to put a construction upon a devise there is no reason, when the court is constituted like ours—that is, when both courts are held by the same judge—why the judge sitting in a court of equity should arrest the case and send it himself, sitting in a court of common law, for the purpose of obtaining a construction of the devise. This is every-day practice. If a case is *in a court of the equity* and it becomes necessary, in order to the decision, to say whether by a proper construction "the rule in *Shelley's case,*" for instance, applies, that court proceeds to determine the question whether it be presented by a deed or by a devise.

The amount of it is this: a court of equity will not take jurisdiction simply to put a construction on a deed or a devise, because that is a pure legal question. There a plain remedy at law, and such an assumption on the part of a court of equity would break down all distinction between the two jurisdictions. But where a case is properly in a court of equity under some of its known and accustomed heads of jurisdiction and a question of construction incidentally arises the Court will determine it, it being necessary to do so in order to decide the cause.

The present is a case strictly of partition, and there is no remedy except in a court of equity, for fifty actions of ejectment, supposing
(87) either party could maintain one, would not establish the dividing line, because there is in fact no such line, and none other but a court of equity can make the line, and this that Court has jurisdiction to do, because there is no other remedy, and it is against conscience for the party to object to a division.

But it is said these parties are neither joint tenants, coparceners, nor tenants in common, and consequently this cannot be a question of partition. It is true, the parties are not, strictly speaking, tenants in common, but they are in a similar relation towards each other; neither has any part in severalty, and yet they own the whole tract to be divided between them, and, in fact, their relation is that of tenants in common, between whom the devisor has made a partial division, leaving it to be completed by their agreement or otherwise by a court of equity, which is the only court that can "enforce the right."

A devisee gives a tract of land to be equally divided between two. They are tenants in common, strictly speaking; and he gives a tract of land to be equally divided between A and B, but B is to have the "upper part." Their relation is that of tenants in common, with a partial division made by the devisor.

He gives, as in this case, a tract of 130 acres of land to be divided between A and B, but B is to have 80 laid off on the north side and A is to have the balance. Their relation is that of tenants in common, with a partial division made by the devisor providing that B's share shall not only be on the north side, but shall contain 80 acres, and A shall have the remnant as his share, without giving any beginning or course for the dividing line or the form of the land.

The decretal order must be reversed. If the defendant by his (88) answer admits the facts alleged he will suggest the mode of division which he insists will be right. The Court can then decide between the two modes of partition suggested, or he may refer the matter to the master with directions to have a survey and to report a scheme of division, together with the facts. To this report either party may except, and the question will thus be directly before the Court.

PER CURIAM. Reversed.

Approved: Alsbrook v. Reid, 89 N. C., 154; *Cozart v. Lyon,* 91 N. C., 285; *Woodlief v. Merritt,* 96 N. C., 228; *Settle v. Settle,* 141 N. C., 566; *Liverman v. Calhoon,* 156 N. C., 192.

(89)

THOMAS A. ROE, ET AL., v. HENRY J. LOVICK, ET ALS.

1. When a paper is signed and sealed, and handed to a third person, to be handed to another, upon a condition, which is afterwards complied with, the paper becomes a deed, *by the act of parting with the possession,* and takes effect presently; unless it clearly appears to be the intention, that it should not *then* become a deed.
2. The inquiry always is, whether the delivery to the third person, under all the circumstances, is a departing with the *possession* of

the instrument, and of the power and control over it; or whether it was delivered merely as a depository, and subject to the future control and disposition of the maker of the instrument. If the former, the delivery, as an escrow, is complete; if the latter, it is not.

3. Where an instrument, signed and sealed by A, purporting to convey certain negroes to B, was placed in the hands of the subscribing witness, and at the time, A said "she wished it to be kept secret until her death, and if C, her granddaughter, should marry a man who was able to buy the negroes mentioned in the deed, she wished the witness to let him have them at their worth, and the proceeds arising from said sale to be secured to B; the deed of gift she wished given up, in case he should pay, or secure to be paid, the worth of the negroes—the deed to be kept until the death of the said A"; and further, "that if she ever wanted it, she would call for it on the witness"; and if she had, the witness said he would have delivered it up to her. And she further directed the witness, "if the husband of C refused to purchase the negroes, or C was not married, to prove the paper." *Held*, that this was not a sufficient delivery of the instrument to constitute it a deed.

CAUSE removed from the Court of Equity of CRAVEN, at Fall Term, 1851.

The case is stated in the opinion of the Court.

J. W. Bryan and *Donnell* for the plaintiffs.
W. H. Haywood and *Green* for the defendants.

NASH, J. The bill charges that in 1847 Wealthy Always made and executed a deed conveying to the plaintiffs four negroes, to be delivered to them at her death, in absolute estate; and she died in 1849. It further charges that after the death of the donor the defendant Caroline, the wife of the defendant Henry Lovick, by fraud and artifice obtained possession of the deed from the subscribing witness, Henry Marshall, and destroyed it by tearing it to pieces. The deed never was registered, and after its execution by the donor remained in the possession of Marshall, the subscribing witness, until destroyed by the defendant Caroline, who is the granddaughter of the donor and her next of kin. After the death of the donor the defendant Lovick took possession of the negroes in question. The prayer of the bill is for the delivery of the negroes and a conveyance by Lovick and wife.

The answers admit the writing and sealing by the deceased of the instrument stated in the bill, but deny that she ever delivered it to the complainants or to any one for them, and states that she retained
(90) the power to withdraw it from Marshall, in whose custody it was merely left, at any time she pleased, and before her death she considered it of no effect, and in her will, made subsequent to the date of the paper, bequeathed the slaves to the defendant Caroline.

Replication was taken to the answers.

William H. Marshall, the subscribing witness, proved the signing and sealing of the instrument, after which, he states, "it was delivered to him, and she requested it to be kept secret until her death; and if Caroline, her granddaughter, should marry a man who was able to buy the negroes mentioned in aforesaid deed she wished the deponent to let him have them, and the proceeds arising from said sale to be secured to the complainants; the *deed of gift she wished given up* in case he should pay or cause to be paid the worth of the negroes; the deed to be kept until the death of said Wealthy Always." The witness further stated that before the instrument was handed to him W. Always said: "If ever she wanted it she would call for it on the deponent"; and if she had so done he would have delivered it up to her; and he was directed, "if the husband of Caroline refused to purchase the negroes, or Caroline was not married, to prove the paper."

The only question arising on these pleadings is as to the delivery of the instrument under which the plaintiffs claim the negroes in question, or rather, claim the relief they seek. We are of opinion the instrument never was legally delivered so as to make it a deed. What constitutes the delivery of a deed has been frequently canvassed in this Court, and by many decisions it seems to be settled that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition which is afterwards complied with, the paper becomes a deed by the *act of parting with the possession* and takes effect presently, unless it clearly appears to be the intention that it should not *then* be- (91) come a deed. And the inquiry always is whether the delivery to the third person, under all the circumstances, is a departing with the *possession* of the instrument and of the power and control over it, or whether it was delivered merely for safe keeping as a depository and subject to the future control and disposition of the maker of the instrument. If the former, the delivery as an escrow is complete; if the latter, it is not. In *Baldwin v. Maultsby,* 26 N. C., 505, the deed, after being signed and sealed by the donor and attested by the witnesses, was left on the table and was, after his death, found in his trunk among his valuable papers. It was inclosed within an envelope indorsed "Warren Baldwin to Charles Baldwin and others. Deed of gift." And the donor several times stated he had made such a deed. The Court decided there was no delivery, because the donor had never parted with the possession. In *Hall v. Harris,* 40 N. C., 307, his Honor, Judge PEARSON, says the question of delivery depends upon the fact "that a paper signed and sealed is put out of the possession of the maker." In *Gaskill v. King,* 34 N. C., 216, the delivery of the deed was by the maker to his wife, with directions to take care of it for the donor and to have it proved and recorded when she pleased. The legal effect of the delivery of the deed

was controverted on the idea that the deed being in her possession the donor, the husband, had a legal dominion over her and might have compelled her to deliver it up; in other words, that, being in her possession, it was in his possession and under his control. The Chief Justice observes upon this argument, "He hight, it is true, have forcibly compelled her to part with the paper, but he could not have done so rightfully if he parted from the instrument as his deed for one in-
(92) stant." And it was decided that the delivery to the wife was a good delivery as a deed. *Comons v. Knight,* 5 Barn. and Cress., 671, is a leading case on this subject and fully sustains the cases before referred to. The question then returns upon us: did Mrs. Always, when she delivered the instrument in question to the witness Marshall, deliver it to him simply as a depository to keep it for her and subject to her control, or did she deliver it to him for the plaintiffs, divested of any future control on her part? The witness Marshall, we think, settles the question.

Before the instrument was signed and sealed by the donor she said if she ever wanted it she would call upon the witness for it, and directed him in the meantime to keep it secret; and in this the witness acquiesced, for he stated that if she had called for it he would have delivered it up to her. The first part of this evidence accompanied the alleged act of delivery and is a part of it, and the latter is proof of the fact that the witness considered himself a mere depositary, and the effect of the whole is to show that both parties considered the instrument under the control of the donor. But again, the witness states that the directions to him were that if the husband of Caroline would pay for the negroes their value he, the witness, was to let him have them and deliver up the deed of gift to him. This evidence is further explanatory of the intentions of the donor in delivering the deed to the witness. She evidently meant to have the constant control over the instrument during her life. If the instrument took effect at the time of the delivery of it to Marshall neither the donor nor the witness had power to sell or dispose of the slaves; they became, by delivery, the property of the plaintiffs. But she did not so intend, but, for the reason assigned by her, reserved to herself the power of otherwise disposing of them if she should think
(93) proper. This power all the cases cited hold to be inconsistent with the idea and principle of a delivery. Marshall, the witness, was the agent of the donor to keep the instrument for her. His possession, therefore, was her possession, and the instrument could have been withdrawn from him at any moment she pleased. There was, therefore, no transmutation of its possession, without which there could be no delivery, either as an escrow or otherwise. The whole argument of the plaintiff's counsel is founded upon the position that the instrument in

this case was delivered as an escrow, and to that point his authorities are directed. For the reasons above given, we do not consider the delivery here was made, but in legal parlance no delivery at all.

PER CURIAM. Bill dismissed with costs.

Cited: Newlin v. Osborne, 49 N. C., 159; *Phillips v. Houston,* 50 N. C., 303; *Tarlton v. Griggs,* 131 N. C., 222; *Craddock v. Barnes,* 142 N. C., 96; *Gaylord v. Gaylord,* 150 N. C., 233; *Buchanan v. Clark,* 164 N. C., 63.

(94)

THOMAS B. HARDY, ADM'R, Etc. v. THOMAS H. LEARY ET AL.

A testator directed that the income of certain property should be applied by his executor to the support and education of his children, but that nothing more than the annual income should be advanced for that purpose. The widow of the testator married again, and her second husband, out of his own funds, for several years maintained and educated the children, the executor not paying to him their income. *Held,* that he was entitled to recover from the executor the amount of the income accruing to the children during the time they were so supported by him, but that he could not recover any part of the income accruing afterwards, though what did accrue was not sufficient to defray the necessary expenses advanced by him.

CAUSE transferred from the Court of Equity of BERTIE, at Fall Term, 1851.

Bragg and *Smith* for the plaintiff.
Heath for the defendants.

RUFFIN, C. J. William Bullock made his will on 23 April, 1839, and therein ordered all his real estate to be sold, and then proceeded thus: "It is my will that all my negroes and other property, after paying my just debts, may be held in joint stock by my wife and children, and that the negroes be hired out annually and the hires appropriated to the support of my wife and children; but it is my express desire if the income of my estate should not be sufficient for the support and education of my children that my negroes should not be sold for that purpose, but that my family shall confine their expenses to their income. But should it be found that the income of my estate exceeds the expense of the family the surplus will be divided amongst my wife and children. The property here divided to remain in joint stock until my children shall attain the age of 21, and then their portions to be set apart (95) to them; or in case my wife should marry again, then her portion, a child's part, to be set off to her." By a codicil of the same date the

testator directed that in case his son Benjamin's portion of the income of the property should not be sufficient to rear and educate him his executor should raise a sufficient amount to defray the expense of his education and charge the same to Benjamin, to be deducted out of his portion of the property. The testator died soon after.

The defendant Leary proved the will in November, 1839, and paid the debts. In 1841 the testator's widow intermarried with Andrew J. Hardy, of Bertie, and upon removing to that county she carried her two children of her first marriage, Benjamin R. Bullock and Isadora Bullock, with her, they being of tender years. Soon afterwards, Hardy was appointed, in Bertie County Court, the guardian of the two children, and in the course of a year Leary paid to him $202 on account of their board, education, and maintenance up to that time. Upon a bill filed for that purpose, the share of the slaves and money belonging to Mrs. Hardy was laid off and decreed to the trustee in a marriage settlement between Mr. and Mrs. Hardy, and the residue of the estate was left in the hands of Leary as executor upon the trusts of the will for the two children. They continued to live with their mother, and were supported and sent to school by Hardy up to his death in 1844, without his receiving any further payment from Leary or any part of their estate. After the death of Andrew J. Hardy the present plaintiff, Thomas B. Hardy, administered on his estate and brought actions at law against the two children, respectively, for their board and clothing and other expenses of education, and recovered therein against Benjamin the sum of
(96) $331.92, and against Isadora the sum of $398.41, besides costs, and took out executions on which he caused two of the slaves to be sold, the children having no other property than that derived from the testator or its profits. Thereupon, Leary, the executor, brought trover against Hardy, the plaintiff, for the conversion of the slaves, and recovered judgment therein for $1,087.12; and then the present bill was filed, alleging that the intestate's demand against the children was for necessaries and reasonable in amount and ought to have been paid out of their estates in the hands of Leary, their father's executor, and ought now, together with interest, to be deducted out of the recovery in the action of trover, and praying that it may be so paid or deducted, and in the meantime for an injunction against Leary's raising the money by execution on the judgment in trover.

The answer controverts but few of the statements in the bill, but says that at the time it was put in, namely, April, 1851, the estate of the two children consisted of twenty slaves and $425 in money at interest, and sets out the profits for 1848, 1849, and 1850 at $599.25, $400.62½, and $354.87, and those amounts are insufficient for their maintenance and education during those periods.

An injunction was awarded on the bill, and upon the filing of the answer the cause was set down on the bill and answer and, without any motion to dissolve, was transferred to this Court for hearing.

It must be understood, as the case stands, that the sale of the negroes was illegal, because the children had not such an interest in them as was liable to execution; yet, to the extent of necessary diet, lodging, clothing, and education suitable to their years, health, and fortune, the plaintiff's intestate had a just claim, which ought to be satisfied out of such parts of their property as may be legally applicable to those purposes. The intestate was not an officious intermeddler; but having mar- (97) ried their mother, from whom at their age it was not proper to separate the children, he received them into his family and was appointed their guardian. Admit, that as a guardian he could not interfere with the powers conferred by the will upon the executor in respect to the management of the property and the education and expenses of the children as far as they were to be defrayed out of the testator's estate, yet it is plain the executor was aware of the residence of the children, and did not disapprove of it, or, as far as seen, have reason to do so. The party was therefore equitably entitled to a reasonable remuneration. But, whether viewed as guardian or simply as supplying necessaries, he can get no more out of this property than such profits as accrued during the period they were with the intestate or had accumulated subsequently to the testator's death, after defraying the current expenses of that interval, with the exception of such sums as were proper for the son's education beyond his share of the profits. That is the general rule between guardian and ward. But it was made emphatically the law between these parties by the restraints imposed on the executor by the testator in respect to expenditures on the children, which it was in his power to impose during their minority, and from the observance of which the executor could only be discharged, if at all, by the previous order of the court of equity. The plaintiff cannot look to profits accrued since his intestate supplied the children, because they were required for the nurture of the children during the same period, and it appears, indeed, that they were not more than adequate. To allow the anticipation of profits would be to defeat the provisions of the will altogether, inasmuch as it might force a sale of property to provide for the mere subsistence of the infants or compel their being put out as apprentices, and thus prevent their proper education. But though expenses in anticipation of the income were not allowable, yet all the profits (98) prior to as well as those accruing from year to year during the expenditures were applicable to the children's nurture, both upon the general principle of law and the terms of the will. There must, therefore, be an inquiry: what is a proper allowance to the plaintiff's intes-

tate for the nurture of the two infants? and what was the income of the testator's estate from his death to that of the intestate belonging to the children, respectively? and how the same was applied by the executor on their behalf? and whether the residue of the income not before laid out for the infants was sufficient to discharge such allowance to the intestate and interest thereon? and if the same should be found not to have been sufficient, then the master will inquire, further, whether any of the expenditures for the infant Benjamin, above his portion of the income, were necessary and proper for his education at those periods, taking into consideration his age, capacity, and property.

The injunction will stand until further order, to be made on the coming in of the report.

PER CURIAM. Ordered accordingly.

Cited: Edwards v. Love, 94 N. C., 370.

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(99)

EDWARD E. GRAHAM, ET AL., EXR'S, v. WILLIAM ROBERTS.

Where premises devised to A for life, remainder to B, are insured, and after the testator's death, are consumed by fire and the insurance paid; *Held,* that A, the tenant for life, is entitled to the interest on the insurance money, in lieu of her right to the premises devised, during her life, and, after her death, the principal is to be paid to B, the remainderman; that the executors are not authorized to pay the money to A, but it is their duty to keep it secure, paying to A the interest annually, and that the premiums of insurance are a proper charge against A and B.

CAUSE removed from the Court of Equity of CRAVEN, at Fall Term, 1851.

This was a bill filed by the executors of Mrs. Mary McKinlay to obtain directions from the Court as to the proper execution of the will. The only point of law submitted arose upon the following facts: Certain premises in the town of New Bern were by the said will devised to Mrs. Elizabeth Daves for life, and after her death to her children, John, Edward, and Graham. The premises were insured, and after the death of the testatrix they were consumed by fire, and the insurance money received by the executors. The opinion of the Court was asked: whether this money belonged to those to whom the premises insured had been devised?

W. H. Haywood for the plaintiffs.
James W. Bryan for Elizabeth B. Daves and children.

PEARSON, J. We are of opinion that the money received upon the policy of insurance stands in place of the buildings consumed by fire;

that Mrs. Daves is entitled to the interest thereon for life in lieu of the use and occupation of the buildings, and the said John, Edward, and Graham Daves will, at her death, be entitled to the principal money. The executors are not authorized to intrust Mrs. Daves with the money. It is their duty to keep it secure, paying to her the interest annually. The premiums of insurance is a proper charge against her and the remaindermen.

PER CURIAM. Decreed accordingly.

Cited: Campbell v. Murphy, 55 N. C., 363.

(102)

WILLIAM A. EATON v. JOHN S. EATON.

1. A mistake by arbitrators, however gross, or clear (as an omission to take into the account and give the plaintiff credit for a large sum, *which was admitted by the defendant to be due*), does not, of itself, furnish a ground for setting aside an award; although the arbitrator admits the mistake, and wishes the case referred back, so that he may correct it.
2. Corruption or partiality is a ground for setting aside an award, and so is a mistake, into which the arbitrators have been led by undue means, or into which they have been permitted to fall by the *fraudulent concealment* of a party or his agent. A Court of Equity does not, in such cases, correct the award or revise the decision of the arbitrators, but holds it to be against conscience to take advantage of the award, in seeking to enforce it, or by using it as a plea in bar of a bill for an account.
3. Where to a bill for an account of a copartnership the defendant pleads in bar an award, which is impeached by the plaintiff, the plea ought neither to be sustained nor overruled, but be kept in suspense until the parties can be heard upon the proofs, in reference to the matter alleged to impeach the award. If the matter be proven, then the plea will be overruled, and the defendant be required to answer as to the copartnership dealings. If it be not proven, the plea will be sustained and the bill dismissed. The benefit of the plea should be saved until the hearing.
4. In such cases, the modern practice is, that the bill, anticipating the defense, sets out the matters relied on to avoid the plea, or the plaintiff brings them forward by an amended bill, and in this way obtains an answer and discovery from the defendant.

RUFFIN, C. J., dissented.

APPEAL from the Court of Equity of GRANVILLE, at Spring Term, 1850.

W. H. Haywood and *Gilliam* for the plaintiff.
Graham and *Moore* for the defendant.

PEARSON, J. The bill alleges that the plaintiff and defendant had been copartners as merchants for many years, and the copartnership be-

ing dissolved the prayer is for an account. The bill further, by
(103) way of anticipating the defense, admits that the matters in controversy had been referred to arbitration and an award made in favor of the defendant for a large sum; and to impeach the award, it is alleged:

First. The arbitrators made many gross mistakes to the prejudice of the plaintiff. One *ex. gr.* in this: The plaintiff had entered a charge against himself of $1,000. This entry he had erased and made the charge against himself in another part of the book. The arbitrators reinstated the first entry without charging off the second entry, and so in the award the plaintiff is charged twice for the same sum of $1,000. Another *ex. gr.* in this: The account was stated between *the firm* and the defendant, exhibiting a balance due by the firm to the defendant of $4,000; yet the arbitrators by mistake treated it as an account between the plaintiff and defendant and awarded that the plaintiff should pay to the defendant the whole sum of $4,800, whereas the plaintiff ought only to have been charged with one-half of the said balance against *"the firm."*

Second. The books were kept by double entry, with which method of bookkeeping the arbitrators were not conversant. That one Cargill, who was an expert bookkeeper and had been the clerk of the parties and understood all of the entries, had been in the employment of the defendant after the dissolution, and at his instance appeared before the arbitrators and remained with them while they were making up the award after the parties had withdrawn, without the plaintiff's consent; and the charge is that Cargill either willfully deceived and misled the arbitrators or by fraudulent concealment permitted them to fall into the many gross mistakes complained of.

The defendant pleads the award in bar of the plaintiff's equity for an account, and supports his plea by negative averments of the matters charged to impeach the award and by an answer in which he
(104) denies that the arbitrators committed the mistakes alleged, so far as he has any knowledge, and avers that if there be mistakes to his prejudice, and these mistakes against both make the result as accurate as could be expected in the investigation of a long and very intricate account. As to the alleged mistake in charging the plaintiff with the whole balance against *the firm* he supposes the charge was so made, not by mistake, but because the arbitrators were satisfied that he had been grossly negligent in managing the affairs of the firm. In reference to Cargill, he admits he was an expert bookkeeper, well acquainted with the books of the firm, and was in his employment and appeared before the arbitrator at his instance. But he denies that he remained with the arbitrators after the parties had withdrawn "without

the plaintiff's consent"; on the contrary, he avers that he so remained by the consent of both parties to explain the books if it became necessary, and to write for the arbitrators.

The plea was set down for argument, and is now before us upon the question thereby raised.

The first question is upon the form of the plea and the manner in which it is supported by the negative averments and the answer. The truth of the plea and its sufficiency, if well pleaded, being admitted by the bill, is conclusive, unless it can be avoided by matter relied on to impeach the award. We see no defect in the form of the plea or of the negative averments and answer by which it is supported.

The next question is as to the sufficiency of the matters relied on in the bill to avoid the plea by impeaching the award upon which it rests.

First. A mistake committed by an arbitrator is not of *itself* sufficient ground to set aside the award. If an arbitrator makes a mistake, either as to law or fact, it is the misfortune of the party and there is no help for it. There is no right of appeal, and this Court has (105) no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award it opens the door for coming into court in almost every case, for in nine cases out of ten some mistake, either of law or fact, may be suggested by the dissatisfied party. Thus the object of the reference would be defeated, and arbitration instead of ending would tend to increase and encourage litigation.

In the earlier cases the Court, yielding to "particular hardships," assumed jurisdiction to set aside awards for mistakes. The inconvenience was soon felt, and it was found that if a mistake was ground for setting aside an award no award could stand; "it was labor lost," and litigation was commenced with more excited feelings. To remedy this inconvenience and put a restraint upon the jurisdiction, in some few of the old cases, a middle course was adopted, and in analogy to the practice of taking exceptions to an account of the clerk and master and of surcharging and falsifying an account stated, the award was permitted to stand, except as to particular items in which a mistake was shown, and these were referred back to the arbitrators to be corrected. In adopting this middle course many difficulties had to be encountered. The arbitrators, after their award, were *functi officio;* some of them might have died or might refuse to act. The particular difficulties arose out of the fact that arbitrators were not bound to assign any reasons or to set out any account (*Patton v. Baird,* 42 N. C., 260), so that to enable a party to except to particular items or to surcharge or falsify on the ground of mistake, it was necessary to make the arbitrators par-

ties defendant to compel a discovery, and then it was inconsistent
(106) to refer the matter back to them for correction. When, as in the present case, the award was pleaded in bar of an account, and matter of impeachment was relied on to avoid the plea, this middle course was wholly impracticable. This mode of restraining the jurisdiction to set aside awards for mistakes was therefore abandoned.

The next attempt at restraint was the adoption of the rule that to set aside an award the mistake must be a *plain one,* and there are many cases going on the distinction between a mistake and a *plain* mistake. The distinction was not easily defined and was found impracticable, so this restraint was abandoned. It was then attempted to put a restriction upon this very inconvenient jurisdiction by holding that a mistake, however *clear* and *plain,* was no ground to set aside an award unless the arbitrators were satisfied they had made a mistake and filed an affidavit of the fact. There is an obvious objection to this doctrine: it makes the right of relief depend not on the mistake, but on the fact that the arbitrators have intelligence enough to see it when pointed out, and frankness enough to admit it, whereas if there be a mistake, and this under any circumstances is a ground for relief, it is difficult to perceive a reason for refusing it, because it so happens that the arbitrators are too dull to comprehend or too disingenuous to admit their mistake. This, so far from being a ground for refusing relief, would seem to be a good reason to induce the Court to interfere, because it furnishes an inference that the arbitrators are totally unfit or dishonest, or both unfit and dishonest.

These attempted restrictions prove clearly a desire on the part of the courts to get rid of the jurisdiction, and the modern decisions in England repudiate the right of the courts of law or equity to interfere and set aside an award simply because of a matter of mistake in a
(107) matter of law or of fact. In a late case, *Hall v. Hind,* 2 M. and G., 847, 40 E. C. L., 656, where there were two gross mistakes, and the arbitrators filed an affidavit admitting them, the Court does not put the decision setting aside the award on the ground of mistake or make any allusion to the affidavit of the arbitrators, but put it on the ground of *misconduct,* and hold that such gross mistakes of the arbitrators was evidence of legal misconduct, and in effect abandoned the old doctrine of a right to interfere simply on the ground of mistake. In a case still later, *Phillips v. Evans,* 12 M. and W., 309, the Court of Exchequer expresses dissatisfaction with the decision in *Hall v. Hind,* and holds that a mistake, however gross or clear (as an omission to take into account and give the plaintiff credit for a large sum, which was *admitted by the defendant to be due*), did not of itself furnish a ground for setting aside an award, although the arbitrator admitted the mis-

take and wished the case referred back so that he might correct it. We fully concur in this decision, and believe the law is settled by it on sound reasoning. Russell on the Power and Duty of Arbitrators, 53 Law Library, 245, 299.

Second. Corruption or partiality are admitted grounds for setting aside an award, and so is a mistake into which the arbitrators have been led by undue means, or into which they have been permitted to fall by the *fraudulent concealment* of a party or his agent. *Metcalf v. Ives,* 1 Atkins, 63; Russell Arbitrators, 53, L. Lib. (new series), 636. A court of equity does not in such cases correct an award or revise the decision of the arbitrators, but holds it to be against conscience to take advantage of the award in seeking to enforce it or by using it as a plea in bar of a bill for an account.

If, therefore, the plaintiff can establish the fact that Cargill, the agent of the defendant, remained with the arbitrators after the parties had retired, *"without the plaintiff's consent,"* or if he can estab- (108) lish the fact that the arbitrators have made a mistake in consequence of fraudulent concealment on the part of Cargill or of a willful omission to explain the entries when he saw that the arbitrators did not understand them, supposing him to have remained with the plaintiff's consent—for in that event he will be presumed to have undertaken to act as the agent of both parties—the award ought not to stand as a bar, and the plaintiff will be entitled to have the account taken in the same way as if there had never been an award.

The remaining question is as to the proper order for the purpose of giving the plaintiff an opportunity to prove his allegations without in the meantime prejudicing the bar set up in the plea.

If the plea be overruled the defendant must answer and make a full discovery as to the partnership accounts, which, by his plea, he seeks to avoid. If the plea be sustained the plaintiff must reply, and his replication will only put in issue the fact *affirmed* by the plea, towit, the existence of the award, which is admitted by the bill.

If the plea is overruled, but is allowed to stand for an answer, with leave to except, the plaintiff can have no ground of exception, for it has been declared that the plea is found and is duly supported by the negative averments and the answer; so the plaintiff would be forced into the investigation of the accounts without the benefit of discovery in reference to the accounts, which, in a case where the defendant has been acting partner, might be very important.

We think the plea ought neither to be sustained nor overruled, but be kept in suspense until the parties can be heard upon the proofs in reference to the matter alleged to impeach the award. If the matter be proven, then the plea will be overruled and the defendant (109)

required to answer as to the copartnership dealings. If it be not proven the plea will be sustained and the bill dismissed. The benefit of the plea should be saved until the hearing.

The plea in this case is what is termed an "anomalous plea." It sets up the award in bar of the plaintiff's right to an account and negatives the allegations relied on in the bill to impeach the award and is supported by an answer making a discovery in reference to those allegations.

The propriety of the order will be more apparent by adverting to the mode of pleading formerly in use. Suppose the bill simply alleged the copartnership and prayed for an account; the award is pleaded in bar; a special replication is put in confessing and avoiding the allegations to impeach the award; the replication is set down for argument; it is held that one of the allegations is sufficient; the defendant rejoins to this allegation and the parties proceed to proofs. If the plaintiff fails to establish the allegation the bill is dismissed. If he succeeds, the defendant is required to answer as to the matters of account and the partnership dealings. This was the old mode. The plaintiff then labored under this advantage: upon the issue made by the rejoinder he was without the benefit of a discovery. To give the plaintiff this benefit the present mode was adopted, and the bill anticipating the defense sets out the matters relied on to avoid the plea or brings them forward by an amended bill, and in this way obtains an answer and discovery from the defendant. Mitford's Pleadings, Lube's Pleadings.

In this opinion Judge NASH concurred.

RUFFIN, C. J. A considerable part of the discussion at the bar turned upon the sufficiency of some of the grounds alleged in the bill in (110) themselves to impeach the award; but that was premature. It may perhaps be true that in some of the particulars the bill does not allege sufficient evidence of the mistakes of the arbitrators to enable the Court to give relief as to them by either setting the award aside or correcting it. But that is not to be passed on now, for that would be in effect to decide the cause as upon demurrer or on the hearing, while the point is simply on the sufficiency of the plea to preclude the plaintiff from going into proofs of the circumstances of the alleged partiality or misconduct of the arbitrators or their mistakes; that is, whether it be sufficient or whether, either in form or substance, it be insufficient to the discovery and relief the bill seeks. In a case involving such a variety of circumstances it seems difficult to frame a plea that would meet the allegations fully and also serve the usual purposes of a plea, for in such a case, upon replication to the plea, the proof to avoid and to support the award must be as much at large as it would be on the hearing after an answer denying the matter alleged in avoidance. This

plea, however, seems clearly to be defective in that it is not a perfect defense to all parts of the bill to which it applies. It alleges the submission and award to include all accounts between the parties, whether as individuals or in company in the several partnerships and contracts mentioned in the bill, and the bar it sets up is to any discovery or relief in respect of any of those accounts and dealings. Now, the bill seeks a general account and settlement of the partnerships; and, anticipating that the award as well as the adjustment between the parties constituted by the plaintiff's giving his note to the defendant, as for a balance due from the plaintiff on the footing of their partnership and other dealing, might be set up in bar, the bill charges divers matters in avoidance and destruction of those bars. With those touching the note there is now nothing to do, so it is not at all the subject of the plea. But in relation to the award by itself there are various grounds of im- (111) peachment which are stated in the bill with more or less distinctness. The plea assumes that the bill meant as one of its grounds to impeach it for corruption, fraud, partiality, and misbehavior of the arbitrators, and therefore the plea denies that there was any corruption, fraud, partiality, or misbehavior on the part of the arbitrators, or either of them, in making the award or in any part of the proceeding in the premises with, however, this important qualification: "so far as this defendant hath any knowledge, information, or belief." Now, although the award may be pleaded to a bill impeaching it in anticipation of its being relied on as a bar, yet it must be pleaded with averments which deny the grounds charged as equities in avoidance of the bar, and those averments must be supported by a full answer to the particular facts of fraud or other misbehavior of the arbitrators. *Mitf. Pl.*, 219, 244, 260; *Foley v. Hill*, 2 M. and C., 475. It is manifest, when the bill states the award, that unless the plea meet the matter charged in avoidance by a direct denial there is nothing in issue, and the very purpose of requiring bills to charge such matter in avoidance, instead of putting in on the record by a special replication, as was formerly the course, would be defeated. The fact of partiality or other misbehavior in the arbitrators is therefore the only point that can be put in issue; and if the plea does not put that in issue it does not meet the bill. Mitf., 240. In this case, besides other improprieties charged or intimated against the arbitrators, the bill states that one Cargill was thoroughly acquainted with the books and accounts and was the clerk and agent of the defendant to conduct his case before the arbitrators, and that after hearing the allegations of the parties and the evidence offered by them the parties were directed to withdraw, that the arbitrators might confer together and make (112) up their judgment; and that after the parties had withdrawn, and without the consent or knowledge of the plaintiff, Cargill was

allowed by the arbitrators to remain in conference with them and to make to them false suggestions, statements and explanations of the books and accounts which influenced the minds of the arbitrators and induced them to make the award against the plaintiff and in favor of the defendant otherwise than it would have been, but for the interference of Cargill. Such conduct in arbitrators is an irregularity and misbehavior which vitiates an award. *Walker v. Frobisher,* 6 Ves., 70; *Pierce v. Perkins,* 17 N. C., 250. It is not at all material that the award has done justice, or that the party relying on the award did not procure or was not cognizant of the misbehavior. It is in itself a wrong thing in the arbitrators which avoids what they did. It is true, the plea contains an averment in general terms in denial of the misbehavior of the arbitrators, and it may be that would have been sufficient without any particular reference to the agency of Cargill if the plea had stopped there, since, in support of the plea, the answer would supply the deficiency in omitting such inference, and the issue made by the plea would be on the alleged misbehavior; but however that might be, it is manifest that the qualification as to the defendant's privity or belief in the misconduct essentially varies the issue and does not meet that part of the bill either as to its facts or its equity.

The bill also charges several mistakes in computation and in charging the plaintiff twice with the same sums in certain schedules and accounts stated in the bill to have been delivered with and to be parts of the award, and in other particulars; and on that ground, also, the award is impeached. In relation to those matters the plea says nothing (113) particularly, nor, indeed, anything whatever, unless it be in the concluding averment, "That all the particulars so awarded, so far as concerns the plaintiff, are fair and just." Taking those mistakes to be unnoticed in the plea, they are, of course, to be considered as admitted, that is, for the purpose of the plea. But taking the concluding averment to embrace them, still the plea cannot be allowed, for the plaintiff has certainly the right to counterplead it by replying to any admissions in the answer in avoidance of the defense set up in the plea; and here the answer admits expressly several of the mistakes to be truly charged in the bill and to have been discovered by the arbitrators themselves, and by them communicated to him. It is true, the answer likewise states that the arbitrators discovered also, and informed the defendant of similar mistakes on the other side to a greater amount; but that only goes to the extent of the corrections which ought to be made in the award, and is the more conclusive that it ought not to stand in its present form as a bar to the plaintiff's suit, which is the point now under consideration. My brethren, indeed, think that mistakes are not grounds for set-

ting aside or correcting awards. I agree that on a general submission arbitrators are not bound to decide according to law, and, therefore, a mistake of the law is not material, unless it appear they meant to decide according to law and missed it. So, also, it is true that a mistake in judgment as to any matter of fact cannot be corrected, for the parties referred the matter to the judgment of the arbitrators and must abide by it. But I have always understood it to be settled law that it was one of the jurisdictions of the court of equity to take cognizance of mistakes in awards. It is to be noticed that it is not now a subject of inquiry, how the party was to show there was a mistake, or the extent of it. He may be under great difficulty in giving satisfactory evidence on that point when the case reaches that stage, as it is (114) hard, except by the arbritrator himself, to show that the result was not arrived at by an erroneous judgment, rather than by a mere mistake in computation or by making a double charge or giving a double credit, or the like. But that is not the question. It is, on the other hand, whether a mistake in an arbitrator, when duly established or when, as here, actually admitted, be not a ground for relief in equity. The jurisdiction is stated in the text-writers as being one of those which is perfectly established in the court of equity, and has been in very many instances acted on in adjudications. Without multiplying references, it may be mentioned that the cases are collected and the rules of the Court well digested in the late Doctor Story's Equity Jurisprudence, secs. 1453, 1456, and it seems impossible that a court of conscience should not hold it to be against conscience for one to insist on an advantage from what he himself, on his oath, admits to have been a mistake. It is true that in some modern cases at law it has been held that mistakes of arbitrators not amounting to misbehavior will not be inquired into. That may be, perhaps, because those courts cannot bring the parties to their oaths, and because they can only enforce or annul an award as a whole and not correct it simply. But whatever may be the reasons of those new rules in the courts of law, there has been no case as yet in equity repudiating this ancient head of jurisdiction in courts of equity. Then, unless the mistakes go to the whole principle of the award it is not set aside or declared void as in cases of fraud or misbehavior, which render it vicious *in toto*. But it seems agreed that for mere mistakes in particular items, an award is only affected *pro tanto*, and may be put right by the Court correcting them or referring it back to the arbitrator if made under a rule of the Court. *Champion v. Wenham*, Ambler, 245; *Rogers v. Dalimore*, 6 Taunt., 111; *Kleine v. Catara*, 2 Gallison, 61. I (115) conclude, therefore, that the plea is bad and ought to have been overruled with costs, leaving the defendant, of course, at liberty to in-

sist in his answer on such parts of the matter of the plea as will be available to him in that form.

PER CURIAM. Decreed accordingly.

Cited: Griffin v. Hadley, 53 N. C., 85; *Wheeler v. Piper,* 56 N. C., 252; *Gardner v. Masters, id.,* 468, 469; *Patton v. Garrett,* 116 N. C., 858; *Ezzell v. Lumber Co.,* 130 N. C., 207.

SAMUEL SIMPSON v. JOHN R. JUSTICE, ET AL.

1. The jurisdiction of Courts of Equity to interfere, by injunction, in the case of private nuisance, is of recent origin, and is always exercised sparingly and with great caution; because, if, in fact, there be a nuisance, there is an adequate remedy at law, by successive actions on the case.
2. Where it is not certain, but only contingent, whether the act of the defendant, sought to be enjoined, will be a nuisance or not, the Court will not interfere until the fact of "nuisance" has been established by an action at law.
3. Where a party does not take out an injunction in the first instance, but permits the other party to go on, erecting the buildings, etc., from which a nuisance is anticipated, if, *at the hearing,* he prays for a perpetual injunction, he must do so, on the ground, that, in the meantime, the fact of "nuisance" has been established by an action at law, or, at all events, he must support his application by *strong and unanswerable proof* of nuisance.

CAUSE removed from the Court of Equity of CRAVEN, at Fall Term, 1851.

James W. Bryan for the plaintiff.
W. H. Haywood for the defendant.

(119) PEARSON, J. The plaintiff and the defendants own lots Nos. 5 and 4 in the town of New Bern, which are separated by Pollock Street. The plaintiff has on his Lot No. 5 a comfortable brick dwelling-house and outhouses, in which he has resided a great many years. The defendants in 1847 erected on the Lot No. 8 a turpentine distillery, situated about 100 yards from the plaintiff's house and about 80 yards from his nearest outhouse, in a direction north of east, and have there carried on the business of distilling turpentine ever since. The bill was filed in July, 1847. It alleges that the defendants are about to erect a distillery; that it will be so near the lot and dwelling-house of the plaintiff as to be a nuisance to him in two ways: Turpentine being an inflammable substance, the distillery will be apt to catch fire, which will be communicated to the buildings of the plaintiff; and in the sec-

ond place, the operation of the distillery will produce a vast quantity of "smoke, blacks, and soot," which will spread over the lot of the plaintiff, enter his dwelling and other houses, and soil the clothes and furniture and persons of himself and family. He therefore prays for a perpetual injunction against the erection and carrying on of the distillery.

The defendants admit that it is their intention to erect the distillery, but they allege that the plaintiff will not be at all in danger of fire therefrom, for although turpentine is inflammable, yet a fire from the distillery will not communicate itself at the distance of the plaintiff's houses, for the fire arising therefrom—supposing them to be so unfortunate as, from accident or neglect, to have their distillery take fire—will emit such a thick smoke as to prevent sparks, and in fact emit but little heat; and they aver that although there have been many distilleries of turpentine in the town of New Bern during the last fifty years kept constantly in operation, and several of them have been consumed by fire, yet in no one instance has fire ever been communicated to other buildings. They deny that "the smoke, blacks, and (120) soots" issuing from their distillery will spread over the lot of the plaintiff so as to annoy him or his family, for, they say, this "smoke, blacks, and soots" which sometimes issue from turpentine distilleries are not a necessary consequence of the operation, but result from the practice of keeping up the fire by burning "scrapings," by which is meant the chips, bark, etc., which settle at the bottom of barrels of turpentine, and, being saturated therewith, make a quick fire. If pine wood is used there is but little smoke, and no blacks or soot that will go over fifty yards; and if oak wood is used neither "smoke, blacks, or soot" will be generated so as to be carried, even by a direct wind, to the lot of the plaintiff. They aver that such distilleries have been in operation within the town of New Bern for many years past; that it is believed they have contributed much to the health of the place, and it is certain they have added much to its business and prosperity.

The bill is sworn to, but no application for an injunction was made, and the defendants erected the distillery and have since been carrying on the operation.

The erection of the distillery is complained of as a private nuisance. There is no allegation that it would be injurious to the town or any considerable part of it. It is true the plaintiff alleges that many of his neighbors will be subjected to a like inconvenience, but they do not join with him in making the complaint, and there is no proof in regard to them. We are therefore to consider of it in the light of a private nuisance. As to a nuisance of this kind the jurisdiction of courts of equity to interfere by injunction is of recent origin, and is always exercised sparingly and with great caution, because if, in fact, there be a nuisance

there is an adequate remedy at law by successive actions on the
(121) case. *Attorney-General v. Nichols,* 1 Ves., 338; an anonymous case before *Lord Thurlow,* 1 Vesey, Jr., 140.

There is an obvious difference between a thing which is a nuisance of itself and one which may or may not be a nuisance according to the manner in which it is used. The present case comes under the latter head. From the proof, it seems that if the fire is kept up by burning "scrapings" the "smoke, blacks, and soot" will be carried to the lot of the plaintiff when the wind is north of east. If pine wood be used this result may also follow, but in a very slight degree. And if ash wood be used, then the plaintiff will not be at all affected, without reference to the wind. So the annoyance to the plaintiff must be looked upon as contingent. It depends on the wind and on the kind of fuel which may be used. In such cases it is settled that this Court will not interfere until the fact of *"nuisance"* has been established by an action at law. *Earl of Ripon v. Hobart,* 8 Eng. C. L., 336.

Again, this bill was filed July, 1847. The plaintiff did not *then* move for an injunction, possibly because of an unwillingness to give the bond. In the meantime the defendants have gone on, *as they had a right to do,* and erected the distillery and have kept it in constant operation for near five years. It is a clear principle of equity—so clear as to strike every one at the first blush—that where a party, instead of taking an injunction in the first instance, stands by and allows the other to make an outlay of his money in erecting buildings and other fixtures, if, at the hearing, he prays for a perpetual injunction he must do so on the ground that in the meantime the fact of "nuisance has been established by an action at law, or, at all events, he must support his application by *strong and unanswerable proof* of nuisance." If this principle needs any authority for its support it will be found in the case last above cited.

(122) So far from strong and unanswerable proof of actual nuisance in the present case since the creation of the distillery the plaintiff offers no proof of it whatever. On the contrary, the proof as to this matter is on the other side. The defendants, upon cross-examination, ask all of the witnesses called by the plaintiff who have had an opportunity of seeing it, whether the walls of the plaintiff's building are blackened or give any other indication of ever having been touched by "smoke, blacks, or soot"; whether they have ever seen the smoke issuing from the distillery reach and settle upon the plaintiff's lot. They all answer in the negative. The defendants called several witnesses who proved the same fact, or rather who disprove the fact of nuisance.

Upon the allegation of nuisance, by reason of the exposure to fire, the testimony is conflicting, and the question is left at least doubtful. It

is proved that many distilleries have been in operation within the town for many years past and no fire has ever been occasioned by them. It would seem that the exposure to fire from a distillery at a distance of 100 yards is not greater than from the erection of an ordinary dwelling-house and outbuildings constructed of wood on an adjoining lot.

It must be declared to be the opinion of the Court that under those circumstances and with this proof the plaintiff is not entitled to the relief prayed for.

PER CURIAM. Bill dismissed with costs.

Cited: Ellison v. Commissioners, 58 N. C., 58; *Clark v. Lawrence,* 59 N. C., 86; *Thompson v. McNair,* 62 N. C., 124; *Dorsey v. Allen,* 85 N. C., 363; *Redd v. Cotton Mills,* 136 N. C., 344; *Durham v. Cotton Mills,* 141 N. C., 630; *Hickory v. R. R.,* 143 N. C., 452, 455; *Pedrick v. R. R., ib.,* 409; *Cherry v. Williams,* 147 N. C., 457; *Little v. Lenoir,* 151 N. C., 418; *Berger v. Smith,* 160 N. C., 209.

(123)

LEMUEL WILLIAMS ET AL. v. JOHN HARRELL ET AL.

1. The objection, that the equity of a plaintiff's bill to have a division of slaves is barred by long adverse possession, may be taken by a demurrer.
2. The fact, that the adverse possession, relied upon to bar a plaintiff, was commenced and continued under a mistake as to the rights of the parties, is not an "avoidance" of its legal effects.
3. Where a mistake, made by an administrator in the distribution of his intestate's effects, has been common to him and to those really entitled, there is no ground for charging the administrator with "gross negligence or fraud."

CAUSE removed from the Court of Equity of BERTIE, at Fall Term, 1851.

Bragg for the plaintiffs.
Smith for the defendants.

PEARSON, J. John Arn died in 1814, leaving a will in which is this clause: "I lend unto my daughter Patience Harrell a negro girl, Lucy, during her natural life; then I give said negro girl to the heirs lawfully begotten of her body." Patience was the wife of Hodges Harrell, who, soon after the death of the testator, took the negro girl into his possession and kept her and her issue until his death, which was in 1839. He died intestate, and left him surviving his widow, the said Patience, and three children by her, who are defendants, and also three children by a

former marriage and several grandchildren, the children of a daughter by his first wife, who are plaintiffs. One Brittain administered upon his estate and allowed the widow and her children to keep the negroes, under the belief that they were entitled to them by the will of (124) John Arn. They have kept the negroes ever since and have divided them among themselves. Brittain, the administrator, died several years ago intestate, and the defendants Richard and William Brittain are his administrators. The plaintiff Williams is the administrator *de bonis non* of Hodges Harrell. This bill was filed in 1848. The plaintiffs allege that the slave Lucy and her increase were in fact the property of Hodges Harrell and ought to have been divided by his administrator among *all of his* children and his widow, and that the administrator committed a mistake when, in 1839, he allowed the widow and *her* children to take the slaves as their exclusive property, and they pray that a division may now be made. They insist that their equity is not barred by the long adverse possession, because it commenced and has ever since been held under a mistake, "which they are advised will now be rectified in this Court, especially as they were not informed of their rights until a very short time before they filed their bill, they being in humble circumstances, uninformed, and not having before consulted counsel."

They insist, in the second place, that if their equity to have the slaves divided is barred as against the widow and her children it was the result of gross negligence, if not fraud, on the part of the administrator of Hodges Harrell, and that they have an equity to hold his administrators liable for the value of the slaves to the extent of their interests as distributees of said Harrell.

The defendants demur, and the case was removed to this Court.

The first question raised is, Can the objection that the equity of the plaintiffs to have a division of the slaves is barred by the long adverse possession be taken by a demurrer? There is no doubt of it. The possession in this case not only constituted a bar to the action, but (125) confers a title by force of the statute. *Hovenden v. Annesley,* 1 Scho. & Lef., 637. There is as little doubt upon the other question. The fact that the adverse possession has commenced and continued under a mistake as to the rights of the parties is not an avoidance of its legal effect. There is no saving clause for those who are ignorant, uninformed, in humble circumstances, and who neglect to consult counsel. *"Leges vigilantibus non dormientibus factæ sunt."*

We are also of opinion that the plaintiffs have no equity against the representatives of the administrator by which to charge them with the value of the slaves. Under a mistake as to the rights of his intestate he allowed the slaves to go into the possession of the widow and her chil-

dren. Under a like mistake as to their rights the plaintiffs allow this possession to be held so long that their rights are lost. Upon what principle should the loss be shifted from them and put on the administrator? They did not remonstrate against his acts or assert any title in themselves. He acted under a mistake which was common to them all. If any one, or all of them, had been in his place they would have acted precisely as he did. What right have they, then, to charge him with "gross negligence, if not fraud"? Was he bound to know more about their rights than they did themselves? Are they not just as obnoxious to the charge of gross negligence, in sleeping on their rights for near ten years, as he? His act did not deprive them of their rights; it was their own neglect which produced that effect. The fact is there was an honest mistake all around; not one of the parties had ever heard of "the rule in *Shelley's case.*" This, so far as the plaintiffs are concerned, was their misfortune, and the loss of their rights is to be ascribed to their ignorance and neglect in not applying to counsel in time to (126) prevent the effect of the long adverse possession.

PER CURIAM. Bill dismissed with costs.

IRBY HUDSON, ET AL., v. RICE B. PIERCE, ET AL.

1. A testator directed certain of his slaves to be emancipated and bequeaths them a sum of money. After giving several legacies, he directs, that "the whole of his personal and freehold property, which is not already disposed of, be sold by my executors, etc., and the proceeds be divided, etc." *Held*, that, though the legacies for emancipation, and the money to be paid the slaves, were void, yet the residuary legatees did not take them, but as to them the testator died intestate, and they go in a course of distribution to the next of kin.
2. A residuary legacy generally passes, not only what is not disposed of, but also what turns out not to be disposed of; but an exception to this rule is, where it appears clearly, from the will, that the testator did not intend to include certain property in the bequest of the residue.

CAUSE removed from the Court of Equity of HALIFAX, at Fall Term, 1851.

Bragg for the plaintiff.
Moore for the defendant.

NASH, J. Thomas Hudson died about 1825, having previously (127) made and published a last will and testament, which was duly proved and recorded, and Martha, his widow, was duly qualified as the executrix thereof and took into her possession the personal property of

the testator. By the will the testator devises as follows: "I lend to my said wife during her life the aforesaid negro man, Ben, and the aforesaid negro girl, Eliza Fails, the last of whom is to be emancipated at the death of my wife, together with any and all the children she may have at that time." In a subsequent clause he directs: "At my death, my will and desire is that the whole of my personal and freehold property which is not already disposed of be sold by my executrix on a credit of twelve months, and the money arising therefrom, after deducting therefrom the sum of $500, to be divided as follows, towit: one-half to my wife, Martha, one-fourth to Mary Shield, and one-fourth to her children. The $500 which I have reserved out of the sale of personal and perishable property I lend to my wife during her life; and at her death it is to be put out at interest for the use and benefit of the aforesaid Eliza Fails." And he charges his wife with the payment of his debts. The sale was made by the executrix according to the directions of the will, and she took into her possession the legacy of $500. Martha Hudson is dead, and the defendant Rice B. Pierce is her executor, and has taken into his hands and sold a negro woman, Sally, and her child, the offspring of Eliza Fails, who died during the life of the widow, Martha Hudson, and has also in his hands the $500 so as above bequeathed. All the necessary parties are before the Court, and the bill is for an account. The bill is filed by the next of kin, claiming the $500 and the proceeds of the sale of Sally as not being disposed of by the will, and as to which they claim there is an intestacy.

(128) The answer of Pierce, the executor, admits that as to the legacy of $500 to Eliza Fails the testator died intestate, and as to the proceeds of Sally and her child he prays the advice of the Court. He alleges there were debts of the testator, to the payment of which both funds were liable. The other defendants claim that the proceeds of the sale of Sally and her child pass under the will, and that as to the $500 legacy they pray to be protected in their rights, if they have any.

The questions presented to the Court are as to the directions for the emancipation of the negro woman, Eliza Fails, and as to the $500 bequeathed her and the proceeds of the sale of slave Sally and her child.

Many cases in this Court establish the principle that such a testamentary disposition of the slave Eliza Fails and her children, as is made in the will of Thomas Hudson before the year 1830, is null and void as being for their emancipation within the State. *Sorrey v. Bright,* 18 N. C., 113; *Pendleton v. Blount, ib.,* 491; *Cresswell v. Emberson,* 41 N. C., 154, and others. The bequest of emancipation being void, Eliza Fails and her child Sally and her child remained as slaves, and the legacy of $500 is void also. A slave cannot hold or be, in law, the owner

of property. (See the above cases and *Kirkpatrick v. Rogers,* 41 N. C., 135.). The widow having but a life estate in them, her executor holds the proceeds of the sale of Sally and her child and the $500 in trust, either for the next of kin or of the residuary legatees. The plaintiffs contend that as to these two funds the testator, Thomas Hudson, has died intestate, and that they do not go into the residuum. It is a general rule in the construction of wills that as to personal property a residuary clause embraces not only everything not disposed of, but everything that turns out not to be disposed of. The law (129) does not suppose that a testator means to die intestate as to any of his property, and the rule is adopted to avoid a partial intestacy, but the rule is subject to limitation. In *Sorrey v. Bright* his Honor, the Chief Justice, after laying down the rule as to the extent of a residuary clause, proceeds: "Doubtless it may be restricted by the special wording of the will. If the residue is partial—that is, of a particular fund—the rule does not apply; so where it is clear from the residuary clause itself or from other parts of the will that the testator had in fact a contrary intention, that the residue should not be general, and that things given away or which the will professed to give away should not fall into the residue"; and in *Bland v. Lamb,* 2 Jac. & Walker, 399, Lord ELDON observes that to take a case out of the general rule very special words are necessary, showing the *intent to be clear* that particular parts of the estate should not pass under the residuary clause. Apply the principle declared in these two cases to the one now under consideration, and it is manifest the residuary legatees have no right to either of the funds. The testator directs Eliza Fails to be emancipated at the death of his wife. This bequest is void—cannot take effect, of course; she and her offspring remained slaves; at his death the executrix is directed to sell the whole of his property, personal and real, not before disposed of, and he gives $500 of the proceeds to Eliza Fails and the balance to designated legatees. Now, according to law, neither the slaves nor the money passed under the will as specific legacies, and in ordinary cases would fall into the residue. But it is manifest that such was not the intention of the testator. Eliza Fails is herself one of those legatees to whom the residue is given, and, according to the rule laid down in *Bland v. Lamb,* there was a particular part of the estate embraced in the residuary clause which the testator did not in- (130) tend should go to the residuary legatees. In the will there is no specific disposition made for the children of Eliza Fails during the life of the widow. From the statements in the bill it is to be presumed that the slave Sally was born after the death of the testator and the widow was entitled to a life estate in her and her child, and at her death they reverted back to the personal representative of the testator; but they

constituted no part of the fund embraced in the residuary clause, for the will directs that at the death of the widow they should be emancipated. A further reason why the proceeds of the sale of Sally and her child do not pass under the residuary clause is that they constituted no part of the estates of the testator directed to be sold, both because of the emancipation clause and because they were not in existence at the death of the testator.

We are of opinion that neither the proceeds of the sale of Sally and her child nor the $500 legacy passed under the residuary clause, and that as to them Thomas Hudson died intestate and that they go to his next of kin in a course of distribution. As to the debts of the testator, they are expressly a charge upon the widow in such a way as to exonerate the balance of the estate.

PER CURIAM. Decree accordingly.

Cited: Lea v. Brown, 56 N. C., 150; *Allison v. Allison, id.,* 237.

(131)

WYATT MOYE AND WIFE v. BENJAMIN MAY.

1. Where a man, domiciled in another State, dies intestate, leaving personal property in this State, this property shall be distributed according to the law of the State, in which the intestate had his domicile.
2. But, if a citizen of another country dies, indebted to citizens of this State, and owns personal property here, it will be appropriated to the payment of his creditors, in the order prescribed by *our law,* and not by that of his domicil; but the surplus will be disposed of according to the law of his domicile.
3. The distinction is this: Our citizens, *as creditors,* have rights which we are bound to protect; we will not sacrifice justice to comity. But, as *kinsmen,* they have *no right.* Consequently, it depends, not on the laws of this country, but on the laws *of his country,* how his property shall be disposed of; and, although it happens to be in our own State, yet, by the comity of nations, it is considered the same as if it had been at home.

CAUSE removed from the Court of Equity of PITT, at Fall Term, 1851.

The case is stated in the opinion delivered in this Court.

Moore, Rodman and *Donnell* for the plaintiffs.
Biggs for the defendant.

PEARSON, J. The Hon. Jesse Speight and the plaintiff Louisa, both native citizens, intermarried in this State in 1827, and continued to reside here until 1837, when they removed to the State of Mississippi.

Speight died intestate in 1847, since which time the plaintiff Louisa has continued to reside in that State, and afterwards intermarried with the other plaintiff.

In 1826 Mrs. May, a citizen of this State, died intestate, leaving the defendant, Louisa, a daughter, and one of her next of kin. John May took out letters of administration in the county of Pitt, and (132) soon afterwards delivered to the next of kin residing here several slaves of the estate of his intestate for the purpose of partition. A petition was filed, to which Speight and wife were made defendants, and such proceedings were had that in the spring of 1847 a division was made and the slave sued for was allotted to *Speight and wife,* and he being in this State at the time of the division, took the slave into his possession and made arrangements to have him sent to the State of Mississippi, to which State he returned, and soon afterwards died. In consequence of his death the slave was not taken from this State. Letters of administration on the estate of Speight were granted to the defendant by the county court of Pitt, and he took the slave into possession as of the estate of his intestate.

In 1839 a statute was passed in the State of Mississippi which provides: "Hereafter, when any woman possessed of a property in slaves shall marry her property in such slaves and their natural increase shall continue to her, notwithstanding her coverture, and she shall have and possess the same as her separate property, exempt from any liability for the debts or contracts of her husband. And when any woman *during coverture* shall become possessed of slaves by conveyance, gift, inheritance, distribution, or otherwise, such slaves and their increase shall inure and belong to the wife in like manner as is above provided as to the slaves which she may possess at the time of her marriage."

In 1846 this statute was amended by securing to the wife "the proceeds of the labor of such slaves."

The bill alleges that under this statute the plaintiff Louisa was entitled to the slave, and it is insisted that the effect of the division and of the act of Speight in taking the slave into possession was (133) to vest the *legal title* in him in trust for her. The prayer is that the defendant be declared a trustee and be required to deliver the slave to the plaintiffs and account for hire.

The defendant alleges that Speight was indebted to him, and also to Patsy May, who are citizens of this State, in large sums, which debts were of long standing; that Speight was insolvent; that his debts in Mississippi much exceed the value of his property there, and if the value of the slave is appropriated to the payment of the debt due to him and Patsy May they will, nevertheless, lose the greater part of their debts, as the property of Speight in this State besides the slave does not exceed $200.

General Speight and his wife had abandoned their "matrimonial domicile" and acquired an "actual domicile" in Mississippi, and the statute of that State was passed several years prior to the time when his wife acquired this slave. By the law of *this State* the slave became the property of the husband when he reduced it into possession. By the law of *Mississippi* he had no such marital right, and the slave "inured and belonged to the wife as her separate property, exempt from any liability for his debts." Which law is to govern the case?

"When there is a change of domicile the law of the *actual domicile* and of the matrimonial domicile will govern as to all future acquisitions of movable property, and as to all movable property the law *rei sitæ*. Story Conflict of Laws, 187.

This is the conclusion of Judge Story after a full and learned discussion of the authorities and the reasoning. We concur in it. And unless there be some peculiar circumstance to take this case out of the operation of that conclusion the plaintiffs are entitled to a decree.

(134) Movable property attends the person, and is therefore called "personal," as distinguished from fixed or real property; and the general principle is that, no matter where it may happen to be, it is subject to the law of the domicile, and although it may be in a foreign country it is governed by the same rules and laws of transfer and succession as if the owner had it in possession *at home*. This is the principle from which the learned commentator derives the above conclusion.

This exception to the general principle is admitted. If a citizen of another country dies indebted to citizens of this country and owns personal property here we appropriate it to the payment of his creditors in the order required by *our law* and not that of his domicile. But the surplus will be disposed of according to the law of his domicile; and if by that law the widow of an intestate be entitled to his whole estate she will receive such surplus, although he left him surviving mother and sisters or *children* citizens of this State. The distinction is this: our citizens, as creditors, have rights which we are bound to protect. We will not sacrifice justice to comity. But as *kinsmen* they have *no rights;* consequently, it depends not on the laws of this country, but on the laws of *his country* how his property shall be disposed of; and although it happens to be in our State, by the comity of nations it is considered the same as if he had it at home.

Our case does not come under this instance, but we think it does come under the principle of this exception.

By the laws of this State a man before marriage may make a settlement on his wife with certain restrictions in favor of creditors, but after marriage any settlement or relinquishment of his marital rights in property which she would thereafter acquire would be deemed fraudulent

and void as to creditors; and if he proved to be insolvent the property to which but for the relinquishment he would have been (135) entitled will be taken from her and applied in satisfaction of the debts. If, therefore, General Speight had in 1839 executed a deed relinquishing his marital rights or conveying to a trustee for the separate use of his wife all the slaves which she might thereafter acquire by "conveyance, gift, inheritance, distribution, or otherwise," such deed would have been deemed fraudulent and void as to creditors. And this slave, when it came to the question, Who shall suffer loss? would be taken from her rather than permit honest creditors to be unpaid. *Allen v. Allen;* 41 N. C., 293.

General Speight did not execute such a deed, but in 1839 his adopted State made a statute which has precisely the same effect. Can that be done indirectly for him which he could not do directly? Is there any principle in the comity of nations by which this State is called upon to stand by and see her citizens deprived of the right to collect their debts out of property within her jurisdiction by an act which, if done by the debtor, would be deemed fraudulent and void? Nay, more by which she is called upon to set aside her own laws for the purpose of carrying into operation a statute of another State having this effect. We think not. And we challenge the production of any authority or any fair reasoning by which such a principle can be established. This is a "conflict of law," and we must be governed by our own law. *Oliver v. Townes,* 14 Martin, 97. A ship was sold in Virginia; the ship at the time of the sale was in New Orleans; before delivery she was attached by a creditor of the vendor. By the law of Virginia no delivery was necessary to give effect to the sale. By the law of Louisiana it was necessary. In this conflict of law the Court of Louisiana decided according to the law of that State and gave judgment for the attaching creditor. (136)

This case is not as strong as the one under our consideration, and the circumstances did not as clearly bring it within the admitted exception to the general principle, but the reasoning of the learned judge who delivered the opinion fortifies our conclusion, and it is evident that Court would not have hesitated an instant in deciding the case as we do. *Lanfear v. Sumner,* 11 Mass., 110; *Thurst v. Jenkins,* 7 Martin, 318, tend to the same conclusion.

We have no right to object to the policy of the law of the State of Mississippi, and we feel bound by the comity of nations to carry it into operation in all cases, except when, as in the present case, a citizen of our State removed and died insolvent and indebted to other citizens of our State, or when, hereafter, a citizen shall remove and is so indebted at the time of his removal.

PER CURIAM. Bill dismissed with costs.

Cited: Drewry v. Phillips, 44 N. C., 85; *Moye v. May,* 54 N. C., 84; *Alvany v. Powell, id.,* 56; *McLean v. Hardin,* 56 N. C., 295; *Carson v. Oates,* 64 N. C., 116; *Medley v. Dunlap,* 90 N. C., 528; *Hornthal v. Burwell,* 109 N. C., 13; *Holshouser v. Copper Co.,* 138 N. C., 258; *Jones v. Layne,* 144 N. C., 602, 612.

(137)

SAMUEL KERR v. JOSEPH KIRKPATRICK, ET AL.

1. In the case of coexecutors, each is accountable for the due administration of the assets which come to his own hands.
2. He is not bound to see to the application of the assets received by his coexecutor, nor is he liable for his *devastavit,* unless the commission of it is encouraged by himself.

CAUSE removed from the Court of Equity of GUILFORD, at Spring Term, 1851.

Morehead and *J. H. Bryan* for the plaintiff.
Miller for the defendants.

NASH, J. John McLean by his last will bequeathed to the plaintiff as follows: "I give and bequeath to Samuel Kerr, son of N. H. Kerr, deceased, $500, to remain in the hands of my executors to be applied in assisting to give him a liberal education." The will was duly proved, and the defendants qualified as executors. The estate consisted principally of bonds, notes, and open accounts, which were taken into possession by the defendants and divided between them, and each collected the money due on the papers, respectively, retained by him. The defendant McLean retained in his hands the funds to pay the plaintiff's legacy. Kirkpatrick has fully administered all the assets which came to his hands in the payment of debts and legacies. McLean is insolvent, and the plaintiff's legacy is unpaid, and he seeks to recover it from Kirkpatrick. The bill charges that the plaintiff is entitled to recover it from either or both of the defendants, "because they jointly acted in the affairs of the estate, they both collected funds and paid over lega-
(138) cies; that Kirkpatrick is responsible, although McLean might have spent a portion of the assets of the estate and became insolvent, because it was his duty to see to the affairs of his cotrustee and to see that he did not waste the estate." It prays for an account, etc.

The answer of Kirkpatrick states that at the time John Mitchell died he was sick in bed, and that the portion of the bonds and notes which were in his hands were delivered over to him by Joseph A. McLean between five and six weeks after the testator's death, and that he has fully

and properly administered the whole. He further states that funds were retained by McLean in his hands to pay the plaintiff's legacy. It further alleges that the plaintiff boarded with McLean one year in Greensboro for the purpose of going to school, and that the latter also paid his tuition.

The answer of McLean is to the same effect.

In the argument before us it was fully admitted that the defendant Kirkpatrick had fully and properly administered all the assets of the testator which had come to his hands, and his accountability for the *devastavit* of his cotrustee was frankly put upon the ground that as a cotrustee it was his duty to have taken care that McLean did not abuse his trust. The bill is framed upon that principle. In the charging part it alleges "that the defendants are liable to the plaintiff because they jointly acted in the affairs of the estate; they both collected funds and paid over legacies; that Joseph Kirkpatrick is responsible, although McLean may have spent a portion of the assets and became insolvent, because it was his duty to see to the affairs of his coexecutor, and to see that he did not waste the estate." There is no specific joint act of Kirkpatrick charged, and relief is sought against him upon the general grounds stated. Are they sufficient to make him responsible? We are clearly of opinion they are not. The estate consisted, as (139) is admitted, principally of bonds, notes, and accounts. It was highly proper, if not necessary, for the executors to divide between them these evidences of debt, both for the purpose of collection and disbursement. They could not, from the nature of these assets, *hold* them jointly. When, therefore, a division was made there was in it no impropriety. Neither did anything out of the usual course of managing such matters. This is the only act set forth in the bill upon which to rest the charge of a joint administration of the assets. It was further admitted that McLean had retained in his hands the fund to discharge the plaintiff's legacy. The defendants were joint trustees for the management of that fund, and, so far as they did join in administering it, each is responsible for the misconduct of the other. The answer of Kirkpatrick, which is responsive to the bill and is not contradicted by any testimony, alleges that at the time John Mitchell died he was sick in bed, and that it was not until the lapse of five or six weeks that he went to the house where he died, and that he there received from his coexecutor some of the papers belonging to the estate. He had, therefore, no hand or agency in placing any of the bonds and notes in the hands of McLean, nor had he any right to take them from him. Each had an entire control over the assets retained by him so far as the other was concerned. Even joining in a receipt does not of itself subject the trustee not receiving to a responsibility for the act of the other. And the reason assigned is,

as each trustee has not the whole power to act, the joining in the receipt is a necessary act, and doing so, without more, is considered mere formality. 2 Wills. on Exr., 1125. And such is the law as applied to executors. *Ibid.,* 1118. Each, under ordinary circumstances, is
(140) answerable only for the assets which came into his own hands.

It is, however, charged to have been the duty of Kirkpatrick "to see to the affairs of McLean, and see that he did not waste the assets in his possession." This would clearly be at war with the principles above stated. McLean had a right to hold in his hands, so far as Kirkpatrick was concerned, all the funds he possessed, and the latter had no power to withdraw them; it was a joint trust and a personal one. The testator had a right to make the appointment to McLean even if he had known that he was insolvent, and we know of no principle of equity which requires that one trustee is bound to keep a supervision over the acts of another when he has not made himself liable to answer for his acts. The whole ground occupied by this case is covered by *Ochiltree v. Wright,* 18 N. C., 338. In that case the defendants, who were executors, had joined in signing the inventory and account of sales, and Wright, against whom the relief was sought—Beck having left the country—had assented to the sales. The bill was dismissed as to Wright upon the ground that the signing the account of sales was merely in conformity to the law, and there was nothing to show that he had any control over the assets which were in the hands of Beck. In this case, Kirkpatrick was a curator or trustee of the fund, but is answerable only for that part of it which came to his hands or was under his control. McLean stood in the same relation to it and with the same power and responsibility. If the confidence of the testator was misplaced it is the misfortune of the plaintiff. Kirkpatrick had no power to deprive him of the fund which was in his possession, nor has he done anything by which the abuse of power by McLean was countenanced or facilitated. He has committed no fault which, in conscience, ought to subject him to the plaintiff's claim.

(141) The plaintiff is entitled to an account, and in taking the account the defendant Kirkpatrick is not to be made accountable, except for the assets that actually came to his hands.

PER CURIAM. Ordered accordingly.

ANDREW L. CHESSON, ADM'R, ETC., v. JAMES A. CHESSON ET AL.

1. An executor, who, in his cash account, is in advance for the estate, may hold on to the specific property for reimbursement.
2. So, if the profits of property, given for life, and then over, be taken for payment of debts, the tenant for life may claim from the remaindermen a contribution, in proportion to the values of their interests.
3. The Court cannot, on grounds of public policy, permit accounts to be carried on when the party, who otherwise might have been entitled to them, has been guilty of such laches as to make it impossible to take the accounts fairly and justly, or, at least, with any reasonable reliance on their being so taken.
4. Therefore, on a bill by the administrator of an executrix, against the legatees, to be reimbursed for moneys advanced by the executrix, the Court will order no account, when the original testator has been dead forty years, and no inventory, account of sales or account current has been left by the executrix.

CAUSE removed from the Court of Equity of WASHINGTON, at Spring Term, 1850.

Smith for the plaintiff. (142)
Heath and *Moore* for the defendants.

RUFFIN, C. J. Samuel Chesson made his will in September, 1847, and died a few days afterwards. It begins with a gift to his wife Elizabeth, of a tract of land and two negroes for her life, and two feather beds and furniture to dispose of as she pleased, and it then adds: "I also lend to my wife during her widowhood, if she keeps my children clear of expense and educates them, all of my chattel property of every kind, except any of my children shall marry, then she is, at her disposal, to give them such of the property as she may deem just, to be deducted out of their parts when a division shall be made." The will, in a subsequent part, directs all the said residue to be divided equally among the testator's children, and that his five younger daughters should in the division have a negro girl each; and if his negroes should not increase to a sufficient number in time, that some of the other negroes should be sold for the purpose of procuring the girls. By several clauses, gifts of a tract of land and a slave are made to each of two married daughters and also to a single daughter then grown, with a limitation over upon her death without leaving issue surviving to the five younger daughters. By distinct clauses, also a tract of land is devised in fee to each of the testator's five sons, Samuel, William, James A., John B., and Andrew L.; and then it gives "to my younger daughters, namely, Ann, Elizabeth, Kizia, Susan, and Lois, all the residue of my lands, to be equally divided between them, except the child my wife now goes with be a son; and if it

should, I give to such child 140 acres of land adjoining, etc.; but if it should be a daughter, then an equal part of the land with the other sisters."

Mrs. Chesson was appointed executrix, and proved the will and took the property into possession, including nine slaves besides those
(143) specifically given, paid the testator's debts, and brought up the children who were all under age except that those before mentioned and who resided with their mother until they, respectively, died or married, and some of them until her death, which took place in 1840. To each of the younger daughters Mrs. Chesson advanced a girl out of the stock of negroes at various times, and also to several of her sons, as they married and left her, she advanced slaves and other things. After her death her son Andrew L. administered on her estate, and the son James A. administered *de bonis non cum*, etc., on the estate of his father and took into possession the slaves left by Mrs. Chesson, being then sixteen.

In 1842 this bill was filed by Andrew L., John B., and William L. Chesson against James A. Chesson and the other children of the testator or the representatives of such as are dead. It states that the testator owed debts to a considerable amount, but how much the plaintiffs were then unable to set forth, though they hoped to establish the same by proof; that as no particular provision for paying them was made in the will and no part of the property could then be spared for that purpose without interfering with the other purposes of the will, Mrs. Chesson, influenced by maternal regards and with the view of advancing the general interests of her family, took possession of the whole estate, real and personal, and for a considerable time used the rents and crops made from the property given to herself and the plaintiffs and other children as she could best make the same available towards the payment of the debts and the expenses of maintaining and educating the children, and thereby effected those ends; and that the plaintiffs John B. and Andrew L. contributed their personal services for many years, besides the produce of their land, at the request of their mother, in attending to the
(144) estate after the debts were paid, and managing the property so as to make it productive enough to maintain their mother and the family, including the negroes, which, by reason of a rapid increase, were also expensive. The prayer is that the sums paid by Mrs. Chesson for the debts of the testator out of her own means may be ascertained, and the amounts taken by her for that purpose, or for the maintenance of the family, out of the produce of the land of the several plaintiffs and the value of the personal services of the plaintiffs in the management and improvement of the property may also be ascertained, and that all those amounts may be raised, in the first place, out of the negroes or

their hires since the death of Mrs. Chesson, and that the residue, including advancements by the executrix, may be divided equally among the plaintiffs and the defendants, the legatees in remainder.

The answers state that the defendants believe that the testator was but little indebted and left debts and money owing to him sufficient to cover what he owed, and at all events that he left crops, stocks, and other perishable effects composing parts of the residue of his personal estate sufficient for that purpose. It insists that the executrix either applied those parts of the residue in that way or ought to have done so, and that her administrator cannot after such a length of time claim to be reimbursed any sums paid by her to creditors, especially as she set up no such claim in her lifetime and left no account against the estate and made no account of her administration. The defendants state that the plaintiffs were quite young at the testator's death, and deny that they contributed to the payment of the debts, and they insist that if any of the profits of their land were used by their mother for that purpose, or if they and the personal services of the plaintiffs contributed to the maintenance of the family, the claim of the plaintiffs there- (145) for is against their mother alone.

The cause was brought on heretofore, but the Court, upon the pleadings and the proofs as then existing, declined deciding the points, and directing certain inquiries. A report has been made, from which the following facts are collected: The executrix, soon after qualifying, made a sale of some parts of the perishable property, but she made no inventory nor account of sales, and it cannot in any manner be ascertained what was sold, or to what amount. She returned no account current nor made any account of her administration. But the master found, upon evidence of witnesses, that, besides the slaves, there came to the hands of Mrs. Chesson stock of various kinds on the plantation to the value of $750, and household and kitchen furniture to the value of $450, and that she received one debt of $400 due to the testator, in four annual installments of $100. The master also made up an account from receipts and vouchers left by her at her death of the debts paid by the executrix which amounted, after deducting some improper vouchers, to the sum of $1,010.52, paid at various times from 1808 to 1818. The report further states that all the stock of furniture left by the testator was either used by Mrs. Chesson or had been worn out or destroyed in her lifetime, and it values the several advancements to the children, and states the present number of the slaves and their profits since the death of Mrs. Chesson. It also states evidence before the master that the plaintiff John B. Chesson lived with his mother from his father's death to the year 1840, and that from 1824, when he came of age, he had charge of his mother's business, and that his services therein were of

an average value of $200 a year, and that she derived during the whole time from his land from $40 to $100 a year, all of which went to the benefit of the mother and family, and that he received no com-
(146) pensation and derived no benefit therefrom, except his support as a member of the family. Similar proofs were made with respect to the profits of the lands and personal services of the sons, Samuel and James A., for different portions of time. But the master declined stating any accounts of those matters because they were not embraced in the inquiries ordered. Upon these facts and upon exceptions to the report the cause has been brought on again, with a view to its being determined whether the sums claimed in the bill for the administrator of Mrs. Chesson, or for the sons personally, or any of them, ought to be raised out of the slaves or their profits before a division.

The Court is of opinion that neither of the charges can be sustained. The will makes it a condition, on which Mrs. Chesson was to have the whole residue of the personal estate during widowhood, that she should keep and educate the children "clear of expense," and she could not therefore prefer any claim therefor against the children or estate. If she could not, it follows, necessarily, that the sons cannot, for they can claim, if at all, only through her, who received their money or services. It is not stated that her estate is not sufficient to compensate them; and if it be, there is no principle on which they can pass by that and come on the children for what she was bound to furnish. But it is the same whether she left any estate or not, for if she was bound to keep the children as long as they lived with her the debt to the sons for their services and money used by her was exclusively her debt; and if she was only bound to keep them during their minority, it is obvious, as she left no charge and made no claim against them, that they all resided together as members of one family, and the children were maintained gratuitously by their mother as far as the services of each failed to supply his or her own necessities. In assisting their mother in the management of
(147) the property the sons proved themselves to be dutiful and good sons, but they cannot make their brethren pay them for being so.

The claim on account of the debts is next to be considered. No doubt an executor who, in his cash account, is in advance for the estate may hold on to the specific property for reimbursement. So, if the profits of property given for life, and then over, be taken for payment of debts the tenants for life may claim from the remainderman a contribution in proportion to the values of their interests. If we could see with any reasonable degree of distinctness that such was the fact in this case the administrator of Mrs. Chesson might perhaps have relief. But notwithstanding all the disadvantages under which the defendants are left by the omission of the executrix to furnish information of the particulars

of the estate, its disposition and the debts paid, by an inventory, account of sales, or account current, the defendants have been able, after the lapse of more than forty years, to establish affirmatively that, besides the slaves, perishable property of various kinds and money received from debts came to the hands of the executrix to the value of $1,600, and that thereout, throughout the course of ten years, she paid in debts only $1,010.52. It is true that it does not appear that she sold all the stock and furniture; and it is assumed she did not, but sold only a part of it, yet she left no document showing what part, and as it only required about $600, after deducting the $400 collected by her, to cover the whole amount of the debts, including the interest accumulated, it is but a reasonable presumption that she may have received from those sales or from other debts or resources belonging to the testator—who appears to have been the clerk of the county court—a sum sufficient for that purpose. Strictly speaking, indeed, it was perhaps her duty to have sold the perishable property and, after paying the debts out of (148) the proceeds, invested the residue, so that she might have the interest during life and left the capital for the remaindermen. But that was probably not the actual intention of the testator, and it need not be insisted on here, because the circumstances lead to the conviction, either that the executrix in fact paid the debts with the appropriate funds of the estate received by her or that she so managed the matter as to deprive the defendants of the power of establishing it, if such was the fact; or, if she did not make the payment with those funds, that she made it voluntarily out of the annual products of the property which belonged to her without charging or intending to charge any part of them against the remainder belonging to her children. Mrs. Chesson obviously looked upon her interest and her children's as one and the same and treated the property and her husband's debts as her own. Hence she used the property as if it were hers absolutely, and made no inventory, nor account of sales, nor account current, nor even kept any account of her own. Under such a state of things it cannot be supposed she intended or expected to reclaim any sums paid by her. But if that were otherwise the Court could not sustain a claim brought forward for the first time by her administrator thirty-five years after her administration without her having left any accounts of her administration whereby the real state of her transactions might appear or the parties enabled to make the investigations necessary to ascertain the truth of the case. Her estate cannot claim any benefit from her having kept and left things so much in the dark as not to make it at all wonderful that at the making of the inquiries in 1851—forty-four years after administration—the defendants could not clearly establish the particulars of the estate received or disbursed by her. As was said by Lord REDESDALE in *Hovenden*

v. Annesley, 2 Sch. & Lef., 638, following Lord ALVANLEY in *Percy* (149) *v. Dinwoody,* 4 Bro. C. C., 257, the Court, on grounds of public policy, cannot permit the accounts sought to be carried on because the party who otherwise might have been entitled to them has been guilty of such laches as to make it impossible to take the accounts fairly and justly, or at least with any reasonable reliance on their being so taken.

As Mrs. Chesson's representative cannot have a decree it follows that, for reasons similar to those given as to the maintenance of the children, the other plaintiffs can have no relief in respect to any supposed application by her of the profits of their land towards the debts. She did the wrong, if any, and to her estate they must look. This conclusion renders immaterial all the exceptions of the defendants, except the fifth, and requires all those of the plaintiffs to be overruled, except the fourth and fifth. Two of those exceptions relate to the values put by the master on the slaves advanced by Mrs. Chesson to James A. Chesson and John B. Chesson—the former being $1,012 and the latter $2,337. Upon looking into the evidence the former seems to be probably correct, but the latter appears to be high upon its face; and upon averaging the values set upon the negroes by these witnesses, who have apparently equal means of judging, the result is $1,975, instead of $2,337. Therefore, the defendant's fifth exception is overruled and the plaintiff's fourth exception is allowed as to the sum of $362. The administrator *de bonis non* of the testator also excepts that the master did not allow him a commission on the hires of the negroes since Mrs. Chesson's death. He is entitled to a reasonable allowance, and as the fund consists of the bonds taken for the hires, 2½ per cent seems to be a reasonable rate. To that extent the plaintiff's fifth exception is allowed. (150) The accounts will be modified accordingly, and there will then be a decree for the division of the slaves and the hires, including the value of the advancements. The plaintiffs must pay the costs up to this time.

PER CURIAM. Ordered accordingly.

WILLIAM McINTYRE v. WILLIAM REEVES, ET AL.

Where a plaintiff alleged that he had placed a note for collection in the hands of a constable, who had transferred it to a third person, upon his promise to pay it: *Held,* that he could not support a bill in equity, either against the original debtor or the third person.

CAUSE removed from the Court of Equity of BLADEN, at Fall Term, 1851.

Strange for the plaintiff.

W. Winslow for the defendants.

RUFFIN, C. J. The bill was filed in October, 1841, and states that on 18 December, 1839, the defendants—Wiley Reeves as principal and Thomas Fort as surety—executed to the plaintiff a bond for $100, payable one day after date, and that shortly thereafter the plaintiff placed it in the hands of Wiley W. Fort, a constable, for collec- (151) tion. That Wiley W. Fort delivered the bond and a judgment thereon, if one was rendered, to the defendant William Reeves upon his promise to the said Wiley W. Fort, as agent of the plaintiff, to pay the principal and interest of the debt to the plaintiff on a day shortly thereafter. The bill then charges that William Reeves did not pay the debt, nor any part of it, at the day appointed, nor at any time since, nor did the original debtors, or either of them, and the prayer is that the defendants may be decreed to pay the plaintiff the debt and interest.

The answer of William Reeves states that he was a justice of the peace, and that on 28 December, 1839, Wiley W. Fort, as constable, returned before him a warrant, at the instance of the present plaintiff, against Wiley Reeves and Thomas Fort on a bond of the tenor of that mentioned in the bill, and that he then gave judgment thereon for the plaintiff and immediately delivered the same to the constable and hath not since had either the bond or judgment, and it positively denies that this defendant ever engaged to collect the debt or even promised the constable or any other person to pay the same at any time.

The answer of Wiley Reeves stated that after the judgment was rendered the constable applied to him for payment of it, and that on 30 December he paid him $101 in full thereof; and the answer of Thomas Fort states that he has no knowledge on the subject, except on the information of Wiley Reeves, who stated that he had paid the debt to the constable, and this defendant believes the same to be true.

The only material testimony is that of Wiley Fort, taken by the plaintiff. He states that he had the bond for collection, and that he is unable to say what became of it. That after he received it he forgot his pocketbook and left it at the house of William Reeves for about (152) a week and never afterwards saw the bond. That he is under the impression that William Reeves either got the bond from him under a promise that he would pay him the amount or that it was taken from his pocketbook when left at the house of William Reeves, but he was inclined to the latter opinion; and at any rate that William Reeves at different times acknowledged to him that he had the bond, and promised the witness to pay it, but that neither he nor either of the other defendants ever did pay any part of the debt to the witness.

There is no ground for a decree against either of the defendants. The bill places the liability of William Reeves on his promise to the constable to pay the debt; but if such a promise was made, and is binding

at all, it is as obligatory at law as it is here, and the nature and measure of the redress must be the same in both courts. Besides, the promise and possession of the papers are both positively denied by this defendant, and there is but a single witness in opposition to the answer.

The case made in the bill against the original debtors is no stronger. It is not framed on the idea of a lost security upon his promise to pay the debt, which he failed to perform. The plaintiff knows where the security is—either in the hands of his agent or of the other person. If the transfer was sanctioned by the plaintiff he can no longer claim against those defendants in this Court. If it was without his authority, and ineffectual, then he could proceed at law against the original debtors and compel the production of the security on the trial by the possessor. The bill charges no privity of these defendants in the transaction alleged between the constable and the other defendant, William Reeves, nor any other collusion with either of them. It merely states that they had not paid the plaintiff the debt, and the bond or
(153) judgment, or it was held by William Reeves, who obtained it from the constable on a promise to pay the amount and has failed to do so. But that cannot change the jurisdiction against these parties. If it could, every case of a conversion of the security by a constable would be one for a suit in equity between the original parties. It is true, it appears in the answer of Wiley Reeves that he has the security, but that cannot change the case, because the relief must be upon the matter of the bill, and it has no such statement; and, moreover, that defendant answers that he paid the principal and interest of the debt to the constable, and consequently the answer in itself furnishes no ground for a decree.

PER CURIAM. Bill dismissed with costs.

CALVIN RICHARDSON, ET AL., v. ELIZABETH PRIDGEN, ET AL.

Where slaves are given by parol, the bailment ceases upon the death of the donee; and the possession of the slaves, for three years, by those claiming in their own right under the will of the donee, vests in them the title.

W. H. Haywood for the plaintiffs.
Moore and *Busbee* for the defendants.

(154) RUFFIN, C. J. Although the preponderance of proof seems to sustain the statement in the answer that the slave Chane was put by James Thompson into the possession of his son-in-law, Noah Peacock, in 1806, which, as the law then stood, amounted to a gift, yet as there is

some evidence that the transaction was in December, 1807, the Court does not deem it proper to determine the cause on that point, as there are others on which the decision as to that slave and issue may be safely made against the plaintiffs without incurring any risk of mistake either as to the facts or the law.

The Court holds that no title was derived by the defendant Elizabeth Pridgen or her late husband and intestate under the will of her father, James Thompson, because, admitting that Chane was lent to Noah Peacock or put into his possession after the act of 1806 was in force, yet the title of Thompson was gone before his death by the adverse possession of Peacock's executor and of the defendant Elizabeth under the bequest in his will. The facts in relation to that point are that Peacock, being in possession of the slave and her children then born, bequeathed them to his widow for life, with a limitation over to all his children; and he died in 1824, and his executor took his estate into possession and assented to the legacy to the widow and delivered the slaves to her, and she held them on that title until her subsequent intermarriage with Hardy Pridgen in 1838. Soon after that marriage Pridgen surrendered to Peacock's children, as the remaindermen, several of the children of Chane, but kept her and two of her children, giving to the executor an obligation not to remove them, but to return them at his death. Soon afterwards, James Thompson died, leaving a will dated in 1839, in which he said that he had "heretofore lent Elizabeth Peacock a negro woman, Chane; and now I give her and her children to the said Elizabeth." *Powell v. Powell,* 21 N. C., 379, and other cases (155) since, show conclusively that the possession thus taken under the will of Peacock is to be deemed a new possession under a claim of title and adverse to the original bailor; and as it was continued from 1824 to 1838 without interruption or claim by the father, his title was barred.

Upon the marriage of Pridgen and Mrs. Peacock he became entitled to her life estate in these slaves, though the parties seem to have thought that he would hold them during his life only, and that they would survive to the wife. The defendant would then be bound to account for the slaves as the property of her late husband for the period of her life if the husband had not himself parted from that interest. But he did so effectually, in the opinion of the Court. In 1846 he made a deed for them to two of the remaindermen, A. and Z. Peacock, which purported to convey all his interest to them. That instrument is impeached in the bill upon the ground that Hardy Pridgen was *non compos* at the time, or, at all events, that it was obtained from him in his old age and while in a state of bodily and mental infirmity, without consideration and by the importunities of his wife acting in collusion with her two sons to take advantage of his weakness. But all those imputations appear to be

wholly unfounded. The fact is, that the intestate was himself the mover in the matter, and was induced to do so because the negroes were increasing so rapidly—being then seven—as to render them an expense and burthen to him, and he urged the remaindermen that they ought not to compel him to raise a family of negroes for them, but relieve him of them by taking them and having his bond to the executor canceled. In those opinions the evidence shows that the intestate was correct, and that he was exercising a sound judgment in getting rid of the family of negroes. Therefore, there seems to be no ground for impeaching
(156) the deed, but it must be declared to have effectually passed all his right in the slaves.

The bill impeaches the purchases of the defendant of some trifling articles at her sale as administratrix upon the ground that the prices were inadequate. The bill was filed very soon after the sale, and the answer, averring that the prices were full and adequate, and that the plaintiffs ran the biddings on her, submits to a resale at the election of the plaintiffs, but the plaintiffs made no motion on the answer. The Court, therefore, concludes that they are content that there should be no resale, and consequently the defendant is to stand charged with the prices which she bid.

The bill also impeaches the year's allowance to the widow upon the grounds that it was exorbitant and obtained by false suggestions and under practices on the commissioners and the county court. If such reasons could lay the foundation for relief against the allowance in this Court, yet it cannot be given in this case, inasmuch as the answer denies the truth of those allegations, and they are not established by the evidence.

There will, of course, be the usual orders for an account and for distribution of the other slaves; but as the main purpose of the bill, when filed, was to assert a claim to the slave Chane and her issue, in which it fails, and as the bill wantonly imputes to the defendant gross fraud and collusion with her sons to set up an unfounded claim to slaves belonging to her intestate, and in that respect was entirely unfounded, it is of course that the plaintiffs must pay full costs in the cause up to this time.

PER CURIAM. Decree accordingly.

Cited: *Woods v. Woods,* 55 N. C., 428.

(157)

JOHN G. HOOKS ET AL., v. BLACKMAN LEE, ET AL.

1. Marriage articles are not considered as settlements, and, as such, to be taken as fully and duly expressing the well considered and final family arrangements by persons about to enter the marriage state.
2. Such contracts are considered, in a Court of Equity, as but notes of the heads of an agreement, in its nature executory, and the trusts created by it are to be favorably moulded by the Court, so as to effectuate the intention of the parties, in reference to the provisions for themselves for the issue of the marriage, and such other persons as are apparently within the contemplation of the parties.
3. They may be modified, so as even to have the chasms in them, in not providing, for example, for particular events, supplied, when requisite to effectuate the general intention, if it can be collected, either from the language of the instrument, or from the stipulations usually inserted in such agreements, or from the condition of the particular contracting parties.

The opinion given in this case, at December Term, 1850 (see 42 N. C., 83), re-examined and confirmed.

AN interlocutory decree having been made in this cause at December Term, 1850, overruling the demurrer, the cause was sent down to the Court of Equity of Wayne County. Answers having been filed and other proceedings had, it was set for hearing and transmitted to this Court at the Spring Term, 1851.

Husted and *J. H. Bryan* for the plaintiffs.
W. H. Haywood for the defendants.

RUFFIN, C. J. This cause was heard in this Court at December Term, 1850, on appeal from a decree overruling a demurrer, as reported in 42 N. C., 83, and the decree was affirmed and the cause re- (158) manded for an answer and for further proceedings. The defendant put in an answer, setting forth an account of his late wife's personal estate, and then the cause was set down and removed to this Court for hearing. Upon the hearing the counsel for the defendant again raised the question as to the construction of the marriage articles, and contended that as the wife did not dispose of the slaves and other personalty he succeeds to it, *jure mariti*, in preference to the plaintiffs, her children by a former marriage. The contract between the parties is in the following words:

STATE OF NORTH CAROLINA—Johnston County.

This indenture, made and entered into this 14 March, 1837, between Blackman W. Lee, of the county of Sampson and State aforesaid, of the first part, and Mary Hooks, of the first named State and county, of the second part, witnesseth:

That whereas the said Blackman W. Lee and Mary Hooks having entered into an agreement of marriage, which marriage is soon to be solemnized, and the said Mary Hooks being of her own right seized and possessed of a large real and personal estate, is willing and anxious so to execute that the said Mary Hooks shall not be deprived of the use, benefit, and profit of the said estate, real and personal, by reason of their intended marriage, and the said Mary Hooks being of lawful age to be her own agent, now, therefore, be it known that for and in consideration of the premises and for and in consideration of the sum of $1 to me, the said Blackman Lee, by the aforesaid Mary Hooks, before the sealing and delivering of the presents, the receipt of which is hereby acknowledged, I, the said Blackman W. Lee, do hereby sell, assign, and deliver, alien and confirm, and have by these presents sold, assigned, aliened, delivered, and confirmed, unto Mary Hooks aforesaid all the right, title, estate, interest, and benefit which I may by operation of law acquire, derive, or receive, either in law or equity, in and to the following real and personal estate now belonging to the said Mary
(159) Hooks by reason of the said intermarriage between the said Blackman W. Lee and Mary Hooks, viz.: Twenty slaves, named Owen, about 27 years old; Pompey, 50 years; Charles, 30; Eliza, 24; Harry, 16; Baltimore, 14; Cader, 10; Henderson, 7; Isaac, 5; Simon, 5; Alvin, 2; Sawney, about 1 month; Patience, 40; Amerite, 25; Rose, 24; Zeny, 19; Ginney, 10; Margaret, 8; Mary, 3; Martha, 2. Also one tract of land in Sampson County containing 830 acres, lying in the fork of Big Cohera and Ward's Swamp, adjoining A. Fleming and Joshua Craddoe; also two tracts of land in the county of Johnston, being the place where the said Mary now lives, containing 807 acres, bounded as per deed from Susanna Blackman to said Mary Hooks, dated 21 February, 1829; also another tract of land joining the above, containing 30 acres, as per deed from John Eason to said Mary Hooks, bearing date 10 December, 1832; also one closed carriage and two horses, to have and to hold all and singular the aforesaid lands, negroes, carriage and horses to the only use and benefit of the said Mary Hooks, her executors and assigns forever. And the said Blackman W. Lee doth solemnly promise and agree to and with the said Mary Hooks that he will, upon the solemnization of the said marriage, or at any time thereafter when requested by said Mary, make, execute, and deliver all and every necessary title, deed, or conveyance, advised or directed by counsel learned in law, more completely and effectually to secure the intention of this indenture, which is entirely to divest himself of right, title, and estate in and to the above mentioned lands, negroes, carriage, and horses, so that he nor his creditors shall have any right to sell or contract the same or any part of said lands, negroes or their increase, car-

riage, and horses. It is further agreed and understood by and between the contracting parties aforesaid that the lands, negroes, and chattels may remain in the use and occupancy of the said Blackman W. Lee, he paying therefor by way of hire or rent the sum of $1 on the first day of January in each and every year, if demanded. It is further agreed by and between the parties to this indenture that if it shall be desirable to sell or exchange the whole or any part of the above mentioned real and personal property, the said Mary may transfer and lawfully convey the whole or any part of said real or personal property (160) to any person whatsoever, receiving a fair and full consideration for the same, which consideration, whether it be in money or property, she shall hold and possess and keep in the same manner as the property hereby conveyed is to be held and kept; and this indenture to be as binding and legal as if a third person had been appointed as agent or trustee, the said Mary acting as her own agent and trustee.

In witness whereof the parties have hereunto set their hands and seals the day and year above written. BLACKMAN W. LEE. [SEAL]
MARY HOOKS. [SEAL]

Signed and sealed in presence of:
JOHN EASON and
YOUNG. ELDRIDGE.

STATE OF NORTH CAROLINA, Johnston County. } August Term, 1837.

Then was this marriage contract duly proven in open court by the oath of John Eason, and ordered to be registered.

R. SANDERS, *Clerk.*

The propriety of bringing up in this manner the same question which has been solemnly decided on demurrer and appeal in this very case is worthy of consideration, and it is not to be understood as admitted, because the Court in this instance considers the matter again.

The merits depend on the inquiry, whether the defendant's renunciation of his marital rights in his wife's estates was intended to be partial or total, except as herein specially excepted.

It is to be noticed at the beginning that the agreement is not a settlement, and, as such, to be taken as duly and fully expressing the well considered and final family arrangements by these persons of their estates; in consists of articles in the form of covenants between the parties themselves, without any trustee. Such a contract is considered in a court of equity as containing but notes of the heads of an agreement, in its nature executory; and it has been long settled that (161) the trusts created by it are to be favorably moulded in equity, so

as to effectuate the intention of the parties in reference to provisions for themselves, for the issue of the marriage and such other persons as were apparently within the contemplation of the parties. *Gause v. Hale,* 37 N. C., 241. Such agreements are subject to be modified so as even to have the chasms in them, in not providing, for example, for particular events, supplied when requisite to effectuate the general intention, if it can be collected either from the language of the instrument or from the stipulations usually inserted in such agreements, or from the condition of the particular contracting parties. The case thus standing on articles, it is to be decided just as it would have been if, in the lifetime of the wife, she had filed her bill to have a settlement made pursuant to the articles. They are exceedingly imperfect, and, obviously, the production of an unskillful and ignorant draftsman, and amount only to notes of the actual agreement, whatever it was, which are very inaccurately expressed. It is incumbent on the Court, therefore, to look through every part of the instrument in order to discover the intention, and then to execute that intention, as gathered from the whole, without regard to particular inaccurate forms of expression. Thus read, it does not seem difficult to find out what those persons had in their minds in entering into those articles, imperfect as they are.

The agreement begins by saying that the *feme,* being in her own right entitled to real and personal estate, "is anxious *so to execute* that the said Mary Hooks shall not be deprived of the use, *benefit,* and profit of *the estate,* real and personal, *by reason of the intended marriage.*" Then it proceeds: "That in consideration of the premises I, the said (162) B. W. L., do sell, assign, deliver, alien, and confirm unto M. H. aforesaid *all* right, title, estate, interest, and benefit which I may, *by operation of law, derive or receive at law or equity by reason of the intermarriage* between the said L. and M. in and to the real and personal estates now belonging to said M." It is impossible to read those clauses without seeing that the purpose was to declare, first, that the *feme* meant to have her whole estates to herself, and that the benefit of and in them should not be impaired in any respect by reason of her marriage; and, secondly, as the mode of carrying that out, that the husband, as such, should not, directly or indirectly, derive any estate or benefit in the wife's property. That clause is in the form of a grant from the husband to the *feme.* But that only shows the plainer the writer's ignorance of the legal character of the instrument. It does not hide the intention, but rather requires a liberal extension of the terms to give effect to the intention thus apparent. The plain meaning and effect of the provision is that he conveyed to her, that is, renounced for himself, *all* the benefit which, "by operation of law," that is, *as husband,* he might derive, either at law or in equity from her property. To ex-

hibit that purpose still more distinctly, if possible, the husband in a subsequent part of the articles again covenants that he will, at any time after the marriage, execute any proper deed of settlement which counsel may direct, "more completely and effectually to *secure the intention* of this indenture, *which is entirely to divest himself of right, title, and estate*" in the property. It would seem that nothing could be more explicit as an abandonment of all claim, *jure mariti*, during the coverture, or after its termination. No partial renunciation was in the contemplation of the parties, but, on the contrary, the entire divesting of all his interest in the estates. It was urged, however, that this last clause is qualified by what next follows: "So that he nor his creditors shall have any right to sell any part" of the property, whence it was inferred from the phrase, "so that," that his renunciation was par- (163) tial, that is, only to the extent that the property was not liable to his debts, or to his disposal during the coverture. But that is clearly not the sense of that passage, for it would render it not a qualification, but a direct contradiction of the clause to which it is appended. That clause has a declaration plain, that he was to be entirely divested of all right, and, therefore, the subsequent "so that" merely expresses one example or consequence of the preceding provision and not a restriction on its generality.

It was further argued that, notwithstanding all this, the husband must succeed, because there is no express provision that in the event which has happened—of the wife's dying without making a disposition —he shall be excluded and her next of kin let in. How it might be upon a settlement, silent as to that state of things, but with express provision for such entire abandonment as is found in these articles, it is not necessary, and perhaps not easy, to say. But undoubtedly, upon such marriage articles, it is obviously more near the intent to imply a trust in favor of those who take by law when the husband is out of the way. And it is competent to imply such a trust under articles, because on them, as before said, the inquiry is not tied down to the sense of the positive provisions alone, as in the case of a solemn definite conveyance, but is the larger one, what sort of settlement would be made under the directions of the Court upon the articles, in order to execute them specifically according to the intent. Then, it is plain that when the husband comes in and says he is to have nothing by operation of law under any circumstances, such a settlement must be decreed as will exclude him at all events, that is, as well from succeeding to his wife's estate at her death as from taking it during her life, except so far as there may (164) be other express provisions in his favor on the face of the agreement. He being thus excluded, the implication arises, of necessity, that those are to take who would do so if there were no husband, and conse-

quently the settlement would be directed to contain a trust for the issue of the marriage, if any, and if not, for the heirs generally and next of kin of the wife. Those persons would thus not take by descent and succession in the character of heirs and next of kin, but the settlement would make those who were the heirs and next of kin purchasers under it. These conclusions are the more satisfactory in this case when one adverts to the remaining portions of the agreement, for although incompatible to a great extent with the previous entire renunciation of any benefit, the next stipulation is that the husband is to have the actual use and benefit of all the property during the coverture at a nominal annual rent and hire, if demanded by the wife, not leaving her a general power of disposition, but restricting her power to exchanging or selling the property for a fair and full consideration in money or property, which is again to be held in the same manner as the original stock under the agreement; thus, by a final express provision, he has the substantial enjoyment and property of all the estates during the coverture. Consequently, if the wife's absolute right to the property and his renunciation and entire divesting of right, so repeatedly mentioned in the previous parts of the agreement, are not to arise at the termination of the coverture, one is at a loss to assign any meaning to the parties or any operation to their contract. She is restrained from giving away the property, and can only change its form by a contract for a valuable consideration, and of the whole he is the beneficial owner during their joint lives. Then, he gave up, according to the agreement, only her right by survivorship, and not even that unless he gave up also
(165) his right of succession as husband, if he should be the survivor, for they both stand on the same footing, since there is no express provision for her taking the property if she should outlive the husband more than there is for his not taking it, should he be the longer liver. But the truth is that each is implied, and the one as much as the other, both from the language in parts of the articles and from the absurdity of the whole agreement without such an implication. Hence, the opinion of the Court is, as it was before, with the plaintiffs.

Those positions are sustained by authority, and, indeed, by most of the cases cited for the defendant. In *Murphey v. Avery,* 18 N. C., 25, a *feme* about to marry covenanted "that she will not set up any claim to the real or personal property of the said J. M., either in right of dower or distributive share as widow, and she doth release and quitclaim forever any present or future interest or claim to any part of the estate or property, real or personal, or any distributive share as next of kin to which she might otherwise be entitled," and it was held that the article embraced all her legal rights as widow, extending to a year's allowance, and, therefore, that it would operate as an equitable, though not a legal

bar, being but a covenant and not a release. In *Ward v. Thompson,* 6 Gill. and John., 349, it was agreed that all the property of M., the wife, should be for the use and benefit of the said M., her heirs and assigns, all which property to be under and subject to the entire management and control of the said M., her heirs, etc., without the interference in any manner of the said T.; and the said M. and her heirs, etc., to receive and enjoy the rents, etc., thereof, with power to the said M. to sell or dispose of the said estates by last will, as if she were sole. The wife died without making any disposition, and it was held that the true character of the contract was not a temporary surrender of (166) the husband's marital rights during the life of the wife, but an entire abandonment of them, and that her kindred and not her husband succeeded to her personalty. *Tabb v. Archer,* 3 Hen. and Mum., 399, was pressed as an authority for the defendant; but on the point material to our case it is the other way. These articles recited "that the parties had mutually agreed that all the estates, real and personal, of the said Frances, the wife, shall be secured to and settled upon her and her heirs, except as therein excepted." And then, "in consideration of the intended marriage and for the intent and purpose aforesaid, the said John, the husband, doth covenant and agree to and with the said Frances that all the aforesaid estates, real and personal, consisting of, etc., shall remain in the right and possession of said Frances during the continuance of the intended marriage, and that the annual proceeds of it only shall be applied to the support and maintenance of the said J. and F. and their issue, if any there should be. And, secondly, the said J. doth further covenant that he will never sell or dispose of any part of the real and personal estates, except as before excepted, in any manner, but the same shall always be held as an inviolable fund for the support of said J. and F. and their issue, if any, applying only the proceeds or profits for that purpose; but the whole of the original stock shall be inviolably held for the use and benefit of the said F. and her heirs in the same manner as if the said intended marriage should never take effect, by which expression is meant and understood that if the said J. should depart this life, leaving issue of the said marriage, and the said F. should again marry and leave issue, such issue shall be equally entitled to the benefit of this settlement as the issue of the said intended marriage; and in the event of the death of the said Frances without issue, both real and personal, except as before excepted, shall go to her next (167) legal representatives." Upon a bill against the husband and wife by the issue of the marriage then *in esse* and by the mother and brothers and sisters of the wife, praying that the estates should be settled pursuant to the articles, so as to secure the respective contingent interests of the several plaintiffs, it was held that the husband was entitled to

claim according to his legal rights, except such as by a prior construction of the articles he had *given up* as a provision for the wife and her issue and other persons within the articles, and that in that case it was the meaning that he should be maintained out of the estate, as well as the wife and children, and therefore that he would be entitled to a share of the profits during the coverture and also during his life if he survived the wife, but to no more, even if he should survive the wife and she leave no issue. Accordingly, it was decreed that the estate should be conveyed to trustees, in trust, to permit the husband during the joint lives of himself and his wife, and upon the death of either, to permit the survivor to take the profits for them, him, or her, and their issue; and from and after the death of the survivor to the use and issue of the wife, if any such, agreeably to the statute directing the course of descents; *and in default of such issue of said F. living at her death,* then and in that case to hold the whole estates in trust *for the use of the heirs of the said Frances,* agreeably to said statute directing the course of descents. Thus, it appears that under the last limitation in the articles, namely, in default of the issue of the wife, "to her next legal representatives," the husband was not to succeed to her personal estate, but her own relations as designated by the statute. Why was that? It (168) was not because he could not be "the next legal representative" of the wife as to her personalty, for he is preferred to the relations; but it was because, upon the whole instrument, it was held that he intended to renounce all his legal rights except that of taking the profits during the coverture or during his own life, if the survivor; for the language of Judge ROANE is, that as the support of the husband and wife are equally objects of the marriage, to which the property of each is naturally contributory, the rights of either thereto accruing by the marriage will only be lost by an express renunciation or by a renunciation arising from a plain and necessary implication. In that case, the terms were by no means as strong as in ours, yet a renunciation was implied, whereby the husband was excluded from taking under the articles as next legal representative, or by succession as surviving husband, and, consequently, her kindred were to take as purchasers in the settlement decreed. So the Court thinks it must be here. It remains to notice another case cited, *Stewart v. Stewart,* 7 John. C. C., 229. There the intended husband entered into a covenant with two persons as trustees for the *feme,* wherein he recited his wish to secure her real and personal property to her, so that she might enjoy it as fully, to all intents, after marriage as though she were a *feme sole;* and then he covenanted with the trustees that the said C. H. during coverture should have to her own use all the personal property she had or might come to her during the continuance of the marriage, and that she might convey away the

same by testament or otherwise, and that during coverture she should enjoy the rents and profits of her real estate as fully as if she had remained a *feme sole,* "hereby releasing all his marital rights in and over the same," and covenanting to make, on request, any other assurances to carry more fully into effect the intent of this covenant. It was held by Chancellor KENT that on the death of the wife, without (169) making any appointment, the husband, as survivor, took her personal effects. But the distinct ground of decision was that the separate use of the wife was expressly "during coverture," with a power of disposition, and, therefore, the release of the husband at the close of the instrument was also to be restricted to the coverture. That construction was considered to be required, both by the grammatical structure of the sentences and the intention gathered from the whole instrument, and it was probably right. But whether that was right or wrong, the case has no application here, because that release, as it was called, was held to be a special one, restraining the exercise of the marital rights during the coverture only. How it would be if there had been a stipulation that the wife should have, not the separate use and profits during the coverture merely, but *"all* right, benefit, and interest in the property, which, by operation of law, the husband might derive from the marriage, and a corresponding general renunciation thereof by him," with the intention to divest himself of all right and interest in the above mentioned negroes, etc., the Chancellor did not say. But one cannot be at a loss to know what he would have said in such a case, since he puts his decision of that case not on a general right of the husband to succeed, *jure mariti,* notwithstanding a general release, but upon the fact that the release was not general, but a very special one which did not, under the existing state of things, impair his legal right of succession as husband. None of the cited cases, therefore, militate against the construction put by the Court on the articles between the defendant and his late wife, but all of them tend strongly to sustain it. The plaintiffs must, upon a sound construction of the agreement, be declared to be entitled to (170) the slaves and other personal property left by Mrs. Lee, and the usual inquiries directed.

PER CURIAM. Decree accordingly.

Cited: Perkins v. Brinkley, 133 N. C., 88.

THOMAS COLE, ET AL., v. JOHN TYSON.

Where a vendor retains the title of premises sold, as a security for the purchase money, and the vendee, after paying a large portion of the money, dies in embarrassed circumstances, leaving infants, his heirs at law, and the vendor then enters on the premises, taking and keeping possession of them, not merely for the purpose of securing and providing for the payment of his debts, but claiming them as his own, both in law and equity, upon the ground that the contract of sale is annulled by the inability of the vendee and his heirs: *Held*, that such entry must be considered as a *tort*, and that the vendor became a trustee for those entitled in equity, and that he is to be held accountable for all he made, or ought with proper diligence to have made, out of the premises, while they were so in his possession.

CAUSE removed from the Court of Equity of MOORE, at Spring Term, 1851.

Strange and *Kelly* for the plaintiffs.
Winston for the defendants.

RUFFIN, C. J. In the year 1850, the defendant John Tyson contracted to sell to Angus McDonald a lot in the town of Carthage, having (171) on it a tavern and storehouse, at the price of $2,000, whereof $500 was paid down, and for the residue the vendee gave his several bonds for $214.28½ each, payable on 1 January, 1831, 1832, 1833, 1834, 1835, 1836, and 1837. The title was to be made when the purchase money was fully paid, but McDonald was let into possession immediately, and he made some improvements and continued in possession until his death, which happened about the middle of the year 1839. He made sundry payments towards the discharge of the purchase money, but for several years before his death a balance was due thereon, as reported, of $796.93 for principal and interest due on judgments rendered on some of the bonds. In the beginning of 1839 the vendor brought an ejectment for the premises against McDonald, and the same was pending at his death. McDonald died intestate, leaving three children, who were his heirs, and very young at his death, and no guardian was appointed for them, nor was administration taken of his estate for several years. Upon his death the defendant John Tyson abandoned his ejectment and took immediate possession of the premises, claiming them absolutely, and sometimes letting them, or parts of them, to other persons, and at other times they were unoccupied. In the answer of the defendant he stated that he believed McDonald to be entirely insolvent, and that he had no estate liable for the balance of the purchase money, and that he was advised "that the law furnished no means of procuring payment of the sum remaining due nor for having the contract of sale judicially annulled, and therefore that he had a right to annul the con-

tract and take possession of the premises and keep it." He accordingly treated the premises as his own up to the beginning of the year 1844, and then he conveyed them to his son, Thomas Tyson, the other defendant, in fee, as an advancement; and the son then entered and sold and removed some offices which McDonald had built, of the value (172) of $160; and in 1845 erected on the premises a store at the cost of $490, and thereafter occupied the premises up to the bringing of this suit in August, 1846, and has continued to occupy them ever since.

The bill is filed by the three infant children of McDonald, and prays for specific performance of the contract, and that an account may be taken of the principal and interest due on account of the purchase money, and also that a proper allowance may be made to the plaintiffs for waste committed by either of the defendants, and such rents as either of them may have received, and such reasonable sums as the defendants ought to pay during their occupation of the premises, and that upon payment of any balance then remaining the defendants shall convey under the direction of the master.

Upon the hearing, there was a decree declaring the plaintiffs entitled to specific performance, and it was referred to the clerk to take an account of the payments on account of the purchase money, so as to ascertain the balance therefor, if any, and also an account of the rents and profits of the premises which the defendants, or either of them, received or, without default, might have received; and also inquire how long the defendants, or either of them, occupied the premises, and set a value on the premises by way of a reasonable annual rent during such occupation, and also an account of any waste committed or caused by either of the defendants during that period, and to charge the same against the purchase money; and the clerk was directed also to inquire the value of any necessary repairs and proper permanent improvements made on the premises by either of the defendants, and deduct the value thereof, in the first place, from the sums allowed for the rents, profits, and waste.

The master found the value of the houses removed in 1844 to (173) be $160, and he deducted that sum as of that date from the balance of the purchase money; and he found the value of houses built and improvements made in 1845 to be $490, and he added that sum as of that date to the balance of the purchase money then due. He found that the sum of $95 was a reasonable annual rent for the premises during the whole period, from the time John Tyson took possession in 1839 to the taking of the account in January, 1850, and charged that sum to the defendants in the account annually, although, for parts of the time between 1839 and 1844, the defendant John Tyson did not receive any rent from others nor actually occupy the premises himself.

The principal questions on the report are raised by exceptions on the part of the defendants, that a higher rent has been allowed than the premises were worth, and more particularly that the defendants ought to be charged only such sums as they actually received for rent, or as the premises were worth to them while occupied by them and not for those periods during which they were not let nor occupied, nor what the premises might have brought upon lettings to others. Those positions are taken in reference to the rules supposed to regulate the accountability of mortgagees in possession. But even a mortgagee who takes possession, with a view of applying the profits to reduction of the debt or to hasten the mortgagors into active diligence to pay it by other means, is chargeable with an occupier's rent upon a customary lease to one for actual occupation. When the mortgagee does not occupy, he is obviously only chargeable for the rent as actually received, or for such as he might have received from a responsible person to whom he refused to let, because, it is said, he is not bound to leave his own business (174) to look out for tenants nor take the responsibility of fixing the proper rent, but that it is the province of the mortgagor to bring a fit tenant, so that the premises may not be idle. That might probably be varied by circumstances. But it is not necessary to pursue the inquiry, as between mortgagor and mortgagee, where the latter *bona fide* enters into possession for either of the legitimate purposes before mentioned, as it is conceived that the present is a case of quite a different character. The vendor, indeed, retained the title as a security for the purchase money, and may, therefore, in some degree, be likened to a mortgagee. But his entry was certainly not in that character. He did not go in to receive the profits towards his debt. On the contrary, he admits in the answer that he took possession as absolute owner, because, as he says, his vendee had died, leaving a part of the purchase money unpaid, and leaving infant heirs without the means of paying it. As he did not enter or claim as mortgagee, he is not entitled to the privileges of a mortgagee. His entry was in avoidance of his sale, and so was wrongful in the view of the court of equity, in which he, as vendor, is regarded as the trustee for the vendee, except only in respect of the estate being a security for the price. But if it would be tortious as against the vendee under ordinary circumstances, it was so in the highest degree after the payment of nearly two-thirds of the purchase money as against infants in straitened circumstances, incapable themselves, and without friends who would undertake to investigate the state of the accounts and assert their rights. The defendant says he was advised he could rescind the sale; but that is hardly possible; and it is the more incredible when it is seen what reason he gives for it, which is, that his vendee left no means of paying the residue of the price. If he

was so advised, it was clearly wrong, for, in the first place, by (175) filing a bill, the balance of the price would have been duly ascertained and then raised out of the premises if there was nothing else to be reached. Besides, if he had the right to rescind the sale, it must have been done entirely, or not at all, and then he would have been bound to refund the part of the purchase money he had received. But nothing of that sort was done or offered, and instead of the fair and legal course of filing a bill, the vendor, upon the mere force of his legal title and taking advantage of the incapacity and helplessness of the vendee's children, injuriously denied any right in them and claimed a perfect title in himself, as well in equity as in law, and as such entered and in all respects acted as owner by pulling down and selling houses and building others, and, finally, by conveying in fee. One thus abusing the power given by the legal title, and denying the rights of infants for whom he was trustee, cannot be looked on, in a court of equity, in any light but that of a *tort feasor,* by reason of a willful and gross breach of trust, and, therefore, he is justly chargeable with the highest occupier's rent from the moment of the breach of trust. He is liable not only for what he made out of the premises, but for what the infants may have lost, which is whatever rent a guardian might have let the premises for if the defendant had not seized them. Therefore, the defendant's third, eighth, and ninth exceptions are overruled.

The defendants also except because the rents are deducted from the purchase money at the end of each year, and because the value of the houses removed and sold is deducted from the purchase money, so as to stop so much interest on the bonds given for the purchase money, and also because the value of the improvements is not deducted from the rents, and because interest is not allowed thereon. But neither (176) of those exceptions—being the fourth, fifth, sixth, seventh, and tenth—is sustainable. The rents and the price got for the houses make so much in the hands of the defendant, which the plaintiffs are entitled to consider in the nature of payments, and thus reduce the amount of the purchase money bearing interest. The value of the improvements is, in effect, deducted from the profits, and interest in the meanwhile allowed on it, for it is added as an item in account to the purchase money, and thus increases the sum bearing interest until extinguished by the accruing rents.

The defendants must pay the costs of the cause, for although, as mortgagees to whom a balance is due, they would be entitled to their costs out of the premises, yet they are made amenable here, not as mortgagees, but as trustees committing a breach of trust, by denying the title of the *cestui que trust* and setting up an absolute one in themselves.

PER CURIAM. Decree accordingly.

Cited: Sugg v. Stowe, 58 N. C., 128.

(177)

WILLIAM T. CARTER AND WIFE v. NATHANIEL W. WILLIAMS AND OTHERS.

1. A term of years does not exclude the actual seisin of the husband and wife, whether they receive rent or not, since the possession of the term is that of the reversioner; and, therefore, in such a case, the husband is entitled to curtesy.
2. A devised "that his plantation, called Eagle Falls, remain in possession of his wife during her widowhood, or until his son B arrived at the age of twenty-one," and that his negroes should be kept on the plantation during that period, or until one of his daughters, M or C, should marry. He then directs how his negroes shall be divided among his wife and children, upon the happening of either of these events. He then proceeds, "I also give my three children all of my tract of land, called Eagle Falls, one-third part of which is hereafter devised to my wife during her life, to them and their heirs, to be equally divided; the two-thirds of which is to be taken possession of immediately upon the marriage of my wife, and the other third at her death. I give to my wife one-third of the plantation called Eagle Falls, during her natural life, it being in lieu of her dower. Should either of my children die, my will is, that the portion or portions of the child and children dying shall be divided between my wife and my surviving child or children." After the death of her father, the daughter M married, had issue, and died before her brother B arrived at the age of twenty-one, and in the lifetime of her mother.
3. *Held*, that as to the one-third of the plantation left to the widow of the testator, M never had any seisin, and therefore her husband has no right by curtesy; that, as to the other two-thirds, the widow had only a term for years, as her estate was determinable at all events upon her son's arrival at the age of twenty-one; that the seisin in the freehold was therefore in M, as one of the devisees, during her lifetime, and consequently her husband was entitled to his estate in curtesy therein; and that the survivorship, mentioned in the last clause of the will, must refer to the death of the testator.

CAUSE removed from the Court of Equity of ROCKINGHAM, at Fall Term, 1851.

Gilmer and *Miller* for the plaintiffs.
Kerr for the defendants.

RUFFIN, C. J. Robert Galloway was seized in fee of certain lands, and made his will, and therein devised as follows: "My will is that my plantation, called Eagle Falls, remain in possession of my wife, Susan, during her widowhood, or until my son Robert arrive at the age of 21. I direct all my negroes to be kept on the said plantation during the widowhood of my wife, or until one of my daughters, Mary or Cora, shall marry, or my son Robert arrive at the age of 21; upon the happening of either of which events the said negroes to be disposed of as hereinafter directed. I will that out of the proceeds of the said plantation the expenses of my wife and family be annually paid; and if there be

a surplus of proceeds, that it be equally divided between my wife and my three children. I give to my wife one-third of my negroes, the division to be made immediately upon her intermarriage, unless it shall have been made sooner, to carry into effect the devises hereinafter made to my children. I give to my three children, Mary, Robert, and Cora, all my negroes not given to my wife, the division to be made upon the death or marriage of my wife, the marriage of either of my daughters, or the arrival of my son Robert to the age of 21—whichever shall first happen. I also give my three children all my tract of land called Eagle Falls, one-third of which is hereafter devised to my wife during her life, to them and their heirs, to be equally divided, the two-thirds of which is to be taken possession of immediately upon the marriage of my wife, and the other third at her death. I give to my wife one-third part of my plantation called Eagle Falls during her natural life, it being in lieu of her dower. I give to my children all the residue of my estate. Should either of my children die, my will is that the portion or portions of the child or children dying shall be equally divided (179) between my wife and my surviving child or children."

The daughter Mary intermarried with Nathaniel W. Williams and had issue, a daughter, Susan Williams, and died before her brother Robert arrived to 21; and when he came to that age, he and the daughter Cora and her husband, William F. Carter, and the infant, Susan Williams, filed this bill against Mrs. Galloway and N. W. Williams, praying that one-third of the Eagle Falls plantation might be laid off to Mrs. Galloway for the term of her life, and that the residue of that tract, including the reversion in the part so allotted to Mrs. Galloway, might be sold for the purpose of partition between Robert Galloway, Carter and wife, and the infant Susan, to each one-third of the proceeds, subject to the right of her father, Nathaniel W. Williams, as tenant by the curtesy in the share falling to Susan Williams, entitled thereto. It was, by consent of all parties, decreed that Mrs. Galloway's third part of the plantation should be laid off to her; and, further, without prejudice to the rights of any of the parties in the proceeds, that all the land, except Mrs. Galloway's interest for life, should be sold. In obedience to the decree, 425 acres of the Eagle Falls—consisting in the whole of 1,255 acres—were laid off for Mrs. Galloway, including the mansion house and outhouses; and then the master sold the whole Eagle Falls tract for $10,000 and reported the sale, and it was confirmed. It was then referred to the master to set a value on the interest of Nathaniel Williams as tenant by the curtesy in the fund, and he reported the share of the infant, Susan, after deducting expenses of the proceeding, to be $3,280.36⅔, being one-third part of the whole proceeds of the sale, and that her father, Nathaniel Williams, was entitled to the profits of

the whole thereof during his life, as tenant by the curtesy, and
(180) he set thereon the sum of $1,372.68 as the present value thereof, taking into consideration his age and health. A doubt then arose whether he was entitled to any part of the fund as tenant by the curtesy, and if any, to what part; and on behalf of his daughter, an exception was taken to the report presenting that point, which was overruled; and then an appeal was allowed therefrom, in order to take the opinion of this Court on the single question of Mrs. Williams' interest.

The question depends on the estate given by the will to Mrs. Galloway. It is confined to the Eagle Falls plantation, and, so far as it was an estate of freehold up to the death of Mrs. Williams, the husband is not entitled; but as far as it is a term of years, he is entitled, for a term does not exclude the the actual seisin of the husband and wife, whether they receive rent or not, since the possession of the term is that of the reversioner. *DeGray v. Richardson,* 3 Atk., 469; Co. Lit., 29a, note 1. The dispositions in the will do not come in the regular order in which, from their nature, they would be expected. But that cannot affect the construction when the intention is clear, and it seems to be so here. In the first place, then, the clause in the latter part of the will expressly gives to Mrs. Galloway an estate for life in one-third part of Eagle Falls, immediately and absolutely. In that part of the land, therefore, the daughter Mary could have no seisin during her coverture, and her surviving husband is not entitled as tenant by the curtesy. The report was, therefore, erroneous in taking the value of the reversion in the 425 acres allotted to Mrs. Galloway in the estimate of the fund, in which he calculated the proportion thereof to which Mrs. Williams would be entitled as the present value of his life estate. But in all other respects, the Court considers the report to be founded on a correct basis, and hold

Mrs. Williams to be entitled to be tenant by the curtesy in all the
(181) real estate, except the 425 acres. As to all the land, except the Eagle Falls, there is no question made. Besides the one-third given absolutely to the wife for life, the testator begins his will by giving her the whole of Eagle Falls, for the maintenance of herself and the children during her widowhood or the minority of his only son; and the necessary construction of that is, that she is to have, until one of the events which shall soonest happen. The interest could not extend beyond her widowhood, though she might marry before her son arrived at 21. So it could not go beyond the son's full age, though she might be then unmarried. Therefore, at most, she had an estate which could only last during the term of the son's minority, that is, a term of years. It is like the common case of limiting a term to one for one hundred years, if he live so long, in which case, though he have the term for life, he is yet but a termor.

But it is argued that in the gift of Eagle Falls to the children themselves in the subsequent clause there is, by implication, an enlargement of the estate of the wife in the whole tract for her life. The words are: "I give to my three children all my tract of land called Eagle Falls, one-third part of which is hereafter devised to my wife during her life, to them and their heirs, to be equally divided; the two-thirds of which is to be taken possession of immediately upon the marriage of my wife, and the other third at her death." The argument is that the children are not to take, at all events, any part of Eagle Falls until the wife shall marry, and that, although by the express gift of the whole to her in the first clause of the will she did not get an estate *durante viduitate* absolutely, but only during the continuing of her widowhood and of her son's minority, yet in this latter clause the children are to take only on her marriage and not on the arrival at full age of the son, and, therefore, that the estate is not given to them for the period between (182) the full age of the son and the marriage of the mother—which has not happened—but, by implication, vested in her. But the Court cannot adopt that construction. It is true that a devise to the heir after the death or marriage of the widow by itself raises, by necessary implication, an estate in the widow during life or widowhood. The reason is that it is absurd, under such a disposition, that the heir should take while the widow lives or is single, as the heir must do unless the widow take. But that implication is open to being rebutted upon a plain intent, and here a similar absurdity would result from allowing such an implication in favor of the widow, for by one clause of the will he gives her the whole tract expressly during her widowhood or the nonage of his son, and by another clause upon the happening of either of those events he expressly gives her one-third of the tract absolutely for her life, which certainly excludes the least supposition that after the coming of age of the son she could still keep the whole during her widowhood. Although in the clause containing the particular gift of Eagle Falls to his children, the testator does not say they shall have the two-thirds in possession upon the full age of the son, as well as upon the sooner marriage of his wife, yet this was unquestionably the intention as gathered from the other dispositions in favor of the wife. The construction is fortified by the scope of the will in other respects, seeing that, upon the coming of age of the son at furthest, the negroes were to be taken from the plantation and divided, thus leaving a very inadequate force for its cultivation. Upon the whole, therefore, the Court is of opinion that there was a seisin of Mrs. Williams in her share of all the lands except the third given to her mother for life, and that her husband is tenant by the curtesy thereof. As the reversion is that one-third, however, was sold with the other lands for the (183)

whole sum of $10,001, a value must be set on it and deducted from the whole price, and Mrs. Williams must be declared to be entitled to be tenant by the curtesy in the remaining fund. To that extent the decree must be reversed with costs, and certified to the court of equity.

As there is no other period designated in the last clause of the will, either expressly or by implication, for the death of a child or children upon which the survivors are to take the share of one dying, it is, of course, that the death of the testator is the era, as the only alternative to an indefinite period, which is always to be avoided, if possible, especially as it would leave the issue of a dying child without any provision. *Cox v. Hogg,* 17 N. C., 121. Of course, then, that limitation over never took effect.

PER CURIAM. Declared accordingly.

MICHAEL TILGHMAN, ADM'R, ETC., v. KINION T. WEST ET AL.

1. Where the real owners were present at a sale of slaves, sold as the property of another, but were ignorant of their title, they are not chargeable with fraud in not forbidding the sale, and will not be enjoined from asserting at law their title of which they were subsequently informed.
2. Fraud cannot exist, as a matter of fact, where the intent to deceive does not exist, for it is emphatically the action of the mind, which gives it existence.

(184) APPEAL from an interlocutory decree dissolving an injunction made at the Fall Term, 1851, of LENOIR Court of Equity, *Dick, J.*

The facts relied upon in this case are the same as those in the case at law between the same parties reported 31 N. C., 163.

J. W. Bryan for the plaintiff.
J. H. Bryan for the defendant.

NASH, J. At the December Term, 1848, the case of *West v. Tilghman,* 31 N. C., 163, was decided. That was an action at law brought to recover the boy Reuben, and under the same state of facts as exist here. The Court then decided that the legal title to the negro was not lost by the plaintiff's being present at the sale and not forbidding it. Upon the granting of the *venire de novo* in that case the then defendant Tilghman filed this bill for an injunction to restrain the plaintiffs at law from proceeding in their action. The injunction was granted; and upon the coming in of the answers on argument it was dissolved and an appeal taken to this Court. The facts upon which the plaintiff rests his claim to the relief he asks are that the defendants were present both at the hiring of the slaves Reuben and Sylva and also at the sale of

them, and they fraudulently concealed their title. This fraudulent concealment is the *gravamen* of the plaintiff's complaint. The title to the slaves was in the present defendants at the time of the sale by virtue of the right of their wives, but they both positively denied that they had any knowledge of the fact at the time, and the plaintiff has entirely failed to sustain the allegation of fraud. The silence of the defendants at the time of the sale is fully explained by their ignorance of the fact of title. Fraud cannot exist as a matter of fact where the intent to deceive does not exist, for it is emphatically the action of the mind which gives it existence. But the absence of all fraudulent intention is incontrovertibly shown by the fact that Kilpatrick, one of the (185) defendants, purchased Sylva, one of the slaves.

The case is not before us on the hearing, but on the interlocutory order dissolving the injunction. We see no error in the decision of his Honor below.

PER CURIAM. Affirmed.

Cited: Saunderson v. Ballance, 55 N. C., 327; *Foy v. Haughton,* 85 N. C., 172; *Hull v. Carter,* 86 N. C., 526; *Ramsey v. Wallace,* 100 N. C., 82; *Tarault v. Seip,* 158 N. C., 370.

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(186)

JAMES SMITH, ET AL., v. JAMES C. TURRENTINE, ET AL.

1. If a deed of trust provides for the payment of one creditor, in the first place, and then provides for the payment of other creditors as a *second class*, the first creditor may call on the trustee for an account and for payment, to the extent of the trust fund, without making the creditors of the *second class* parties.
2. But when the deed provides that any payment made by the bargainor is to be credited in extinguishment of the debt on which it is paid, the creditors of the second class are interested in the amount of such payment, and are, therefore, necessary parties, in order that they may be bound, and the trustees protected.
3. Where an objection, for want of parties, is taken in the Supreme Court for the first time, it is almost a "matter of course" to remand the case at the costs of the plaintiff. But where the defendant is a trustee, answers fully, states the conflicting claims of the plaintiffs and others to the trust fund, and asks that, for his protection, these others may be made parties, but the plaintiffs urge the case to a hearing, without making such parties, this Court will not remand for that purpose.
4. Creditors, secured by a deed of trust, accepted by the trustee, may require the execution of the trusts, though not privy to the execution of the deed.

CAUSE removed from the Court of Equity of ORANGE, at Fall Term, 1851.

Haughton for the plaintiff.
W. H. Haywood for the defendant.

PEARSON, J. James Smith, one of the plaintiffs, being indebted to Turner, one of the defendants, and being under obligation to save him harmless as his surety to sundry persons for a large amount, and being also indebted to divers other persons, in January, 1846, executed to Turrentine, the other defendant, a deed in trust, conveying and assigning to him eighteen quarter sections of land in the State of Illinois, and sundry evidences of debts in trust, first to pay to said Turner out of the proceeds of the sale of the land and out of the money to be collected upon the evidences of debt all of his debt against the said James Smith, and to indemnify him against all of his liabilities as the surety of said James Smith, and in the second place to apply the surplus, if any, to the payment of the debts due to the other persons named in the deed. The deed further provided, and contains this clause: "Any and all sums of money that the said James Smith shall pay to any one of the persons herein secured shall be duly credited on the respective claims of the parties herein secured, and shall be credited on first sums secured to each one and not to the last and general class." This deed was signed and sealed by the plaintiff James Smith and the defendant Turrentine.

(187) Afterwards, the defendant Turner brought suit for the debt due him, recovered judgment, and caused execution to be issued and levied upon several tracts of land and other property as the property of James Smith, and, at the sale by the sheriff, became the purchaser for very low prices, the sale being forbidden by the plaintiffs.

The defendant Turner then instituted suits to recover several portions of the property thus purchased by him, which was in possession of and claimed by the other plaintiffs. Whereupon, in March, 1847, the defendant Turner and all of the plaintiffs made a compromise and executed a covenant, by which Turner agreed to convey, without warranty of title, the land on Price's Creek, which he had bought as the property of James Smith, to the plaintiff Mary Smith in fee, and to convey in fee to the plaintiffs Francis and Sidney Smith, or to either with the consent of the other, all of the other property which he had purchased as belonging to the plaintiff James Smith, and further, to assign and release to them, or to either with the consent of the other, all of his claim and interest under the deed in trust executed by James Smith to the defendant Turrentine. In consideration whereof the plaintiffs James Smith, Sidney Francis, and Mary Smith agreed to pay to Turner the amount then due to him by James Smith, and to indemnify him against all such amounts as he was bound for as the surety of James Smith; and in order to secure the due performance of this covenant, it

was agreed that one or the other of the said James, Sidney, Francis, or Mary Smith should execute to Turner a note with approved security within three months after the execution of said covenant. The note with approved security was not executed by the plaintiffs, or any one of them, in pursuance of the covenant, and thereupon Turner recovered, in an action on the covenant, a large sum to the amount of the debt due him by, and his liabilities for, the plaintiff James Smith, which sum was paid to him by the plaintiffs, or some of them.

In April, 1849, the defendant Turrentine, at the instance of (188) the plaintiffs, sold the eighteen quarter sections of land, and the plaintiffs Francis and Sidney became the purchasers at the aggregate sum of $1,000, for which they executed their note with surety, payable to said Turrentine. The amount due upon the debts set out in the deed in trust has also been collected, with the exception of a note on Francis Smith, which the plaintiffs aver was inserted in the deed by inadvertence. The proceeds of the trust fund are less than the amount paid to Turner upon his judgment.

The plaintiffs allege that the defendant Turner has not performed the stipulations on his part contained in the covenant of compromise, and in the words of the bill, "Indeed, the only portion of performance on his part consists in dismissing the suits pending at the time of the adjustment and in executing an informal assignment to one Dr. Francis Smith of his claim against James Smith, by reason of money paid as his surety, etc., and a judgment in his favor against the administrator of Thomas Faddis." The plaintiffs insist that they are entitled to a specific performance of the covenant on the part of Turner, and pray that he may be decreed to execute deeds according to his covenant to the plaintiffs Mary, Francis, and Sidney. The plaintiffs Mary, Francis, and Sidney further allege that they have satisfied the judgment recovered by Turner upon the covenant of compromise, and they insist that they have an equity to be substituted to the rights of Turner under the deed of trust, and pray that Turrentine be decreed to account for the trust fund and to pay the whole of it, including the note of $1,000, over to them, inasmuch as the amount paid to Turner exceeds the said fund. The plaintiff James Smith does not pray for any relief.

The defendant Turner alleges that he has performed the cove- (189) nant of compromise by dismissing the suits which were pending in his name for the property purchased by him and by executing deeds for the property and for his interest under the deed of trust; and if the deeds already executed are not sufficient, he submits now to execute such as may be approved of by the Court, and avers that he has at all times been ready and willing to do so. Copies of these deeds are filed as exhibits. They refer to the covenant of compromise, and acknowledge as a consideration the due performance of said covenant on the part of the plaintiffs.

The defendant Turrentine alleges that he has at all times been ready to account and to pay over the trust fund to the parties entitled to it; but he avers that he has been notified by the defendant Turner, as the agent of one Wood, who is a creditor secured in the second class, that Wood and, as he is informed by Turner, the other creditors in that class insist that the debt of Turner was paid by the plaintiff James Smith and not by the other plaintiffs, Mary, Francis and Sidney Smith; and that by the terms of the deed in trust this payment by the plaintiff James Smith of the debt due to Turner has the effect of extinguishing that debt, so as to inure to their benefit and entitle them to the whole of the trust fund. He further avers that in support of the allegation that the debt of Turner was in fact paid by James Smith, the said Turner exhibited to him copies of the judgments taken by the plaintiffs Mary, Francis, and Sidney, respectively, against James Smith for the sum of $2,500 each upon notes executed to them by James Smith, which notes express upon their face the fact that the said Mary, Francis, and Sidney, respectively, had advanced in cash *for James Smith* the sum of $2,500 *to Josiah Turner.* Copies of these judgments and notes are annexed as part of the answer. The defendant insists that he ought not to
(190) be required to take upon himself the responsibility of deciding whether the payment to Turner was made by the plaintiff James Smith or by the other plaintiffs, and he insists that to relieve him from this responsibility, the creditors of the second class ought to be made parties so as to be bound by the decree.

As to the defendant Turner, the bill must be dismissed with costs. He avers that he has performed his part of the covenant, and exhibits copies of the deeds executed by him. The plaintiffs have taken no exception to them, and they are in conformity with the stipulations of his covenant.

The objection, for the want of parties, taken by the defendant Turrentine is well founded. If a deed of trust provides for the payment of one creditor in the first place, and then provides for the payment of other creditors as a *second class,* there can be no doubt that the first creditor may call on the trustee for an account and for payment to the extent of the trust fund, without making the creditors of the second class parties, for there is no question, in respect to which they are directly concerned, except the amount of the debt of the first creditor, and as to that the trustee can protect their rights. But the clause in the deed of trust above recited, by which any payment made by James Smith is to be credited in extinguishment of the debt upon which it is paid, presents a question entirely different. The mere suggestion of the fact that the creditors in the second class insist that the debt of Turner was paid by James Smith and not by the other plaintiffs shows at once that the question, By whom was Turner paid? is one in which they are

directly concerned, and as to which this Court should make no declaration without giving them an opportunity of being heard, so as to bind them and protect the trustee. But when this suggestion is supported by the exhibit of the judgments rendered upon the notes for $2,500 each, executed by James Smith to the other plaintiffs, respect- (191) ively, the consideration of which is *for cash advanced by them to enable him to pay the debt of Turner;* the bare statement, without argument or authority, proves that the creditors of the second class are necessary parties, and ought to be heard. It was contended by Mr. Haughton that as the creditors of the second class were not parties to the deed of trust and had no privity or connection with its execution, they acquired no right under it, and for that reason were not necessary parties. This question is fully discussed and settled in *Ingram v. Kirkpatrick,* 41 N. C., 463.

The day after the case was argued and left with the Court, Mr. Haughton moved, that if the Court should decide that the creditors of the second class were necessary parties, the plaintiffs should have permission to remand the case for the purpose of obtaining leave to amend in the court below, by making parties. When the objection for the want of parties is taken in this Court for the first time it is almost "a matter of course" to remand the case at the costs of the plaintiffs. But in the present case, the defendant, without attempting to evade an answer by a plea for the want of parties, has answered fully, submitting to account with the party entitled to the trust fund. In his answer he sets out clearly the difficulty in which he is likely to be involved by the conflicting pretensions of the plaintiffs, who claim to be substituted to the rights of Turner and the pretensions of the creditors of the second class, and he asks, most reasonably as we think, not to be required to take the side of either, but to be protected by having the creditors of the second class made parties, so as to bind them by the decree. The plaintiffs reject this reasonable request, and urge the case to a hearing, thus showing, either that they care not for the protection of the defendant, who is a mere stakeholder, or are unwilling to meet the creditor of (192) second class upon the issue, Who paid the debt of Turner?

Under these circumstances, we are forced, according to the course of this Court, to refuse the motion to remand. The bill must be dismissed as to the defendant Turrentine, for want of parties, with costs.

PER CURIAM. Decree accordingly.

RICHARD MOORE v. HENRY W. IVEY, ET AL.

1. What facts are sufficient to show that a deed, absolute on its face, was intended as a mere security for money.
2. Where a bill is filed for the purpose of having a deed, absolute on its face, declared merely a security, and the answer denies directly an agreement for redemption, and avers positively a purchase, such a deed and answer constitute a defence, not, indeed, conclusive under all circumstances, but, at the least, not to be repelled but by the clearest and most cogent proofs from facts and circumstances.

CAUSE removed from the Court of Equity of NORTHAMPTON, at Fall Term, 1851.

(193) *Smith* for the plaintiff.
Bragg and *Barnes* for the defendants.

RUFFIN, C. J. The bill states that the plaintiff was indebted to one Stancell in the sum of $50.69 on a justice's judgment rendered 1 April, 1843, and that execution immediately issued, and the constable seized a negro girl, Irena. That the plaintiff was also indebted to Henry Deberry in a further sum, which made, with the former debt, interest, and costs, the sum of $80.21 on 10 April, 1843. That the plaintiff was unable to pay the judgment without having his slave sacrificed at execution sale, and to avoid that he applied to Deberry to lend him money to pay the constable, and Deberry agreed to take up the execution if the plaintiff would convey the slave to him to secure that sum and also the debt he then owed Deberry; and that it was finally agreed between them that in order to secure those sums to Deberry, and also to raise them in convenient time and without a sacrifice, the plaintiff should place the slave in possession of Deberry, with authority to sell her as soon as he could do so advantageously. That Deberry was a competent man of business, in good circumstances, and that the plaintiff had great confidence in his integrity and disposition to deal fairly with him. That Deberry advanced the money and prepared a bill of sale for the girl, which was absolute on its face, and was recommended by him because it would enable him the more easily to make a private sale of the girl and convey her, and that the plaintiff, from confidence in Deberry and ignorant of the effect of such instruments, executed the bill of sale on 10 April, 1843, and Deberry promised that he would sell the girl as soon as he could for a fair price and, after satisfying his debt, pay the surplus to the plaintiff, or would allow him to redeem, if he could, before such sale. The bill avers that the deed was intended by both par-
(194) ties as security merely for the debt of $80.21 and interest thereon, and that it was made in that form, and the girl taken into De-

berry's possession, for the reason that Deberry would thereby be better able to make sale of her. It states further that the girl was 8 or 10 years old, and that the plaintiff was offered for her considerably more than $80.21, and refused it, and that she was worth $200 or upwards. That the plaintiff subsequently gave an order on Deberry for money on account of the girl, which he declined advancing because he had not made sale of her; and that about a year afterwards, Deberry wishing to keep the girl as his own absolute property, instead of selling her, called on two persons to set a value on her as a price to be allowed by him to the plaintiff for her; and they fixed the value then at $250, which he said he was willing to give, but that he died soon afterwards without anything further having been done. He left a will, and his executor divided his slaves among his children, and this girl was included in the division. The bill was filed in May, 1847, against the executor and legatees, and prays for an account and redemption.

The executor answers that he has no knowledge on the subject, except that he found the bill of sale among the testator's papers and the slave among his negroes at his death in October, 1844. He admits that the plaintiff claimed from him an allowance of the excess in value above the consideration of $80.21 mentioned in the bill of sale, and stated the ground of the demand as set forth in the bill, and that he declined making any because the deed was absolute and he had no personal knowledge of the matter. He states that two years having elapsed from his administration he distributed the property among the testator's nine legatees in December, 1846, and that this slave fell into the lot of six infant children, valued at $1,400, and was delivered to their (195) mother and guardian, who duly gave a refunding bond.

The answer of the children states that they have no knowledge of their own of the terms on which their father got the slave from the plaintiff, and therefore they can neither admit nor deny the allegations in the bill. It further states that in their father's last illness he sent for the plaintiff, and he came and stayed all night, and that they believe the plaintiff then received full compensation for the slave, for, although they had been unable to find among their father's papers any memorandum of a settlement, as they had hoped to do, yet they say that when the plaintiff went away their father said, "Thank God, I am clear of Richard Moore," the plaintiff.

The evidence is that Deberry was in easy circumstances, and that Moore owned a negro woman and her children, who were the girl Irene and two or three other small ones. That he was indebted to Deberry in a bond for $200, given in March, 1839, and payable one day after date. That on 1 April, 1843, Deberry, who was a magistrate, gave the judgment for Stancell and issued the execution, and the constable, one Long,

seized the girl and carried her to his house. That a credit for $224.65 is entered in the handwriting of Deberry, as of 5 April, 1843, on Moore's bond to Deberry, but how the payment was made does not appear, and that the bond has the word "Paid" written across the face, but without any explanation as to the time it was written, or by whom, or how the payment was made. The bill of sale is dated 10 April, 1843, and purports to have been attested by one Lemuel Deberry, but has never been proved nor registered. That person is examined as a witness for the defendants, and he states that Moore came to Deberry's and offered to sell the

(196) girl to Deberry, and the latter refused to buy, but proposed to lend Moore the money to pay the execution Long had and release the negro if Moore would give a deed of trust for her to secure the same, and also what was then due to Deberry, and that Moore refused to give a deed of trust, and that the next day the witness Moore and Deberry went to Long's, and Moore got the girl and delivered her to Deberry; and that Deberry told the witness he had purchased the girl and paid $180 for her. Long deposes that while he had the said girl he offered the plaintiff $100 for her, and that another man offered him $150 for her, which he refused, and that Deberry paid him for Moore about $54 in discharge of the execution. Another witness deposes that Moore, being unwell and not able to go to June Court, 1843, gave an order on Deberry to pay a sum of money to a man at court, and that, upon its being made known to Deberry, he asked why Moore did not come himself, and when informed of the cause he said he could not pay any money then, as he had not sold the little negro yet, but was waiting to get a higher price, as he thought she was worth considerably more than Moore had authorized him to take for her. And another witness states that in the last of 1843, as he thinks, Deberry called on him and another neighbor as judges of the value of negroes to set a value on the girl Irena, stating to them as the reason that he had advanced about $80 for Moore and taken a firm bill of sale to secure the money, with the understanding between them that he should sell the girl and pay himself the debt of $80 and pay the residue of the price to Moore, but that his wife was so well pleased with the girl that he had concluded to have her valued and offer Moore the excess of the value and keep the girl for himself, and that those two persons examined the girl and valued her at $250, and Deberry seemed to be satisfied therewith.

(197) The principle on which deeds absolute on their face are sometimes held to be but securities has so often been the subject of discussion in the Court, that it is unnecessary to go over the reasoning again. The grounds on which it rests are summed up in the late case of *Blackwell v. Overby,* 41 N. C., 38, as accurately, perhaps, as it is in the power of the Court to do it. And in that case and the still more

recent one of *Kemp v. Earp,* 42 N. C., 167, it was acted on by relieving against such deeds. The case under consideration presents, as it seems to the Court, facts and circumstances *dehors,* which leave no doubt that this instrument, as far as the interest of the apparent vendee was involved, was originally intended as a security merely for the sum mentioned in it as the consideration; and that the possession of the slave was delivered to Mr. Deberry, and the deed put into the form of an absolute conveyance for the purpose simply of vesting in him such a formal title as would enable him the more conveniently to make an advantageous private sale and conveyance of the slave without calling on Moore to join in it. There is the fact—generally considered the most material—of great disparity between the real value and the alleged price. That has great additional weight imparted to it by the further fact that the plaintiff had actually refused nearly double the sum as the price of the girl, for which, it is supposed, he sold her absolutely to Deberry within a week afterwards. Then comes the additional circumstance that within three months after the supposed sale the plaintiff asserted an interest in the negro, and Deberry distinctly recognized it. And this is of the more consequence, since it shows how far, in Mr. Deberry's opinion, the sum of $80.21 was below the value of the slave, for there can be little question that if Moore had any interest and fixed on any price at all to be asked for the negro, it must have exceeded the sum of (198) $150, which he had just refused, and yet Deberry thought she was worth considerably more than the plaintiff said he was willing to take. That circumstance is rendered more impressive by the fact of the subsequent appraisement by two judges of the value of the slave which Deberry procured to be made, and the reasons assigned for it, which go far to corroborate the force of the other facts in their tendency to establish the real purpose of the bill of sale. Against all these facts the only thing offered is the testimony of the subscribing witness, that Deberry told him that he purchased the negro at the price of $180. He does not state the period of this declaration, but it must have been after the giving of the bill of sale, as it is hardly possible that he should have inserted in it, as the consideration, a sum less by $100 than the true one. If that be so, it confirms instead of weakening the conviction that the transaction was not a purchase—at all events, not at the beginning. If it was then a security merely, it is incumbent on the defendant to show when and how it changed its character and became a purchase. That consideration brings the answer next under notice. It is always a very material thing in such cases, when an absolute deed is sustained by an answer of the person who took it which denies directly an agreement for redemption and avers positively a purchase. Such a deed and answer constitute a defense not, indeed, conclusive under all circumstances, but, at the least, not to be repelled but by the clearest and most cogent proofs

from facts and circumstances. But there is not such an answer here, but one rather admitting the plaintiff's interest. The party himself being dead, an answer precisely denying the fact was not to be expected from his executor and legatees. Being without personal knowl-
(199) edge of the transaction, they cannot undertake to deny the allegations of the bill, even though they be false.

If, therefore, the answer here had said simply that the defendants had no knowledge on the subject, perhaps no animadversion could have been made on it, though, certainly, an answer denying "knowledge" is less satisfactory in such cases than the fairer statement that the defendants had neither knowledge of their own, nor any information from the testator, nor belief that the deed was not intended as a security, but as an absolute conveyance.

But while the answer denies any personal knowledge of the terms on which the testator got the slave, it proceeds to state another transaction between the same parties, as understood by them, and relies on it as a bar to the bill, which in reality implies that the plaintiff's claim was once at least well founded, for it states that shortly before the testator's death he and the plaintiff had a settlement, as the family understood, and that the defendants believe the plaintiff *then* received full compensation for the slave, although the testator did not say so directly, and although they are unable to produce any writing to that effect or otherwise establish it. The fair inference from that statement is that the testator's family had at some time understood from him that the slave was not absolutely his, but that she was to be sold for the benefit of the plaintiff after paying his debt. This inference is the stronger, as the bill charges in detail the great inadequacy of $80.21 as a price, the agreement that the girl should be sold, the wish of the testator to keep her to gratify his wife, and the valuation made at the house of the testator, and the answer takes no notice of any of these allegations, though some of the facts must have been in the personal knowledge of the defendants and almost certainly the subjects of conversation in the family. The answer, therefore, is not such an one as aids the argument derived
(200) from the form of the bill of sale, but, on the contrary, it decidedly sustains the statements and proofs made by the plaintiff. No stress is laid on the circumstance that the word "Paid" is written through the plaintiff's bond to Deberry, on which, after deducting the payment of $224.65, there was due a sum which, with the money paid to Long, made about $80. No stress is laid on it because it does not appear which party put it in as proof. If the plaintiff did so it would not be material, as it would stand like the money paid to the constable, secured merely by the bill of sale. But if it came from the other side it would strongly sustain the plaintiff as tending to show it was not paid by the

sale of the negro, but only secured. The plaintiff's case is, however, sufficiently sustained by the other facts, which seem to the Court to be absolutely incompatible with the notion of an absolute sale. It must be declared, therefore, that the deed was intended but as security, and that the plaintiff is entitled to redeem and the usual inquiries ordered.

PER CURIAM. Decree accordingly.

Cited: Harding v. Long, 103 N. C., 7.

(201)

ELANOR LYON v. JOSEPH LYON.

1. The general rule is that an administrator cannot purchase at his own sale, but this rule does not apply when he fairly bids, with the privity and consent of the next of kin, having a full knowledge of the condition of the estate and the value of the property.
2. A widow cannot claim her year's allowance in a Court of Equity. It is a legal right and must be prosecuted in a legal Court, as prescribed by the Statute.
3. The neglect to prosecute a legal claim within the proper time, though arising from mistake, amounts to *laches*, and the party must abide the consequences, unless the other party either agreed not to take advantage of the delay, or contributed to bring about the delay.
4. Where an administrator has advanced to the widow a sum in part of her year's allowance, and, in consequence of a mutual mistake as to the law, the allowance is not afterwards directed by the Court, he cannot charge her with the sum so paid, in accounting with her for her distributive share.

CAUSE removed from the Court of Equity of BLADEN, at Fall Term, 1851.

Strange for the plaintiff.
W. Winslow for the defendant.

RUFFIN, C. J. Robert Lyon, of Bladen, died intestate in October, 1841, leaving the plaintiff, his widow, and the defendant, his only child, the issue of a former marriage. With the consent of the widow, the defendant took administration of the estate at the next term of the county court, which was held in November, 1841. The intestate left some slaves, and also other personal effects and debts, to the value, probably, of about $500 or $600. In December, 1841, the perishable articles were offered for sale by the defendant at about half the value or less, the sales amounting to $258.15, and the purchases for the defendant being more than twice as much as those for the plaintiff. At (202) February Term, 1822, the widow filed her petitions for a year's allowance and for her dower, and in each an order was made according

to the prayer, with the privity of the defendant; and between that and the next term the dower was laid off and the parties divided the slaves between them, and also the sum of $225.08 was assessed for the year's allowance, and the report returned to May Term, 1842. At November term following, the defendant moved the court to set aside the report and also discharge the order appointing commissioners to lay it off, upon the ground that the application should have been made at November Term, 1841, when administration was granted, and the court had no power to order an allowance afterwards, and the court accordingly allowed the defendant's motion.

The bill was filed in April, 1843, by the widow to have the benefit of the year's provision assessed for her, and also for an account of the personal estate and payment of her share. It states that upon the death of the intestate the plaintiff and defendant came to an agreement that she should relinquish her right of administration in favor of the defendant, and that in consideration thereof she need not apply at the first term for her year's provision, but might do so at the succeeding February Term, 1842, as she afterwards did. It further states that the allotment of dower and division of the slaves were not satisfactory to her, and that she so informed the defendant at the May Term, 1842, and that the defendant then agreed with her that if she would abide by the same he would, on his part, acquiesce in the year's provision assessed for her, and that accordingly the plaintiff then accepted her dower and share of the slaves, and the defendant allowed the report for the year's allowance to be confirmed, and subsequently paid to the plaintiff a portion thereof.

(203) The bill further states that the intestate owed no debts, and that when the sale of the perishable property was about coming on the defendant proposed to the plaintiff to let it proceed for form's sake, and that as one or the other would need nearly all the articles, the things should be all bid in on their joint account and afterwards divided between them according to their relative shares of the estate, and that the plaintiff, then having full confidence in the defendant, accepted the proposal, and accordingly the property was sold, and the plaintiff purchased to the amount of about $30 and the defendant, through one Barksdale, purchased the residue for much less than the value and much less than would have been bid by the persons present if the defendant had not informed the company of the understanding between him and the plaintiff and thereby prevented competition.

The bill states that the defendant afterwards refused to make any division of the perishable property, but has taken all the purchases made for him and claims to retain them to his own use at the prices bid by his agent. And the prayer is that the defendant may be compelled to perform specifically his several agreements by paying to the plaintiff

the sum assessed for her year's allowance, and also by dividing all the perishable property between them or by accounting for the same in the settlement of the estate at its true value.

The answer denies any agreement whatever in respect of the time of applying for the year's allowance. It states that the defendant knew the plaintiff was entitled to such an allowance and did not know that her application ought to be made at the term of granting administration, and that, under those impressions, after he administered, he made advances of provisions and other necessaries, to the value (204) of $111.42, which the plaintiff promised to allow as a credit in part of the sum of $225.08 assessed as the allowance, and that on that understanding he did not object to the amount of the allowance, but afterwards made a further payment thereon of $89 in cash. The answer further states that the defendant subsequently proposed to the plaintiff to come to a settlement for the allowance and to pay her the balance, and that then the plaintiff refused to allow a credit for any part of the sum of $111.42 for advances prior to the allowance, but demands the whole assessment, deducting only the $80 paid after the judgment, and thereupon he applied to counsel for advice how he might have the benefit of the advances made by him in anticipation of the allotment of the year's provision, and was informed that the order for it was illegal and void because the application of the plaintiff was not made in due time, and on that ground the allowance was, at his instance, set aside. The answer denies that the defendant ever consented to waive any legal right in respect to the year's allowance or had any understanding with the plaintiff that he would acquiesce in any irregular proceeding or in any wise induced the plaintiff to delay her application to the county court therefor.

The answer further denies that there was any agreement between the parties that all or any of the articles should be bid in on the joint account of the plaintiff and defendant or that the same should be divided between them in any proportions whatever. On the contrary, it states that the estate was but little indebted, and as the parties were the only persons interested, and considered that all the articles would be useful to the one or the other, they came to an agreement that each of them should select such articles as he or she desired to have and appoint an agent to purchase what they respectively wanted, and that accordingly the plaintiff employed James Bryan to bid for her and (205) the defendant, with her knowledge, employed George F. Barksdale to bid for him, and that Mr. Bryan bought for the plaintiff such things as she directed, at very low prices, without any interference on the part of the defendant, and Mr. Barksdale in like manner purchased for the defendant at higher prices than those given by the plaintiff.

The answer denies that the defendant did anything to prevent others from bidding or that there was any understanding that he would account with the plaintiff for his purchases at any other prices than those bid, or that there was any dissatisfaction with the sale on the part of the plaintiff.

The answer then states several demands of the defendant against the intestate for which he claims to retain out of the assets, upon the taking of the accounts, which need not be stated in this stage of the proceeding. On the hearing, the parties prayed a declaration of their rights upon several points—the plaintiff that she was in this Court entitled to the sum which was assessed for her year's allowance, and also that the defendant was chargeable in his account with the estate with the fair value of his purchases at the sale, while the defendant insisted that he was only chargeable for the prices bid at the sale, and also that in taking the account between the plaintiff and himself in respect of her distributive share he should have credit for the sums advanced or paid to the plaintiff on account of her right to a year's allowance.

The evidence relates only to the value and sales of the perishable property, and sustains the answer as to that part of the case. The prices were about half the value, and each party, with the knowledge of the other, had an agent who purchased for them, respectively, and the plaintiff was entirely willing the defendant should purchase in that
(206) way and for those prices such things as she did not want for herself, and in one instance complained of a bidder's running up some articles for which the defendant's agent was bidding.

The plaintiff has failed to establish an agreement that the defendant's purchases and hers were on joint account, and therefore the usual account of the defendant's administration is to be ordered as of course and the plaintiff's share of the surplus ascertained. In the account the Court cannot direct the defendant to be charged for his purchases more than the prices bid at the sale. It is generally true that an administrator cannot buy at his own sale, and property bid off by him remains unchanged, yet that does not apply when he fairly bids with the privity and consent of the next of kin, having a full knowledge of the condition of the estate and the value of the property. In this particular case the transaction was substantially a mode of dividing between the next of kin a small part of the property, consisting of household stuff, plantation tools, and an indifferent stock, without any unfairness or inequality not known and intended. There is no reason for disturbing such an arrangement which would not likewise invalidate every voluntary partition of specific property between next of kin if one of them happen to be administrator.

With respect to the year's allowance, the Court holds also that the

plaintiff has not entitled herself to any relief. It is to be taken here that the report of the freeholders and the order for the allowance were, in point of law, properly set aside in the court of law. Then, there can be no relief upon the basis of the original right to an allowance, for that was a legal right on which the legal remedy ought to have been prosecuted; and, moreover, we know that it is gone at law, because the statute requires the widow to petition at the term in which the administration is granted, and she cannot do so afterwards. *Gillespie v.* (207) *Hyman,* 15 N. C., 119. The bill, therefore, places the equity on an agreement of the defendant that the plaintiff need not petition at the first term, but might do so at the succeeding term. But there is no proof of such an agreement or even of a treaty on the subject, consequently that ground fails. But enough appears in the answer to establish the mistake of both the parties as to the plaintiff's remedy for her year's allowance and to show that they thought she might get it by petitioning at the first term, but a mistake of that kind will not authorize this Court to set up again a legal right which is gone at law by not being prosecuted in due time. The neglect to prosecute, though arising from mistake, amounts to laches, and the party must abide the consequences unless the other party either agreed not to take advantage of the delay or contributed to bring about the mistake, and here the defendant denies that he did either.

But while there can be no decree as for an allowance to the plaintiff, it seems to follow that the defendant cannot in this Court charge the application to the payments made by him on account of the year's allowance. If he can get them back at law, equity must say nothing against it, but it would be a clear answer to a bill by him, founded on his mistake in making the advances and payments, that the widow's legal remedy was also lost merely by a mistake of law, and, therefore, conscience no more forbids her to keep what the defendant voluntarily, though under a mistake, paid her than it would compel the defendant to reject the money if the plaintiff were voluntarily to offer it back upon the ground that he paid it to her under a mistake. There is no equity between them, for if he insists that she waived her right by not acting on it in proper time she may in like manner urge that, to the extent of advances and payments, he waived the objections (208) given him by the law, and the more especially when he deferred his objections until she could in no manner proceed anew at law. The defendant, therefore, is not entitled to apply any of those sums in diminution of the plaintiff's distributive share.

PER CURIAM. Decree accordingly.

Cited: Haymore v. Comrs., 85 N. C., 271; *Barcroft v. Roberts,* 91 N. C., 369; *Joyner v. Massey,* 97 N. C., 150, 155.

JONATHAN LOWDER v. JOHN NODING, ET AL.

1. When a contract for the sale of land is rescinded, the vendee is entitled to be discharged from the payment of the purchase money he had promised, and consequently, to have his bond he had given to secure it surrendered; as the consideration for it had thus failed. For, although the failure of the consideration of a bond is not a discharge of it in law, and cannot be inquired into there; yet it is otherwise in equity because, here, the debt is considered to arise out of the original contract of purchase, and the bond to be only a security for it.
2. Where a suit is brought at law against two persons, a finding of the jury, that one of the defendants is principal, and the other surety, if binding at all between the parties, does not in equity establish the relation of suretyship.

CAUSE removed from the Court of Equity of FORSYTH, at Spring Term, 1850.

(209) No counsel for the plaintiff.
Morehead, J. H. Bryan, and *Miller* for the defendants.

RUFFIN, C. J. The case as found from the pleadings and proofs is this: "The *Unitas Fratrum* of Salem owned extensive tracts of land around that place, of which the title was in the defendant Shultz as a trustee for the sale thereof, and it was a rule in the land office, as it was called, that when the purchase money was not paid the title was retained as a security for it, and also a bond taken from the purchaser and a surety; and a further rule, when there were no written articles between the vendor and purchaser, if the surety became unwilling to stand longer and the principal failed to discharge him by payment or giving a new bond, that the surety should have the right to be substituted as purchaser and take the land himself. In August, 1822, the plaintiff made a verbal contract with Shultz for a tract of land containing 50 acres, at the price of $287.50, and to secure it he executed his obligation to Shultz in the sum of $565, with the defendant Noding as his surety, conditioned for the payment of $287.50, with interest thereon from the date. The plaintiff immediately took possession and occupied until 1827, having made several small payments, but not sufficient to extinguish the interest; and he then became embarrassed and unable to pay for the land, and Noding represented to Shultz the plaintiff's inability to make payment and claimed his own right to take it, saying he would sell it and raise the money to pay the bond, and, without consulting the plaintiff, it was agreed between Noding and Shultz that the former should take the land as purchaser instead of Lowder, and either sell it and raise the purchase money or give his bond with a surety therefor.

This arrangement was soon after communicated to the plaintiff by Noding, who requested him to surrender possession to a tenant, to whom Noding let the place for the year 1828, but Lowder (210) refused at first unless some allowance were made him for improvements. Thereupon Noding applied to Shultz for a written order to Lowder, and on 3 November, 1827, Shultz wrote to the plaintiff that as he could not pay for the land it had been concluded between Shultz and Noding that the latter should take the land at the same price, and, therefore, that the plaintiff must deliver the possession to Noding, and stating that Noding was to give a new bond, and that he (Shultz) would give up the plaintiff his bond. The latter was delivered to Noding, who sent it to Lowder by the man to whom he made the lease for 1828, and upon receipt of it the plaintiff, in compliance with the direction therein, immediately left the premises and removed a few miles off and the lessee entered and occupied the next year as tenant of Noding at $12 rent, and in 1829 at $15. In 1828, and several times afterwards in the two succeeding years, the plaintiff applied at the land office for his bond or for a release from his liability on it, and was told by Shultz and his clerk and general agent that it could not be delivered up nor a release given then, because that would discharge Noding as well as the plaintiff, but he was told further that they considered Noding the purchaser of the land, and had done so from the time he took it on himself, and they looked to him for the payment and not to Lowder, and only held the bond until Noding should give a new one, which he had frequently promised to do. Noding continued to exercise various acts of ownership over the premises up to 1839, and in that year he contracted with one Jarvis for the sale of the eastern half at $125, to be paid to Shultz in part of Noding's debt for the purchase money, and gave him a letter to Shultz requesting him to receive the money and credit on the bond and, upon getting it, to convey that part to Jarvis, which was accordingly done.

The answer of Noding states that he is illiterate, and that the contract between Jarvis and himself was that the former was to (211) take the whole tract and clear him altogether, and that Jarvis wrote and read the order to Shultz falsely, and in that respect the answer is supported by a witness who was present, and contradicted by the deposition of Jarvis. In 1845 Shultz indorsed the bond to a new trustee of the *Unitas Fratrum,* and an action was brought on it against both Noding and Lowder, in which the plaintiff was nonsuited. Upon being served with the writ Lowder called on Shultz and the clerk in the land office and complained of being sued after having been so repeatedly assured that he was not looked to for the debt, and he was told immediately by both of them that the attorney had included him in the writ by mistake, and that it should be corrected, as they had never looked to

him for the debt since Noding had taken it upon himself, and it would be unjust that he should pay any part of it. After the nonsuit in the above mentioned action another was brought in 1847 in the name of Shultz against Noding and also Lowder, and in October, 1848, judgment was recovered against both, and at the suggestion of Noding the jury found that he was the surety and Lowder the principal in the bond.

The bill was filed immediately against Noding and Shultz, and states that both of the defendants, as well as the plaintiff, considered the plaintiff's contract of purchase absolutely rescinded in November, 1828, when he was ordered and went out of possession, and that he has at no time since, in any manner, set up any claim to the premises, but, on the contrary, Noding was in fact the purchaser of the land and treated it as his own, and the bond, which was originally given by the plaintiff and Noding, was kept up as the bond of Noding alone, or at least as a security by which he alone was to be bound in equity. The prayer is that
(212) it may be declared that the plaintiff's purchase was rescinded, and that thereby the plaintiff was no longer bound to pay the purchase money he had agreed to pay, but ought to be relieved against the judgment rendered therefor by an injunction, and for general relief. The answer of Shultz admits the transaction with Noding in 1827, and that he wrote the letter to Lowder informing him that Noding had purchased the land, and that he must surrender it to him; and it further admits that Noding and not Lowder was afterwards considered by him as the purchaser and bound as the principal in the bond, but states that, not being privy to any arrangement between the other two parties, this defendant likewise thought he might look to the plaintiff as bound as surety for Noding. The plaintiff states that he took no part in the contest between the defendants at law as to their relation of principal and surety, as he had no concern in it, but his interest and effort was to get judgment against both; and he submits to procure a conveyance of the legal title to either of the parties, to whom, in the opinion of the Court, it ought to be made upon the payment of the purchase money and interest. The answer of Noding denies explicitly that he carried any such letter as that mentioned from Shultz to Lowder or sent it to him, or that Lowder's purchase was ever rescinded, to his knowledge, or that he had agreed to become the purchaser of the land, or to give a new bond for the purchase money or otherwise to discharge Lowder, or to stand in his place in the payment of the purchase money, and it states that he considered that Lowder, being insolvent, had first abandoned the premises to the vendor and his surety to do the best they could with them, and that all his subsequent acts were merely efforts to save himself as surety from loss and not acts of ownership in
(213) his own right. It finally insists on the finding of the jury in

the suit at law that he was the plaintiff's surety for the debt. But notwithstanding those denials, the facts before stated are established clearly by the proofs, and further that at the time of Noding's sale to Jarvis in 1839 the plaintiff had acquired property sufficient to pay the debt and has been in good circumstances ever since and living in the same county with the other parties, and yet there is no evidence that from 1827 to 1845 there was any communication whatever between Noding and Lowder in respect to the land or debt or that Noding ever requested Shultz to apply to Lowder for payment, but, on the contrary, it appears that he was often urged by Shultz or his clerk for payment of the bond, and as often promised to sell the land and then to pay up whatever the land might fail to discharge.

An injunction was granted on the bill, but it was dissolved on the answers, and on 13 April, 1849, the plaintiff paid Shultz $508.76 for the principal and interest then due on the judgments. The plaintiff took replication to the answers, and the parties proceeded to proofs, and the cause was transferred for hearing in this Court.

The fact seems to be beyond doubt that Shultz, at the instance of Noding, ordered the plaintiff off the land and rescinded his purchase, and then made a new sale to Noding. It is not material whether the plaintiff willingly assented to those arrangements or not, for the contract on the part of the vendor was oral and created no obligation which could be enforced. When, therefore, Shultz wrote to Lowder that he would not convey to him, but had sold to another and ordered him to give up the possession, Lowder had no option, but was under a necessity to comply, and he did so. In that state of things the plaintiff was entitled, in the view of a court of equity, to be discharged from the payment of the purchase money he had promised and, consequently, to have his bond surrendered, which he had given to secure it, (214) as the consideration for it had thus failed, for although the failure of the consideration of a bond is not a discharge of it at law and cannot be inquired into there, yet it is otherwise in equity, because here the debt is considered to arise out of the original contract of purchase and the bond to be only a security for it; therefore, when the party is equitably discharged from the debt, the security fails in equity, however it may be at law. There can be little question that the bond would have been given up on the spot had it not happened that the second sale was to one of the obligors in that bond, who was to give a new one, with a surety, for the purchase money, and agreed that until he did so the vendor might retain the old bond as his security. Those parties might probably make such an arrangement as between themselves, but they had, in the view of this Court, no right to deal in that way with the paper as the bond of Lowder without his concurrence, for

being equitably discharged from the obligation it required an explicit agreement on his part to set it up for the purpose of binding him as the surety of Noding. The intention and expectation of Shultz on that point could not affect Lowder's rights; but there was no such expectation or intimation at the beginning nor for many years afterwards, for he and Noding looked on the latter as the purchaser and the bond as binding him exclusively, and both Shultz and his clerk and general agent assured the plaintiff all along that it should never come against him, and even after he was sued that it was by mistake and should never hurt him. The plaintiff is, therefore, entitled to be put into the same situation as he would have been if the bond had been actually delivered up.

(215) The question remains as to the particular manner, and against whom he is so entitled. First, he ought to get back the sum he paid on the judgment for the debt, interest, and costs at law, with interest thereon from the days of payment. Next, both of the defendants are liable to him therefor, but Noding in the first instance, if he be of ability, and Shultz will cause the remaining half of the premises to be duly conveyed to him. Noding is primarily liable, because, as already said, he agreed that this bond should stand as a security for his purchase money, and, therefore, he was bound to pay it in exoneration of the plaintiff. In opposition to that, reliance is placed on the finding of the jury that he was the surety. This is not the occasion for putting a construction on Laws 1826, ch. 31, which would certainly require serious consideration before holding that, instead of providing merely a guidance to the sheriff in proceeding on the execution, it was intended to conclude the rights of the parties on this point, which often involves nice equities, by a finding of the jury on a matter on which no issue even is joined, but merely a collateral suggestion made by one of the defendants against the other. But supposing that, ordinarily, the finding amounts to a decision of the right as between the defendants at law, it cannot in this Court affect the question between these parties, for here the plaintiff's case is very different in its nature from what it was at law and depends on different principles. In the action at law, the failure of consideration constituted no defense, and, therefore, the debt demanded was legally the debt of both parties, and the plaintiff at law was obliged to recover against both. If Lowder was liable at all on the bond, it was certainly as principal, for he executed it in that character and never agreed that it should operate to any other purpose. As far, then, as both of the obligors are bound to the creditor, who is to have his debt at all events, and the only question is, Which is principal and which is surety? and that question depends on the same mat-

(216) ter of fact and of law both in the court of law and the court of

equity, it may well be that the finding should be conclusive, and that the point cannot be drawn into question a second time in equity. But that manifestly cannot apply when, though bound at law, one of the parties has an equitable discharge from the debt, so that in the court of equity he is bound neither as principal nor surety, which is the case before the Court. The equity on which such a discharge arises cannot be taken notice of by the jury, because by giving effect to it between the defendants and the plaintiff they both were legally indebted to him, but as between the defendants themselves one of them was not indebted to the plaintiff. The jury could not pass on this equity between the defendants without finding inconsistently with their verdict for the plaintiff, and for that reason, at all events, the case is not within the statute.

There is no reason, therefore, why, upon Shultz having a proper title made to him, Noding should not be decreed to reimburse to the plaintiff the sums before mentioned, to be ascertained by an inquiry. If, indeed, Shultz will not have the remaining half of the land conveyed to Noding, or if Noding should be unable to pay those sums, the plaintiff may then take his recourse on Shultz. The defendants must pay to the plaintiff the sums he paid as costs on the dissolution of the injunction, and they must also pay all the costs of this suit up to the hearing.

PER CURIAM. Decree accordingly.

Cited: Coleman v. Fuller, 105 N. C., 332.

JUNE TERM, 1852.

(AT RALEIGH.)

BENJAMIN SAUNDERS, ET AL., v. ELIZABETH HAUGHTON, ET AL.*

1. The increase of the personal property, except in the case of slaves, belongs to the tenant for life, as a compensation for the trouble and expense of taking care of the original stock.
2. But it is settled in our State, that, where such property is of a perishable nature, or may be consumed in the use, it is the duty of the executor to sell it, and pay over the interest only to the tenant for life.
3. Where that is not done, but the property itself is delivered to the tenant for life, the increase, such as of cattle, etc., belongs to him, and the remainderman is only entitled to the original stock.

THE case is stated in the opinion delivered here.

William J. Baker for the plaintiff. (218)
Heath for the defendant.

NASH, J. Job Pettijohn died in 1824, and by his will devised as follows: "I lend to my wife, Elizabeth Pettijohn, the use of all of my negroes and personal estate of every kind during her natural life." He then provides that if my wife remains a widow the whole of his estate to remain in joint stock to her use during her natural life, and at her death to be divided equally among his six daughters, towit, Frances, Sarah, Elizabeth, Rachel, Mary Ann, and Rosanna. To this will the widow and his three daughters, Frances, Sarah, and Elizabeth, were appointed executrices, and qualified as such. The widow took into her possession all the property bequeathed to her, and died in the year. Rosanna, one of the legatees in remainder, intermarried with the plaintiff, Benjamin Saunders, and died in the lifetime of the widow, and her husband was duly appointed her administrator. The bill is filed for a division of the slaves of the estate and an account of their hires since the death of the widow, Elizabeth Pettijohn, (221) and also for an account of the perishable property which came to the hands of the executrices under the will. An order of reference to the clerk and master was made to state the account. His report was returned and excepted to by the defendants.

The first exception is that the master has charged against the defendants $350, the present value of 50 head of cattle and 50 hogs, which,

*This and the following case were accidentally omitted in the Reports of the last term.

from the evidence, were the offspring of the original stock which went into the possession of the widow as tenant for life twenty-four years ago.

The second and third exceptions are but corollaries from the first.

It is true, as a general proposition, that a tenant for life of personal property is entitled to the increment made during the course of the tenantry as a compensation for the trouble and expense of taking care of the original stock, and the executor, so far as the legatees are concerned, has discharged his duty when he assents to the legacy. The rule does not in this State extend to slaves, and when the property is of such a nature to be consumed in the use, *quo ipso usu consumitur,* a different rule of duty devolves upon the executor. In such a case the tenant for life, being entitled only to the use, if it be entirely consumed, the remainderman loses altogether the benefit of the bequest. The executor is appointed to take care of the interest of all concerned, and is as much bound to see that the remainderman is not deprived of his interest as that the tenant for life shall enjoy his. It is now well settled that when a residue is given for life of such property, with remainder over, it is the duty of the executor to sell it and pay over the interest to the tenant for life. *Smith v. Barham,* 17 N. C., 425; *Jones v. Simmons,* 42 N. C., 178. If, however, the executor assents to the
(222) legacy, and the property remains in the hands of the tenant for life and it be of such nature as to be consumed in the using, such as cattle, horses, or hogs, and an increase from them takes place while in the possession of the tenant for life, it belongs to him, and the remainderman is only entitled to what remains of the original stock. From the case before us, the cattle and hogs, valued by the master in his report, was the property of the widow. The master, then, has taken into his account property which never was of the estate of the testator. It was the original stock he was directed to take an account of.

This exception is allowed and the report set aside as to the two items excepted to. In all things else it is confirmed.

PER CURIAM. Decree accordingly.

VIRGINIA CLARK v. GOOLD HOYT ET AL.

1. In settling the accounts of a trustee, he should be allowed, not only reasonable commissions, but also actual expenses.
2. When the master, in his report, allowed the trustee nothing for his expenses, but a greater amount of commissions than had been stipulated by the parties, if, upon the whole, the trustee receives no more than a fair compensation, the Court will not disturb the report.

CLARK *v.* HOYT.

THIS cause came on to be heard upon exceptions to the mas- (223)
ter's report on the accounts of the trustee. It is unnecessary to state any of the exceptions, as they embrace merely matters of fact, except the third, upon which the Court delivered its opinion.

B. F. Moore for the plaintiff.
Heath, Ehringhaus, Jordan, and *Smith* for the defendant.

RUFFIN, C. J. The third exception of the plaintiff to that account, and both of the exceptions of the defendant Hoyt thereto, relate to the same matter and may be considered together. The deeds of trust mentioned in the pleadings stipulate that the trustee shall have a commission of 5 per cent on both sides of his account, and also his reasonable expenses in the execution of the trusts. The master allows 5 per cent of the receipts and 7½ per cent on the sum of $7,186.40 as disbursements, and makes no allowance for expenses. He reports that the trustee produced and claimed a large amount for expenses, amounting to several hundred dollars, which he rejected on the ground of its unreasonableness, and that, instead of making any allowance on that score he added 2½ per cent, and the defendant Hoyt excepts, first, because allowances were not made for the loss of time, personal services, and expenses, and, secondly, because insufficient commissions were allowed him. The trustee is not entitled to compensation for his time and services beyond the commissions, because the commissions constitute such compensation, and in this case the parties fixed the rate, which, indeed, appears to the Court to be fully adequate.

To his expenses he was also entitled, and it would have been most proper that the master should have made an allowance for them specifically. But, upon computation, it is found that the 2½ per cent on the disbursements, which the master gives for the expenses, amounts (224)
to about $180; and, upon looking through the accounts and considering the nature of the defendant's duties as stated in the testimony, it appears to the Court that would have been a reasonable allowance for his expenses. The Court will not, therefore, disturb the account, since the error is merely in form and substantial justice has been done. All those exceptions are overruled.

The Court sees no reason to differ from the trustee as to the allowance of commissions on the administration account of the defendant James S. Clark, and, therefore, the exceptions of both the plaintiffs and the defendant thereto are overruled.

PER CURIAM. Decree accordingly.

Cited: Ivie v. Blum, 159 N. C., 123.

ELISHA FELTON v. SIMEON P. LONG.

1. A receipt *under seal* will not avail as a defence to a bill brought to have an account against a guardian, by his former wards, on the ground of a mistake, which the defendant admits.
2. Nor will the lapse of time bar such a bill, when, during the greater part of the time, the plaintiffs were under age and under coverture; and especially where the defendant, claiming the benefit of such lapse, was the trustee of the plaintiffs.
3. A *cestui que trust* may call the trustee to account, making any person a party with whom the trustee, in violation of his duty, has seen proper to divide the fund; or he may, if the thinks proper, join such person as a party defendant.

(225) CAUSE transmitted from the Court of Equity of PERQUIMANS, at Spring Term, 1852.

Heath for the plaintiffs.
Smith, Bragg, and *Jordan* for the defendants.

PEARSON, J. In 1800 Thomas Long executed a deed of gift, by which he conveyed to his children several tracts of land and a number of negroes; among others, he gave to his son Edward a negro girl, Esther, and to his son Joshua a boy named Lewis. Edward and Joshua died soon afterwards intestate and before arriving at the age of 21. In 1806 Thomas Long executed the following deed:

STATE OF NORTH CAROLINA—Perquimans County.

Know all men by these presents that I, Thomas Long, Sr., for and in consideration of the natural love and affection that I have and do bear towards my two sons, William Long and Simeon Long, and my daughter Elizabeth Harvey, all of the county aforesaid, do give and grant unto my two sons and daughter all the right, title, interest, property, claim, and demand of my sons, Edward Long and Joshua Long, deceased, invested in them and by a deed of gift from under the hand and seal of me, the said Thomas Long, Sr., to them, the said William Long, Simeon Long, and Elizabeth Harvey, their heirs and assigns forever, now remaining on record in the register's office of the county of Perquimans, for a certain tract of land in the said county, adjoining the lands of Isaac White, Samuel Creecy, Thomas Myers, or howsoever otherwise bounded or reputed to be bounded, to have and to hold the said granted and devised premises, with appurtenances thereof, unto them, the said William Long, Simeon Long, and Elizabeth Harvey, their heirs and assigns forever, clear of the lawful claims of all manner of persons whatsoever.

In testimony whereof I have hereunto set my hand and seal, this 13 August, 1806. T. LONG, SR. [SEAL]

Witness: WILLIAM CREECY.

The slaves Esther and Lewis remained in the possession of (226) Thomas Long until his death in 1817. By his will of that date he gives to his three daughters, Mary, Sarah, and Harriet, and a "child which my wife now appears to be pregnant with," the following negroes, Esther, Lewis, etc. These four children were the issue of a second marriage, and nothing is given to them by the deeds of 1800 and 1806, they being then unborn. The testator appointed his son Thomas Long and Alfred Moore his executors, who qualified and proved the will.

In 1818, upon the petition of Simeon Long, John Nixon, administrator of William Long, and Mary Harvey, the only child of Elizabeth Harvey, one of the donees in the deed of 1806, the negroes Esther and her child were sold and the proceeds of the sale divided between the said Simeon, John Nixon, administrator, and Mary Harvey upon the allegation that, by the deed of 1806, the negroes Esther and Lewis were given to the said Simeon, William Long, the intestate of John Nixon, and Elizabeth Harvey, the mother of Mary Harvey.

In 1826 Joseph Manning, the administrator of Elizabeth Haughton (formerly Elizabeth Harvey), filed a bill in equity against Simeon Long, who had then taken out letters of administration upon the estate of Edward and Joshua Long, and Nixon, the administrator of William Long, and others, for the purpose of having one-third of the sum for which the negroes had been sold paid to him as administrator of Mrs. Harvey (afterwards Mrs. Haughton) instead of Mary Harvey, and it was accordingly so ordered.

In 1827 Simeon Long was appointed guardian of his infant half-sisters and brothers, and in 1829, as they respectively arrived at age or married, he had settlements and took receipts under seal in full. These receipts do not refer to the proceeds of the sale of Esther and Lewis, and that fund was not brought into the account. At the sale in 1919 made by Simeon Long under the order of the county court (227) the boy Lewis was purchased by one Call for $838, and has been sent to parts unknown. Esther and her child were purchased by Simeon Long for $776. He has sold the woman, but still has possession of her issue.

The bill is filed by the four children, or their representatives, to whom these negroes are given by the will of Thomas Long, Sr., against Thomas Long, Jr., the executor of Thomas Long, Sr., and Simeon Long, the administrator of Edward and Joshua Long, and others, and seeks to charge the defendants Thomas and Simeon Long with the value of the negroes.

Simeon Long insists that by the deed of 1806 the equitable title to the negroes passed to him and his brother William and sister Elizabeth, their father being entitled to them as the distributee of the two infant

donees, Edward and Joshua, and that the legal title was perfected by the grant of administration to him in 1824 upon the estates of said Edward and Joshua. He also relies upon the receipts under seal given to him as guardian, and upon the lapse of time.

The other answers do not vary the case.

Upon the death of the two children, Edward and Joshua, their father became entitled to the negroes as their distributee, and, although he was obliged to derive title through their administrator, yet in equity he was owner, subject to the rights of creditors if they had any, which is not suggested. The case, therefore, depends upon the deed of 1806.

We are at a loss to conceive of any ground upon which it could ever have been supposed that this deed passed the interest of Thomas Long, Sr., in these two negroes. They are not named in the deed, nor are they in any manner referred to. It simply purports to pass an
(228) interest in a certain tract of land. It is said the donor had no interest in the land. That is true, but *non constat* that he intended to pass his interest in the negroes. It may be he supposed he had acquired an interest in the land, and, at all events, the deed in no way intimates an intention to pass his interest in the negroes, and it cannot have that effect by the utmost stretch of the maxim, *"Ut res magis valeat quam pereat."*

The defendant can derive no aid from the receipts, although they are under seal, for he expressly admits that the proceeds of the sale of the negroes were not brought into account by him in the settlements with his wards, for the reason that he supposed, and had all along acted under the impression, that the negroes belonged to himself and his brother and sister under the deed of 1806. Nor can he derive any aid from the lapse of time. The plaintiffs were under age and under coverture, and for the greater part of the time he was their guardian and in duty bound to protect their rights.

It was insisted that as the representatives of William Long and of Mrs. Haughton had each received one-third part of the fund, they were necessary parties and ought to contribute with the defendant Simeon in replacing the fund.

The plaintiffs were at liberty to make them parties, but they were not obliged to do so. A *cestui que trust* may call the trustee to account without making every person a party with whom the trustee, in violation of his duty, has seen proper to divide the fund.

There must be a decree for an account against Simeon Long. All objection for the want of parties *merely formal* being waived by consent.

PER CURIAM. Decree accordingly.

(229)

AYERS & TUNIS v. SARAH WRIGHT, ET AL.

1. Where a party obtained goods, under an assurance that he would secure the payment by a deed of trust on a house and lot, conveyed to him by his mother-in-law, and he accordingly executed such a deed, but, on the day of sale, according to the trust, the mother-in-law forbade the sale, and the debtor refused to have the conveyance, which he had received from her, proved and recorded. *Held*, that this was a clear case of fraud on the creditor, for which he was entitled to relief in Equity.
2. A bill is multifarious, where several plaintiffs demand, by one bill, several matters, entirely distinct and separate, or when, in the same bill, several matters of distinct natures are demanded against different defendants. But when all the matters charged constitute but one whole transaction, then the bill is not multifarious; and all the persons, mixed up in the transaction, and having an interest in the subject matters, must be made parties, to avoid multiplicity of suits.
3. One who, acting solely as an agent, receives a deed in his own name, and then conveys to his principal, need not be made a party to a bill by his principal.

CAUSE transmitted from the Court of Equity of NEW HANOVER, at Spring Term, 1852.

D. Reid and *W. Winslow* for the plaintiff.
Strange for the defendant.

NASH, J. The defendant Wright has filed no answer. The bill is taken *pro confesso,* and as to her the case is to be heard upon the bill. The defendant Gilbert demurs, first, because of want of equity on the face of the bill entitling the plaintiffs to any relief against him; secondly, for multifariousness; and, thirdly, for want of proper parties. A demurrer has been defined to be an allegation on the part of the defendant which, admitting the matters of fact as stated in the bill to be true, shows that as they are therein set forth they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer. It therefore confesses the matters of fact which are well pleaded to be true, as alleged in the title. Cooper's Eq. Pl., 110. The (230) facts as set forth in this bill are as follows: The plaintiffs are merchants, doing business in the city of New York, and the defendant Gilbert resides in the town of Wilmington, North Carolina. The latter applied to the former to purchase of them a quantity of goods upon credit; and in order to induce them to comply with his request represented himself as owning a valuable house and lot in the town of Wilmington which he would convey to them as security for the payment of the goods. Being unacquainted with the defendant or his circumstances, they referred the matter, with the consent of Gilbert, to their attorney

in Wilmington to ascertain the validity of his title to the house and lot. To his attorney the defendant exhibited a deed of bargain and sale from the other defendant, who is his mother-in-law, fully executed and attested, but not proved or registered. Gilbert retained the deed in his hands for the purpose and under a promise to have it duly registered. The goods were furnished, and the defendant Gilbert executed a mortgage to the plaintiffs for the premises. As additional security Gilbert indorsed and transferred to the plaintiffs, with the knowledge and consent of the defendant Sarah Wright, a policy of insurance which she had before that time taken out and which she had transferred to him. Upon the expiration of the stipulated credit, Gilbert having failed to make any payments, the premises were advertised for sale by the agent of the plaintiffs, and on the day of sale Mrs. Wright, by her agent, forbade the sale, claiming the property. The sale proceeded, and the house and lot were bid off for her. The agent of the plaintiffs refused to ratify the sale because of the fraud and again advertised the property for sale, one of the conditions being that the purchaser should give a note at bank with good and sufficient sureties within a limited time or the title should be made to the next highest bidder. At
(231) this sale the property was bid off by a person calling himself John Hobson, but no man of that name is known in the town of Wilmington, nor has any person claimed his bid. On the expiration of the time limited a conveyance was made to John Dawson, who was the next highest bidder and who had acted as the agent of the plaintiffs in the sale and who immediately transferred or conveyed the premises to them. The conveyance from Sarah Wright to John Gilbert has never been registered and is still in the possession, if in existence, of one of the defendants. None of these facts are denied by the defendants, and if they do not constitute a case demanding the interference of a court of equity, fraud the most open and glaring never can. The bill does, upon its face, set forth a sufficient equity in the plaintiffs to entitle them to relief.

The second cause of demurrer is that the bill is multifarious. A bill is multifarious where several plaintiffs demand by one bill several matters entirely distinct and separate, or where in the same bill several matters of distinct natures are demanded against different defendants; but where all the matters charged constitute but one whole transaction, then the bill is not multifarious and all the parties mixed up in the transaction and having an interest in the subject matters must be made parties to avoid multiplicity of suits. This bill is not multifarious in any sense. The matters set forth all constitute parts of one transaction.

The third cause of demurrer is that John Dawson is not a party.

He was the agent of the plaintiffs to bid for them, in order to save their debt. The form was gone through of making a conveyance to him and he immediately conveyed to the plaintiffs. Dawson had no interest whatever in the matter.

The demurrer is overruled, with costs, and the cause remanded. (232)

PER CURIAM. Decree accordingly.

Cited: Thigpen v. Pitt, 54 N. C., 64.

WILLIAM WATSON v. BENJAMIN C. WILLIAMS.

The validity of a decree in a Court of Equity cannot be impeached collaterally.

CAUSE transmitted from the Court of Equity of MOORE, at Spring Term, 1852.

No counsel for the plaintiff.
Strange and *Mendenhall* for the defendants.

NASH, J. This case is substantially the same as that of *Sinclair v. Williams, post*, 235. The facts are the same, with a few variations. The land is dispute is a different tract, and at the master's sale Josiah Tyson, one of the defendants, was the purchaser and sold it to the plaintiff, but has never made any conveyance for it, and the deed of Bryan Burroughs to him was made after he had ceased to be clerk and master. In this case both defendants answer. Tyson admits the facts stated in the bill, is willing to make title, and submits to such decree as may be made.

The answer of Williams admits that Charles Chalmers was (233) his duly appointed guardian, and that he is now of age, and has commenced an action of ejectment to recover the land in question. It denies that any such proceedings as those set forth in the bill ever were had; that there ever was such decree of the court of equity of Moore County ordering the real estate belonging to him to be sold by the master; that any sale was made by him, or that any report of his proceedings was made by him and confirmed by the Court. It alleges that if any such proceedings were ever had they were irregular and of no offect. It further admits that the deed made by Bryan Burroughs to Josiah Tyson was made by him after he was out of office, and is therefore "insufficient and inoperative"; that the plaintiff purchased of Josiah

Tyson. The destruction of the courthouse of Moore County, with the papers belonging to the court, is admitted.

The answer of the defendant Williams brings up matters with which the Court in these proceedings have nothing to do. Whether the proceedings set forth in the bill as having been had were rightfully conducted or not we cannot inquire into in this collateral manner. If they did take place; if the decree as alleged was made by the court of equity of Moore County and is unreversed its validity cannot be questioned in these proceedings. The main inquiry is, Did the court of equity make such a decree? The defendant has, without any qualification, denied the statement made in the bill as to those proceedings, in whole and in severalty. It is stated in the bill and admitted in his answer that the courthouse of Moore County, after the appointment of Mr. Bruce as clerk and master, was destroyed by fire, and with it all the records of the court. The plaintiff avers that among the papers of the court were the proceedings under the petition of Charles Chalmers. To prove that the records of that suit did exist, the depo-
(234) sitions of two gentlemen of the bar who were concerned in the case have been laid before the Court. They fully sustain the allegations of the bill upon this subject, so as to leave no doubt of the fact. They were personally and professionally engaged in transacting the business, and it may be said cannot be mistaken. The decree, then, was duly made—the report of the master of a sale duly returned and confirmed. The fact of a sale under the decree by the then clerk and master, Bryan Burroughs, is denied by the answer. Did it take place? Burroughs proves that he did make the sale, and Josiah Tyson became the purchaser of the land, and that he made a full report to the court, which was confirmed. Dr. Chalmers proves the same. This testimony sustains the allegations of the bill. The plaintiff alleges that the deed made by Burroughs to Tyson was inoperative and did not convey the legal title, and this the defendant Williams admits, for it was made and executed after Burroughs had gone out of the office, and the order of the court was that the conveyance should be made by the clerk and master. The plaintiff has a clear equity to the relief he seeks—the equitable title being in him and the legal title being in the defendant Williams. The injunction must be made perpetual, and the defendants must be decreed to make a conveyance in fee to the plaintiff, to be judged of by the clerk and master of this Court.

The defendant Williams must pay the costs.

PER CURIAM. Decree accordingly.

(235)

DUNCAN M. SINCLAIR v. BENJAMIN C. WILLIAMS ET AL.

Where land has been sold under a decree of a Court of Equity, the purchaser will be protected against the legal claim of one who, or whose guardian, was a party to the decree.

CAUSE transmitted from the Court of Equity of MOORE, at Spring Term, 1852.

No counsel for the plaintiff.
Strange for the defendants.

NASH, J. Charles Chambers, as the guardian of the defendant, Benjamin C. Williams, exhibited his petition in the Court of Equity for Moore County, praying for the sale of certain land therein described, belonging to his said ward, and, for the reasons set forth therein, a decree was had at ———term of said court ordering a sale of the said land at public auction by the clerk and master of the court. A sale was duly made by him, and a tract called the Perkins tract was purchased by the defendant Murchison. A report was made by the master, and confirmed by the court, and the master directed to make a conveyance to the purchaser, which he did. Murchison sold and conveyed for a valuable consideration to the plaintiff's father, who took possession and devised the land to the plaintiff. Subsequently, the defendant Williams, upon arriving at 21, brought an action of ejectment against the plaintiff, and the bill is filed to enjoin his recovery upon the ground that the deed of conveyance from the clerk and master to Murchison is defective and does not convey the legal title to him, and it also prays a decree against the defendants for a conveyance in fee of the land so purchased.

Murchison's answer admits the allegations of the bill and (236) submits to any decree that may be made by this Court. No answer has been filed by Williams, and, as to him, the bill is taken *pro confesso* and the cause set for hearing.

A motion is made, on the part of the defendant Williams, to dismiss the bill on the ground that it is so defectively drawn that no relief can be granted under it. It is alleged that in the stating part of the bill everything should be set forth which is essential to the granting the relief asked for, and that nowhere is it sufficiently stated that Benjamin M. Williams, the father of the defendant Benjamin C. Williams, is dead or that the latter is the heir or devisee of the former. To the plaintiff's equity, it is perfectly immaterial how the defendant Williams claims the land. It was sold under a decree of the Court of Equity of Moore County as the property of the defendant, upon the petition of his guard-

ian, and he cannot be permitted to disturb the possession of the purchaser in the way he has attempted it. The plaintiff's equity consists in this: that under the sale made by the master the purchaser Murchison acquired no legal title to the land, it being a mere covenant to make title, and consequently the legal title is still in the defendant Williams. The object of the court of equity was to sell the fee simple in the land. The deed made by the master is so defective that it does not convey the legal estate, and the defendant has brought an action of ejectment to turn the plaintiff out of possession. All these facts are admitted by the defendant Williams. He has filed no answer, and the bill, as to him, is by order of the Court taken *pro confesso*. Such an order dispenses with any proof on the hearing, or rather puts the case into a position in which there is no opportunity to get proof, exclusive of the bill. *Attorney-General v. Carver,* 34 N. C., 235. The plaintiff has a clear right to the interference of the Court. He is a purchaser under a decree, and the Court is bound to enforce its decrees and to protect those who act under its orders.

(237) PER CURIAM. The injunction must be perpetuated, and there must be a decree that the defendants Williams and Murchison, by proper and sufficient deeds, to be judged of by the master of this Court, convey to the plaintiff in fee simple the land mentioned in the bill.

The costs will be paid by the defendant Williams.

Cited: Watson v. Williams, ante, 232.

BENJAMIN RIVES v. JONATHAN R. FRIZZLE ET AL.

1. A bequest of personal property to the testator's wife for life, and "after her death to be equally divided among his lawful heirs," is a vested legacy in those who were his heirs at the time of his death, and, upon the death of one of his daughters, during the lifetime of the widow, survives to her administrator.
2. The words "after," or "upon," the death of the wife, or the like expressions, do not make a contingency, but merely denote the commencement of the remainder, in point of enjoyment.

CAUSE transmitted from the Court of Equity of PITT, at Spring Term, 1842.

Rodman for the plaintiff.
Biggs for the defendants.

(238) RUFFIN, C. J. Jonathan Frizzle, by his will dated 18 August, 1843, lent certain slaves and other specific chattels to his wife, Ruth, for life; and he ordered that three other slaves and the

residue of his property not lent to his wife nor given to Edwin Carman in trust for his daughter Ann should be sold and the proceeds of the sale, after paying his debts, be lent out and the interest paid to his wife during her life. Then the will directs that "all the property lent to my wife and the principal money (so lent out), after my wife's death, shall be equally divided between my lawful heirs, except the share or part which I have given away in trust for my daughter Ann, and she is not to have any other part or share." The testator died in 1844, and his executor, who was one of his sons, proved the will and delivered to the widow the slaves and other things given to her specifically, and she kept them during her life. He also sold the residue and lent out the money and paid the interest to her during her life. One of the testator's daughters, Margaret, died intestate in November, 1849, and without having had issue, and the plaintiff administered on her estate; and in the summer of 1851 the testator's widow died, and then the executor took the slaves and other property lent to her for life and sold the same. The bill was then filed against the executor and the other children of the testator, except the daughter Ann, claiming an aliquot part of the produce of that part of the property and also of the principal money arising from the residue, with interest, since the widow's death as the share of the daughter Margaret, and the answer insists that she was not entitled to any share thereof, inasmuch as she died in the lifetime of the widow, and so was not an "heir" of the testator at the period for dividing the fund.

It is clear this was a vested legacy in Margaret, and, therefore, survived to her administrator. If there had been no life estate given to the widow, but simply a direction for a payment to or an equal division among the testator's children at a future period, the (239) legacy to each child would not be vested, according to the known distinction between a gift at a certain epoch, or when such an event shall happen, and a direction for payment at that period, or upon that event. But the previous life estate to the wife and the gift over on her death taken together constitute a disposition of the whole fund, and the interest of the second takers is simply by way of remainder, or rather executory bequest; and "after" or "upon" the death of the wife, or the like expressions, do not make a contingency, but merely denote the commencement of the remainder in point of enjoyment. See the cases collected, 11 Roper Leg., 392. The limitation here is not to such persons "as may be my heirs at the death of my wife," but it is to "my lawful heirs," *simpliciter,* and imports, therefore, those who were the heirs at the testator's death who took in right then, though they were not to take in possession until the previous benefit, intended for their mother, should terminate by her death. It must be declared, therefore,

that an aliquot part of the fund belonged to each of the testator's children (excepting only the excluded daughter) as a vested legacy on the death of the testator, and that such share of Margaret belongs to the plaintiff as her administrator, and the usual inquiries must be directed for ascertaining it.

PER CURIAM. Decree accordingly.

Cited: Starnes v. Hill, 112 N. C., 11; *Harris v. Russell,* 124 N. C., 554; *Bowen v. Hackney,* 136 N. C., 190; *Bullock v. Oil Co.,* 165 N. C., 69.

(240)

JOHN R. RITTER v. JACOB STUTTS ET AL.

1. If, in the institution of a suit, or in its progress, the course of the Court requires a party to make an affidavit, the fact of his being infamous does not make him incompetent to do so; as an affidavit to continue cause, etc.
2. On the other hand, if a party offers himself as a witness in his own case (as, for instance, under the book debt law) the fact of his being infamous will make him incompetent.
3. A party, though he is infamous, is competent to make affidavit to the truth of the facts alleged in his bill, seeking to recover the amount of a lost bond.

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

Strange for the plaintiff.
Winston for the defendants.

PEARSON, J. The bill seeks to enforce payment of a note, under seal, for $300, which the plaintiff alleges was executed by the defendants to him, and which he further alleges was by accident lost out of his possession. The plaintiff annexes to the bill his affidavit of the truth of the matters therein set forth.

The plea alleges that there has been a conviction and judgment against the plaintiff for mismarking a hog. Two questions are presented: Does the conviction and judgment make the plaintiff infamous? If so, is he incompetent to make the affidavit?

Without deciding the first question, and assuming that the offense of mismarking, created by the statute, is infamous, we are of opinion that the plea was properly overruled, on the ground that the plaintiff was not incompetent to make the affidavit.

(241) "If, in the institution of a suit, or in its progress, the course of the Court requires a party to make an affidavit, the fact of his being infamous does not make him incompetent to do so: for, if an

affidavit be *required,* and, at the same time, the party is held to be incompetent to make it, he cannot pursue his right, and there will, in effect, be a denial of justice. This principle is settled, as well upon the reason of the thing as by authority. For instance, a party infamous for crime, or a free negro in a suit against a white man, is competent to make an affidavit to sue———, or to continue the case, or to remove the case, etc. *Davis v. Carter,* 2 Salkeld, 461; *Hall v. Cox,* 1 N. C., 15; ——— *v. Kimbrough, id.,* 16.

On the other hand, if, under some of the exceptions to the general rule, a party offers himself as a witness in his own case, the fact of his being infamous will make him incompetent: for, if he is not a competent witness between third parties, of course he cannot be competent to give evidence in his own favor. This principle is also well settled upon the reason of the thing and upon authority. For instance, a party who is infamous cannot prove his debt under the book debt act. *Walker v. Carney,* 2 Strange, 1148; 1 Gr. Ev., sec. 374.

The only question is, which of these two principles applies to the case now under consideration? Evidently the first; for the affidavit of the plaintiff is required by the Court as a condition precedent to the jurisdiction of this Court, and a change of the forum.

PER CURIAM. This opinion will be certified.

Cited: Latham v. Dixon, 82 N. C., 56.

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(242)

JOHN STEWART ET AL., v. STARKY MIZELL ET AL.

1. A judgment at law and a decree in Equity, in cases of partition, are both equally conclusive, in respect to the thing in which the parties had, or admitted, or it was declared they had, an estate in common, and also in respect to the share, to which each was entitled, and to the parcel allotted to each, as his share in severalty.
2. Wherefore a bill cannot be supported, to set aside a decree formerly made between the parties, though it be alleged, that the facts then admitted and found by the Court, and on which the decree was founded, did not in fact exist.

CAUSE transmitted from the Court of Equity of BERTIE at Fall Term, 1851.

Winston, Jr., for the plaintiffs.
Bragg for the defendants.

RUFFIN, C. J. Henry Cobb died intestate, in Bertie, in 1843, seized in fee of four tracts of land in that county, having had eight children, of whom several survived him, and of each of those who were dead there

was issue living. In April, 1844, the children and grandchildren of the intestate united in a petition in the Court of Equity for the partition of the lands among them; and, in the petition, each tract was particularly described and it was stated that the said land descended from the intestate, Henry Cobb, to his children and grandchildren, the petitioners, in fee; and then the share therein of each of the petitioners was particularly set forth; that is to say, that each of the surviving children was entitled to one-eighth part thereof, and that each of the grandchildren was entitled to a certain aliquot part of one-eighth part of the whole, as representing his or her parent. The petition then prayed for
(243) partition among the parties, so that a share should be allotted to each of the petitioners in severalty, according to their respective rights, as therein set forth: and, representing further, that the land was of so little value, and the number of shares so many—fourteen in all—that the actual partition could not be made without injury to the parties. The petitioners prayed, also, that the Court would decree a sale of the lands and a division of the proceeds among the petitioners, in the proportions, and according to their said several and respective rights.

Upon the petition the sale was decreed as prayed for, and was subsequently made by the clerk and master, at the price of $841, and reported to the Court, and confirmed without objection: and, in March, 1845, the clerk and master was ordered to collect the money and pay it to the parties, according to their several rights, as set forth in the petition. The master got in the money and distributed it accordingly: and paid to each his or her share, except such as belonged to the infants and *femes covert,* and those portions were retained by him, to be invested and secured for the benefit of those persons, under the direction of the Court.

The present bill was filed in March, 1848, by four of the intestate's children, or those representing such of them as were dead, against the other four children or their heirs. It states that the intestate had in his lifetime settled on each of his four children, respectively, who or whose heirs are defendants, lands equal in value, at least, to one-eighth part of the lands so settled in his life, and also of those of which he so died seized: and that the children, on whom the lands were settled, were not entitled to any part of the land descended, or, at all events, to only as much thereof as would make the estates of all the children equal. And the bill charged that those children never accounted for any part of the land settled on them respectively, and that, without having done so, each received a full share of the proceeds of the descended land,
(244) under the decree made on the petition. The prayer is for a discovery, as to the lands settled on the several defendants, or their parents, by the intestate, and that a value may be set on them and the rights of all the heirs of the intestate adjusted upon the basis that each

child thus provided for was entitled only to such portion of the proceeds of the descended land as would make him equal with the other children, and that such of them as have received more may be decreed to pay in the excess, that it may be duly divided among those children on whom nothing was settled.

The defendants put in a demurrer, which was overruled in the Court below. They then put in an answer, and admit certain lands to have been settled on them respectively by their father, and that they were not considered in the division of the lands descended at their father's death. They say that those provisions were well known to all the parties when the petition was filed, and the proceedings had under it: and that in consequence thereof the children who had been provided for would not bid for the other land, against the children not provided for, but allowed them to become the purchasers at an undervalue in order to place them all nearer on an equality. The answer then insists on the former suit and decree as conclusive of the rights of the several parties, as therein set forth and established.

The bill cannot be sustained. A judgment at law, in partition, is conclusive, in respect to the thing in which the parties had an estate in common, and also in respect to the share to which each was entitled, and to the parcel allotted to each as his share in severalty. *Mills v. Witherington,* 19 N. C., 433. In that case it was held that where land belonging to one of the parties in severalty was stated in a petition for partition, to be a part of the land which belonged to all the parties in common, and was allotted in severalty to one of the petitioners as his share of the whole, the judgment was conclusive and the parti- (245) tion was, in itself, a good title as between the parties to it. If, instead of an application to the Court of Equity for a partition by a sale, these parties had proceeded at law for a partition, and one had been adjudged, giving to each child an equal share, specifically, of all the land, as having descended from their father to all of them equally, the case cited determined that the partition would have been final. For, by the act of descents, where a child is provided for, all the lands of which the parent dies seized does not descend to all the children, but it descends to them as tenants in common, and only "so much of the lands shall descend to such child so provided for as will make the estates of the children equal." Therefore, when the petition stated that the descended land descended to all, equally, the form, as in the case cited, admitted of record that land which in fact belonged exclusively to them, was vested in the whole, in fee: and the judgment of the Court, founded on that admission in the pleadings, would be necessarily conclusive. Not less so is the decree of the Court of Equity, upon facts found and declared, and *a fortiori* on those admitted by the parties. If it were not so there

would be no end to litigation in this Court. Indeed, the decree in this cause could no more be regarded as final than that which the present bill seeks to overturn upon the ground merely that it was not in itself strictly right. This is not an attempt to review the decree: for it is just what it ought to have been, and what the Court was obliged to pronounce, according to the concurring allegations of all the parties. Nor is there any allegation now that some of the parties formerly practiced any arts to deceive the others as to the facts or law on which their rights depended, or that the facts were not fully known to every one of them. There is nothing of the kind in the bill, and, indeed, the answer states that there was not even a mistake in respect to the facts. So, the
(246) sole ground on which the relief is sought is that the former decree, though right according to the facts then agreed by the parties, was not right according to the facts then truly existing. Consequently a decree in this couse, founded on a declaration that the plaintiffs were not at all provided for by the father in his lifetime, might by and by be overset upon evidence that, in fact, the father did settle lands on the present plaintiffs, or did not settle them on the present defendants: and thus neither fact, found or admitted, would be deemed established, nor adjudications resting on them be respected as right or conclusive.

PER CURIAM. Bill dismissed with costs.

Cited: Ivey v. McKinnon, 84 N. C., 657; *Turpin v. Kelly,* 85 N. C., 401; *Grantham v. Kennedy,* 91 N. C., 154, 155; *Weston v. Lumber Co.,* 162 N. C., 192.

ASHLEY SANDERS, EX'R, ET AL., v. NATHANIEL G. JONES, ADM'R, ETC.

1. An administrator, in this State, cannot, by virtue of his appointment, collect the assets of his intestate in another State, and is under no legal obligation to procure administration out of the State.
2. But if an administrator pays over to one of the distributees, residing in another State, his share of the personal property in this State, without charging him with advancements made to him by the intestate, the administrator becomes personally liable to the other next of kin for the amount so misapplied.

CAUSE removed from the Court of Equity of JOHNSTON, at
(247) Spring Term, 1852.

Husted for the plaintiff.
W. H. Haywood for the defendant.

NASH, J. The bill is filed for an account against the defendant N. T. Jones as administrator of Hardy Jones and David Jones. Hardy Jones,

in his lifetime, sent a parcel of negroes to the State of Alabama by his son, the defendant David T. Jones, to hire out. Hardy Jones died intestate, and N. T. Jones is his administrator. The plaintiffs and defendants are his next of kin. The slaves were afterwards taken into possession by the administrator and the estate settled and duly distributed, except the claim against the defendant D. T. Jones for the hire of the negroes while in his possession. David Jones came to this State and received from the administrator his proper proportion of the estate of his father without any deduction or being called to account for his advancements. The plaintiffs are entitled to a decree for an account of the hires of the negroes. This account is claimed by the plaintiffs on two grounds. The first is that it was the duty of the administrator to have gone to Alabama and taken out letters of administration there and collected what was due from the defendant D. T. Jones, and, second, because he paid over to D. T. Jones his distributive share without retaining what was due from him to the estate. The first ground is untenable. An administrator is by virtue of his appointment bound to collect all the personal assets of the intestate which are within the State, because his letters of administration are coextensive with the State, but he cannot, by force of them, collect the assets in another State, and is under no legal obligation to procure administration out of the State. *Plummer v. Brandon,* 40 N. C., 190; *Butts v. Price,* 1 N. C., 289; *Governor v. Williams,* 25 N. C., 153; *Morrell v. Dickey,* 1 John Ch., 186.

The agreement between the father and son was, if the lat- (248) ter would take slaves to Alabama and hire them out, the former would give the latter one-half the proceeds, and allow him his board and schooling for one year. The number of the negroes was twelve, and the defendant David Jones at that time resided in the State of Alabama. It is proved that the slaves were hired out by David for the sum of $1,200, and notes taken from the hirers. This transaction between the father and son cannot be looked upon in the light of a contract, properly speaking, but as a donation made by the former to the latter of so much money to settle or assist him in life. The sum of $600 was too large, and shows, we think, the true character of the transaction. This case bears a strong analogy to *Hanner v. Winburn,* 42 N. C., 142. In the latter case the father, Nathan Armfield, put into the possession of his son John a negro, not as an advancement but as a loan. The slave was kept by John several years during the life of the father, and upon his death a question arose in what light he was to be considered. The Court decided that the slave was not an advancement, but the hires which were in the hands of John and had never been demanded by the father were. I do not say this case decides the case now before us, but

it bears upon it and aids in its decision. David's estate was increased by his portion of these hires, for it was a donation, and the remainder of the hires reserved to the testator and never claimed by him was also so much of the personal estate in his hands and for which he was bound to account on the settlement of the estate. It is admitted in the pleadings that the defendant David has never settled with or paid over to the defendant N. T. Jones, the administrator of Hardy Jones, any portion of these hires, nor has the administrator ever settled with the plain-
(249) tiffs for the same, but that he has duly paid over to the plaintiffs all their portion of the other personal property of Hardy Jones. Hardy Jones died in 1837, and at the August term of the court of pleas and quarter sessions of Johnston County, in the same year, the defendant N. T. Jones was appointed his administrator. In 1842 or '43 a division was made among those entitled to it of the personal property of the intestate which was in this State, at which time the defendant David Jones was present and received his portion without accounting for the hires of the negroes received or to be received by him in Alabama, nor was any attempt made by the defendant N. T. Jones to hold him to an account. We hold that it was the duty of the administrator to withhold from David Jones his portion of the estate of his intestate until he had fully accounted for all the advancements made him and the property of the estate in his hands, and that in failing to do so he has subjected himself to the claims of the plaintiffs to their full respective portions of said advancements, to which alone the plaintiffs admit their present claim extends. It is referred to the master to ascertain the amount of the said advancements and the other fund. Although David Jones was of age, such reasonable sum as he expended in his maintenance and education under the direction of his father is not to be charged to him as they are not an advancement.

It must be referred to the clerk.

PER CURIAM. Ordered accordingly.

Cited: Williams v. Williams, 79 N. C., 421; *Grant v. Reese,* 94 N. C., 730; *Morefield v. Harris,* 126 N. C., 627.

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(250)

ELIZABETH HUNTLEY v. ROBERT S. HUNTLEY.

1. Although a deed from a husband to his wife, for slaves, cannot have the effect of vesting a title in her, yet it amounts to a declaration of trust in her favor.
2. Where, by agreement, property is to be held in trust, the trustee is not at liberty to assume the position of an adversary, and cannot make a title to himself by the length of his possession; because he holds for another, and not for himself, and continues to be bound by the original agreement.

HUNTLEY *v.* HUNTLEY.

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

Winston for the plaintiff.
Strange and *Mendenhall* for the defendants.

PEARSON, J. After the demurrer was overruled (41 N. C., 514), the defendant answered and evidence was taken on both sides, by which these facts were established: In 1838 the plaintiff separated from her husband, the defendant Robert Huntley, and put herself under the protection of her brother, James H. Ratcliff, the testator of the other defendant, who undertook to act in her behalf, and as her next friend instituted proceedings for alimony. Soon thereafter the parties, at the instance of mutual friends, agreed to compromise, and on 22 May, 1838, James H. Ratcliff, in behalf of his sister, paid to the defendant Robert Huntley $200 and executed to him a bond, with a condition to pay the cost of, and to dismiss, the proceedings which had been taken for the recovery of alimony and to indemnify the said Huntley from all liability for the debts and contracts of his wife so long as she may live separate from him. On the same day the defendant Huntley delivered to James H. Ratcliff three slaves and executed to the plaintiff an actual bill of sale for the same slaves. These three acts—the (251) payment of the $200 and execution of the bond by Ratcliff, the delivery of the slaves, and the execution of the bill of sale to the plaintiff—were parts of the same transaction. On the day following the plaintiff executed to James H. Ratcliff an absolute bill of sale for the same slaves, and he and the defendant, his executor, have held them ever since. The plaintiff alleges that by the sale and delivery of the slaves the legal title vested in James H. Ratcliff, in trust, as a security for the money by him advanced and to indemnify him, and then in trust for her separate use and benefit absolutely and free from all claim on the part of her husband.

The defendant Huntley admits the plaintiff's allegation, but the other defendant denies that there was any such trust, and alleges that James H. Ratcliff, his testator, purchased the slaves and took the legal title for his own use and on his own account, and says he made the purchase "for better or for worse." If Huntley and his wife should remain separate for a long time it was "a bad bargain"; if they should become reconciled in any short time it was "a good bargain."

This presents the main question in the cause, Was the sale and delivery of the slaves to James H. Ratcliff in trust as alleged by the plaintiff, or was it a purchase by him for his own use?

We are entirely satisfied that James H. Ratcliff took the slaves in

trust as alleged by the plaintiff. Whether a trust can by parol be added to a deed absolute on its face is a question not presented by this case, for the conveyance was parol, viz., by sale and delivery; and, passing by that question, the fact of the trust is established by the evidence beyond all doubt. James H. Ratcliff professed to pay the $200 for and in behalf of his sister. He bound himself to dismiss the proceedings and release her claim to alimony. This he of necessity did (252) as her agent and in her behalf, and his bond recites that her husband had agreed to *give her* the slaves, and "that she may ever use, possess, and enjoy them free from any contract or liability on his part." Besides this, as a part of the same transaction, the husband executes to the wife an absolute bill of sale to the slaves. Although this deed could not have the effect of vesting the title in her, yet it amounted to a declaration of a trust in her favor.

We are thus relieved from the necessity of commenting upon the conduct of a brother who, after undertaking to protect and aid a sister, should attempt to speculate upon her domestic relations and to acquire as a purchaser for his own use and, in the language of the answer, "for better or for worse," property of the husband to be paid for in part by a surrender of the claim of the sister to alimony.

It was then insisted for the defendant John P. Ratcliff that although the bill of sale executed by the plaintiff to his testator was inoperative to pass title, yet it had the effect of making his possession adverse as an assertion of title in himself, which, having been continued for more than three years, gave him a good title. This position is not tenable. When, by agreement, property is to be held in trust the trustee is not at liberty to assume the position of an adversary, and cannot make a title to himself by the length of his possession because he holds for another and not for himself, and continues to be bound by the original agreement.

It was further insisted for the same defendant that the trust was a substitution of the slaves in lieu of the plaintiff's alimony, and that as a reconciliation had taken place the trust in favor of the wife had thereby determined, and, consequently, she could not maintain this bill, as the trust resulted to the husband, and it was for him to enforce it if he saw proper. This objection would come with more propriety from (253) the husband. But admitting it to be open to the other defendant, the reply is: the trust alleged and proven is an absolute one for the separate use of the wife, which "she may forever possess and enjoy, free from any contract or liability on the part of the husband." This excludes the idea of a trust resulting to the husband upon the reconciliation, and there is no allegation or proof in regard to the terms of the reconciliation.

There will be a decree for the plaintiff, and the defendant must pay the costs, except those of the other defendant.

PER CURIAM. Decree accordingly.

Cited: *Garner v. Garner,* 45 N. C., 4; *Winborne v. Downing,* 105 N. C., 21; *Maxwell v. Barringer,* 110 N. C., 83.

(254)

JOHN C. WASHINGTON, EX'R, ETC., v. ELIZABETH BLOUNT ET AL.

1. A testator bequeathed, as follows: "I desire that my two negroes, A. and S., shall continue to labor for the benefit of my estate, for three years after my death, or pay the sum of seven hundred and fifty dollars each to my executor. At the expiration of that time, (three years), I desire that they may be permitted to select their masters; and do authorize and empower my executor to sell them to such person or persons as they may select, at a nominal price, or to liberate them, if it can be done consistently with the laws of North Carolina, as they may prefer; my intention being to have them kindly treated, and properly taken care of, for the remainder of their lives, etc." *Held,* that the first part of the bequest was void, as being substantially for their emancipation; and that, therefore, if the negroes chose to remain in this State, it would be the duty of the executor to sell them *as slaves,* but, in doing so, he is not obliged to put them up at auction, but may sell them *as slaves* at private sale, for a fair price, to any person at his discretion. If they prefer being emancipated, the executor may send them out of the State, by giving bonds or without giving bonds.
2. The testator also bequeathed as follows: "Should my negro woman H. desire to be sold in the neighborhood of Washington, where she was raised, I authorize and request my executor to sell her and her child S. to such persons as she may select in that neighborhood, and for such prices as he may think proper. My executor is further authorized, requested and empowered to hire out said H. for six or twelve months, to such person as she may select, thus giving her an opportunity of choosing her master; or she may remain with her mistress eight or ten years, if she wishes." The woman preferred remaining with her mistress, but, having had several children, had become expensive, and her mistress declines to keep her, without some compensation being allowed from the estate. *Held,* that the executor could not make such an allowance, and if the mistress will not keep and support the negroes, the executor must sell them; and, in doing so, he may exercise his discretion, according to the testator's intention, and may sell in the neighborhood of Washington, to any person at private sale, for a reasonably fair price.
3. An executor, who has entered upon the discharge of his trust, cannot afterwards resign it.

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

This was a bill filed by the plaintiff as executor of Nathan G. Blunt,

praying the direction of the court in regard to the execution of certain bequests contained in his testator's will. The bequests and the questions therewith connected are set forth in the opinion delivered in this Court.

J. W. Bryan and *J. H. Bryan* for the plaintiff.
Rodman for the defendants.

PEARSON, J. Three questions are presented: First. The will has this clause: "I desire that my two negro men, Allen and Samuel, shall continue to labor for the benefit of my estate for three years after my death, or pay the sum of $750 each to my executor. At the ex-
(255) piration of that time (three years) I desire that they may be permitted to select their masters, and do authorize and empower my executor to sell them to such person or persons as they may select, at a *nominal price,* or to *liberate them, if it can be done consistently with the laws of North Carolina, as they may prefer;* my intention and desire being to have them kindly treated and properly taken care of for the remainder of their lives," etc.

It is evident that the testator intended to sell these negroes to themselves at the price of $750 each, or three years labor, "for the benefit of his estate" under the stimulus of a promise of freedom. Two questions are presented: Suppose they prefer to enjoy their freedom *in this State,* by selecting some one who is to become their ostensible owner, at a *nominal price,* and who will "treat them kindly and take care of them for the remainder of their lives." Is this a lawful trust, such as the executor is at liberty to carry into execution? We think not, for it is only another name or mode or disguise under which to make free negroes and introduce a sort of *quasi* freedom wholly incompatible with our institutions. Should the negroes prefer to remain in this State it will be the duty of the executor to sell them *as slaves* and to account to the estate for a fair and reasonable price. Of course, he has a discretion and is not obliged to put them up on the block to the highest bidder, but may sell them at private sale to any one who will give a fair price for them as slaves.

Suppose they may prefer to be emancipated. The executor may then adopt one of two courses, either of which, according to the decisions of this Court, can be done *consistently* with the laws of North Carolina. He may give the bonds required by the statute and send them out of the State, or he may send them out of the State, and thus liberate them without the bonds. *Thompson v. Newlin, ante,* 32; *Wooten v. Becton, ante,* 65.

(256) Second. There is this clause: "Should my negro woman Harriet desire to be sold in the neighborhood of Washington, where

she was raised, I authorize and request my executor to sell her and her *child Sophy* to such person as she may select in that neighborhood, and for such *price as he may think proper.* My executor is further authorized, requested, and empowered to hire out said Harriet for six or twelve months to such person as she may select, which will give her an opportunity of choosing her master, or *she may remain with her mistress eight or ten years if she wishes."*

Harriet preferred to remain with her mistress, the widow of the testator, but she has had several children and, as the widow says, her services are not worth the maintenance of herself and children. The question is, Can the executor pay the widow a reasonable sum for maintenance? We think not. The testator evidently intended to favor Harriet, and took it for granted that "her mistress" would keep her and Sophy eight or ten years, but he seems not to have thought about the children she might have afterwards, and while intending a favor to her there is nothing to show that he intended to put a burden on his estate or on his widow. The result, therefore, is that if the widow is not willing to maintain Harriet and her children free of charge the executor must sell her. In making the sale he has a wide discretion, according to the intention of the testator, and may sell to any person in the neighborhood of Washington Harriet may select, for a reasonably fair price, at private sale. It was evidently the testator's intention that not only the child Sophy, but the children born since, should be sold with their mother to some kind master. And in reference to this the executor is at liberty to aid the woman with his advice in making a selection.

Third. Can the executor resign? We think not. He has accepted and entered upon the discharge of his trust and can only be removed upon a suggestion of unfitness or unfaithfulness, neither of which (257) is alleged.

There must be a decree according to this opinion.

PER CURIAM. Decree accordingly.

Cited: Delap v. Delap, 55 N. C., 293; *Harrison v. Everett,* 58 N. C., 163; *Tulburt v. Hollar,* 102 N. C., 408; *McIntyre v. Proctor,* 145 N. C., 291.

UNIVERSITY OF NORTH CAROLINA v. JOSIAH MAULTSBY ET AL.

1. The act of 1850, ch. 62, directing the personal estate of any deceased person, that might remain in the hands of an executor or administrator for seven years, unclaimed, etc., to be paid over to the President and Directors of the Literary Board, is not unconstitutional, though such property, as it might accrue, had been directed to be paid to the University, by the acts of 1784 and 1809, Rev. Stat., ch. 46, sec. 20.

It is competent for the Legislature to enact, that an administrator should after a reasonable time, pay an unclaimed surplus of the estate to any person, charged by law with the keeping and securing of the same, for the benefit of the creditors and next of kin. And they may, when they think proper, from time to time, change such depositary.

2. The University of North Carolina is a public institution and body politic, and, therefore, subject to the legislative control. It was not only, originally, the creature of the Legislature, but is absolutely dependent upon the legislative will for its continuing existence.

3. The fact that private donations have been made to the University does not alter the nature of the foundation, nor the character of the corporation.

(258) APPEAL from the Court of Equity of COLUMBUS, at Fall Term, 1851.

This was a bill filed in 1851 by the trustees of the University of North Carolina, alleging that one Charlotte Rouse, of Columbus County, died intestate in the year 1841, and that administration on her estate was granted to Josiah Maultsby at August Term, 1841, of the county court of the said county; that the said administrator still has in his possession a large amount of the estate of his intestate remaining unclaimed, and the bill prays for an account of such estate, and that the amount may be paid and delivered over to the plaintiffs.

To this bill a general demurrer was filed by the defendant.

(262) *John H. Bryan,* with whom were *W. H. Haywood* and *Moore,* for the plaintiffs.

Strange and *Troy* for the defendant.

RUFFIN, C. J. The Court had considered this cause and was prepared to pronounce a decision and assign the reasons for it when an application was made on the part of the plaintiff for a further argument. As it is the course of the court of equity not to conclude parties on one hearing, the leave must be granted. Yet as the second argument is in the nature of a rehearing it is considered proper that some note of the opinions of the Court on the points involved should be communicated to the counsel, as well to prevent any speculation on the idea that the law on these points is deemed doubtful as to direct attention to the questions for argument.

The Court is clearly of opinion that it was competent to the Legislature to enact that an administrator should, after a reasonable time, pay an unclaimed surplus of the estate to any person charged by law with the keeping and securing the same for the benefit of the creditors and next of kin. The duty of securing the estates of dead men is a political trust of high obligation, and the disposition of the surplus in such a case is simply an act in the course of administration and subject to

legislative regulation. The administrator hath no right to retain it to his own use. He got his office and the possession of the assets from public authority and he must execute the office and account for the property and deposit it, under the direction of the law. Therefore, the plaintiff would be entitled to a decree if the act of 1850, ch. 62, had not made it the duty of the defendant to make the payment to the literary board, instead of the trustees of the University, under the previous act of 1809.

The Court is further of opinion that the act mentioned is constitutional.

The same reasons on which the trustees might be authorized (263) to take the surplus from an administrator require a power in the Legislature to change the person from time to time with whom it shall be deposited, as it may be deemed more safe for those having a beneficial interest in it. Accordingly, the payment has been required to be made at one time to the wardens of the poor, at another to the public treasurer, then to the trustees of the University, and, lastly, to the literary board. In this particular duty, then, the trustees were discharging a political agency, in subjection, necessarily, to the legislative discretion, and any incidental advantage from the possession of the assets, or even ultimate permanent property, cannot change the nature of the office, even if the corporation might be regarded as private.

But the Court is further of opinion that the University is a public institution and body politic, and hence subject to legislative control. It is admitted, and the Court is prepared to hold, that charters of corporations founded by individuals on their own funds, either for their own emolument or for the purposes of education or other general charity, are contracts of inviolable obligation. The admission and exclusion of members, the qualification of directors or trustees, the mode of keeping up their succession, and the government of such corporations, are absolutely fixed by the charter and can only be modified by the concurring will of the Legislature and the corporations. The property of such a corporation also is as secure as that of the individual citizen. But the University was founded by the State on the public funds and for a general public charity. In both senses of the term "foundation"—that of *fundatio incipiens* and of *fundatio perficiens*—the State is the founder of the college. The trustees were not of private appointment or designation, nor had they a faculty of keeping up the succession of themselves, and no person in particular derived any exclusive advantage from the corporation, but, on the contrary, the election of trustees has ever been by the Legislature, and their number more or less at (264) different periods, as directed for the time being, by the Legislature. There is no power but their own sense of the public interest and their representative responsibility which can coerce the members of the

Legislature to keep up the succession by elections to fill vacancies as they may occur, and, therefore, the corporation was not only originally the creature of the Legislature, but it is absolutely dependent on its will for its continuing existence. Hence, it seems to the Court that there cannot be an instance of a corporation more exclusively founded by the public, more completely the creature of public policy, for public purposes purely, than the University of North Carolina. It is as much so as those other public functionaries, the president and directors of the literary board and the board of public works. It is true that since the incorporation there may have been donations to the college, but that would not alter the nature of the foundation nor the character of the corporation. It is merely a political agent—an instrument of State—and it follows that its organization, devotion, and government, its power of acquiring property, and the disposition of the property belonging to it —at all events, so far as it is of public endowment—are subjects for legislative regulation. Hence, the Court concludes that the act of 1850 is constitutional, and, accordingly, that the literary board and not the University is entitled to receive the fund in the defendant's hands.

PER CURIAM. Declared accordingly.

Cited: University v. R. R., 76 N. C., 106, 107; *Mial v. Ellington*, 134 N. C., 153.

(265)

GEORGE W. B. SATTERFIELD ET AL., v. WILLIS F. RIDDICK ET AL.

1. Whether an infant female can or cannot bind her realty by marriage contract, yet, if lands to which she is entitled, with others, as tenants in common, be sold for partition, under an order of a Court of Equity, a contract made by her, she being still an infant, for the conveyance of the fund arising from such sale, in consideration of marriage, will not be supported, where it appears that she was under a misapprehension of her rights, and believed that the fund constituted personal and not real estate.
2. An infant female may settle her personalty at marriage, on the ground that it cannot be to her prejudice, but must be to her advantage, if it secure to her or her issue anything, since, without the settlement, the whole would go to the husband, absolutely, on the marriage.

CAUSE transmitted from the Court of Equity of GATES, at Fall Term, 1851.

Smith for the plaintiffs.

Bragg and *Heath* for the defendants.

At December Term, 1851, the following opinion was delivered by

RUFFIN, C. J. In 1826 John Riddick died intestate, seized of lands in Gates County, and leaving three daughters, Emily, Sarah, and Mary,

who were his heirs at law. Emily married Thomas B. Hunter, and Sarah married William Ely, and they and the said Mary, then an infant, united in a petition in the court of equity for partition of the land by having it sold, which was accordingly decreed, and the sum of $2,400 received therefor. Before the money was paid, Mrs. Hunter died, leaving her husband surviving and also their two infant children, Thomas and Sarah Ann, and their father, Thomas B. Hunter, was appointed their guardian, and then received one-third part of said sum. Afterwards, Mrs. Ely died intestate and without issue, and Mr. (266) Hunter received one-half of her share of the money for the share thereof of his children, representing their mother as one of Mrs. Ely's heirs. Subsequently, Thomas Hunter died intestate and an infant, leaving his sister, Sarah Ann, his sole heir; and then, in 1835, Thomas B. Hunter, the father, died also, leaving a considerable personal estate to his daughter, Sarah Ann. Thomas Twine was afterwards appointed the guardian of Sarah Ann and received from the administrator of her father all the sums he had held as part of the proceeds of the land, and also the personalty to which she succeeded as the next of kin of her father.

Thomas B. Costen, a brother of the wife of the before named John Riddick, died intestate and without issue and seized of lands in fee, and leaving as his heirs two brothers, James and George, and Mary Riddick aforesaid and Sarah Ann Hunter, the two last representing Mrs. Riddick, the deceased sister of the intestate, Thomas R. Mary intermarried with George W. B. Satterfield, the plaintiff, and Twine having removed from the State the plaintiff was appointed the guardian of Sarah Ann. Upon the petition of James Costen, George Costen, Satterfield and wife, and Sarah Ann, those lands were also sold by decree of the court of equity, and the share of the proceeds belonging to Sarah Ann was $975.16, after deducting the expenses; and the plaintiff as her guardian received the same. Before any settlement was made by the plaintiff with Twine, the former guardian, Sarah Ann and Willis F. Riddick, contemplating an intermarriage, entered into articles on 9 September, 1847, in which it was recited that she was in possession of and entitled to a considerable personal estate, consisting principally of money in the hands of her two guardians, Thomas Twine and George W. B. Satterfield, and also that she was entitled to a portion of the estates of Mary Goodman, deceased, as an heir, devisee, lega- (267) tee, or next of kin of said Mary, and further that it had been agreed between them that he, Willis F. Riddick, should not receive or enjoy any portion of the property then in the hands of either of the said guardians or in possession of the said Sarah Ann, or any portion of the estate of Mary Goodman, deceased, to which she might be enti-

tled, but that the same should be settled as therein provided; and then the articles contain an assignment and conveyance from Sarah Ann to Isaac R. Hunter of all the said money and personal property in the hands or possession of Twine and Satterfield, and each of them, and of the share of Goodman's estate to which she might be entitled as aforesaid upon trust for Sarah Ann until the marriage, and then for her sole and separate use during the coverture, with power to invest and pay the profits to her alone; and upon the further trusts if she should survive her intended husband to convey and transfer the whole to her immediately, but in case he should survive her, then in trust for the husband and such child or children as she might leave, equally to be divided between them; and if she should leave no child, then for such person or persons as she might, by any writing in the nature of a will, appoint, and for want of such appointment to the husband absolutely.

The marriage took effect, and in about a year the parties had issue, a son, who lived only a few days, and then Sarah Ann died in infancy and without any other issue and without making any appointment of the property. Soon after the marriage Isaac R. Hunter, the trustee, instituted a suit in the Court of Chancery of Virginia against Twine, the first guardian, and got a decree for the whole fund in his hands, consisting as well of the principal money arising from the sale of the land descended from John Riddick as the profits thereof and the money and other personal estate to which Sarah Ann was entitled from
(268) her father; and after the death of Sarah Ann the whole was received and paid over to the husband, Willis F. Riddick, as his own.

Lassiter Riddick then took administration of the estate of Sarah Ann and instituted an action at law against Satterfield and his surety on the bond given by him as her guardian, and recovered therein $1,676.23, whereof $975.16 was the principal money received for the Costen land, and the residue for the interest accrued thereon in his hands.

The bill is filed by George W. B. Satterfield and George Costen, who is the surety in Satterfield's guardian bond, against Willis F. Riddick, the husband, and against the trustee in the marriage articles and the administrator of Mrs. Riddick. It states further that the plaintiff Satterfield and his wife, Mary, after she came of full age duly assigned and conveyed to one Hoskins all that portion of the money arising from the sale of the lands to which the said Mary was entitled as one of the heirs of her father, John Riddick, deceased, she having been privily examined thereto, and that Hoskins afterwards assigned the same to the plaintiff Satterfield. It states further that after the sales of all the lands and the death of Sarah Ann Riddick the plaintiff Satterfield and his wife duly assigned and conveyed to one Hudgins all that portion of

the fund arising from the sales of the Costen land, to which she was entitled as one of the heirs of Thomas R. Costen, deceased, and also any and every other interest which she, the said Mary, had in any other funds or estates whatever, she having been also privily examined thereto, and that Hudgins afterwards assigned the same to the plaintiff Satterfield.

The prayer is that the principal money arising from the sales of the land of John Riddick, deceased, belonging to Sarah Ann and received from Twine, may be decreed to the plaintiff Satterfield as belonging to him, and also that he may be declared to be entitled to the principal money, namely, the sum of $975.16, now in his hands arising from the sales of the Costen lands and once belonging to the said (269) Sarah Ann, and that the defendant be restrained from raising the same upon the judgment at law obtained on the guardian bond by Lassiter Riddick, administrator, as relator, and for general relief.

The answers are silent as to the assignment and conveyance from Satterfield and wife to Hoskins and Hudgins, and from them to Satterfield. They insist on the marriage articles as an effectual disposition of the interests and funds in controversy, and that they are thereby vested in the surviving husband.

The injunction was granted as prayed for, and on the coming in of the answers there was no motion to dissolve it, but the cause was set down and transferred to this Court for hearing.

It was not disputed at the bar that these funds, being the produce of land sold for partition, though they were in the hands of the infant's guardians in the form of money, were yet to be regarded in the court of equity as land, in respect to alienation, devise, or descent. As the owner died in infancy she could make no election to take the funds as money, and, therefore, the question is whether she made a valid disposition of them as land. That was the point principally debated by the counsel, though it was further insisted for the defendant that Mrs. Satterfield was a necessary party.

Upon the question whether an infant female may settle her real estate on marriage opinions seem to have much fluctuated in England. The prevailing ground for upholding such dispositions is the reasonableness of providing for the issue against the imprudence or misfortunes of the parents and protecting the *feme* in the beginning against the solicitations of the husband to join him in alienations. On the other hand, the common law denies the capacity to an infant to execute a conveyance of land, which cannot be avoided, and the doctrine that such (270) a conveyance is valid is exclusively that of equity. The difficulty is how the infant acquires an equitable capacity when she is under a legal incapacity. At the present day it seems to be altogether uncertain

what the rule in equity is on this point. The text-writers take opposite sides and great chancellors have differed, though in more modern times equity seems to be leaning to the law. *Milner v. Harewood,* 18 Ves., 275; *Shaw v. Boyd,* 5 Sarg. and Rawl, and 2 Kent Com., 243. Indeed, the reasons for upholding such settlements do not seem to be as strong in this country as in England. Marriage settlements are more rare in this country, and there seems to be a prevalent sentiment that, on the whole, they do not promote domestic harmony, and that the children are sufficiently and, perhaps, better protected by the law regulating the rights of husband and wife in their own and each other's property and the equal succession of all the children to the estates, both real and personal, of the parents. The Court may well pause, therefore, before laying down a definite rule on a point on which so much doubt seems to be entertained by others until it shall come directly and unavoidably into judgment. It does not arise at present, because the cause is not ripe for a decision, and because, if it were, it might be decided on another point not involving the general question and supposing an infant female capable of settling her land or binding it by marriage articles.

The point alluded to arises upon the particular terms of the articles entered into by these persons. The instrument states that the *feme* was, or might be, entitled to some estate as an heir of Mrs. Goodman, which must have been real estate, and that interest is undoubtedly the subject of the articles. But her other interests are described as personal estate, consisting principally of money in the hands of her guardians, and then in order to carry out an agreement that the intended husband
(271) should be excluded from the receipt and enjoyment of the money, the articles assign those funds as "money and personal property," upon certain trusts agreed on. There is no doubt, therefore, that the parties thought this money to be personalty to all intents and purposes, and the articles plainly disposed of it as personalty. In that there was a total mistake. The inquiry, then, presents itself—admitting, even, that her disposition by the articles of the land, as such, would have been binding—whether the Court can regard this as an effectual, equitable disposition of this fund, being land, when the parties thought they were dealing for a purely personal interest, as they declare in the instrument, and as they most certainly did think.

It is not seen at present how the affirmative can be maintained. The difference consists in this. An infant female may unquestionably settle her personalty at marriage. That has been long settled in England on the ground that it cannot be to her prejudice, but must be to her advantage if it secure to her or her issue anything, since, without the settlement, the whole would go to her husband absolutely on her marriage. It may, indeed, be regarded as a settlement by the husband operating

by way of estoppel. For these reasons the Court held in *Freeman v. Cooke,* 41 N. C., 373, that a marriage settlement of slaves by an infant female was binding on all the parties and on the husband's creditors. Hence, the reasons of this lady for including this interest in the articles may have been—and, looking at it as money, her reasons must have been—that but for a marriage contract the husband would sweep all, and nothing would be left for her or her issue. But *non constat* had she known the source from which the money was derived and the real character impressed on it that she would have included it in this arrangement and would not have preferred the interest secured by law to herself, her issue, and her other heirs, leaving in the husband at (272) most, in case he should survive her, the profits for life—being far less than he got under the agreement. There seems, therefore, to be a strong reason why a court of equity cannot hold this lady's heirs to the specific performance of a contract so unequal and entered into under a clear mistake as to the nature of this property and the operation of the marriage on the rights to it. But this point was not spoken to in the argument, and the Court is quite willing it should be, as well as the other question, if either party so desire, before coming to a decision of the cause, especially as it is not now in a condition for a decree on the merits in favor of either party. The plaintiff has not shown himself entitled to the rights of the heir of Sarah Ann Riddick, if the heir have any rights. The bill states that by certain assignments—she being the heir—the rights of Mrs. Satterfield became vested in the plaintiff Satterfield exclusively, and the terms of one of the assignments, as stated, are perhaps broad enough to cover those rights. But those assignments are not admitted in the answers, nor otherwise established, and in that state of the case Mrs. Satterfield ought to be before the Court. The equity of the husband and wife together is only that the rights of the parties should be declared, and that the capital sums produced by the land, whether in the hands of one of the parties or the other, should be brought in and invested under the direction of the Court for the benefit of all concerned, giving the interest during his life to the surviving husband as tenant by the curtesy and securing the capital for the reversioner, Mrs. Satterfield, or her assignee in law or in deed. As husband merely or as the defendant in the judgment at law, the plaintiff cannot maintain the bill. But as it may have been an oversight merely not to exhibit his deeds, or, if there be none, not to have made his wife a party, and as it is better for all parties to have an early determination on the merits, it seems best that the cause should stand over that (273) the plaintiff may bring in his assignments or make his wife a party as he may be advised. When the cause shall be brought on again each party will be at liberty to insist on any equity to which he may suppose himself entitled.

And at June Term, 1852, the following additional opinion was delivered by

RUFFIN, C. J. The plaintiff at this term produced the deeds stated in the bill, under which he claims his wife's interest in the fund in controversy, and it was admitted at the bar that they are sufficient to vest the right in the plaintiff, if the wife had any. Therefore, the question is as to obligation of the marriage agreement on Mrs. Riddick. On that question there has been no argument at the present term; but longer consideration confirms the previous impression of the Court that, laying out of view the point whether an infant can or cannot bind her real estate by marriage articles, yet this agreement cannot be sustained and enforced in this Court, in respect to this fund, as realty. The parties believed it to be personalty, and so called it, and they dealt with it as such, and it must be understood that the intention was to settle the *feme's* personalty only, with the exception of the real estate derived from Mrs. Goodman. That is not now in contest, and there was no intention to settle any other realty. That being so, and the difference being so great between the rights of the husband and wife in the real estate of the wife derived under the law and derived under the articles, if effectual, the Court is obliged to say that the wife ought not to have been compelled to execute the agreement specifically conveying on the trusts of the articles this fund, which is the produce of the sale of her land, and, under the statute, is regarded in equity as land. Her
(274) heir stands, of course, on the same equity, and is entitled to the fund in reversion, after the husband's estate, by the curtesy. The interest hitherto accrued belongs, therefore, to the surviving husband, and the capital ought to be brought in and invested for the benefit of Riddick for life, and afterwards for that of the plaintiff Satterfield, his executors and administrators.

The defendant Riddick must pay the costs up to this time.

The following decree was directed to be entered, and was entered accordingly:

This cause coming on to be heard upon the bill, answers, former orders, exhibits, and other evidence in the cause, and being debated by counsel, the Court doth declare that John Riddick died intestate, seized of certain lands in the county of Gates which descended to his three daughters, Emily, Sarah, and Mary, his heirs at law. That the said Emily, who had intermarried with Thomas B. Hunter; Sarah, who had intermarried with William Ely, their said husbands and Mary, by proper proceedings in the court of equity, for partition caused said lands to be sold for $2,400. That Emily afterwards died, leaving her husband and two children, Thomas and Sarah Ann, surviving; and her

share in said fund, towit, $800, thereby descended to said Thomas and Sarah Ann, her heirs at law, subject to the life estate of their father, the said Thomas B. Hunter. That afterwards the said Sarah Ely died without issue, leaving as her heirs at law her sister, said Mary, and said Thomas and Sarah Ann, children of her deceased sister Emily, to whom the share of the intestate, Sarah Ely, in the said fund descended. That the said Thomas having also died an infant intestate, his share in said fund descended to his sister, the said Sarah Ann, and that, by means of these deaths and descents, the one-third part of said (275) fund belonging to said Emily, and one-half of the other third belonging to said Sarah Ely, being one moiety of the whole fund, became vested in the said Sarah Ann.

And the Court doth further declare that Thomas R. Costen, a brother of the wife of the said John Riddick, died intestate, without issue, seized of land in fee, and leaving as his heirs at law two brothers, James and George, and Mary Riddick aforesaid and Sarah Ann Hunter, the said Mary and Sarah representing Mrs. Riddick, the deceased sister of the intestate, Thomas R. Costen, and that the said lands descended to them. That the said Mary having intermarried with the plaintiff George W. B. Satterfield, they and the said Sarah Ann, James and George Costen, caused the said lands to be sold for partition by proper proceedings in the court of equity of Gates County for a sum, the share of which belonging to the said Sarah Ann was $975.16.

And the Court doth further declare that the said Thomas B. Hunter was duly appointed guardian to said Sarah, his daughter, and as such received from the fund arising from the sale of the lands descended from the intestate, John Riddick, her moiety thereof, towit, the sum of $1,200, to be held as real estate. That said Thomas afterwards died, and one Thomas Twine was duly appointed guardian to said Sarah Ann, and as such collected from the administrator of said Thomas R. the said fund of $1,200 belonging to said ward and which was held by him as real estate.

And the Court doth further declare that the said Thomas Twine afterwards removed to Virginia, and the plaintiff George W. B. Satterfield was duly appointed her guardian, who received into his hands the said sum of $975.16, his ward's share in the lands descended from said Thomas R. Costen, to be held as real estate, and that the principal money of said fund is still in his hands as well as such interest thereon as may have accrued and not been paid over to the de- (276) fendant Lassiter Riddick, administrator.

And the Court doth further declare that the said Sarah Ann, in contemplation of marriage with the defendant Willis F. Riddick and while still an infant, entered into a marriage settlement, whereby she attempted

to convey as personal estate the aforesaid funds to the defendant Isaac R. Hunter upon the trusts therein set forth, but the said settlement was made by the said Sarah Ann under the erroneous belief that she held the said funds as personal and not real estate, and under a mistake as to her rights therein, and that the said deed of settlement was therefore ineffectual to transfer or assign the said funds, or any part thereof.

And the Court doth further declare that the said Sarah Ann, after her intermarriage with said Willis F. Riddick, had issue, a son of the marriage, who lived a few days only, and after his death the said Sarah Ann died, still an infant and without other issue, and that by means thereof the said Willis F. became entitled as tenant by the curtesy to an estate for his life in the two funds aforesaid, and the said Mary Satterfield, as heir at law of said Sarah Ann, to whom the same had descended, became entitled to the remainder after the death of said Willis F. in the said funds.

And the Court doth further declare that by sundry deeds of bargain and sale, properly executed, the estate in remainder in said funds vesting in said Mary Satterfield has been assigned and conveyed to the plaintiff George W. B. Satterfield in his own right and in fee.

And the Court doth further declare that the said fund of $1,200 was collected by the defendant Isaac R. Hunter as trustee soon after the marriage of said Sarah Ann from the said Thomas Twine by proceedings in the courts of Virginia, and paid over to said Willis F. Riddick.

And the Court doth declare that the said George W. B. Satterfield is entitled to the principal money of said funds, towit, the sum of $1,200 and the sum of $975.16 upon the death of said Willis F., and
(277) that the said Willis F. is entitled to the interest thereof during his lifetime, and the plaintiff, said George W. B. Satterfield, is entitled to have said funds secured, to be forthcoming at the death of said Willis F.

And it is thereupon ordered, adjudged, and decreed that the said Willis F. Riddick, who is primarily liable, and the said Isaac R. Hunter, who is also liable, pay into this Court the sum of $1,200, principal money received by him as herein declared, and that the said George W. B. likewise pay into Court the sum of $975.16, principal money in his hands as aforesaid, to be invested, under the order of this Court, so as to secure the interest thereon to said Willis F. during his life, and the principal, at his death, to the said George W. B.

And it is further ordered, adjudged, and decreed that the injunction heretofore awarded against the defendant Lassiter Riddick, as administrator of said Sarah Ann, be made perpetual.

And it is referred to the master of this Court to inquire and report

what interest has accrued, or ought to have accrued, on the said funds when the same are paid into his office, as directed by this decree.

Cited: McLeran v. Melvin, 56 N. C., 200; *Sullivan v. Powers,* 100 N. C., 28.

(278)

WILLIAM H. HAYWOOD, JR., v. CALVIN J. ROGERS.

1. A., by his will, gave to his wife, "for her life, a tract of land, called the Red House, and three slaves; and after her death, the land to be sold by my executor, and the negroes to be hired out, until my youngest grandchild arrives at lawful age, and then sold and divided equally between my grandchildren, B. H. M., B. M., J. B. M. and M. J. M.; the proceeds of the land to be divided equally among the above mentioned children, or as many as may be living, as they come of age." He then directs, other land, and "all the residue of my property, of every description, to be sold, at such time as my executor shall think most advantageous, the whole to be equally divided among my eight grandchildren as they come to lawful age, towit, S. M.," etc.
2. *Held,* that the gift of the residue to the eight grandchildren, was a legacy, vesting at the death of the testator, and payable on their arriving at full age; but that the gift of the proceeds of the "Red House" did not vest at that period, but was contingent, and would vest only in those of the four grandchildren who attained their full age, the expression, "or as many as may be living as they come of age," qualifying the previous absolute gift.

CAUSE transmitted from the Court of WAKE, at Spring Term, 1852.

No counsel in this Court on either side.

RUFFIN, C. J. Dennis Grady died in Wake County in 1833. By his will he gave to his wife, for her life, a tract of land called "the Red House" and three slaves, and "after her death the land to be sold by my executor and the negroes to be hired out until my youngest grandchild arrives at lawful age, and then sold and divided equally between my grandchildren, Benjamin W. H. Maderis, Betsy Maderis, Joel B. Maderis, and Martha J. Maderis; the proceeds of the land to be divided equally amongst the above mentioned children, or as many as may be living, as they come of age." The will then directs other land and all the "residue of my property of every description to be (279) sold at such time as my executor shall think most advantageous, the whole to be divided amongst my eight grandchildren, as they come to lawful age, namely: Sally Maderis, Dennis G. Maderis, John W. Maderis, Polly Maderis, Benjamin W. H. Maderis, Betsy Maderis, Joel B. Maderis, and Martha J. Maderis." At the date of the will and death of the testator all the grandchildren resided with their father in

Tennessee, and they all survived the widow, who died a few years after the testator. Benjamin W. H. Maderis afterwards died intestate at the age of 19, and the plaintiff is his administrator, and each of the other grandchildren has attained the age of 21. The executor sold the land and other property, and has the proceeds ready for division. The bill claims for the intestate, Benjamin W. H. Maderis, one-fourth of the produce of "the Red House" and of the three negroes and their increase and one-ighth of the general residue.

It is somewhat singular that there should be such different dispositions of the three portions of the estate. In relation to the proceeds of the slaves and the residue there is no difficulty. They are simple gifts, to be equally divided at their lawful age, the former among four named grandchildren and the latter among eight, and the plaintiff's intestate was one of each class. They were plainly vested legacies on the death of the testator, and transmissible. But though not perfectly clear, it seems to be otherwise as to the proceeds of "the Red House." They are not given to the four grandchildren absolutely as other parts of the property are. As first made they are so given, but that is qualified by adding "or as many as may be living, as they become of age." The gift, then, is to such of them only as may be living at some particular time,

(280) and the question is, What time? From the structure of the sentence the apparent sense is that such as may be living as, or when, they respectively come of full age—that is, live to that age. It is said that this not only requires an alteration of the words, but imputes the absurdity to the will of requiring the legatee to be alive when he comes to full age, since that must of necessity be; and thence it is argued that the meaning is that the gift is to as many as may be *now* living—that is, at the making of the will or death of the testator, payable as they come of age. But there is nothing to show that the testator was looking to the probability of the predecease of his grandchildren. If he had been he would probably have provided for the same contingency in respect to the other funds given among the same persons; and the supposed absurdity cannot affect the question, for it is not an uncommon form of expression in wills for making a gift intended for one at or if he attain a certain age. Besides, the same objection applies equally to the other construction, since it is equally absurd to order a payment to a dead person at 21 as it is to make a gift to such a person. In respect to the proceeds of "the Red House" both the payment and the gift are, as it seems to this Court, on the same contingency of the respective children's coming to full age, and, therefore, the whole goes to the three grandchildren who have attained that age.

PER CURIAM. Decree accordingly.

(281)

ISAIAH RESPASS, ADM'R, ETC., v. ALFRED LANIER AND WIFE.

1. The law requires no particular words, whereby a slave is to be conveyed in a bill of sale. If the words clearly evidence a sale, it is sufficient.
2. A, by deed, conveyed a slave to J. and E.; "and in case the said J. and E. both die without leaving any child or children, then, and in that case to go to C." These expressions create no cross-remainders between J. and E., but the estate is a vested interest in each, subject to be defeated only upon the contingency of *both* dying without children.

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

NASH, J. In 1814 Samuel Clark executed and delivered to Edna Loyd a paper-writing under his hand and seal, which is in the following words: "This day received of Edna Loyd, for and in behalf of Joseph H. Winfield and Elizabeth Loyd, children of said Edna Loyd, the sum of $400 in full payment for a negro girl by the name of Sal, reserving unto the said Edna the use of the said Sal and her increase, if any, during the natural life of the said Edna. And in case the said Joseph and Elizabeth *both* died without leaving any child or children, then, and in that case, to go to the children of the sister of said Edna (Elizabeth Clark, deceased), which said negro I acknowledge to be fully satisfied for, and do secure peaceably to the said Edna, etc., the said Sal from all persons whatever. In witness whereof I do set my hand and seal, this 28 February, 1814." This paper was duly sealed, delivered, attested, and registered. Edna Loyd took immediate possession of the slave, which she retained up to the time of her death, which occurred in 1851. Sal has had several children, and upon (282) the death of Edna Loyd the defendant Lanier took two of them into his possession, and still has them. Elizabeth, one of the children of Edna Loyd, died before her mother, intestate and without issue. Joseph Winfield, the other child of Edna mentioned in the deed, died in 1828, before Elizabeth, leaving one child, the defendant Sophia, who intermarried with the defendant Alfred Lanier. The plaintiff is the administrator of Elizabeth Loyd, and the defendant Lanier of Joseph H. Winfield.

The bill charges that Elizabeth Loyd and Joseph H. Winfield were tenants in common of Sal and the increase and prays a decree for a partition and account.

The answer submits that there are no words of conveyance in the deed, and therefore the legal title to the negro woman Sal and her increase remains in Samuel Clark and his representatives, and the deed was

merely a declaration of a trust; or if the legal estate passed to the said Edna Loyd by the delivery to her of the slave, the deed must be regarded as a declaration of trusts, and the said Edna held the said slaves upon those trusts, and that upon a proper construction of these declarations of trusts the remainder in said Sal and her issue vested exclusively in the defendant Alfred Lanier in right of his wife Sophia upon the death of the said Edna Loyd, or in him as administrator of Joseph H. Winfield by way of cross-remainder between him and said Elizabeth.

The case involves the proper construction of the paper-writing set forth in the bill. Upon the part of the defendants it is contended that the legal title of the girl Sal and her increase is still in the personal representatives of Samuel Clark for the want of words of conveyance in it; and, secondly, if by the delivery the slave did pass to Edna Loyd the paper-writing amounted to a declaration of a trust in favor
(283) of herself for life with cross-remainders to her two children, and that under this last aspect of the case, as Elizabeth Loyd died without leaving issue, and the other tenant in remainder left a child, Sophia, the whole estate vested in her.

The first question raised is answered in *Satterwhite v. Fortescue,* 23 N. C., 571, where it is declared that the law requires no particular words whereby a slave is to be conveyed in a bill of sale. If the words clearly evidence a sale it is sufficient. 1 Shep. Touchstone, 388. The words used in this instrument do clearly show a sale. Samuel Clark, under his hand and seal, acknowledges the receipt of $400 as the price of Sal, and warrants the title. No estate then remained in Samuel Clark.

Admitting that the negro Sal did pass by the conveyance, the only controversy raised by the pleadings is as to the nature of the interest which Elizabeth Loyd and Joseph H. Winfield took under it. Upon the part of the defendant it is alleged that they took what is termed cross-remainders, that is, that they took as tenants in common, and if either died without leaving issue the other should take the whole. We have considered only the question raised by the parties. There are no cross-remainders created by the deed between Elizabeth Loyd and Joseph H. Winfield, but a simple conveyance to them, thereby creating under it a tenancy in common. The expression upon which the defendants rest to show that there is a survivorship arising under the deed refers to an entirely different matter, towit, the interest secured to the children of Mrs. Clark, the sister of Edna Loyd. The words are, "and in case the said Joseph H. and the said Elizabeth *both* die without leaving any child or children, then, and in that case, to go to the sister's children of said Edna (Elizabeth Clark, deceased)." These words show no intention on the part of S. Clark to create a survivorship be-

tween the children of Edna. Do they, in themselves, constitute or create cross-remainders? *Picot v. Armistead,* 17 N. C., 228, answers the question. That was a testamentary disposition of per- (284) sonal property to the children of the testator. The words are as follows: "If my child or children should die before they arrive at the age of 21 or marriage, then I give their estate," etc. The Court decide that there was no cross-limitation by implication, but the estate became and was a vested remainder in each. This was a construction upon the words of the instrument. In the case before us, the words are still stronger against construing them cross-remainders between the children of Edna Loyd: "If *both* my children die," etc. In this case, the children took vested interests, subject to be defeated upon both the children dying without leaving children. Joseph H. has died, leaving a child, whereby the contingency cannot arise.

By force of the deed upon the ground upon which the parties have put the controversy Joseph H. Winfield and Elizabeth Loyd were tenants in common. Upon the death of the latter her right passed to her personal representative, and the plaintiff is entitled to the decree he seeks. It must be referred to the master to take an account of the hires, etc., of the slaves.

PER CURIAM. Decree accordingly.

Cited: Cobb v. Hines, 44 N. C., 351; *Gwynn v. Setzer,* 48 N. C., 384.

(285)

ALEXANDER SWINDALL ET AL., v. SAMUEL SWINDALL ET AL.

A dishonest executor, who denies the receipt of the assets, accounts for neither principal nor interest, but converts all to his own use, is chargeable not only for interest, but for interest at the highest rate; and, therefore an infant may well call for annual rests, or compound interest.

CAUSE removed from the Court of Equity of BLADEN, at Fall Term, 1851.

Winslow for the plaintiffs.
Strange and *W. Winslow* for the defendants.

RUFFIN, C. J. The bill is brought by the residuary legatees of Samuel Swindall, deceased, against his executors, Hays F. Shipman and Samuel Swindall, the younger. The testator died in 1841, and the bill was filed some years afterwards, praying an account of the estate and payment of the surplus to the plaintiffs. It states, in particular, that

the testator left considerable sums of money concealed in different parts of his house, and that after his death his son Samuel discovered them and took them secretly for his own use, and especially one sum of $360, and another of $450. And it further states that Shipman proved the will and took on himself the office of executor upon the testator's estate, but that the son Samuel did not, in consequence of his reluctance to return an inventory, including those sums and others which he concealed and converted. Afterwards, Shipman having heard of the conversion of the money, and being able to adduce the testimony of a witness to each of those two sums, demanded payment from Samuel Swindall, the younger; and on his refusal he brought an action at law therefor, and then in order to defeat that action the defendant therein also took probate of the will, and thereupon this bill was brought.

(286) The answer of the defendant Swindall admits that his motive for qualifying as executor was that charged in the bill, but it denies positively that he received, found, or took, after his father's death, either of the sums of money mentioned in the bill, or any other, belonging to his father's estate, or that he received any part of the estate except what was delivered to him as and for his legacies by the other executor.

Upon a hearing, a reference was made to the clerk to take the usual accounts. He did so, and in his report charged the defendant Swindall with the two sums of $360 and $450 found at different times in 1841 in his father's house shortly after his death and converted by that defendant, and also charged him with interest thereon from the period at which he received them up to the present time. The defendant excepted to each of these charges of principal money, because it was supported by the testimony of but a single witness, which was insufficient to outweigh the positive denial of the answer. He also excepted to the charge of interest, because there was no evidence that he received any, and, lastly, that no commissions were allowed him.

The two first exceptions, as to the sums of principal money, are unfounded in fact, and must for that reason, be overruled. It is true that but one witness speaks directly to each precise sum, but they are both sustained and corroborated by circumstances and the testimony of other witnesses, which concur in establishing very clearly that the defendant received at least those sums, and render it highly probable that he got considerably more, though it cannot be told how much more.

Of course, a dishonest executor who commits the flagrant fraud of denying his receipts of the assets, and accounts for neither principal nor interest made, but converts all to his own use, is chargeable with interest from the beginning. Indeed, he is properly chargeable with interest at the highest rate, and, therefore, the infant plaintiffs

might well have asked for annual rests, or compound interest, as (287) if the defendant had been their guardian. As for commissions, one cannot but be curious to learn for what service the defendant has entitled himself to compensation. All the exceptions must be overruled, and the report stand confirmed, and a decree made for the plaintiffs accordingly, the defendant Samuel Swindall paying all the costs of the other parties.

PER CURIAM. Decree accordingly.

DAVID ROBERTS v. DANIEL WELCH ET AL.

1. Even before our act of 1826, a presumption of satisfaction of a mortgage would arise after the lapse of twenty years, there having been no demand of payment of either principal or interest, and the mortgagor remaining in possession. And, after such delay unaccounted for, a bill for foreclosure would not lie.
2. Since the act of 1826, Rev. Stat., ch. 65, sec. 14, such presumption, under the like circumstances, arises within ten years after the forfeiture of said mortgage, or last payment on the same, and it is only necessary that, in the answer to a bill for foreclosure, the fact of payment be averred, and the presumption insisted on.

CAUSE removed from the Court of Equity of BUNCOMBE, at Fall Term, 1826.

No counsel in this Court for the plaintiff. (288)
Iredell for the defendants.

RUFFIN, C. J. On 10 August, 1813, John Knighton executed to the plaintiff a mortgage in fee for a tract of land containing 230 acres, expressed to be for the security of a debt of $100, payable on the 15th of September following. Knighton died in 1830, leaving no child, but a widow and several brothers and sisters, who were his heirs and next of kin. James Gudger administered on his personal estate; and in 1836, at the instance of the brothers and sisters, the land was sold under a decree of the court of equity for the purpose of partition, and was bought by Robert P. Wells, at the price of $415, which he afterwards paid into court. In 1838 the plaintiff had his mortgage proved by the evidence of the handwriting of Knighton and the subscribing witness, who was also dead, and registered; and in March, 1842, he filed this bill against Wells, the administrator of Knighton, and against Welch and his other heirs, praying for payment of the principal of the debt and interest from 15 September, 1813, by the administrator, or out of the produce of the sale of the land then in court, or else for the foreclosure of the mortgage.

Most of Knighton's heirs are nonresidents, and the bill was taken *pro confesso* against them. But one of them, Mr. Welch and Gudger and Wells, put in answers. They state that they had no knowledge of the alleged mortgage, nor ever heard of it until the plaintiff had it proved and registered in 1838. That they do not believe that Knighton owed the plaintiff any debt at that time, but if he did that they believe it had been paid by him many years before his death. That at the time the deed purports to have been made the plaintiff had but little property, and Knighton was possessed of several slaves and other property besides the land. That Knighton resided on this tract of land
(289) until his death, and then left a clear personal estate exceeding $1,000, which was distributed soon after his death among his next of kin, and that during all that time the plaintiff lived in the same neighborhood in straitened circumstances, and was also present at the sale of the land under the decree, and yet did not produce the pretended mortgage, nor set up any claim under it. The defendants then insist that under such circumstances and after so long a time had elapsed before the filing of the bill and without the plaintiff's having entered into possession of the premises or demanded the debt or received anything on it, the Court ought to presume payment of the debt and satisfaction of the mortgage.

The proofs induce not a slight suspicion from circumstances existing at the time of the deed that the mortgage debt had no real evidence, but that the encumbrance was fabricated as an obstacle to others expected to claim as creditors and was never intended to be set up by the plaintiff. There is also evidence of the circumstances alleged in the answers from which it might be inferred, supposing the debt to have been a true one in its creation, that it had been actually paid by Knighton. But it is deemed unnecessary to consider the particular proofs to those points, because upon the pleadings the Court considers the plaintiff barred by a legal presumption of payment.

The bill is to be considered as one purely for foreclosure. It is true, the plaintiff submits, instead of taking the land, to accept payment from the administrator or out of the money got for the land by the heirs. But that is really saying nothing more than that he will not interfere with the equities of the defendants as between themselves. The plaintiff has no right to come into this Court to recover his debt merely, for that is a legal demand. His redress is against the land, and he is to have that unless his debt has been already satisfied, or
(290) shall now be satisfied by the person claiming the land or some one else at his instance. There is, therefore, no direct or independent equity in the plaintiff against the fund in Court, but at most he could only have satisfaction decreed out of it by showing a right in

himself to have a decree of foreclosure in respect of the land itself. Whether a bill for foreclosure would lie where the mortgagee had not been in actual possession, nor received nor demanded interest for twenty years, is a point of which there has been much contrariety of opinion and adjudication in England. Those who were for sustaining such bills admitted that a debt is generally presumed to be satisfied after twenty years; but they held that a mortgage was not affected thereby, because the mortgagor was tenant at will to the mortgagee, and so there was no adverse possession, and the mortgagee could recover in ejectment at any time. Hence, it was said that if the bond or other collateral security were presumed to be satisfied, the mortgage yet remained, and the court of equity could not deny the party the benefit of it.

On the other hand, it was considered that the two securities of bonds and mortgages stood on the same footing in respect to the presumption from nonpayment of interest for twenty years, and that the mortgage could not be upheld in equity when the debt appeared to be satisfied, either upon express proof of payment or on the presumption of payment. Those judges regarded the reasoning as fallacious which was founded on the notion that the mortgagor was tenant at will of the mortgagee, for although he has sometimes been so called, it is obviously only *sub modo* and by way of illustration for certain purposes, since there is no demise, express or implied, and no actual tenancy, but the mortgagor may at any time be turned out without notice. It was thought, therefore, and with apparent reason, that the fiction of the supposed relation of landlord and tenant at law ought not to affect in equity that peculiar relation there existing between (291) mortgagor and mortgagee, whereby they are looked upon as debtor and creditor, and the former as the owner of the estate, and the latter as having merely a security on it for whatever sum may be due to him. The heirs of a mortgagor in fee may, for instance, call for a conveyance from the heirs of the mortgagee upon payment of the debt to the executor, and may require the executor of the mortgagor to make the payment, showing that, in truth, a mortgage is, in the view of a court of equity, but a collateral security, and the whole benefit of it sinks with the extinguishment of the debt, at least, unless by the laches of the mortgagor, he shows that he has abandoned his equity to a reconveyance. As the mortgagor is shut out of redemption by the mortgagee's possession for twenty years, it was thought reasonable and convenient that the bar should be reciprocal on the mortgagee, who did not act on his debt or mortgage until the debt was presumed to be satisfied by the lapse of twenty years. It is a point for curious and interesting investigation to trace the adjudications of different periods on this question at law and in equity, and the attention of those who may have a fancy

for it may be directed to the following as some of the cases from which the learning may be gathered: *Leman v. Newham,* 1 Ves., Sr., 51; *Toplis v. Baker,* 2 Cox Ch. C., 118; *Meade v. Brandon,* 2 Dow P. C., 268; *Hall v. Doe,* 5 Barn. & Ald., 687; *Wilson v. Witherly,* Bul. N. P., 110; *Martin v. Mowlin,* Barn., 978; *Richards v. Syms,* Barn., 90; *Trash v. White,* 3 Bro. C. C., 289; *Blewitt v. Thomas,* 2 Ves., Jr., 660; *Hillary v. Walker,* 12 Ves., 239, 266; *Doe v. Calvert,* 5 Taunt., 170; *Christophers v. Sparks,* 2 Jac. & Walk., 223; *Cooke v. Saltan,* 2 Sim. & Ste., 154, and *White v. Panther,* 1 Knapp, 328. In that country, however, the point is one of curiosity only, for the correctness of the
(292) latter course of reasoning received a full parliamentary sanction in the recent acts of 3 and 4 W. IV, ch. 27, and 1 Vic., ch. 28, which require mortgagees to enter or sue within twenty years next after the last payment of any part of the principal or interest secured by the mortgage.

In this country there was less difficulty in disposing of the point so much controverted in the English courts. The judges here, not being fettered by the adjudications there, as authorities, and at liberty to regard the better reason of the opposing opinions without the aid of a statute, and *una voce,* we believe, treated the presumption of a release or abandonment of the equity of redemption on one hand, and of payment of the mortgage debt on the other, and the consequent satisfaction of the mortgage as arising from a delay of twenty years without some payment or acknowledgment between the parties. The first American case found is that of *Morgan v. Davis* (in 1781), 2 Har. & McHen., 9. There have been many since, among them are *Higginson v. Mein,* 4 Cranch., 415; *Collins v. Terry,* 7 John., 278; *Jackson v. Wood,* 12 John., 242; *Giles v. Basemore,* 5 John. C. C., 545. In the latter case, *Chancellor Kent* held the broad principle that the presumption of payment of a mortgage debt from lapse of time was allowed and made in the court of equity as at law, and that where there had been thirty-five years before suit without interest paid or demanded, the mortgage was presumed to be satisfied, and the bill for foreclosure dismissed. And he deemed it sufficient to enable the defendant to avail himself of that presumption that he stated in his answer his ignorance of the debt, and insisted that he had a complete title by a purchase at sheriff's sale, and
a long quiet possession. In *Hughes v. Edwards,* 9 Wheat., 489,
(293) the Supreme Court of the United States said that in respect to a mortgagee seeking to foreclose, the general rule is, when the mortgagor retained possession, the "mortgage will, after a length of time, be presumed to be discharged by the payment of the debt or a release, unless circumstances be shown to repel it, as payment of interest, or some acknowledgment of the mortgagor that the mortgage is subsisting."

There can be no doubt, then, that, according to the settled course of decision in this country and the reasons on which it proceeds, which are apparently so sound as lately to have influenced the legislation both in England and our own country, the debt and mortgage under consideration are to be presumed to have been satisfied, as there was a lapse of twenty-eight and a half years from the day of payment before suit brought; and during that long interval, the supposed mortgagor was in possession, and neither the debt nor mortgage was asserted by the alleged creditor nor recognized by the other party as subsisting, and the bill offers no explanation of the delay. But the case does not even depend on a presumption from so great a length of time, for the act of 1826, in shortening the period from which the presumption of the payment of certain debts should thereafter arise, expressly provided in the second section for presumptions, both against the mortgagee and mortgagor in respect to mortgages by enacting against the former that "the presumption of payment," and against the latter that "the presumption of abandonment of the rights of redemption" on mortgages before made should arise within thirteen years after the forfeiture of the mortgage or last payment on it. Upon that enactment it is only necessary to say that, according to *Giles v. Basemore, supra,* the fact of payment is sufficiently averred and the presumption insisted on in the answer; and it is clear that the bill should thereupon be dismissed, with costs to (294) such of the defendants as answered. *Anders v. Lee,* 21 N. C., 318.

PER CURIAM. Decree accordingly.

Cited: Powell v. Brinkley, 44 N. C., 156; *Hughes v. Blackwell,* 59 N. C., 76; *Ray v. Pearce,* 84 N. C., 487; *Pemberton v. Simmons,* 100 N. C., 320; *Simmons v. Ballard,* 102 N. C., 109; *Menzel v. Hinton,* 132 N. C., 673; *Woodlief v. Wester,* 136 N. C., 166.

AUGUST TERM, 1852.

(AT MORGANTON.)

JOHN R. DYCHE v. A. J. PATTON.

1. Whether a Court of Equity will interfere in a case at law, where the verdict was obtained by the testimony of a witness, which was known to be false by the party using it, and which the opposite party had no means of contradicting at the trial, or in time to support a rule for a new trial, and with the further ground offered, that the false witness has been prosecuted for perjury, or has absconded so as not to be answerable to the process of the law: *Query?*
2. When the answer to a bill of injunction is responsive to its allegations and not evasive, and positively denies the truth of the facts set forth in the bill, the injunction must be dissolved.

CASE transmitted from the Court of Equity of CHEROKEE, at Fall Term, 1851.

J. W. Woodfin for the plaintiff.
Gaither and *J. Baxter* for the defendant.

PEARSON, J. It is attempted by the bill to raise this question: (296) Will a court of equity interfere and require the parties to set aside a judgment and verdict at law, and try the matter *de novo* upon the allegation that the verdict was obtained by the testimony of a witness *which was known to be false by the party using it,* and which the opposite party had no means of contradicting at the trial or in time to support a rule for a new trial, without *an allegation* that the false witness has been presented for perjury or has absconded so as not to be answerable to the process of the law.

The question is an interesting one, but we do not feel at liberty to decide it, because it is not presented by the case in the stage in which we are now considering it. The answer, without evasion, responds to the allegation by a positive and flat denial; consequently, the plaintiff has nothing to stand on, and cannot support the injunction which he obtained at the filing of his bill, for, on the motion to dissolve upon the bill and answer, the answer, so far as it is responsive to the bill, is taken to be true.

The allegation of the discovery of *new matter* after the trial and after the term, when it was too late to move for a new trial, is also positively denied in the answer.

In this case the denial of the answer is accompanied with an exhibit

and also a narration of facts, all tending to disprove the allegations of the bill.

PER CURIAM. Affirmed.

Cited: Burgess v. Lovengood, 55 N. C., 460; *Dyche v. Patton,* 56 N. C., 333; *Carson v. Dellinger,* 90 N. C., 231; *Simmons v. Mann,* 92 N. C., 17; *Blackwell v. McElwee,* 94 N. C., 429.

(297)

BURGESS McENTIRE v. A. C. McENTIRE.

Where the vendor of a slave has been informed that the slave has been unsound, he is not bound to disclose it to his vendee, if he believes that the unsoundness does not still exist. Moral turpitude is necessary to constitute the fraud.

APPEAL from RUTHERFORD, at Fall Term, 1851, *Battle, J.*

J. Baxter for the plaintiff.
G. W. Baxter for the defendant.

NASH, J. The case is before us on an appeal from the decree of the court below dissolving the injunction previously obtained. The bill alleges that the plaintiff, at the request of the defendant, loaned him $100; and to secure the repayment the latter conveyed to him by way of mortgage a negro woman named Juno, and if at the end of the specified time the defendant did not repay the money borrowed, then the plaintiff was to pay the further sum of $200 by a specified time. This contract was reduced to writing and signed by the parties, and is dated in February, 1848. After the time when the $200 were to be paid the present defendant brought an action at law to recover that sum, and the bill seeks not only to enjoin the recovery at law, but to rescind the contract. The bill states that in the transaction the defendant was guilty of a gross fraud, for that "for fifteen or eighteen years before, and on the day the contract was made, the slave Juno was unhealthy, subject to periodical enlargement of one of her legs and abdomen,

(298) which rendered her almost, if not entirely, useless; that those enlargements and unhealthy periods usually came on with the warm weather in the spring, and continued until the cold weather in the fall; that her unsoundness was well known to the defendant at the time he pledged her unto the plaintiff, and unknown to him, for the negro was apparently sound and healthy," and that the defendant falsely averred her to be sound "as far as he knew." The bill then alleges that the disease exhibited itself in May after the sale, and calls

upon the defendant to say how long he had owned the negro Juno, from whom he purchased her, whether he was not told by his vendor that she was unsound, if so, in what respect, and whether the person from whom he purchased her did not expressly refuse to warrant her soundness.

The defendant answers that at the time he sold the negro to the plaintiff she seemed to be perfectly sound and healthy, as she had been during the whole time he owned her, which had not been more than a month or six weeks; and although respondent was informed by Mr. Harthen, from whom he had purchased her, that she had at one time in her life, for several years, been afflicted with some disease of the legs and abdomen, he was at the same time informed by Mr. Harthen that she had entirely recovered and had enjoyed good health for some two or three years immediately preceding the sale, which your respondent honestly believed at the time he sold her to complainant, and denies that he falsely affirmed she was sound as far as he knew. The parties differ as to the construction of the written contract, but it is in no way important in the present inquiry which is right.

The foundation of the plaintiff's claim to the relief he seeks is the fraud he alleges to have been practiced on him by the defendant in the sale. To the charges of the bill, the answer is fully responsive, and denies the alleged fraud. It admits that the vendor did inform the defendant that the woman had been so afflicted, but that she was (299) then—at the time of the purchase—well, and had been so for several years; and the plaintiff admits that at the time of his purchase she was entirely well. Add to this the admitted fact, as stated in the bill, that the disease usually broke out in the spring, as the warm weather approached, and the short time that the defendant had owned Juno, and that in the winter, and the answer is complete. But it is said that the defendant ought to have informed the plaintiff of the information given by Mr. Harthen. Certainly he ought, if he had thought she was still liable to the disease. If he did not so believe, he was guilty of no fraud in not mentioning it.

Where the vendor of a slave has been informed that the slave has been unsound, he is not bound to disclose it to his vendee, if he believes that it does not still exist. Moral turpitude is necessary to constitute the fraud. *Hamrick v. Hogg,* 12 N. C., 350. If, then, the defendant honestly believed, from the representation of his vendor, that the negro was, at the time of his sale, sound, he was guilty of no moral delinquency in not mentioning to the plaintiff her previous unhealthfulness. There is no error in the interlocutory order of the court below.

PER CURIAM. Affirmed.

(300)

H. L. POTTS v. M. FRANCIS.

Even if a contract between an attorney and his client for a conditional fee dependent on success in a cause can be sustained at all in Equity, yet where the condition was that the attorney should attend to the cause, the fee to be dependent on the event of the party's success, and the attorney neglected or abandoned it without trying it and a term or two before the trial, it is unprofessional and unconscientious in him to claim such fee, although his client was successful. In such a case, a Court of Equity will interfere to prevent the collection of the claim.

APPEAL from the Court of Equity of HAYWOOD, at Spring Term, 1852, *Manly, J.*

Baxter for the plaintiff.
Woodfin for the defendant.

RUFFIN, C. J. The plaintiff offered for probate a script purporting to be the last will and testament of John Davidson, deceased, dated 3 September, 1844, whereby he bequeathed to his wife three slaves for her life, with remainder to three of his children, and appointed the plaintiff the executor; and a *caveat* was entered by some others of the children, and an issue of *devisavit vel non* was made up. At the same time a bill was filed by the remaindermen and other children in the court of equity against the plaintiff and Mrs. Davidson to restrain the removal of the three slaves from the State.

The defendant was a practicing lawyer and applied to by the plaintiff to conduct the two causes as his attorney and counsel in conjunction with another member of the bar, and they undertook the business, and as a remuneration therefor he paid each of the counsel $30, and also gave to each of them his bond for $250 as a further and con-
(301) ditional fee for their attention to the causes and trying them and succeeding in them. The bill then alleges that the charge was excessive, and that the defendant made many representations calculated and intended to alarm the plaintiff unnecessarily as to the danger of losing the causes, and the serious consequences to him therefrom, so as to obtain from him this security for a sum far above an adequate remuneration for the services to be rendered. But it is not necessary to state them particularly, as the decision of the Court proceeds upon a different ground. The bill further alleges that the defendant drew the plaintiff's answer in the suit in equity, merely denying any intention to remove the slaves, and rendered no other services therein, and that he made up the issue on the *caveat* and attended the court at a term or two afterwards, but did not try the cause nor continue his attention to it up to the time of the trial. On the contrary, it states that a year or more before the cause came on for trial, the defendant gave over all

attention to it, and, indeed, abandoned his practice entirely, and the plaintiff was consequently compelled to employ other counsel in the defendant's stead to manage and try the issue. That they succeeded in establishing the will, and thereupon the defendant demanded payment of the bond to him for $250; and upon the plaintiff's refusal he put it in suit. The prayer is to be relieved against the bond, and for repayment of the money, if it should be collected before the hearing of this suit.

The answer denies the charges of taking undue advantage, and insists that the fees were reasonable, inasmuch as the question in the court was as to the capacity or insanity of the alleged testator, which was deemed doubtful, and the plaintiff had a deep personal interest in it, because he claimed a tract of land and eight slaves under conveyances made contemporaneously by Davidson. The answer states that the defendant drew the answer in the suit in equity, and that he also instructed the plaintiff in preparing the will cause for trial, and examined many persons whom the plaintiff brought to him as his witnesses. It denies that the defendant abandoned the plaintiff's cause, and states that the defendant withdrew from the bar on account of domestic affliction before the trial—the second term before, according to the evidence—but had spoken to other counsel to attend to his cases. And it further states that the trial which subsequently took place was merely formal, for that, under the advice of the counsel originally engaged with the defendant and the one subsequently employed by the plaintiff, the causes were compromised, and, by consent, a verdict passed in favor of the will. (302)

Supposing such contracts between attorney and client, as the present, to be sustainable in equity, it appears to the Court that the defendant cannot be allowed to enforce this, because he did not perform the services he engaged to perform, as the consideration of the bond. It is true, he did some acts as the plaintiff's attorney, but it is equally true that he received some compensation in the $30 paid him. The other bond was conditional, and in its nature the condition must be deemed entire and as going to the whole bond. The money was to be paid in case the defendant brought the cause to trial and tried it successfully. The plaintiff employed the defendant, and agreed to give that fee because of his estimation of both his fidelity and ability in his profession, and it cannot be assumed that he would have engaged to give as much to another member of the bar. The great reliance in such cases is on the services of eminent counsel in the trial itself, and it is obviously next to impossible, when the counsel declines to appear on the trial, to apportion a conditional fee, so as to remunerate instructions and services prior to the trial, in a manner to do justice to the expectations of the client and meet the intentions of the parties. (303)

In this case, however, the defendant, for aught that can be seen, willfully withheld his services at the trial. He says, indeed, that he withdrew from the bar for domestic reasons, and that he engaged other counsel in all his business. But he gives no evidence of either, and, therefore, it cannot be assumed if it would do him any good. The truth is, however, that the plaintiff was obliged to employ another counsel, and the cause was settled by compromise about a year after the defendant had gone out of it. The terms of the compromise are not stated, but it is manifest that if the *caveators* voluntarily abandoned the contest, the cause must have been one in which the fees stipulated were inordinately high, and if the present plaintiff paid them anything, *non constat,* that he would have done so, if the defendant, in the performance of his engagement and duty, had been there to advise and act for him. In fine, it is unprofessional and unconscientious to claim a conditional fee, payable on succeeding in a cause which the counsel neglected and abandoned without trying and a term or two before the trial. The plaintiff must have the decree he asks, and with costs.

PER CURIAM. Decree accordingly.

(304)

D. F. RANSOM v. E. SHULER.

1. A motion to dissolve an injunction, until the defendant has filed his answer is irregular: At all events, such a motion ought not to be entertained, after a general demurrer, has been set down for argument and before the argument.
2. The rule in Equity is, that a vendor cannot, with a good conscience, coerce the payment of the whole purchase money, when there was fraud in the sale, and leave the vendee to pursue a personal action at law for the uncertain damages, which a jury might assess, for the fraud in selling what did not belong to the vendor, but, on the contrary, the vendee has the right of withholding so much of the purchase money, as will re-imburse him for his loss, because, to that extent, the consideration has failed in his own hands against the loss impending over him.
3. In such a case, the contract remaining unexecuted, the Statute of Limitations has no application.

APPEAL from CHEROKEE Fall Term, 1851, *Battle, J.*

Gaither for the plaintiff.
J. Baxter for the defendant.

RUFFIN, C. J. The bill was filed on 5 September, 1851, and states that at the public sales in 1838 the defendant purchased from the State two adjoining tracts of land in Cherokee County containing together 265 acres, and that before he had fully paid for them he contracted on 8

January, 1848, with the plaintiff to sell them to him for the sum of $600 over and above the residue of the purchase money due to the State, and that the plaintiff paid the defendant the sum of $300 down and gave him his bond for the remaining sum of $300, and the defendant transferred to the plaintiff the survey and commissioner's certificate, with authority to receive the grant from the State, upon payment by the plaintiff of the remainder of the purchase money, (305) the land being particularly described by miles and bound in the survey. That the defendant had cleared a field containing about 15 acres, and had erected thereon a dwelling-house and made other improvements, and that the same were worth between $200 or $300, and that during the treaty the defendant represented that the said houses and improvements were included in the survey and land so purchased from the State, and the plaintiff made the purchase under the belief that they were included, and would belong to him accordingly. Upon the conclusion of the bargain, the defendant removed and delivered the possession to the plaintiff, as well of the dwelling-house and other improvements and the cleared field of 15 acres as of the other parts of the land, and the plaintiff entered into the whole as one purchase. The bill further states that the defendant knew at the time of the treaty and sale that his purchase from the State did not include that field and his improvements thereon, but that it still belonged to the State, and that his representations on that point were false and fraudulent, as the plaintiff afterwards discovered, and that he commenced an action at law in the Superior Court of Cherokee against the defendant for the deceit, but was unable to prosecute it successfully by reason that the defendant had removed over the line into Georgia so that the writ could not be served. That the plaintiff had paid a part of his bond, but that a balance of $182 remained due thereon, for which judgment had been taken at law just before the filing of this bill, and that the sum was insufficient to make good to the plaintiff the loss sustained by him by reason of not getting a good title to the houses and other improvements mentioned. The prayer is that the plaintiff may be relieved by a deduction from the purchase money, and to that end for an injunction against proceedings on the judgment at law. Upon this bill an (306) injunction was granted, and at the first term of the court of equity the defendant demurred for want of equity, and because the plaintiff had a remedy at law by action of deceit, and because more than three years had expired before the bill filed, and, therefore, the statute of limitations was a bar. The demurrer was set down by the parties for argument at the next term, and then the defendant's counsel moved to dissolve the injunction. The court disallowed the motion, and the defendant, by leave, appealed.

The ground of his Honor's decision is not stated in the transcript, but it appears to the Court that there are several grounds on which it is correct. No doubt an injunction which has been irregularly obtained may be discharged on motion for that cause; but it appears to be the course of the court not to receive the motion to dissolve an injunction until the defendant has filed his answer. 1 Smith's Ch., p. 615. At all events, such a motion ought not to be entertained after a general demurrer has been set down for argument and before the argument. There is an obvious inconsistency in such a course, for the motion to dissolve must be founded on the defects and insufficiency of the bill itself, and therefore it involves precisely the same questions of equity which must arise on the demurrer when brought on for argument and decision. It is, therefore, an attempt to obtain, by the summary action on a motion, a declaration of the Court as to the equity between the parties, which is to come up again for solemn determination on the demurrer. It is plain that the decision of the motion involves the whole merits of the controversy, and where the defendant has chosen to put that in issue by demurrer he ought not to ask the Court to anticipate the decision by a summary step, which would necessarily commit the Court upon the points made by the demurrer. As a matter of practice, therefore,
(307) the Court might properly have refused to hear the motion. But on the merits, the injunction ought to have been continued even if the motion to dissolve were entertained. Taking the bill to be true, there was both a fraud and a failure in the consideration, for which the plaintiff gave his bond, in respect to the land and improvements, not embraced in the defendant's purchase from the State which entitled the plaintiff, in a court of equity, to ask, perhaps, for the rescinding of the contract altogether, or, at all events, for reforming it by abatement from the purchase money to the value of the portion thus lost by him. Admitting that he might recover damages in an action at law for the deceit, yet that would not impair his right to equitable relief, since that and the legal remedy are not of the same nature; but the latter may be, and generally is, that the vendor cannot with a good conscience coerce the payment of the whole purchase money and leave the vendee to pursue a personal action at law for the uncertain damages which a jury might assess for the fraud in selling what did not belong to the vendor, but, on the contrary, the vendee has the right of withholding so much of the purchase money, because, to that extent, the consideration has failed as a security in his own hands against the loss impending over him. That being the ground and nature of the relief in equity, it is plain that the statute of limitation has nothing to do with the matter as long as the contract remains unexecuted in the view of the court of equity, by reason that part of the purchase money is unpaid, and the

plaintiff seeks compensation thereout. There was, therefore, no error in the interlocutory order appealed from, and the defendant must pay the costs in this Court.

PER CURIAM. No error.

Cited: *S. c.*, 55 N. C., 487; *Knight v. Houghtalling,* 85 N. C., 30, 34.

(308)

LEWIS WILES v. JOSHUA HARSHAW.

When parties reduce a contract to writing, the instrument is strong evidence that what it speaks is the truth; nor can that conclusion be repelled by any evidence which is not clear and cogent.

CASE transmitted from the Court of Equity of CHEROKEE, at Fall Term, 1851.

J. Baxter for the plaintiff.
Gaither and *J. W. Woodfin* for the defendant.

NASH, J. The bill charges that the plaintiff borrowed from the defendant $50, and as a security for its payment he mortgaged to him a negro girl named Ailsey. The mortgage deed was drawn by Harshaw, and read over to the plaintiff by him, and the consideration mentioned, as read, was $50; and the bill avers that the plaintiff never did read over the deed before executing it, being old and infirm, and that he never did receive but $50 from the defendant. It charges that after it was recorded, he was induced to examine it, and found that, instead of $50, the consideration is for $550, and prays for the redemption of the negro upon paying $50 and the interest. The answer states that the plaintiff applied to the defendant for the loan of $500 or $600, but got but $550, and avers that amount was loaned him; that the girl Ailsey was mortgaged to secure that amount; admits that the defendant drew the mortgage, but avers that he drew it according to the contract, and that it was deliberately read over to the plaintiff by the defendant and then handed to the former, who himself read it over and said it was all right. We have carefully looked over the evidence in the cause, and are constrained to say that the plaintiff's proofs do not so sustain the allegations of his bill as to authorize the Court to make such (309) a declaration as he requires. There were three witnesses to the mortgage deed, one is dead, the depositions of the other two have been taken; they both prove that the defendant read over the deed to the plaintiff, and that he then handed it to the latter, when one of them swears he read it, and the other that he looked at it and signed it, and

the son of the plaintiff swears that the deed was read over to the plaintiff, and the consideration mentioned was $50. It is further in evidence that the plaintiff can write, and it is not in the bill denied but that he can read writing. Upon the whole, however much we may be led to suspect the truth of the defense, we cannot feel justified in declaring that a fraud was practiced on the plaintiff. When parties reduce a contract to writing, the instrument is strong evidence that what it speaks is the truth, nor can that conclusion be repelled by any evidence which is not clear and cogent.

Such is not the evidence on the part of the plaintiff in this case. The bill is to redeem the negro Ailsey upon the payment of $50, with legal interest thereon, but the plaintiff has failed to establish that the money borrowed was less than the amount stated in the written contract, to-wit, $550. He is entitled to redeem the negro Ailsey upon the payment of that sum, with interest thereon, and to that end to have the usual accounts at his election; and if he fail to have such accounts before the next Court, that the bill be dismissed.

PER CURIAM. Decree accordingly.

(310)

JOSEPH BRYSON v. WILLIAM C. PEAK.

1. In the case of a breach of contract of sale, the injured jarty is entitled, at his election, to a bill for specific performance, and is not bound to bring an action at law for damages.
2. As a general rule in Equity, time is not the essence of a contract, and is therefore not material, except so far as costs may be concerned.

CAUSE removed from the Court of Equity of MACON, at Fall Term, 1851.

N. W. Woodfin for the plaintiff.
J. Baxter for the defendant.

PEARSON, J. So much of the case as it is necessary to state in order to present the only question made at this stage of the proceedings is as follows:

In 1849 the plaintiff contracted to sell to the defendant a tract of land, and executed a bond to make title on or before 1 January, 1851. The defendant went into possession. The plaintiff had not perfected his title, and was consequently unable to make title to the defendant on 1 January, 1851, whereupon the defendant commenced an action at law upon the bond, and before the trial the plaintiff perfected his title, tendered a deed to the defendant, and offered to pay the costs of the action at law. This was declined, and the defendant took a judgment.

The bill is for a specific performance of the contract. There is an injunction in reference to the judgment at law. Upon the coming in of the answer, a motion to dissolve was disallowed, and the defendant appealed.

The answer insists that as there was a breach of the condition of the bond, the defendant had his election to sue at law and recover damages, or file a bill for a specific performance, and that having elected to go for damages, the plaintiff had no equity against his judg- (311) ment. It further insists that if the plaintiff has an equity, he should, beside the costs of the action at law, make compensation to the defendant for *his trouble and entire expenses.*

Specific performance is one of the most extensive and most beneficial heads of equity jurisdiction. It is based upon a clear, simple, and broad ground; that is, that in a contract of sale, compensation of damages is not an adequate remedy for a breach and a fair and even measure, as justice requires that the vendor should take, and that the vendee *should take* the thing bargained for. This principle applies with perfect mutuality, while on the one hand the vendee is not obliged to take compensation in damages, but may insist upon having the thing contracted for; so, on the other, the vendor is not obliged to make compensation in damages, but may insist upon the vendee's taking the thing contracted for; consequently, there is no foundation for the idea that after the breach the vendee has an election to sue for damages at law or file a bill for a specific performance, using the term "election" in the sense of the vendor's being bound by it. Anciently, the vendee was required to establish the contract and a breach thereof by an action before he was at liberty to file a bill for specific performance; by the modern authorities, he can file a bill at once; and by all of the authorities, the remedy in equity is held to be mutual, so that either vendee or vendor may insist upon a specific performance at any time before the contract is extinguished by the payment of the damages, for the reason that a specific performance is the most fair and even measure of justice.

It is said the plaintiff was bound to make title on 1 January. That is true, but as a general rule in equity, time is not the essence of a contract, and is therefore not material, except so far as costs may be concerned. It is almost an invariable practice for courts of (312) equity to allow vendors "time" to perfect title. In the case under consideration, it is clear that time was not of "the essence," for the defendant is let into possession in 1849, and his possession is not interrupted; so it made no substantial difference whether he got title in January or August. Again, it is said the plaintiff being in default cannot in conscience insist that the defendant shall forego his judgment at law and take the land without making full compensation. That

is true, and the question is, What is full compensation? So far as we can see, in the present case, it is the amount of the costs of the action at law. We can notice no costs except such as are provided for and allowed by statute. We are not at liberty to have reference to the private contracts of the defendant. There is

PER CURIAM. No error.

Cited: *Welborn v. Sechrist,* 88 N. C., 292; *Whitted v. Fuquay,* 127 N. C., 69; *Rodman v. Robinson,* 134 N. C., 515.

(313)

ELIZABETH L. GOODRUM v. JAMES GOODRUM ET AL.

1. The words "sole and separate use" are those most appropriate to create a separate estate in a married woman, independent of her husband.
2. Indeed each of those terms, "sole," "separate," has been held sufficient for that purpose, and especially when coupled with that of "disposition" by the wife.
3. The trust will not be allowed to fail for the want of a trustee; if necessary, the executor of the will devising such an estate, would be held to be the trustee. But, on application of the wife, a Court of Equity would appoint any other fit and proper person to be trustee.

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

Avery for the plaintiff.
Davis for the defendant.

RUFFIN, C. J. The plaintiff is the wife of the defendant James Goodrum, and her mother, Elizabeth Upton, bequeathed several slaves to her as follows: "I give to my daughter, Elizabeth L. Goodrum, wife of James Goodrum, for her sole and separate use and maintenance and to be disposed of as she desires, a negro woman named Nellie, a boy, Willis, and a girl named Mahaley, and their increase," and she appointed the defendant Whitson her executor. The bill is filed by the plaintiff by her next fried against the executor and the husband, and alleges that the testatrix left personal estate more than sufficient to pay her debts and all charges, exclusive of the slaves, and that the executor retains them because there was no trustee appointed in the will to whom he can convey them as trustee and to settle a conveyance by the executor for the separate use of the plaintiff, while the husband claims
(314) them, inasmuch as there is no other trustee, though the plaintiff deems him an unfit person to have the management of the prop-

erty, for the reason that he is an imprudent and needy man and much involved in debt to persons, who already threaten to seize the slaves for his debts. The prayer is that the plaintiff may be declared to be equally entitled to the slaves as her separate estate and subject to her disposition, exclusive of any control or power of the husband, and not liable to his debts; and that in order that she may thus enjoy them, the executor may be desired to convey the slaves to some fit person as trustee in trust for her, as her separate estate, by a proper conveyance to be directed by the Court.

The defendants answer and admit the allegations of the bill to be true, and submit to any proper decree, and the cause is heard on bill and answer, and a copy of the will exhibited with the bill.

The construction to be given to the will is perfectly settled. The words "sole and separate use" are those most appropriate to create a separate estate in a married woman independent of her husband. *Porter v. Brooks,* 9 Ves., 583. Indeed, each of those terms, "separate" and "sole," has by itself been deemed sufficient for that purpose, and especially when coupled with that of "disposition" by the wife. *Adamson v. Armitage,* 19 Ves., 419, and *Ex parte Ray,* 1 Mad., 199. Here, all those expressions are united, and it is clear they create a separate and equitable estate in the wife. Of course, they would not be allowed to fail for the want of a trustee. The executor would be held to be the trustee, if necessary. But as he is not expressly appointed to that office, and the parties seem to prefer some other person, it will be referred to the clerk to report a fit person other than the husband to hold for the separate use of the plaintiff, with the usual powers of disposition and appointment by her, and also with proper limitations over for the want of disposition or appointment by the plaintiff. (315)

PER CURIAM.

Cited: Apple v. Allen, 56 N. C., 124.

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