THE

Carolina Law Repository.

CONTAINING

BIOGRAPHICAL SKETCHES

OF

EMINENT JUDGES;

OPINIONS

OF

AMERICAN AND FOREIGN JURISTS;

AND

REPORTS OF CASES

ADJUDGED IN THE SUPREME COURT OF NORTH-CAROLINA.

VOL. II.

"The mind of man not being capable of having many ideas under "view at once, it was necessary to have a REPOSITORY to lay up those "ideas."—*Locke.*

RALEIGH:

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1816.

TAYLOR, C. J. delivered the opinion of the Court:

Costs are made discretionary in this Court, with a view that they may follow as nearly as possible the conscience of the demand; and there is no instance of trustees being chargeable with them where they have acted fairly, although they fail in establishing a claim. 1 *Ves. jr.* 205.

The conduct of these complainants was such as might have been reasonably expected from executors who were disposed to do their duty; for seeing a will coming forward for probate at a considerable interval after the testator's death, and after the notoriety of one will being proved, it was natural to suspect the fairness of the attempt, and just to resist it, until it was established by testimony. It would be a great discouragement to executors to oppose even forged wills, if it were understood that it must be done at the private hazard of paying the costs out of their own estate, in the event of a failure. Where their conduct is wanton and litigious, and the Court can collect that from the facts of the case, it will require the application of a different rule.

All these expenses have arisen from the circumstance of the testator's having left two wills, without giving any reason to the person who had the custody of the prior, to believe that it was revoked by a subsequent one. It is equitable therefore that the costs should be paid out of his estate. Where a testator by his will has occasioned difficulties, the costs ought to be paid out of his assets. *Studholme* v. *Hodgson & al.* 3 *P. Wms.* 303. *Jotliffe* v. *East*, 3 *Bro. Ch. c.* 25. *Pearson* v. *Pearson.* 1 *Schoale & Lefroy*, 12.

Heirs of Orr v. *Ex'rs & Devisees of Irwin.*

This was a bill in equity for the specific conveyance of a tract of land, for which the bill charged that *R. Irwin* had, in his life-time, procured a grant to issue in his own name.

The executors pleaded to the jurisdiction of the Court, that the lands lay in Tennessee, the Courts of which State could alone take cognizance of such a claim.

TAYLOR, C. J. delivered the Judgment of the Court:

Though it may be admitted that the decree of this Court cannot act directly upon lands, yet its power may be exercised over all those persons who are within its jurisdiction. So that if a decree should be made ordering a conveyance, the party disobeying it, might be attached for the contempt. It seems to be a well settled principle, that any contract made, or equity arising between parties in one country, respecting lands in another, will be enforced in the Chancery Courts of that country where the parties reside, or can be brought within the jurisdiction of the Court. 1 *Eq. Ab.* 133. 1 *Vern.* 75, 135, 419. 3 *Atk.* 589. 3 *Vesey, jr.* 170.

To these cases may be added, a decision made by the late *Chancellor Wythe*, in Virginia, which may be cited as equal in point of authority, if not superior to any of the British decisions, from the luminous and conclusive reasoning on which that upright and truly estimable Judge founds it.

Clarum & venerabile nomen.

His words are, "the fourth question is, whether a Court of Equity in this Commonwealth can decree the defendants, who are within its jurisdiction, to convey to the plaintiffs lands which are without its jurisdiction?

"The power of that Court being exerciseable generally over persons, they must be subject to the jurisdiction of the Court; and moreover, the acts which they may be decreed to perform, must be such as, if performed within the limits of that jurisdiction, will be effectual.

"That the defendants are subject to the jurisdiction of the Court, and amenable to its process, hath not been denied; and that a charter of feoffment containing a power of attor-

ney to deliver seisin, a deed of bargain and sale, deeds of lease and release, or a covenant to stand seised, executed in Virginia, would convey the inheritance of lands in North-Carolina, as effectually as the like acts executed in that State would convey such inheritance, hath not been denied, and is presumed, until some law there to the contrary be shewn, because the place where a writing is signed, sealed and delivered is, in the nature of the thing, unimportant.

"If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey lands in North-Carolina, why may not a Court of Equity in Virginia, decree that party, regularly brought before that tribunal, to perform the act?

"Some of the defendants' counsel supposed, that such a decree would be deemed by our brethren of North Carolina, an invasion of their sovereignty. To this shall be allowed the force of a good objection, if those who urge it will prove that the sovereignty of that State would be violated by the Virginia Court of Equity decreeing a party within its jurisdiction, to perform an act there, which act, voluntarily performed any where, would not be such a violation.

"The defendant's counsel objected also, that the Court cannot, in execution of its decree, award a writ of sequestration against the lands in North-Carolina, because its precepts are not authoritative there. But this, which is admitted to be true, doth not prove that the Court cannot make the decree; because although it cannot award such writ of sequestration, it hath power confessedly to award an attachment for contempt, in refusing to perform the decree. This remedy may fail, indeed, by the removal of the defendants out of the Court's jurisdiction, yet such a removal after the party had been cited, is not an exception which can be interposed to prevent a decree. A Court of Common Law may enter up a judgment against him, who, by removal of his

goods and chattels with himself, after having pleaded to the declaration, or after having been arrested, rendereth vain a *ca. sa.* or a *fi. fa.*

"From a contrary doctrine to that now stated and believed to be correct, may result both inconvenience and a failure of justice.

"1. A man agrees to sell to another, or holds in trust for another, lands in Georgia, Kentucky, or one of the new States north west of the Ohio, but he cannot be decreed to execute the agreement, or to fulfil the trust, by any tribunal but that in one of those countries, several hundred miles distant from the country *ex. gra.* North-Carolina, in which both parties, and the witnesses to prove matters of fact controverted between them, reside; like and greater inconveniencies may happen in numberless other cases; whereas a case can rarely if ever occur, the discussion of which can be so convenient to the defendant in any other, as in his own country.

"2. An agent employed to purchase lands for people intending to emigrate to America, or for others, having laid out the money deposited for that purpose with him by them, and having taken conveyances to himself, or to a friend for his use, refuseth not only to make title to his constituents, but also to discover the lands purchased. They meet with him in one of the States, and in the Court of Equity there, file a bill against him, praying for a discovery and a decree for conveyance; he excepts to the jurisdiction of the Court as to any lands not lying within that State, and denieth by answer, that any lands within that State were purchased by him for the plaintiffs, which was true. The bill in such case, according to the doctrine of the defendants' counsel in the principal case, must be dismissed, and this must be the fate of every other bill, until he shall have the good fortune to find out in what State the lands purchased are; and if they be in several States, a bill must be filed in every one. If to

this be said, the Court may compel a discovery though they proceed no farther, the answer is, that this is directly the reverse of the rule in the Court of Equity, viz. that the Court, when it can compel a discovery, will complete the remedy, without sending the party elsewhere for that purpose, and decree to be done, what ought to be done, in consequence of the discovery." *Wythe's Rep.* 143. *Farley* v. *Shippen.*

We have transcribed thus largely from the work of the *Chancellor*, because it is not in every library, and the discussion of the question, which is new in this Court, being the most able and copious we have any where met with, cannot fail to be instructive to the student, and acceptable to the practitioner, who will both be disposed to allow, that the excellence of the matter atones for the length of the extract. ——Plea overruled with costs.

Dunwoodie's Ex'ors v. *Carrington.*

Detinue for five negroes. A special verdict was found, stating the proofs and circumstances at great length; but the following extract is all that is necessary to a thorough comprehension of the points in the cause.

Warren the plaintiff, as executor of *Dunwoodie*, hired the slaves sued for two years successively to the defendant, who on the expiration of the last year, refused to restore them, resting his defence on the last will of *Henry Dunwoodie*, the plaintiff's testator, in which he devises all his property to his wife *Elizabeth* during her life, and after her death the negro *Jude*, one of those sued for and mother to the rest, to his grandson *Absalom.* To his grandson *James*, he bequeaths fifty pounds after the death of his wife, to arise out of his estate. To his son *John* one shilling; to his daughter *Nancy* one shilling; and to *Sarah Grissom* and his grand-