REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR THE RICHMOND DISTRICT.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)

PRINTED AND PUBLISHED BY I. RILEY.

1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. The second edition, revised and corrected by the "authors. Volume I. By William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie-"tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

JUNE, 1807.

Edmonds v. Carpenter.

Wickham, in reply, laid it down as a general proposition that a proviso in an act never enlarges its operation, in any case; much less in a penal law. The legislative exposition, which has been relied upon, clearly proves that they did not think this law embraced the case of a person's selling goods at two stores under one license, or they would not have changed the language of the proviso, in their subsequent revenue laws.

Tuesday, June 23. By the whole Court, the judgment of the District Court was reversed.

Worsham *against* M'Kenzie.

Monday, June 22.

ON an appeal from a decree of the High Court of Chancery.

After a confession of judgment by an executor, in an action brought on his executorial bond, for the purpose of recovering against him and his securities for a *devastavit*, he cannot resort to a Court of Equity for relief, on the ground that he had fully administered the assets of his testator.

John Worsham, the testator of the appellant, being indebted to *M'Kenzie* by bond in which his heirs were bound, departed this life, leaving lands incumbered by a mortgage as well as a considerable personal estate under no incumbrance. These lands he devised to *William Worsham* the appellant, and made him his executor. As devisee he entered upon all the testator's real estate; and, in the character of executor, he took possession and disposed of all the slaves and personal property.

The appellee having obtained a judgment against the appellant as executor on the said bond, and issued an execution which proved unproductive, commenced a suit in the District Court of *Petersburg* on the executorial bond, with a view to charge the executor in his own right for a *devastavit*, and, with him, the securities in the bond for his due administration of his testator's estate. At the *September* term, 1798, the cause was continued for the defendants; and, in *April*, 1799, judgment was confessed, with a stay of execution until the 1st of *September*, 1799. At the expiration of this period, an execution issued on the judgment, and a delivery bond was taken, upon which judgment was confessed at *April* term, 1800, with a stay of execution until the 1st of *October* then next following.

The appellant, the executor, obtained an injunction from the High Court of Chancery on the ground of a full administration of the personal assets; and assigned, as a *reason for his not relying, at common law, on the plea of *plene administravit*, that the affairs of his testator were so com- * 343

JUNE, 1807.

Worsham v. M'Kenzie.

plicated that he did not know the state of the assets at the time when the judgment was rendered; and moreover stated that, being ruled to trial without counsel, (the late Mr. *John Thompson*, whom he had retained in the defence, having departed this life but a short time before the trial came on,) judgment passed against him unopposed.

The answer of the appellee expressed a doubt of the appellant's having fully administered the personal assets of his testator, and relied on the several confessions of judgment; and on this point also, that the appellant, as heir or devisee, was in possession of ample funds to discharge this debt.

The bill was dismissed on a final hearing, from which decree of dismission an appeal was taken to this Court.

Wickham, for the appellant. The first point meant to be contended is, that the appellant is not barred from seeking relief, in equity, by the judgment at law. This point has never been solemnly settled in this Court; but it has uniformly been acted on in the Court of Chancery. Cases have frequently occurred where an executor has been relieved after a judgment at law, if it appeared that he had acted fairly and had fully administered the assets of his testator. In the Federal Court the same rule prevails, on the ground of its being the settled practice of the Courts of Chancery in this state. In the present case, it is assumed as a fact, that the executor had (before the rendition of the judgment) fully administered the estate committed to his charge. He exhibits an inventory and account of sales of the personal estate; and, though he does not produce an appraisement, yet that is immaterial, as the account of sales corrects and overrules the appraisement. The account of administration is in the common form, and has received the sanction of the County Court. When that is done, the account is always presumed to be correct. It is never the course of the Court of Chancery to require the vouchers by which the several items of an account of administration are supported. If an account be objected to, it is referred to a commissioner to examine and compare the items with the vouchers on which they are founded. By the account which has been settled by commissioners and passed by the County Court we are creditors to the amount of three hundred and fifty pounds. During the present term of the Federal
* 344 Court, administration *accounts have been admitted without vouchers, and verdicts rendered for the defendants, on the plea of *plene administravit*. They should always be

considered as *prima facie* evidence; and, if objected to, ought to be referred to a commissioner.

But it may be argued that the appellant confessed a judgment. This, under existing circumstances, ought not to prevent relief in equity. I will not raise the question (which seems never to have been solemnly settled) whether a previous suit be necessary against an executor, before you can sustain an action on the administration bond. Let it be admitted that the judgment at law, under the circumstances of this case, was an admission of assets, and that on a return of an execution "*nulla bona*" the executor would have been liable for a *devastavit*. If relief could then have been had in equity, his confession of judgment cannot vary the case: for the return of *nulla bona* would, at law, have had the same effect; it would have estopped the executor from saying that he had no assets. Even if, pending the suit at law, he had applied to the Chancellor for relief, he would have been compelled to confess a judgment.

Another reason may be assigned why the appellant ought not to be deprived of relief in equity. He was induced to confess a judgment under an impression that he could not defend himself at law. Counsel differed in opinion on this point; and even his own counsel was of opinion that he could not avail himself of a defence in a Court of Common Law. It may be said, that, by obtaining a stay of execution, he undertook to pay the money in any event. But he evidently mistook his case; and it has always been held that a man shall not be precluded from relief in equity merely because he was mistaken in the conduct of his suit at law. It will be admitted that if, by a stay of execution, he had deprived the creditor of his right, he must abide by the consequences. But that does not appear to be the case in the present instance. No payments were made by him to other creditors, between the rendition of the judgment and the expiration of the time to which execution was stayed; and the assets of his testator were as sufficient at one period as at the other.

I come now to another point; the supposed liability of the appellant as devisee, in consequence of the lands given him by the will of his testator. It is admitted that, if the lands be sufficient to satisfy prior incumbrances, the surplus, if any, is assets in equity. If he is to be charged on *account of those lands, it should be as heir or devisee; and * 345
the lands should be sold for the payment of the demand; but there should be no *personal* charge. By charging the land, not more than the *value thereof* could be recovered;

JUNE, 1807.

Worsham v. M'Kenzie.

but by making it a *personal charge* he may be compelled to pay ten times its value; especially as it was incumbered with a mortgage which must first be satisfied.

If the appellant be entitled to relief in equity *as executor*, and be chargeable *as devisee*, then there ought to be a decree for the sale of the lands, by commissioners, and an account taken of the real and personal estate which came to his hands; because the value of those lands cannot otherwise appear. In every view of the case, the decree of the Chancellor ought to be reversed, and an account taken; and the judgment at law should stand as a security for the performance of the final decree.

Hay, for the appellee. It appears, from the documents filed in this cause, that the appellee brought a suit against the appellant as *executor*, upon the bond of his testator; and that, after a judgment and an ineffectual execution, a suit was brought on the executorial bond, in which the security in the bond, as well as the executor, was a party. The suit progressed, and, finally, a judgment was confessed by the appellant, in consequence of his agreement that he himself would pay the debt; and six months were allowed for that purpose. The time elapsed; an execution issued, and a forthcoming bond was taken. At the moment when a motion was about to be made for a judgment on that bond, the executor again confessed a judgment, and obtained a stay of execution for six months longer. It is now contended that he is not bound by these two judgments deliberately rendered by himself.

Much has been said by Mr. *Wickham* to shew the practice in the Chancery and Federal Courts, as to relief in cases of a fair administration. I shall not deny the propriety of this practice; but I do not see the propriety of a reference to those authorities. I never meant to say that a judgment against an executor in his executorial character deprived him of relief in equity, if he were otherwise entitled to it; but I *do say* that, when there is a suit brought against an executor for wasting the assets of his testator, for retribution out of his own estate, *his* confession of judgment is an acknowledgment that the charge of waste is true, and that he is bound both in law and equity. It is remarkable that, in this case, there was a
* 346 stay *of execution even after a judgment on a forthcoming bond; the appellant clearly manifesting, in every stage of the proceedings, that he considered the debt as his own. These circumstances differ the case widely from the statement made by Mr. *Wickham*. The suit in which this

judgment was confessed was not against the appellant *as executor;* but against him *in his own right,* to establish a *devastavit.*

But it is assumed as a fact, that the appellant has fully and fairly administered the assets which came to his hands. This, it is said, appears from an account which has been returned to the County Court; and we are told that a Court of Equity will relieve in such cases, where a judgment has been rendered against a man in his executorial character. This last position, though true, has no application to the case before the Court. Relief is sought by the appellant, not in his *representative,* but in his *individual* character; so that the executor, as a party, would not come within the scope of Mr. *Wickham's* own argument.

Though a Court of Equity will relieve where an executor has acted fairly, yet the rule does not apply to this case. The account exhibited by the executor has a very suspicious aspect. There is no account whatever of any credits to the estate of his testator. It is improbable that a man should have owed upwards of a thousand pounds, and that not a shilling should be due to him. Such appears to have been the case with the testator of the appellant, from the account exhibited by his executor. Again, there was no appraisement of the estate. This the executor was bound to have done, by the tenor of his oath, and the condition of his bond. This important duty was omitted. Why? The account of sales will answer. It will be found that ten negroes sold for three hundred and odd pounds only, and were purchased by the executor himself. It may be said, that it might have been either a good or a bad bargain; but, if there had been an appraisement, the real value of the negroes would have appeared. As the executor has not done what his duty prescribed, we are at liberty to presume against him, and to infer that the sale was a fraudulent one. That the executor committed a *devastavit,* there can be no doubt. The evidence of the counsel who prosecuted the suit against him shews that the plaintiff was prepared to establish that fact, and that the confession of judgment was the effect of a compromise between them, which was proposed by the executor himself. From that moment he considered that the executor took the debt upon himself.

*It is said by Mr. *Wickham,* that the second judgment makes no difference, since there would necessarily have been a judgment at law. The position is not correct. Where there is a suit brought against the executor him- * 347

JUNE, 1807.

Worsham v. M'Kenzie.

self, and he is the only party, the original judgment against him as executor, is evidence of assets. Mr. *Wickham* has not adverted to the distinction between an action against the executor suggesting a *devastavit*, and an action on the executorial bond. In the latter case, the security is a party, and, by the express provision of the law, he is not liable beyond the assets for any omission or mistake in pleading or for false pleading of his principal.(*a*) The object of the second suit, in this case, was to *prove* a *devastavit*; and, however accurate Mr. *Wickham's* ideas may be as to the legal effect of the first judgment against the executor, *as such*, being the ground of a second judgment *against him in his own right*, the counsel opposed to the appellant did not expect to succeed on that point of law, but to obtain the second judgment, on the testimony of witnesses proving a *devastavit*. I contend that the confession of judgment, under the circumstances of this case, was a fair contract, which the appellant is bound in law and equity to perform.

(*a*) *Rev. Code*, vol. 1. c. 92. s. 33. p. 165.

But it is said, if the confession of judgment and stay of execution has deprived us of any right, the appellant must abide by the consequences. Already have we been extremely incommoded, in not being permitted to go on with our action at law. We should have obtained a judgment against the appellant individually, on proof of a *devastavit*. Can it be believed that the appellant, if he had been a creditor of the estate of his testator, as he represents, would have confessed a judgment, and acknowledged that he had wasted it? If we had gone on, and obtained a judgment on establishing the fact of a *devastavit*, he never could have come into a Court of Equity for relief. The counsel for the appellant, in the Court of Common Law, I am well assured, never expected to succeed on the ground that there had been no *devastavit*; but only that the appellee's counsel had not brought an intermediate suit against the executor, to establish the *devastavit*, before he commenced his action on the executorial bond. The celebrated case of *Braxtow* v. *Winslow*,(*b*) has produced much confusion, and has never been clearly understood. It would seem, from the opinion which the Court is made to express, in that case, that a *devastavit* must be established by a separate action against the executor, before you can resort to

(*b*) 1 *Wash.* 31.

* 348 *a suit on the executorial bond. But this opinion is not supported by reason; nor was it necessary for the Court to decide that point, there having been, in that case, no suit whatever against the executor, even to establish the debt.

It is admitted by Mr. *Wickham*, that the lands devised to the appellant are liable; but it is contended there should be no judgment against him personally. After such a length of time, it would be unreasonable to ask the appellee to resort to the land. It may not be in the possession of the appellant. But there is one circumstance which deserves consideration: it is extremely probable that, in consequence of these lands, the appellant was induced to confess judgment: especially if he had disposed of them.

But, it is said, the land was subject to a mortgage. It does not clearly appear that this was the case. There is no evidence that this is the same land. But if it were, the mortgage has probably been paid off; as there appears, in the executorial account, an item for money paid on account of a mortgage. It is not said for what land; but the presumption is, that it was for the land devised to the appellant.

Another circumstance deserves the consideration of the Court. The appellant repeatedly promised to pay this debt. I would ask, if this does not strengthen the conviction, that he considered himself bound to pay it?

Wickham, in reply. It is not contended, on the part of the appellant, that there ought to be a perpetual injunction, without further inquiry; his liability for the property, real and personal, which came to his hands as devisee or executor, is admitted. All that we contend for is, that enough appears to put the Court on an inquiry as to the truth of the facts alleged by the appellant.

It is admitted by Mr. *Hay*, that we were not so conclusively bound by the first judgment, as to preclude us from relief in equity. He *must* admit that we were bound by it at law. I cannot, therefore, see that the confession of the second judgment made any difference: for the appellee had only to carry his first judgment into Court, with a return of *nulla bona* on the execution, and take his second judgment as a matter of course. It was, consequently, unnecessary to summon witnesses to prove a *devastavit which the law implied.* If the appellant had applied to a Court of Equity in the first instance, he would have been compelled to confess a judgment, before an injunction would have been awarded. As to the stay of *execution, it is admitted, that if any loss had been sustained on that account, it must have been borne by the appellant; and with respect to the delay, we pay interest on the debt, which the law deems an adequate compensation.

* 349

JUNE, 1807.

Worsham v. M'Kenzie.

But the account is said to have a suspicious aspect. There is no proof of fraud; and *prima facie* the account is correct. It is settled in the usual form; and, if there be a suggestion of any unfairness, it is not now too late to inquire into it. The circumstance of there being no credits is easily accounted for; the testator being much in debt, probably assigned the bonds of others, payable to him, in discharge of his own debts.

Why, it is asked, was there no appraisement? This question cannot be asked here. If the appraisement were now in my pocket, I could not produce it. In Chancery it might be called for. With respect to the negroes we know nothing. Those ten sold by the executor and purchased by himself at the price of three hundred and fifty pounds, might have been very old or very young; they might have been a good or a bad bargain.

It is inferred that the appellant knew he was a debtor to the estate of his testator by confessing a judgment. What else could he have done? He was bound at law by the first judgment against him as executor; and advised that his only defence was in equity. If there had been a judgment for a DEVASTAVIT, it would have been no bar to relief; because, in the action suggesting a *devastavit*, the Jury would have been bound by the original judgment. Nor does the stay of execution make any difference: for cases have gone so far, as that, where there was a *bond* given on a new contract, relief has been granted on the equity arising from the original transaction. But the land may be gone. If so, the injunction bond stands as a security. It is said too that it does not appear the land was mortgaged. This comes out in the answer. "But the "mortgage may be paid." This may or may not be the case; and ought to be inquired into——"But the appel- "lant promised to pay the debt." Mr. *Hay*, himself, (as appears from the record,) told him that he could not get relief. It was then only a promise to pay a judgment which he thought himself bound to pay. Cases are numerous where relief has been granted in equity, after a promise by the party to pay arising from a mistaken apprehension that he was bound.

Tuesday, *June* 23.—The decree of the Chancellor was unanimously affirmed.