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.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)

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1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, 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. Volume II. By William W. Hening and Wil-"liam 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.

4,000 dollars, for the faithful performance of his duty; which the Legislature, no doubt, thought a sufficient sum to cover the delinquency and malfeazance of any one inspector; though in this singular instance, it seems, they were mistaken.

APRIL, 1808.
The Commonwealth v. Colquhouns and others.

It seems a hard case on the appellees, but they must seek relief from another quarter.

The decree was reversed, and the bill dismissed *with costs*.(1)

Anderson and Starke *against* Fox and others.

ON an appeal from a decree of the late High Court of Chancery, dismissing a bill exhibited by the appellants against the appellees.

Nelson Anderson, one of the complainants, was surety for *Richard Anderson*, in a bond to *Alexander Baine* for 1,889*l.* 12*s.* 0*d.* in paper money, which, being reduced by the scale, amounted to 157*l.* 9*s.* 4*d.* bearing interest from

(1) The *Commonwealth*, when the decision is *in its favour, recovers* costs; though it does not *pay* costs, when *cast in a suit.*

If an executor sells the slaves of his testator, when there are no debts to render such sale necessary, and buys them himself, the sale may be set aside, at the instance of any person interested.

An executor having sold certain slaves which were specifically bequeathed by his testatrix; having become the purchaser himself; and, afterwards, recovered damages in an action of *trespass* against the sheriff for seizing and selling them as the property of the *specific legatee*, in whose possession they were found; a Court of Equity will require an account of his administration, to ascertain whether the sale, at which he was himself the purchaser, was necessary for the payment of debts, or not; and (even if the sale and purchase by himself be justified by the result of the investigation) will grant a new trial of the issue in the action of *trespass;* (though no motion to that effect was made *at law;*) in case the damages were *excessive,* and produced by erroneous impressions on the minds of the jury; *and* where the damages are *evidently* excessive, the testimony of the *jurors* will be received to declare the motives which induced them to give such damages. In such case, the damages ought not to be *vindictive*, but only for the *value* of the slaves, with a reasonable allowance for *hire.*

Quere, how far an *ex parte* settlement of his administration account by an executor, with commissioners appointed, on his own motion, by the Court in which the will was proved, is valid?

☞ In this case, a doubt was suggested, whether, an executor could legally purchase the property of his testator sold by himself *though the sale were public, and necessary for the payment of debts;* but it appears, from the decree, that such sale and purchase (the sale being necessary for the payment of debts,) would be confirmed if no fraud were proved.

APRIL, 1808. Anderson and Starke v. Fox and others.

November 13th, 1778. A judgment was obtained upon it in *Louisa* County Court, by *Philip Duval* as assignee, and execution was levied on a negro woman *Milley* and two children, in the possession of *Richard Anderson.*— The sale was forbidden by *John Fox*, who set up a claim to them; whereupon *Nelson Anderson*, who was afraid of suffering as surety, and wished as much of the execution as possible to be satisfied out of the property of *Richard Anderson*, agreed to indemnify the sheriff, and became himself the purchaser of the slaves, at the price of fifty-five pounds. *Fox* brought his action in the District Court of *Richmond*, against *Starke* (the sheriff who had levied the execution) and recovered two hundred pounds damages.

Nelson Anderson and *Starke*, as joint complainants, on the 9th of *May*, 1801, obtained from the *Chancellor* an injunction to the last mentioned judgment; stating in their bill, among other things, that the slave *Milley* and her increase, with other slaves, were given by *Susanna Fox*, to her daughter *Caty Anderson*, wife of *Richard Anderson*, who was in possession of the said slaves, many years before the death of the said *Susanna;* that, by her last will and testament, (operating as a confirmation of the previous gift,) she bequeathed the same slaves to the said *Caty Anderson*, and other slaves to different persons; that the defendant, *John Fox*, was her executor, and assented to all the several legacies; that the other legatees were permitted by him to enjoy their legacies without disturbance; but that he claimed the slave *Milley*, and her children, under the pretext that the estate of his testatrix was in debt; that, if such had been the fact, all the legatees ought to have contributed; that *Richard Anderson* was completely insolvent; and that there was an undue combination between the other legatees and the executor, to injure the complainant, *Nelson Anderson;* that he had no notice of the trial at law, which if he had had, he might have prevented the recovery against *Starke;* that the *damages were excessive;* that, to avoid litigation, he had offered to give up *Milley*, and her chil-

dren, which *John Fox* had refused to accept. *Richard Anderson* and all the legatees were among the parties defendants. The bill also prayed a new trial of the issue at law; an *account* of *John Fox's* administration of the estate of *Susanna Fox*, and contribution, if necessary, from the other legatees. It moreover charged a fraudulent and collusive recovery by *Joseph Fox*, of some of the slaves, given by *Susanna Fox* to *Richard Anderson's* wife.

The defendant, *John Fox*, on the 12th of *August*, 1801, *on his own motion*, obtained an order of *Louisa* County Court, appointing *William O. Callis*, and others, or any three of them, to examine, state and settle the account of his executorship, on the estate of *Susanna Fox* deceased; in obedience to which order an account was taken and certified, by three of the persons appointed on the 22d day of the same month, and afterwards admitted to record by the Court of that County. Five days after this account was made up, to wit, on the 27th of *August*, 1801, he filed his answer in the High Court of Chancery; stating that *fourteen* slaves were left and claimed by *Susanna Fox;* of whom *five*, including *Milley*, and her children, and a negro woman named *Charlotte*, had been sold for the payment of her debts; *five* had been recovered by *Joseph Fox; one* by the name of *Phil*, been a runaway for a considerable time, but (as he believed) had been retaken, and would be sold for the benefit of the estate; and the *residue* were secreted by *Richard Anderson*, and detained in his family; that the other legatees of *Susanna Fox* held their slaves by *gifts in her life-time*, of which her will operated as a *confirmation only;* but that *Richard Anderson* and his wife had no right, except that which they claimed under the will; that he, as executor, never assented to the legacy of *Milley*, and her increase, to *Caty Anderson*, and therefore had a right to sell them, to pay the debts of the estate; that the said estate was largely indebted to *himself*, as would appear by the certificate of the commissioners who had settled his account; (according to which, a balance, of 154*l.* 16*s.*

8*d.* 3-4 appeared to be due to him;) that *Susanna Fox* had lived at *Richard Anderson's* for a considerable time before her death, and continued there till she died; that, while she lived there, some of the said slaves in her possession were seized by executions, against *Richard Anderson*, and released on her asserting her right to them; that if, however, these slaves were liable for the said *Richard Anderson's* debts, he, the respondent, claimed them to satisfy a judgment which he had obtained many years ago, against the said *Richard Anderson*, in *Louisa* County Court, for nearly three hundred pounds yet unpaid.

Joseph Fox filed his answer, denying all fraud and collusion with respect to his recovery of the *five* slaves, which he claimed by a title paramount to that of *Susanna Fox.*—No answers were filed by the other defendants.

The plaintiffs having replied generally, a number of affidavits were taken on both sides, which related principally to the circumstances under which the slaves were received, and held by *Richard Anderson* and his wife, and the reasons which induced the jurors to give such heavy damages.—It appeared from these affidavits, as to the *first* of these points, that *Richard* and *Caty Anderson* had been married upwards of twenty years; that *Susanna Fox*, after the marriage, went to live with them, and carried with her all her negroes and other personal property; that she continued to live there until her death; that, during her life-time, some of the negroes were taken by virtue of an execution against *Richard Anderson*, claimed by her, and relinquished by the sheriff, in consequence of her claim; and that, after her death, another execution against *Richard Anderson* was levied on *Jenney*, one of the said slaves; the sale forbidden by *John Fox;* a Jury impannelled and the property discharged. There was no proof that Mrs. *Fox*, had *given*, *in her life-time*, any of these negroes to *Richard Anderson* or his wife; (except that one witness heard *him* say, that they belonged to him;) nor that he paid Mrs. *Fox* any hire for the use of them. It more-

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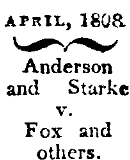

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over, appeared from these affidavits, and the administration account of *John Fox*, that *John Woodson* and *Robert Perkins*, who had married daughters of *Richard Anderson*, did, on the 29th of *March*, 1791, deliver a parcel of negroes to *John Fox*, as executor of *Susanna Fox*, saying that they were authorised to deliver them; that this was done at a public place, at which the executor had them appraised and hired on the same day, according to a previous advertisement; that one of them was hired by a certain *William Smith*, who again hired him to a certain *Nelson Harris*, by whom he was kept until a few days before *Christmas*, and then returned to the executor; that seven of the said negroes, viz. *Hager*, *Barsha*, *Jenney*, *Milley*, and her three children, *Daniel*, *Aaron* and *Aggy*, were hired to *Caty Anderson*, by consent of *Richard Anderson*, who afterwards refused to return them; that the executor employed persons to retake them privately, and so regained possession of *Milley*, *Daniel* and *Aggy;* that he advertised and sold *Milley* and *Daniel*, at public auction; became the *purchaser himself* at the price of *sixty-one* pounds; and entered a credit for that sum on an "*acknowledged account*," due from the *decedent* to him; that *Milley* ran away to *Richard Anderson*; as did also the other slaves who had been delivered and appraised as aforesaid; except *Daniel*, and *Aggy* who was afterwards sold by the executor to satisfy (as he alleged) further demands against the estate; that *no suit* was ever brought by the executor for these slaves against *Richard Anderson;* that *Milley* remained in the possession of the latter until she had two children, which appeared to be *twins*, and was then, together with those children, taken and sold under the execution as before mentioned.

As to the *second* point, the affidavits of three of the jurors stated that the Jury were induced to give 200*l.* damages, (and would have given a larger sum, if it had been demanded in the declaration,) on the ground that it was clearly proven, to their satisfaction, that the slaves belonged to *John Fox;* that *Starke* was apprized of this, the sale hav-

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ing been forbidden, and was therefore guilty of an unwarrantable act. They stated also, that *Starke* was not present at the trial; that there was an attorney who defended the suit; but no evidence was adduced on the part of the defendant.

Among the exhibits filed in the cause, were the will of Mrs. *Fox;* two letters from the complainant *Nelson Anderson* to *John Fox*, offering to give up the slaves, (one of whom, to wit, the child *George*, died before the judgment obtained by *Fox* against *Starke*,) to pay the costs of suit, and *hire*, if any were due; which offers were not accepted; a writing under seal signed "*Caty Anderson*," and dated *April* 20th, 1791, in which she acknowledged to have hired, for that year, the negroes *Milley*, *Aaron*, *Daniel*, *Aggy*, *Hagar*, *Barsha and Jenney*, described them as *belonging to the estate of the late Susanna Fox deceased;* and bound herself, her heirs, &c. to deliver them well cloathed, on or before the ensuing first day of *January*, to *John Fox*, *executor to the said Susanna Fox;* (the sum to be paid for hire, appearing from a memorandum at the foot of the writing, to be for *Hager* 40*s*. *Barsha* and *Jenney* 40*s*. and *Milley*, &c. 40*s*.) and, lastly, *John Fox's* administration account, (settled under the order of *Louisa* County Court,) in which he charges 186*l*. 14*s*. 9*d*. as due from the testatrix to himself by *bond;* (although the affidavit of *Kitty Perkins*, a witness in the cause, stated that, when Mrs. *Fox* lay on her death-bed, *Caty Anderson* asked him, *John Fox*, how much her mother owed him, and, in answer to the question, he said it did not exceed *eighty pounds;*) credits the sale of *Milley* and her child *Daniel*, (purchased by himself,) at 61*l*. of *Phœbe*, (a negro girl bequeathed in the will, to his own daughter *Anne Fox*,) at 17*l*. 10*s*. and of *Aggy*, at 37*l*. 10. omitting to give any credit for *Charlotte*, whom he acknowledged, in his answer, to have sold.

The injunction awarded the complainants was dissolved; afterwards reinstated by consent of the defendants, *Joseph* and *John Fox*, and by a like consent, brought on to a hear-

ing, when the bill was *dismissed;* whereupon the complainants appealed to this Court. The appeal, having abated by the death of *John Fox*, was revived against *Thomas Gardner*, his administrator.

The *Attorney-General* and *Wickham* for the Appellants.

Call and *Randolph* for the Appellees.

The counsel for the appellants contended, 1. That, as a creditor and surety of *Richard Anderson*, who was insolvent, the appellant, *Nelson Anderson*, had a right, in equity, to stand in his place, and assert all his rights to *Milley* and the other slaves devised to his wife; that the title of *Richard Anderson*, if not supported by a gift in the life-time of Mrs. *Fox*, was good under her will; and that the assent of the executor, ought to be presumed from his suffering *Milley*, and her children, to remain in his possession so long without suing for them.(a)

In support of this position, it was observed that the bill stated the estate of the decedent to have been amply sufficient to pay all the debts due from it, without sacrificing the interests of the specific legatees. The executor, in his answer, alleged that the estate was considerably indebted to *himself*; but the account exhibited by him, having been taken *ex parte*, *on his own motion*, and by commissioners selected by himself, was no proof of the truth of this.—Therefore,

2dly. The Chancellor, instead of dismissing the bill, ought to have directed a new *account* to be taken of *John Fox's* administration. An account ought also to be directed of the property which came to the hands of the other legatees; for, though the defendant, *John Fox*, pretended that the slaves held by them were donations during the life of Mrs. *Fox*, they really stood on the same footing with *Richard Anderson's* claim; and therefore, if in fact a sale for the payment of debts was necessary, they all ought to

(a) *Toller's Law of Executors*, 242.

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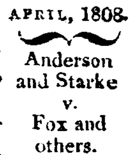
abate in proportion.(a) This account being necessary, the Court of Chancery ought not to have decreed, till all the defendants were before it.

3dly. The appellee, *John Fox*, ought not to have sold *Milley* to *any person* for the payment of a debt alleged to be due to himself, until that debt had been established; and, if he had a right to sell, his purchase for his own benefit was not binding, but might be set aside on payment to him of the purchase-money. The justice of his claim was very questionable, from the evidence of *Kitty Perkins* proving his declaration that Mrs. *Fox* owed him *eighty* pounds only; and, also, from that of another witness, (*William Smith B.*) that the voucher on which the claim was founded was an *acknowledged account*, whereas he charged it as a *bond*. If it was only an acknowledged *account*, it might have been barred by the act of limitations. True it is, the executor could not have pleaded the act against himself; but nevertheless, if the demand was old and stale, it ought not to be countenanced.

(a) *Toller's Law of Executors*, 265, 266.

The point, that, if the executor had a right to *sell*, he had not a right to become the *purchaser*, was strongly urged, on the ground of the similarity between the office and duty of an *executor*, and that of a *trustee* appointed to sell lands, who, according to a number of authorities, is not authorised to purchase *for his own benefit*, but only for the use of *cestuy que trust*. The authorities cited were 7 *Bac. Abr. Gwillim's ed.* p. 181. the case of *Whelpdale* v. *Cookson*, 1 *Vesey*, 9. *Killick* v. *Flexney*, 4 *Bro. Ch. Cases*, 161. *Campbell* v. *Walker*, 5 *Vesey*, jun. 678. and *Sugden's Law of Vendors*, in which, from p. 391 to 405. all the doctrine on this subject is contained, and all the cases are referred to.— The general proposition laid down by *Sugden* is that "trustees, agents, commissioners of bankrupts, assignees of "bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, "or any persons who, by their connexion with any other "person, or by being employed or concerned in his affairs,



" have acquired a knowledge of his property, are incapa-
" ble of purchasing such property themselves ; except un-
" der certain restrictions which he afterwards mentions."
This rule is founded upon the principle that there is an irreconcilable difference between the interests of the *buyer* and *seller;* since the former buys for as *little* as he can, and the latter sells for as *much* as he can. An *executor*, therefore, ought not to act in both capacities; and, if he sells and buys himself, any person interested may set the sale aside.

4thly. The damages assessed by the Jury being excessive, as being greatly beyond the value of the slaves, the complainants were entitled to relief against them; especially as their ground of relief was originally an equitable one. It was obvious that the suit at law was not defended.—*Starke* summoned no witnesses, and *Anderson* was not informed when the trial was coming on. The Jury were influenced to give such vindictive damages by their supposing that *Starke* had been guilty of a wanton and atrocious invasion of private property without a colour of title. The evidence, now, shews the contrary; and, if it had been before them, would have produced a very different verdict. What makes the case still stronger is *Anderson's* offer to *Fox* to give him up the negroes, and to pay *hire* for them which he refused to accept. This shews that the sum allowed him by the verdict was more than just on his own principles. But *vindictive* damages, in a case of this sort, ought not to have been given; for, as the verdict *changed the property*, since the recovery in this action of *trespass* might be pleaded in bar to an action of *trover* for the same slaves, their *value* only ought to have been the amount of the damages. The sheriff, too, only did his duty, (as *Richard Anderson* had been so long in possession of the property,) and if he had refused to sell, after being indemnified, might have been sued.

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On the part of the appellees, it was insisted that the plaintiffs in equity were not entitled to relief on the ground of any objections to the administration account; because the action at law was for a *tort*—for a *trespass* committed by the public officer, in illegally taking away the property from *Fox;* that the verdict, therefore, ought not to have been influenced by collateral circumstances. It has been heretofore a practice in the Court of Chancery to grant injunctions to judgments for just debts, on the ground of other actions founded on *torts* being depending, by the complainants, in equity, against the plaintiffs at law; but that practice is now discountenanced.

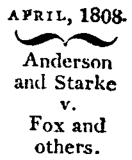
The case of a sheriff permitting an escape is similar to this. He is liable for damages, notwithstanding the plaintiff may still proceed against the debtor ;(*a*) and, if the *escape* be voluntary on the part of the sheriff, nothing afterwards will purge it.(*b*) The case, also, of *Langdon*, executor of *Dickenson*, v. the *African Co.* and *Dockwray*,(*c*) is analogous to this; for, there, the complainant, executor of *Dickenson*, brought his bill to be relieved from a judgment which *Dockwray* had recovered against his testator for a trespass, and the bill was dismissed, as to the defendant *Dockwray*. So here the sheriff asks to be relieved against a verdict founded on a trespass which he had himself committed.

(*a*) *Cro. Eliz.* 652. *Bonner* v. *Stokeley.* 2 *Wils.* 294. *Ravenscroft* v. *Eyles.* 2 *Bac. Abr. Gw. ed.* 516.

(*b*) 2 *Wils.* 295.

(*c*) *Prec. Ch.* 221.

That *Nelson Anderson* indemnified the sheriff, and that, therefore, the sheriff ought to have the same remedy which *he* would have, is an argument of no weight. *Starke*, the sheriff, either gave *Anderson* notice of the suit, or he did not. If he did not, *Anderson* might plead the want of notice in bar of his action against him on the indemnifying bond. If notice was given, (which is most probable,) *Anderson* was the substantial defendant to the suit, and the verdict was found against *him*. The sheriff was *Anderson's agent;* as in the case last cited, *Dickenson* was agent for the *African Company*, who were compelled to indemnify him.



Strike out *Anderson* from the bill, and *Starke* has clearly no right to the relief requested; and, in every point of view, *Anderson* ought to be bound by the verdict as much as *Starke*.

If *Anderson* be entitled to an *account*, he may go on for it in another shape, notwithstanding his injunction is dissolved; for in the case of *White, Whittle & Co.* v. *Banister's Executors*,(a) the injunction was dissolved, and the complainants left to pursue the effects of *Banister's* estate.

(a) 1 *Wash.* 166.

Let it be admitted that the verdict changed the property; yet the Jury had a right to give more than the *value;* the overplus being damages for the *trespass*. But there is no case where a Court of Equity has granted a new trial for excessive damages, *without proof of fraud.*

As to the point that the executor who *sold* had not a right to *purchase*, this is not the law of *Virginia;* the custom of the country being altogether opposite to this doctrine; for the rule *here* is that, if the executor purchased *fairly*, he had a right to the property; if *not fairly*, the sale may be set aside; and that in such cases, the burthen of proof lies on those who suggest unfairness.

With respect to the administration account exhibited by *John Fox;* the universal practice is to admit such accounts, settled before commissioners *ex parte*, as *prima facie* evidence. In the case of *Quinney* v. *Jett's Executors*, in the Federal Court, the *Chief Justice* of the United States decided that the audited account of an executor is *prima facie* evidence, and that it is incumbent on those who attack it to surcharge or falsify it. The executor may say that he has lost the receipts which he once laid before a competent tribunal; though if he has not lost, it is admitted that he is bound to produce them. If the account is not to be considered as having any *effect* until settled by a commissioner of the High Court of Chancery, an executor will never know what to rely upon.

This would have been a clear case if the account had been filed before the bill: but its being filed *since* makes no difference; for a party cannot, by exhibiting a bill in equity,

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take away the right of the County Court to call the executor to an account under a positive act of Assembly.(*a*) This acccount was taken on the motion of the executor himself; but that makes no difference; for he acted in conformity with his duty in making the motion. The bill calls for an *account*. The account which was taken was made a part of the answer. If the plaintiffs did not like it, they ought to have exhibited *exceptions;* instead of which they replied *generally*,

(*a*) See *Rev. Code*, 1 v. p. 162. sect. 19.

As to *contribution*, the suit is still going on, for *that* against the legatees, in the High Court of Chancery.

In *reply*, it was argued that the cases cited from *Precedents in Chancery*, 221. *and* 2 *Wilson*, 294, 295. were both inapplicable. In the *former* the *merits* were against the agent of the *African Company;* in the *latter*, the party was not entitled to recover the *full amount* of the debt against the sheriff for an escape on *mesne process;* but only the damages *actually* sustained.

The conduct of the executor was highly fraudulent throughout. Under the circumstances of the case, he had no right to withhold his assent to the legacy: his refusal to assent was therefore fraudulent. *At first*, indeed, he *did not refuse;* for the will was recorded, *September* 13, 1790, and nothing *adverse* to *Richard Anderson's* title appeared until 1792; during all which time *Richard Anderson* continued in possession. It is presumable, therefore, that he held with the assent of the executor. The producing the slaves to be appraised, and the hiring them to *Caty Anderson*, was a mere sham to shelter them from *Richard Anderson's* creditors; as the smallness of the hire (being only *six pounds* for *seven* valuable negroes) clearly proved.

The executor's getting possession of *Milley* and her children was by stealth in the night-time, and his subsequent *sale* was shortly afterwards. There was no proof that that sale was *public*, or that it had been *advertised.* The *onus probandi* lies on him to exculpate himself by shewing the circumstances. But, whether the sale was fair, or unfair, it was certainly void if no debt rendered it necessary. A

sale to a *third person* by an executor is good, though no debt require it; the executor being, in that case, responsible to the legatees ;(a) but it is otherwise where the executor is seller and buyer both.

As to the *account*, the decision of Judge *Iredell*, which gave rise to that of the *Chief Justice* in *Quinney* v. *Jett's Executors*, must have been founded on a supposition that the practice *here* was to summon all the parties interested, *as in England*. *There* the rule in the Ecclesiastical Courts is to serve a citation on the legatees and others ;(b) and, when the account is once settled in that manner, it is conclusive. But, it is said, that the County Court had jurisdiction to *settle* the account. If so, the legatees ought to have been summoned; if it had not, there is an end of the question. Indeed, said Mr. *Wickham*, I lay down the broad principle, that an account taken *ex parte* without summoning the legatees, ought to have very little weight in a Court of Chancery. To consider it as *evidence* would violate two important rules of law; that the best evidence the nature of every case admits shall be produced; and that no person shall be judged unheard. It would be unjust to make it incumbent on the legatees to *surcharge* or *falsify;* because, although many items might be altogether fictitious, it might not be *in their power* to shew their impropriety; it being impossible to prove a negative. But, be the general principle as it may, in *this case* the bill of the complainants demanded an *account;* not an account taken *ex parte* before commissioners nominated by the executor himself and appointed by the County Court without the knowledge of the legatees; but an account before a commissioner of the Court of Chancery, in presence of all the parties; not an account *merely recorded without examination*, as is always the case in the County Courts; but an account open to scrutiny and exceptions, *before it should be received.*

The account itself, as exhibited, is highly objectionable on its face; *Phœbe*, a valuable negro girl, having been credit-

(a) See *Sale* v. *Roy*, *ante*, p. 69.

(b) See 4 *Burn's Eccl. Law*, 368, 369.

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ed at 17*l.* 10*s.* 0*d.* only; *Aggy* at 37*l.* 10*s.* 0*d.* and *Charlotte* and *Phil* altogether omitted. In every point of view, therefore, a new account ought now to be directed.

Monday, April 18. The Judges delivered their opinions.

Judge TUCKER. The equity of the appellants in this cause depends upon several distinct questions both of fact and of law.

1. Whether there was any actual gift by Mrs. *Susanna Fox*, in her life-time, of the slaves in question, to her daughter, the wife of *Richard Anderson?* It seemed, I thought, to be conceded, towards the close of the argument, that there was no evidence of such a gift; nor have I been able to find any direct evidence in the record to that effect; and the presumption from circumstances is, I think, against it.

2. That if Mrs. *Anderson* was entitled only as a legatee, the executor, Mr. *Fox*, had assented to the legacy. This is flatly denied by the answers, and there is neither direct nor collateral evidence to contradict the answer.

3. That Mrs. *Fox* left assets sufficient to pay all her debts without recourse to her slaves, which were specifically devised. Upon this point the evidence is very unsatisfactory. The executor swears, that the will of Mrs. *Fox* directs her just debts to be *first* paid, and authorises her executors to dispose of *any part* of her estate for that purpose; which is correct. He then proceeds to state, that his testatrix left only fourteen slaves, whom he names, *five* of which, also named, were sold, and the produce of the sale credited the estate; but the account to which he refers has omitted a credit for one of them, named *Charlotte*. Another, whom he states to have been a runaway for a considerable time, and to have been retaken; and that he would be sold for the use of the estate, is not mentioned in the account referred to, nor in any subsequent account.

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" That the estate of his testatrix, after a *full settlement* of " all accounts with him, is greatly indebted to him, as will " appear by a certificate of the commissioners appointed for " that purpose." The account thus referred to, appears to have been submitted by an order of *Louisa* County Court, after the commencement of this suit, *on his own motion*, to six commissioners named by the Court, or any three of them, to whom it is referred to *examine*, *state*, and *settle* the same, and to make report thereof to the Court, which *three* of them accordingly did, at the next succeeding Court. The bill contains a prayer that *Fox* may " *settle* " *his executorship of the estate of his testatrix;*" but does not suggest any fraud in the account rendered; probably, because it was after the bill was filed; nor is there any exception to the answer, to which it is said to have been annexed, nor was there any motion for a reference thereof to a commissioner, as perhaps ought to have been done, unless it was intended to *accept it*, *altogether*, as it stood. And, although a general replication was made to the answer, and a general commission awarded to take depositions, none appeared to have been taken, with a view to surcharge, or falsify, the executor's account. But the account is objected to as a mere *ex parte* proceeding, on the *motion* of the *executor himself*, without having been first summoned to render his account, and without any summons issued to the legatees, creditors, or other persons interested, to appear and attend, and contest the settlement if they should think proper. This appears to be the course of the Ecclesiastical Courts in *England*, as cited by Mr. *Wickham*,(a) but I have strong grounds to believe has never been practised in this country, even in the former General Court, which united common law, chancery and ecclesiastical jurisdiction, within its powers, and was the Supreme Court in this country, until the revolution. To call in question a practice sanctioned by that of the Supreme Court of the country for perhaps a century, and never, that I know of, drawn in

(a) 4 *Burn's Eccles. Law*, 368, 369.

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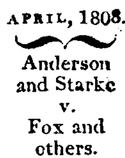
question before the present occasion, is what I cannot presume to do. It ought, therefore, I conceive, to be taken as *prima facie* evidence of the several charges, and credits therein contained. But still, any person interested therein, may, I conceive, be at liberty by a bill in equity to *surcharge* and *falsify* the whole, *if capable of adducing* satisfactory evidence to that purpose. The present account, for example, may be *surcharged* by a reference to the defendant's own answer, which admits the sale of one of the negroes, (*Charlotte*,) not credited in that account. It may, perhaps, be *falsified* also, if it be true, as suggested by the appellant's counsel, (though possibly he may be mistaken,) that there was in fact no bond from the testatrix to her executor. The presumption is against him upon the face of the account, which states the amount of the principal even to a farthing, and charges interest upon it from a particular day, which was probably the date of the bond. I mention it only to illustrate my conception of the proper course in such cases, which I take to be this: The party who wishes to open an executor's account, (which has been returned and audited by commissioners appointed by the Court which granted the probate of the will,) by a bill in equity, in order to surcharge and falsify the account so audited and admitted to record, ought in his bill to suggest the grounds upon which he means to surcharge or falsify the account; and call for the inventory, appraisement, and account of sales of the estate, together with the vouchers in the hands of the executor. And, in case of any fraud, concealment, or diminution in the inventory, or in the accounts rendered, he ought to suggest the same in his bill, and seek a discovery; or, if any fraud or malpractice shall have been committed, or so *supposed*, in the payment of debts, or the settlement of accounts, or in the conduct of the sales, these things ought also to be specifically charged in the bill, that the executor may discover the same by his answer. And, upon a reference to the commissioner, the accounts so audited and returned to the Court granting the probate,



ought to be admitted in every respect as just and true, except as to such articles as may be *surcharged* or *falsified* by the evidence *produced to him*.(1) In the present case, as there was no motion made for a reference to a commissioner, I am inclined to think it was not incumbent on the Chancellor to refer the accounts, (as I see no necessity for putting the parties to such an expense, where the accounts are neither long nor intricate,) were it not that the answer itself disclosed the omission above noticed, therein. This of itself was sufficient to direct a reference, and the omission to do so, was, I think, an error. Especially as there were some other reasons, arising also out of the *answer*, to suppose that the executor has not rendered as perfect an account of the assets which came to his hands, as possibly he might; or that he omitted to possess himself of such parts of the estate of his testatrix, as he notices in the latter part of his answer.

As to the purchase of the negroes, *Milley* and her children, by the executor himself, I am by no means prepared to say, with the counsel for the appellants, that he is to be regarded as a *mere trustee*, as to the property of his testatrix, so exposed to sale, and purchased by himself. If this Court were to declare the law to be such in all cases, even where there was an undoubted deficiency of assets, and, although the sale should have been made after due notice, at public auction, and with all possible fairness, it would probably be the immediate parent of a thousand suits in Chancery, to set aside such purchases, either in behalf of the legatees, distributees, or creditors; although, as fre-

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(1) Note by Judge Tucker. "The *onus probandi* is always on the "party having liberty to *surcharge* and *falsify*: for the Court always "takes it as a stated account, and establishes it; but, if any of the par-"ties can shew an *omission*, for which credit ought to be given, that is "a *surcharge*. Or, if any thing is inserted that is a wrong charge, he is "at liberty to shew it, and that is a *falsification*: but that must be by "*proof on his own side*." Per *Ld. Hardw.* 2 *Vez.* 566. *Pitt* v. *Cholmondeley*. See also 2 *Bro.* 62. *Brownell* v. *Brownell*.

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quently happens, the executor should have been largely in advance for his testator's estate, and should have saved it from total ruin by his exertions. What would be the consequences of such a doctrine, if we were to declare that the progeny of a female slave, so purchased, at any distance of time, might be recovered against the representatives of a deceased executor, or those claiming under him? The practice has been too general in this country, and has prevailed too long, to be now drawn in question, by analogy to the doctrines in *England*, concerning trustees of lands, or commissioners of bankrupt. For though executors and administrators are, *to many purposes*, considered as trustees in a Court of Equity, they are not so *in all cases*.(a) At the same time, I am free to declare, that I think there *may* be cases, where the sale of a SLAVE by an executor may be avoided by a legatee, distributee, or creditor of the testator, as I have before said, during the last term, in the case of *Sale* v. *Roy*,(b) from which opinion I have found no reason to depart.

(a) 2 *Vez.* 482.

(b) *Ante*, p. 69.

It only remains to consider two other points:

The recovery by *Joseph Fox* is expressly denied both by that defendant and *John Fox*, the executor, to have been by *collusion*. I therefore think the bill was properly dismissed as to him. The suit for contribution, I understand, is still depending before the Chancellor. Nothing, therefore, ought to be said as to that point.

The next question is, whether the injunction ought to be dissolved at this stage of the proceedings. And I incline to think it ought not; for the damages against the sheriff who levied the execution and sold the slaves, appear to be vindictive, rather than according to the value of the property as twice before sold at public sale. And, if the complainants should, upon the final hearing of the cause, be entitled to relief, they would, in that case, be kept out of the money which they had wrongfully paid, for a long time. For these reasons, I do not think the injunction ought to be dissolved, and I concur in the decree which

has been agreed to in conference by the unanimous opinion of the Court.

Judge ROANE. There is no doubt but that the damages given in this case were vindictive, and that the Jury in assessing them, had not a due regard to the injury actually sustained. This is evident from the testimony of three of the jurors themselves; from a comparison of the sum recovered with the prices for which the slave in question had been twice sold at two several *public* sales; and from the offer of the appellant *Anderson* to give her up with her increase, in lieu of the sum recovered. It is a case in which, I presume, even a Court of Law would, on a timely and proper application, have granted a new trial; as such Court would have had sufficient *data* from whence to infer that the verdict had greatly exceeded the standard of justice. But as to a Court of Equity, the case of *Ross* v. *Pines*,(a) informs us, that, although, in matters of *tort*, a Jury is not bound to an exact calculation, yet, where a verdict is owing to sudden passion in the Jury, it ought not to bind; but it is the duty of the Chancellor, in such case, to moderate the verdict. In that case, this temper in the Jury was merely *inferred* from the enormity of the second verdict compared with the first, and confronted by the Judges' certificate, that the verdict was against evidence: In this case, this temper is admitted by the jurors themselves, and is further manifested by a reference to the *data* just mentioned.

(a) 3 *Call*, 568.

Notwithstanding this character of the verdict, however, if this were now a mere law case, as no motion for a new trial was made in the Court of Law, I should doubt whether this Court ought, on this ground, to interfere. Even the *alleged* circumstance, that *Anderson* received no notice from his co-plaintiff of the pendency of the suit against him, and therefore did not defend it, would probably not furnish a just exception from the general doctrine. It ought not to affect a verdict duly obtained by the appellee against a proper and sufficient party.

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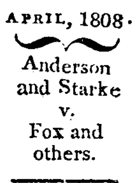
But this is not a mere legal controversy. Circumstances exist in it which could not have been properly and availably brought forward in the trial at law, and which are peculiarly proper for the interposition of equity. For example, the public sale of the slave in question, and purchase by the executor, purported in him a complete legal title: but in equity it is more practicable and more proper than at law to impeach that sale by an inquiry, (which will involve an account of the executorship,) whether it was rendered necessary for the payment of debts, and whether it was competent for the executor *himself* to purchase. On these grounds, ulterior to any existing in the case at law, or at least existing more efficaciously in a Court of Equity, it is competent in such Court to impeach the verdict and demand a hearing of the case in equity, although a motion for a new trial was omitted to be made before the Court in which the verdict was rendered.

It is not necessary to decide, how far an *ex parte* settlement of his accounts by an executor, with commissioners appointed by the County Court, on his motion, is valid. That question is very important, and I should require to be aided by a fuller argument than has yet been urged, were it now to be solemnly settled. I believe, however, that the usage and understanding of the country has been to give to such settlements *some* validity. But, as to the case actually before us, I am clearly of opinion, that, after a suit is brought against an executor, the direct object of which is to inquire into and enforce a full and fair settlement of his accounts before the Court of Chancery or its commissioners, the defendant shall not elude that object by slipping away into another County, and making an *ex parte* settlement by auditors appointed on his own motion. A settlement of this kind, and made under these circumstances, shall not affect or arrest the avowed object of the suit, as before mentioned. I lay no stress upon the circumstance, that the record does not exhibit any *particular* motion on the part of the appellants for a reference of the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accounts to a commissioner. The bill is always before the Chancellor, and it contains a prayer for an account. In the case before us, the settlement exhibited is not only of the character just mentioned, but it omits a credit of a negro, admitted by the answer of *J. Fox* to have been sold, belonging to the estate in question. This circumstance alone is conclusive, that a new account is necessary.

As to the general question, whether an executor can purchase slaves sold by himself at public sale, *when necessary for the payment of debts*, neither is *that question* necessary to be decided in the case before us. The considerations on which the decisions cited on the part of the appellants are founded, appear to me to be important; but I am not, at present, prepared to say how far these decisions consist with the usage and understanding of this country upon this subject; or what might be the consequences of adhering, in cases of this kind, to the principle stated in those decisions. I have, however, no hesitation to say, that a purchase made by an executor of property sold by himself, in a case where in truth *no sale was necessary*, may be vacated. In the case of *Ewer* v. *Corbet*,(a) cited last term in the case of *Sale* v. *Roy*, the decision in which case entirely conformed to it, it was held that a purchaser of personal goods from an executor shall not have his title impeached, " for that it is not reasonable to put every pur-" chaser from an executor *to take an account of the testa-" tor's debts*, and that this would lay an *embargo* on per-" sonal estates in the hands of executors, which would be " attended with great inconvenience." As to *strangers* who purchase from executors, these reasons hold very strongly; but, as to the *executor himself*, who is at all times conusant of the state of the testator's affairs, the reason seems to fail; and, if an executor sells and purchases in himself property which he knows (or might know) he had no right to sell, he is not injured, and cannot complain, if his purchase under such circumstances, should be vacated. I have no difficulty, therefore, in saying, that

(a) 2 P. Wms. 148.

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if the state of the testator's assets in the case in question (which will be ascertained by the account to be taken) did not justify the sale of this, or some other part of the property devised to *Richard Anderson*, the sale itself should be considered as if it had never been made.

As to contribution from the other legatees in this case, the plaintiffs have brought the cause to a hearing without including such legatees. Such contribution, therefore, (as between the parties to this suit,) cannot be decreed. The plaintiffs, however, will still have liberty to proceed against them, and, if their property be liable, may, in the final arrangement in this suit, make an end of the whole case by obtaining against them also a decree for contribution.

It results from these ideas, 1st. That an account ought to be taken of the state of *S. Fox's* assets; 2dly. That if that result should shew that the sale and purchase by *J. Fox*, of the slave in question, was made unwarrantably, and without necessity, (of which the Chancellor will judge on the report made to him by the commissioner,) the sale shall be considered as invalid, and the property in the said negro as having existed in *Richard Anderson*, at the time of the levying the execution under which she was purchased by the appellant, *N. Anderson*. This result would put an end to the cause, and call for a perpetual injunction to the judgment in question; and, 3dly. That if, on the contrary, the sale and purchase be justified, and the slave in question consequently considered to have belonged to *J. Fox* at the time of the sale to the appellant; the verdict in the trial at law, for the trespass, having been produced by improper motives on the part of the Jury, and being for a sum greatly exceeding the value of the slaves, or any injury which the appellee has sustained by the trespass; a new trial ought to be granted, and the appellants made liable only for the sum recovered in such second trial. I am of opinion, therefore, that the decree be reversed as to *John Fox*, the injunction continued, and the cause remanded to be proceeded in, in conformity with the ideas now stated.

Judge Fleming pronounced the following as the decree which had been *unanimously* agreed to in conference.

" This Court having maturely considered, &c. is of opi-
" nion that the said decree is erroneous in dismissing the
" appellants' bill as to the said *John Fox*, instead of direct-
" ing an account to be taken of his administration of the es-
" tate of his testatrix, the said *Susanna Fox;* but that there
" is no error in so much of the said decree as dismisses
" the bill against the said *Joseph Fox*. Therefore, it is
" decreed and ordered that so much of the said decree as
" is stated above to be erroneous, be reversed; that so
" much thereof as is stated not to be erroneous, be affirm-
" ed, &c. And this Court proceeding to make such de-
" cree as the said Superior Court of Chancery ought to
" have pronounced, It is further decreed and ordered,
" that the said *Thomas Gardner*, administrator as aforesaid
" of *John Fox* deceased, do make up before a commission-
" er to be appointed by the said Court of Chancery, a full
" and true account of the said *John Fox*'s administra-
" tion on the estate of the said *Susanna Fox* deceased, after
" due notice to the adverse parties; and that the said com-
" missioner make report thereof to the said Court of Chan-
" cery for further proceedings to be had thereon. And, if,
" on such account, it should appear to the satisfaction of
" the said Court that the sale of the slave *Milley*, in ques-
" tion in this suit, or any other part of the property be-
" queathed to *Richard Anderson* in and by the last will of
" the said *Susanna Fox* deceased, was *necessary for the pay-
" ment of her debts*, the sale made by, and purchase of the
" said slave *Milley* by the said *John Fox*, be confirmed;
" that, in that event, a new trial of the issue in the action
" of trespass in the proceedings mentioned be awarded by,
" and the verdict certified to, the said Court of Chance-
" ry; with liberty to the appellant, *Nelson Anderson*, to be-
" come a party defendant in the said issue and defend the
" same; that, upon the return of the verdict aforesaid, if

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"the sum thereby recovered be of smaller amount than the "sum enjoined in this suit, the injunction be decreed "to be perpetual for the excess, and dissolved as to the re- "sidue. But if the said account should ascertain (on the "other hand) that neither the said slave *Milley*, nor any "other part of the property of the said *Richard Anderson*, "derived under the will aforesaid, was necessarily sold, "or liable to be sold, for payment of the debts of the said "testatrix, that then, and in that event, the purchase of "her by the said *John Fox* should be held to be void; and "also, as depending thereupon, the verdict in the action "of trespass aforesaid; and that the said *Nelson Ander- "son* be decreed to be quieted in his purchase of the slave "aforesaid, and the injunction granted in this case be de- "clared to be perpetual."

Hite's heirs and devisees *against* Wilson and Dunlap, And the same *against* the same.

A defendant in error wishing to avail himself (in opposition to a writ of *supersedeas*) of a *release of errors*, or of any other matter, not being properly a part of the record, ought not to move the Court to quash the *supersedeas*, but should *plead in bar* such a release, or other matter; and an issue joined on such plea ought to be tried by a Jury.

A bill of injunction and the proceedings thereupon, are not properly part of the record of the judgment *at common law;* neither ought such papers to be brought up to the Superior Court by a *certiorari;* on a suggestion of diminution in *that* record.

If a release of errors be pleaded to a *supersedeas*, and found for the defendant in error, the judgment should be, not that the judgment of the Court below be *affirmed*, but that the plaintiff be *barred* of his writ of *supersedeas*.

The clerk's stating on the record, "which pleas the plaintiffs join," &c. is not a *joining of issue*.

Where there are two issues in *fact*, and the verdict of the Jury answers to one only, there ought to be a *venire facias de novo*.

Quere, whether an attorney, in obtaining an injunction for his client, can execute, on his behalf, a sufficient release of errors? and, if he can, whether such release would be good though *not under seal*?

THESE were two writs of *supersedeas* obtained by the heirs and devisees of *John Hite* deceased, from a Judge of the General Court, to two judgments of the County Court