REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

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But Garland not being of that description, can claim no benefit under it. The advertisement therefore is out of the question; and without it, there is no doubt, but that the admission of the bonds as offsets was improper. Neither the advertisement, nor the bonds ought to have been given in evidence to prove a payment, upon the plea and issue joined in the cause.

Judgment reversed and a new trial awarded.

SIR JONATHAN BECKWITH,

against

BECKWITH BUTLER & others.

THE appellees filed their bill in the High Court of Chancery, praying for a distribution of the personal estate of Sir Marmaduke Beckwith, and to set aside a deed made by Sir Marmaduke to the appellant for 14 slaves, upon a suggestion of fraud in the obtaining of it, and for a division of them amongst the representatives.

The defendant in his answer denies the fraud in obtaining the deed, and contends that it was but a reasonable provision for him, the heir of the family and title, otherwise unadvanced. He states that there were little other estate except a debt due by bond from Col. Tayloe which his father gave him in his lifetime as a compensation for his having consented to the sale of a large English estate which would have descended to him.

The allegation in the answer respecting the gift of Tayloe's bond is not supported by testimony.

The Chancellor having directed an account of advancements made by Sir Marmaduke Beckwith to his children and grandchildren with the value of such advancements, also an account of the value of such of the slaves, named in the deed from the said Sir Marmaduke to the defendant Jonathan Beckwith and their increase, as were living, a report was made, to which sundry exceptions were taken by the defendant. These exceptions being over-ruled by the court, the defendant was decreed to pay (out of the estate of his intestate in his hands to be administered) to Beckwith Butler £610: 12: 4½ and to Lawrence Butler £813: 2: 3½ with interest from the 1st of September 1781 appearing by the said report to be due to them. From this decree Beckwith appealed.

The

The PRESIDENT delivered the opinion of the Court.

The answer of a defendant in chancery is not evidence where it asserts a right affirmatively in opposition to the plaintiffs demand. In such a case, he is as much bound to establish it by indifferent testimony, as the plaintiff is to sustain his bill. The appellant, who is the heir at law and executor of his father, swears in his answer, that the father in his life-time gave him Tayloe's bond, the amount of which forms the great bulk of the personal estate sought to be distributed. It would be monstrous indeed, if an executor when called upon to account, were permitted to swear himself into a title to part of his testator's estate.

As to the fraud charged in the bill, in the obtaining of a deed for the 14 negroes, it is not sufficiently proved. Some of the witnesses prove an incapacity in the donor to contract at certain times: but the subscribing witnesses swear to his capacity at the time of executing the deed, and as the settlement is by no means an unreasonable one, the court think it most proper and safe to establish it. It resembles the case of a will which was contested in this court, where the proof as to the state of the testators mind, when the will was signed, overcame all the testimony respecting his capacity both before and after. But then the negroes conveyed by this deed must be considered as an advancement, as to which a question was made at the bar, whether the encrease of the slaves, and interest on money advancements ought to be brought into hotchpot? The court are of opinion, that where a child is advanced with money, or negroes, he need not bring into hotchpot the encrease of the one, or account for the interest upon the other. For as he must sustain the loss, by accounting for the property at it's value *when given*, and by supporting and raising the negroes, so he is entitled to the encrease of them. There does seem to be a hardship, where one son has been advanced for many years, that he should account with an unadvanced child only for the principal; yet no better rule than the above can be adopted.

Some objections were made at the bar to the mode pursued by the master, in ascertaining the value of the negroes advanced; but we are of opinion, that though the value seems to have been guessed at; it does not appear to be unreasonable either way, and as no exception is taken to the report, the objections now made ought not to be regarded.

The report is in favor of all the plaintiffs and is confirmed by the Chancellor. Yet a decree is given in favor of the But-

lers only, without noticing Marmaduke Beckwith, another of the plaintiffs. This we ſuppoſe to have been a miſtake of the clerk.

The decree therefore muſt be affirmed ſo far as it goes, and the cauſe remitted to the High Court of Chancery, for a hearing as to Marmaduke Beckwith.

WARDEN and WASHINGTON for the appellant.

CAMPBELL for the appellees.

SALLEE, *againſt* YATES & Wife.

THIS was an appeal from a decree of the High Court of Chancery—The bill was brought by the appellees to recover a legacy of £300, deviſed to the female plaintiff, by the will of Benjamin Harris her father, made in the year 1776, of which, £100 was to be paid in a year after the legatee ſhould attain the age of 18 years, and the reſidue, ſo ſoon as the executors could raiſe it. The firſt payment was made to Sallee, the guardian of the legatee, on the 12th of September 1778, ſome time after ſhe arrived to the above age, as was alſo the reſidue, on the 31ſt July 1779.

The guardian lent out the £200 on the day he received it, which was repaid to him in the year 1780—the £100 remained in his hands, not lent out, nor uſed, until the paper money was called in, when he funded the whole ſum of £300 together with his own money, at the rate of one, for a thouſand. The legatee refuſed, (before the money was funded) to receive it from the guardian, and inſtituted this ſuit, againſt him, as alſo againſt the executors and reſiduary legatees of the teſtator, praying that the £300 may be reduced according to the ſcale when it was paid, and that the balance may be made good out of the reſiduary eſtate. The Court, decreed the executors to pay the £300 to the plaintiffs, after deducting therefrom, the payments, made according to the true value at the time of ſuch payments with intereſt from the time the plaintiff was entitled to recover her legacy. From this decree, the defendants appealed.

The PRESIDENT delivered the opinion of the court.

This is certainly a very hard caſe, but we think there is no ground for relief. The legiſlature in the year 1781, contemplating, no doubt, all thoſe caſes of hardſhip, and at the ſame time, the infinite miſchief and confuſion which would be introduced,