REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF CHANCERY OF THE STATE OF SOUTH CAROLINA

AND

IN THE COURT OF APPEALS IN EQUITY

IN FOUR VOLUMES

BY

HENRY WILLIAM DESAUSSURE

SENIOR JUDGE OF THE COURT OF EQUITY, AND PRESIDING JUDGE OF THE COURT OF APPEALS IN EQUITY IN THE SAID STATE

VOLUME IV

Justitia est velle omnibus quod æquum est.
The duties of life are more than life.—Bacon's Works, Vol. VI.

COLUMBIA, S. C.
PRINTED AT THE TELESCOPE PRESS
1819

ANNOTATED EDITION
ST. PAUL
WEST PUBLISHING CO.
1917

to bind the said house and lot, it is ordered and decreed, that the complainant shall be at liberty to retain the amount appearing to be due on the face of the judgment and the costs, out of the purchase money, for the space of two years; and if, in the mean time, the same shall be revived, the complainant may apply so much of the purchase money to pay off said debt.

It is also further ordered and decreed, that the sale heretofore made of the said house and lot, under the judgment and execution of the said defendant, be set aside; and that upon the delivery of the title deeds by the defendant to the commissioner, for the complainant as above directed, the injunction be dissolved, and the defendant be at liberty to proceed to a resale of the house and lot under his judgment at law. The complainant to pay the costs of suit.

HENRY W. DESAUSSURE.

An appeal was made from this decree; but it was afterwards abandoned.

Mr. Starke for complainant.—Egan for defendant.

---

4 Desaus. *139

*Case XXV.

Columbia.—Heard before Chancellor Desaussure.

JACOB HARTEN alias GIBSON v. JACOB GIBSON, Sen., and others.

(June, 1810.)

[*Bastards* ⊂⊃98.]

A deed by a stranger, providing for his natural child by a married woman is valid, and will be enforced against the trustee, administrator and representatives of the donor; though imperfect in its form, and though no immediate possession of the property be given by the grantor.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⊂⊃98.]

[*Bastards* ⊂⊃98.]

It would be more immoral for the father of such a child, to deceive the nominal father, and leave him to support a child not his own than to avow the truth, and make the provision.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⊂⊃98.]

[*Bastards* ⊂⊃98.]

[The bastardy act has not changed the common law, and the putative father, who has neither wife nor lawful issue, may dispose of all his estate by deed or will. But a provision made by him for his child by another man's wife will be supported in equity.]

[Ed. Note.—For other cases, see Bastards, Cent. Dig. § 249; Dec. Dig. ⊂⊃98.]

[*Gifts* ⊂⊃21, 41.]

[A person executed to A. a deed empowering him to sue for and recover his property, and invest it for the benefit of B., and died. *Held*, that this was a valid gift to B., not revoked by the death of the donor before the recovery of the property.]

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 20, 36; Dec. Dig. ⊂⊃21, 41.]

The bill states, that the complainant was always reported to be the illegitimate son of a certain Joseph Gibson, of Fairfield district, who departed this life about five years since, without wife or any lawful issue; that in the old man's lifetime, he uniformly acknowledged the complainant as his child, and treated him with tenderness and regard; that the said Joseph Gibson had, by frugality and industry, accumulated a little property, viz. a valuable slave called Anthony, some notes of hand, and other things, the precise amount not known; and he had always declared his intention, that the complainant should have all he possessed; and a little before his death, for the purpose of securing to complainant the property aforesaid, he executed an instrument of writing to his brother Jacob above mentioned, but complainant does not know the precise purport of said writing, which is in the possession of said Jacob Gibson. After the death of the said Joseph, the said Jacob administered on his property, and refuses to give the complainant any thing. That Messieurs M'Graw and Jones, mentioned in the complainant's bill, were security to the administration bond, which Jacob gave, and took the administration from him, sold the negro Anthony to one Clanpitt; and they also refused to give complainant any of the estate. The complainant, therefore, prays for a discovery and amount of the estate of said Joseph Gibson, founding his claim thereto on the declaration of the deceased, and the

*140

instrument of wri*ting aforesaid, and prays that the said Gibson and others, may be compelled to produce said writing, &c.

The answer admits the death of Joseph Gibson, without wife or children. It admits the execution of a deed, constituting Jacob Gibson his attorney, to sue for and recover money;† and desires his attorney to employ

† Abstract of the Power or Deed.

Know all men by these presents, that I, Joseph Gibson, sen. have made, ordained, constituted, &c. Jacob Gibson, to be my true and lawful attorney, for me, and in my name and for my use, to ask, demand and receive from all that are indebted to me by bond, note or any other account; and upon nonpayment thereof, the said Jacob Gibson or his attorney, for me and in my name, to sue, arrest, imprison, implead and prosecute for the same, &c. ratifying and holding firm, all and whatever my said attorney or his substitute shall lawfully do, or cause to be done, in and about the premises; and I also desire that my said attorney, do keep a record of all that he recovers or receives; and put the same to interest, or purchase any property with the same, that he may think most advantageous for my son, Jacob Gibson, jun. whom I claim and acknowledge to be mine; he is a son of Rose Harten, wife of Henry Harten, and I have given him the name of Jacob Gibson; and I do allow him to have all that I now possess whenever he comes to the age of maturity; and that the same be held by my attorney until that time, and then be given up to him; and in case he should die without issue, the property to revert back to Jacob Gibson,

the funds he might collect, for the use of his natural son, Jacob Gibson, the complainant. That no property was delivered to defendant by Joseph Gibson; who kept the estate in his own hands till his death. But defendant has administered and possessed himself of the property. Defendant denies any acceptance of a trust; and insists that the deed was only a power of attorney, which died with the maker. The defendant asks the direction of the court, in the construction of the said deed, as the same does not appear to be a regular or legal deed. The case came to a hearing.

Mr. Egan for complainant, argued that the deed is not testamentary; it was a trust

*141

deed, to be executed *immediately, and was irrevocable. Whether the child can be recognized by the law as the son of Gibson, or not, is not of importance. He might make a gratuitous gift to the child, and that is good, unless creditors are injured, which is not alleged in this case.

Mr. Nott for defendants.—Gifts by deed are valid though no consideration; but where the deed shews a particular consideration which is not supportable, the deed is void. —Pow. on Con. 33.

As to the policy: Does the law permit any man to claim the child of a family, and dishonor a husband and wife? There is no consideration here; for there can be no love and affection for a natural child like this.

As to a gift, to a mere stranger, there must be an actual delivery of the property. In this case no delivery of the property took place. Will the court say this was not a revocable deed? The court would be governed by the construction which the party himself seems to have put upon it. Can it be supposed it was the intention of Joseph Gibson, to have divested himself of the property, so that his trustee or attorney might have recovered the property, and taken it out of the hands of Gibson himself? He lived for ten years after the deed, and never gave possession of any part of it to the trustee or attorney. Could it be supposed he meant to bind himself in such a manner as to preclude him from revoking it? Where a person undertakes to express a consideration, and that is not a justifiable one, (such as love and affection for a natural child by a married woman,) then it must be void; differing in that respect from the case where no consideration at all is expressed.

The court delivered the following decree: This case turns on the validity and operation of a deed executed by Joseph Gibson, deceased, to Jacob Gibson, the defendant, for the benefit of the complainant, whom Joseph Gibson, claimed as an illegitimate son.

It appears that Joseph Gibson had neither wife nor lawful issue; so that the case stands clear of any objection drawn from the bastardy act; and Joseph Gibson was free to dispose of his property to any person by deed or will.

*142

*One objection to this deed is, that the deed was either gratuitous, and no possession being given of any property, but it being to take effect at a future and uncertain time, it cannot legally take effect; such gifts being void at law. And that it cannot be supposed the executor of this deed, intended to preclude himself from altering or recalling the deed if he had chosen; which would be inconsistent with an absolute gift, and shews the same to be void.

I am of opinion, however, that this deed, though gratuitous, and unaccompanied by possession of the property, is valid. Verbal gifts, unaccompanied by possession, are indeed void. But the law considers the deliberate execution of a deed, sufficiently evincive of a settled purpose to give, which may take effect at a future day; and it is the duty of courts so to construe deeds, ut res magis valeat quam pereat. And though this deed be badly drawn, and awkward in its provisions, the intent of the donor is sufficiently clear. It intended to create a trust in the defendant Jacob Gibson, of all Joseph Gibson's property, for the benefit of the complainant.

It is not necessary for the court to embarrass itself with the question, whether the deed was revocable, and what effect that ought to have on the case. It is enough to say, that the deed was not revoked, and must have its effect, unless some legal or moral principle be violated thereby.

It is further objected, that this deed expresses a consideration of an immoral tendency, and which this court ought not to sanction. That it is a gift of property for a child, whom the donor recognizes to be the child of a woman, who was the wife of another man, which is a moral turpitude, that cannot receive the support of this court. God forbid that I should lend the sanction of the court, to any thing which would shake or loosen those great moral ties, which bind society together; but we must not permit our feelings and apprehensions to mislead our judgment. Although it is morally as well as legally improper to have illegitimate

*143

children, the law *not only permits, but enjoins it on the father to maintain the illegitimate child. The immorality is in the act and not in the provision; for if this man had really violated the marriage bed of another, and had a child by the wife, it was

sen. to be disposed of at his discretion. In witness whereof, I have hereunto set my hand and seal this sixth day of June 1796.

Joseph Gibson, Sen. (L. S.)

Signed sealed and delivered in the presence of us,
David Gibson,
Abel Gibson.

more proper that he should provide for it out of his substance, than that he should have allowed the injured husband to remain the dupe of his artifices and crimes, and to bear the burthen of the fruit of them. Besides, the child is innocent at all events, and it is he who is to be benefitted by the deed. I see no solid objection, therefore, against the deed being supported.

It is ordered and decreed, that the defendants do account with the complainant for the whole amount of the property left by Joseph Gibson, including the price brought by the sale of the negro: and that the costs of this suit be paid out of the estate of Joseph Gibson.(††)

There was no appeal from this decree.

††This is not an encouragement of any corrupt or vicious habits. If the donor had made use of this as a mode of slandering a virtuous family, the gift would be repelled with indignation, and the donor, if living, punished for the slander. But if it were really true, that a man had intruded himself into a family, and was the father of one of the children of that family, it was his duty to make some compensation for the evil he had done, by providing for the child; which was, at all events, innocent, and at liberty to accept such provision. Settlements made by men on their mistresses, and their children, have been supported in equity, when made in præmium pudicitiæ, as a compensation for the injury done; though not where it is a reward for the continuance of the vicious connection, which would be pro turpi causa.

4 Desaus. 143

Case XXVI.

Ninety-Six District.—Heard before Chancellor Gaillard.

ARCHIBALD DOUGLASS, et al. v. JACOB CLARKE, et al.

(June, 1810.)

[*Descent and Distribution* ⊂⊃65.]

A widow is entitled, under the statute of 1791, for abolishing the rights of primogeniture, &c. to one third of the real estate of her intestate husband, in fee.—This is in lieu and bar of dower. If she dies without having claimed her dower, her representatives are entitled to the third which the statute gave her in fee.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 195; Dec. Dig. ⊂⊃ 65.]

*144

*The complainant, Douglass, married one of the daughters of Phebe Hearst, by her former husband, Cochran. The other complainants are her children by the same marriage. The complainants state, that shortly after Mrs. Cochran's intermarriage with Hearst, he died intestate, seized in fee of a valuable estate in lands, leaving Phebe Hearst his widow, and several children, all of whom were by a former marriage. That under the act for the abolition of the rights of primogeniture, and for the giving an equitable distribution of the real estate of intestates, she became entitled to one third of the real estate of said intestate, in fee simple; and the children of Hearst to the other two thirds of it. That the said Phebe Hearst died intestate, about three years after the death of her husband, without having had her proportion of his estate, partitioned off to her. Her legal representatives, the complainants, claim the third of Hearst's real estate, and pray for a writ of partition. The facts are admitted by the defendants, who are the children of Hearst. The counsel for the defendants resisted the claim of complainants, on the ground stated in the answer, that in cases of intestacy, when the widow has not elected in her lifetime, to take the provision made for her in her husband's real estate by the abovementioned statute, she is considered as having made choice of her provision of dower. They relied on the following clause in that statute: "That in all cases where provision is made by this act for the widow of a person dying intestate, the same shall, if accepted, be considered as in lieu and in bar of dower," and they contend that the widow, having died without signifying by any act her acceptance of her distributive share, the same never vested in her, and was not transmissible to her representatives.

Chancellor Gaillard delivered the following decree:

Where a person entitled to real estate in fee simple dies without disposing of it by will, the act for the abolition of the rights of primogeniture, &c. directs the manner in which it shall be distributed. "First, if the intestate shall leave a widow and one or more children, the widow shall take one third

*145

of the real estate, and the re*mainder shall be divided between the children, if more than one, but if only one, the remainder of the estate shall be vested in that one absolutely forever." The court is of opinion that under this clause, on the death of Mr. Hearst, his widow became entitled to one third of his real estate; and that no act on her part was necessary to vest in her a right to this third. The intention of the clause which says that "where provision is made for the widow of a person dying intestate, the same shall, if accepted, be considered as in lieu and bar of dower," is obvious; it was merely to prevent the widow from having one third of the intestate's real estate, and her dower also. She cannot have her distributive share under the act, and her dower likewise. She has not had her dower, nor does it appear she ever intended to claim it. Her representatives, the complainants, are therefore entitled to that part or share of Hearst's estate which, on his death, vested in his widow. Let the writ of partition issue.

Theodore Gaillard.

BRE

S.C. MA

COLUM