MENIFEE'S AD'RS *vs.* BALL ET AL.

Administrators are merely legal trustees of the creditors and heirs of the intestate; they are not the guardian of the decedent's children, and cannot incur a fiduciary liability on their account.

Neither courts of law or equity will allow a set-off of debts accruing in different rights.

When the remedy is complete at law, a party is not entitled to come into equity for relief—a matter that can be set-off at law is no foundation for a bill in equity.

Appeal from the Chancery side of the Conway Circuit Court.

BILL in chancery by Bennet B. Ball and Mary E. Menifee against Benj. F. Howard, Dudley D. Mason and James Menifee, administrators of Nimrod Menifee, determined in the Conway circuit court, chancery side, at the Sept. term 1845, before Brown, judge.

The material allegations of the bill are stated in the opinion of this court. On the filing of the bill, the master granted a temporary injunction to the judgments at law. The defendants were served

with process, appeared, but declined to answer the bill, and the court decreed a perpetual injunction of the judgments at law for the amount of the set-off claimed by complainants, in accordance with the prayer of the bill, and defendants appealed.

RINGO & TRAPNALL, for appellants. The appellants, upon the transcript of the record and assignments of errors, state the following points and authorities, viz:

1. That the bill presents no case over which a court of equity can exercise jurisdiction, admitting all the facts as therein stated to be true.

The whole object of the bill is to obtain a set-off of $60, advanced by the appellees to or for the use of the appellants at their request, after the making of the notes sued on, which is but showing a cross demand, constituting a good set-off, if properly pleaded in a court of law, but the appellees themselves show, that they had the means of proving said demand by the testimony of witnesses, without the aid of any discovery from the appellants: that the suits at law were commenced on the 13th March 1843; that the appellees permitted judgment to go against them by default, without taking any steps to obtain the deposition of Thompson, the witness; nor do they show an excuse for their neglect. They neither show the insolvency of the appellants nor the estate of Menifee; nor did they file any account as a set-off. So that they neither show themselves without adequate remedy at the common law nor bring their case within the jurisdiction of a court of equity on any good ground whatsoever. *Watkin's Ev. vs. Chamberlin et al.* 8 *Dana* 164. *Merrill vs. Fowler et al.* 305. *Collins &c. vs. Farquar,* 4 *Lit. Rep.* 155. *Robbins &c. vs. Holly,* 1 *Monroe* 194. 3 *Monroe* 97.

2. In all cases of concurrent jurisdiction the court which first has possession of the subject must determine it conclusively. *Smith vs. McIver,* 9 *Wheat.* 532. 5 *Cond. R.* 662. *Marine Ins. Co. of Alexandria vs. Hodgson,* 7 *Cranch* 332. 2 *Cond. R.* 576. *Baker vs. Biddle,* 1 *Baldwin's C. C. R.* 403. *Green vs. Darling,* 5 *Mason's C. C. R.* 201.

3. In this case the appellees have adequate relief at law if the

appellants are in fact indebted to them as alleged in the bill, but their bill fails to show any ground of equity, admitting every fact therein to be true. They show or allege that they at the request of the appellants paid the expenses of removing certain children of Nimrod Menifee from Kentucky to their home in Conway county, Arkansas, or furnished the money to pay the same to the amount of $60, at the instance and request of appellants; but do not show that they loaned or advanced the money to the appellants or whether it was paid for them or to their use as the administrators of N. Menifee's estate, or in their private character—nor that the appellants had anything to do with the removal of the children of Menifee from Kentucky to Arkansas—nor indeed any facts sufficient to charge them either at law or in equity, out of their own estates, or the estate of Menifee in their hands as administrators, with the payment thereof.

4. The sum enjoined is larger than the sum alleged to be due by the appellants to the appellees.

5. By their exhibits comprising a part of the bill, the appellees show that the judgments enjoined, and against which they pray a set-off, of a demand alleged to be due from the appellants to them alone, are one a judgment in favor of the appellants against the appellees and R. Welborn and L. Shaper, and the other a judgment in favor of the appellants against the appellees and R. Baine and Thomas L. Shaper: showing thereby conclusively that there is no such mutuality of indebtedness between the parties as enables either to set-off the one demand mentioned in the bill against the other either at law or in equity. The rule in this particular being the same in both courts. *Howe vs. Shepard,* 3 *Sumners C. C. R.* 409. *Hulbert vs. The Pacific Ins. Co.* 2 *ib.* 471. *Green vs. Darling,* 5 *Mason's C. C. Rep.* 201. *Cobb vs. Haydock et al.* 4 *Day's Rep.* 472.

NO COUNSEL, contra.

CONWAY B, J. The administrators having filed no answer in the court below, the allegations of the bill stood confessed as true, and

we have but to inquire whether the case made by the bill authorized the decree perpetuating the injunction. The appellees stated that in March 1842, they made to the administrators of Nimrod Menifee deceased, two notes, one for $38.50 cts; the other for $32.03 cts, payable in twelve months; that in March 1843 suit was instituted by the administrators on said notes; that on the day of trial they filed their claim of set-off for $60, which they had advanced at the request of the administrators to defray the expenses of William and Jane Menifee (children of said decedent) in bringing them from Kentucky to their home in Conway county, Arkansas; that said sum was advanced after the making of said notes, and was to be applied by said administrators as a credit thereon: that they failed to give them the credit, and on the trial refused to allow them an off-set for the same; that they prayed the justice before whom the suits were tried for sufficient time to obtain evidence of the payment of the $60 having been made at the request of said administrators; that the witness by whom the proof could have been made resided in Kentucky, and that it was impossible to obtain him in time: that judgments were rendered against them for the whole amount of both notes, and that in August 1843, executions issued against them for the same.

Administrators are merely legal trustees of the creditors and heirs of the estate. They are not the guardians of the decedent's children, and cannot incur a fiduciary liability on their account. Indeed it would be a breach of trust for them to expend any of the effects of the estate for their benefit. The care of the children is entirely out of their province. That duty devolves upon their guardians. If therefore the witness had been present at the trial and proved every fact alleged to be in his knowledge, appellees could not have properly prevailed before the justice. Nor ought they to have succeeded in the circuit court on their bill. For the claims against them were due appellants as the administrators of Menifee, and the demand for which a off-set or credit was claimed, was against the administrators in their individual character, and not in their fiduciary capacity. Neither courts of law nor equity will allow a set-off of debts accruing in different rights. 2 *Story's*

Eq. J. 663. 2 *Mad. Ch.* 665. 5 *Ark. R.* 54. 1 *Eng. R.* 388. But if the demands had been due in the same right, we can perceive nothing preventing appellees from a complete remedy at law, and if fully adequate in a legal forum, they are not entitled to come into equity for relief. For a matter that can be set-off at law is no foundation for a bill in equity. In such case a bill will not be entertained. 6 *Ves.* 136. 1 *Mad. Ch.* 87.

The decree is therefore reversed and the circuit court of Conway county directed to dissolve the injunction, decree damages and dismiss the bill of appellees.