*John Archer and John W. Stump, executors of John Stump, Complainants and appellants, v. Mary Deneale, widow and executrix of George Deneale, deceased, Charles T. Stuart and Ann Lucretia, his wife, Mary Catharine and Nancy P. Deneale, children and representatives of the said George Denale, Defendants and appellees.

Charge of debts by will.

A testator, residing and owning real and personal estate in the county of Alexandria, district of Columbia, by his will, gave "all his estate, real and personal, to his wife, during her life, for the use and purpose of raising and educating his children," each child, at the age of twenty-one, to be entitled to an equal portion of his estate, real and personal; subject, each, to a deduction of one-third for the maintenance of his wife; he recommended his wife to sell the negroes for a term of years, and directed "an appraisement" only of "his estate" should be made, that no sale of the furniture should be made; and then stated, that he was indebted to "no one, and proposes to continue so," that he was surety for his brother, for which he held a deed of trust on his property, sufficient, he hoped, to pay the same, and directed, that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directed, that his executors should not give security, as his own debts did not require it:" This will does not charge the real estate of the testator with his debts. p. 588.

The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation. p. 589.

Under the laws of Virginia, relative to the estates of deceased persons, lands are never appraised. p. 589.

Stump v. Deneale, 2 Cr. C. C. 640, affirmed.

Appeal from the Circuit Court of the District of Columbia. This was an appeal, by the complainants in a bill filed in the circuit court for the county of Alexandria, from a decree rendered in favor of the defendants, appellees in this court.

The complainants, by their bill, sought to make the real estate of George Deneale liable for the payment of their debt. They set forth, that they had a subsisting judgment against the executrix of George Deneale, for the sum of $7957.58, besides interest and costs. That this judgment was founded on a contract between James Deneale and George Deneale, and the testator of the complainants. That $2913.65 of this judgment was satisfied by a sale of the property of James Deneale, the principal, leaving a balance due on the judgment, of $5000. The bill charged that George Deneale left a considerable estate, real and personal. That the personal estate had been exhausted in the payment of the debts of the said George Deneale, in a regular course of administration; and that there was *nothing left to pay their debt but the real estate, which the bill alleged was expressly [*586 charged by his will with the payment of it, in a certain event; which event it was alleged had happened, to wit, that the property of James Deneale had been sold, and the deficiency of it to pay the debt ascertained. The bill prayed an account of the personal estate, and of the balance due to the complainants on their said judgment, and that so much of the real estate of the said George Deneale as would be necessary to pay what was due them, might be decreed, in pursuance to his will, to be sold, and the proceeds applied to pay that balance; and for general relief.

Mary Deneale, the executrix, in her answer, admitted the judgment

against the testator, as surety for James Deneale; that the said James Deneale had reduced the claim considerably below what was demanded by the bill. That her testator died possessed of a large personal estate, consisting principally of bank and other stocks, standing in his name, which had been claimed by Conway Whittle and others, as specifically belonging to them, by a suit depending in the court of Alexandria county. She stated, if the bank and other stock, claimed as before stated, should be decided to belong to the estate of her testator, there would be personal estate sufficient to pay his debts. If they should be decided to belong to the said Whittle and others, then there would not be a sufficiency of personal estate to pay all his debts, if his estate was bound to pay this demand of the complainants. She denied, that the real estate of her testator was charged, in any event, with the payment of the debt due to the complainants. That he never intended to make any such charge upon it, and that, upon a fair construction of the will, no such charge was authorized by it.

The defendant, Nancy P. Deneale, by her guardian *ad litem*, answered substantially as the executrix had. To their answers, there was a general replication and issue. The other defendants being non-residents, there was an order of publication against them, and the bill taken for confessed.

The commissioner made his report, which showed that he had charged the executrix with the appraised value of the personal estate, including the stocks, instead of the *actual* value, as proved by the sale of all the personal estate, except the stocks which were claimed by others. It would appear from the circumstances detailed by the commissioner, if the stocks were excluded, that the executrix had paid more than the value of the personal estate, including debts due to her testator and received by her.

The will, which was made an exhibit, was dated 13th of February 1815, and was admitted to record, 11th July 1818. By his will, the testator gave *587] to his wife, "all his estate, real *and personal, during her life, for the use and purpose of raising and educating his children, until they respectively are twenty-one." He directed, that each child should, at that age, become entitled to an equal portion of his estate, both real and personal, "subject each to a deduction of one-third of the same," to be retained for the support and maintenance of his wife. He recommended to his wife, to sell the negroes for a term of years. He directed, that an appraisement only of his "estate" should be made; that no sale of furniture should take place. He then stated, that he was indebted to "no one, and proposes to continue so." He stated, that he was security for his brother James for two sums, for which he had a deed of trust on his property, sufficient he hoped to pay the same. He then directed, that his "estate shall not be sold to pay these debts, until the property so deeded shall be sold," when his "estate must be charged with any deficiency." He directed, that his executrix and executor should not give security, alleging that his own debts did not require it. He closed his will, by giving a gold ring of $50 value to a friend, and a bank-share to the Masonic Lodge.

After a hearing on the bill, answer, the will of George Deneale, and the report of the commissioners, the circuit court dismissed the bill with costs. The only question for the decision of the supreme court was, whether George Deneale had, by his will, charged his real estate with the payment of the debt due to the complainants below, the appellants to this court?

Archer v. Deneale.

Swann, for the appellants—The testator charges his estate with the residue of the debt which may remain due to the executor of Stump. The words are—"I direct that my estate shall not be sold to pay these debts, until the property so deeded shall be sold, when my estate must be charged with any deficiency." The term "estate," includes real as well as personal property, and where there is nothing to qualify the word "estate," it will carry real as well as personal property. 8 Ves. jr. 608.

Having then said, his "estate" must be charged, we must look into the will, and see whether there is anything there to qualify the term. The testator devises to his wife "all his estate," both real and personal, during her life. The reversionary interest is left to take its legal course. He then directs "that an appraisement only of my estate be made, and that no sale of furniture shall take place." The meaning of this would depend upon extraneous circumstances. Estate, here, was intended to be the personal estate. Then comes the clause, "my estate must be charged with *the deficiency." What was his meaning? The term estate is competent [*588 to effect this intent. In making a construction, the court will make a man do what is morally just. 3 Ves. 551. Whenever a testator wills that his debts shall be paid, that rides over every disposition, whether against heir or devisee. Ibid. 379.

Lee, for the appellees.—The first question is, what was the real intention of the testator? That intention must prevail. 2d. It is alleged that the direction—that on a certain contingency his "estate must be charged with any deficiency," was to pay the particular debt of the plaintiff; and that the word "estate" included his real estate. It is true, that there are many cases in which the word "estate" in a will, has been held to convey "real estate," even in fee-simple. But these words, and every form of expression, whereby a testator declares his will in respect to the disposition of his property, must submit to the rule, which requires a will to be construed agreeably to the intention of the testator, where it can be collected from the whole will. 2 Roper on Wills 619.

The case of *Woollam* v. *Kenworthy*, 9 Ves. 137, is very analogous to the present case. The general principle decided in that case, was, that under the general word "estate," in a will, real estate will pass, unless restrained, as was in that instance, by the intention collected from the whole will. Then, construe the will of Mr. Deneale, by this rule and by these cases; it is plain, that he has not charged his real estate, in any event, with the payment of this debt. *Shaw* v. *Bull*, 12 Mod. 592.

MARSHALL, Ch. J., delivered the opinion of the court:—This suit was brought in the circuit court for the district of Columbia, sitting in the county of Alexandria, to subject the lands of George Deneale to the payment of a debt for which he was surety. The sole question arises on the construction of his will. The complainants contend, that it charges his lands with his debts.

By his will, the testator gives to his wife "all his estate, real and personal, during her life, for the use and purpose of raising and educating his children, until they respectively are twenty-one." He directs, that each child shall, at that age, become entitled to an equal portion of his estate,

both real and personal, "subject each to a deduction of one-third of the same," to be retained for the support and maintenance of his wife. He recommends to his wife, to sell the negroes for a term of years. He directs that an appraisement only of his *estate "shall be made, that no sale *589] of furniture shall take place." He then states, that he is indebted to no one, and purposes to continue so ; he states, that he is surety for his brother James, for two sums, for which he has a deed of trust on his property, sufficient, he hopes, to pay the same. He then directs that his estate shall not be sold to pay these debts, until the property so deeded shall be sold, when his estate must be charged with any deficiency. He directs that his executor and executrix should not give security, as his own debts did not require it.

That the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted. A little is it to be denied, that the word alone, if not used with an intent to subject the lands of the testator to the payment of his debts, cannot have that effect. In the will under consideration, the testator alludes, in two instances, to his property, generally ; in both, he uses the words "estate," both "real and personal." In the next instance, the word estate is introduced alone, in the clause which follows : "Item, I do hereby direct, that an appraisement only of my estate be made, and that no sale of furniture shall take place." In Virginia, lands are never appraised, and the law directs a sale of all perishable articles. When, therefore, the testator directs that an appraisement only of his estate be made, and that no sale of furniture shall take place, he obviously applies the term, exclusively, to that kind of property, the appraisement of which is directed by law, and is usual ; and by adding the word "only," restrains his executors from selling that property which is directed by law to be sold. In this clause, the word estate is plainly confined to personalty. He then speaks of the debts for which he is surety for his brother James, and directs that his "estate" shall not be sold to pay these debts, until the property conveyed to him in trust shall be exhausted. This direction is obviously restrictive ; it restrains the executors from using a power they possess under the law. That power is to sell the personal estate for the payment of debts, but it does not extend to the sale of lands ; consequently, the word estate in this place, also designates only personal estate. After this prohibition to sell his estate, until the trust property should be all applied to the object, he adds, "when my estate must be charged with any deficiency." There is no foundation for the opinion, that the testator has used the word estate, in this part of the sentence, in a different sense from that in which it was used in the same sentence, *immediately before, while treating of the same subject. The same *590] estate, the sale of which he had just forbidden, until a particular event should take place, must, he says, be sold, when that event shall take place. He means only his personal estate.

It would, we think, be an entire perversion of the language used by the testator, to construe these words a charge upon his estate. He does not intend to create any liability, which the law had not created. When the trust property shall be exhausted, his estate, he says, "must be charged with the deficiency ;" he can no longer prevent its sale.

We think, there is no error in the decree, which declares, that the will of George Deneale does not charge his real estate with his debts, and that the bill of the complainants be dismissed with costs, and that the said decree be affirmed.

Decree affirmed.

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*JOHN TAYLOE, Plaintiff in error, *v.* ELISHA RIGGS, Defendant in error. [*591

Evidence.—Lost papers.—Testimony of party.

The rule of law is, that the best evidence must be given, of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind, in the party's possession or power;[1] the withholding of that better evidence, raises a presumption, that, if produced, it might not operate in favor of the party who is called upon for it. For this reason, a party who is in possession of an original paper, is not permitted to give a copy in evidence, or to prove its contents. p. 596.

The affidavit of a party to the cause, of the loss or destruction of an original paper, offered, in order to introduce secondary evidence of the contents of the paper, is proper; if such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least, in a court of law.[2] p. 596.

It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply; questions which do not involve the the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness, for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received. p. 596.

That testimony which establishes the loss of a paper, is addressed to the court, and does not relate to the contents of the paper; it is a fact which may be important, as letting the party in to prove the justice of the cause, but does not itself prove anything in the cause.[3] p. 597.

The action being upon a written contract, said to have been lost or destroyed, and not for deceit or imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view, in construing the instrument itself. Had the written paper, stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrep-

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[1] United States *v.* Laub, 12 Pet. 1; McPhaul *v.* Lapsley, 20 Wall. 264; United States *v.* Gibert, 2 Sumn. 21; De Tastett *v.* Crousillat, 2 W. C. C. 132; Romayne *v.* Duane, 3 Id. 246. It is sufficient for the admission of secondary evidence of a lost record, that it appears to be the best which the party has it in his power to produce. Cornett *v.* Williams, 20 Wall. 226.

[2] The affidavit of a party of the loss of a paper, and his inability, after the use of due diligence, to find or produce it, is sufficient to admit secondary evidence of its contents. De Lane *v.* Moore, 14 How. 253; Boyle *v.* Arledge, Hempst. 620; Nicholls *v.* White, 1 Cr. C. C. 58. If account books have been destroyed by fire, secondary evidence of their contents may be given. Insurance Co. *v.* Weide, 9 Wall. 677; s. c. 14 Id. 375. And see Hedrick *v.* Hughes, 15 Id. 123.

[3] See Hemphill *v.* McClimans, 24 Penn. St. 367; Graff *v.* Pittsburgh and Steubenville Railroad Co., 31 Id. 489; Livingston *v.* Frier, 16 Johns. 193; Graham *v.* Chrystal, 2 Keyes 21. Very slight proof is required of the loss of a paper, of only transitory interest, where there is no rational motive for keeping it. American Life Ins. Co. *v.* Rosenagle, 77 Penn. St. 507; Bond *v.* Root, 18 Johns. 60.