C. A. BENSON, surviving executor of the estate of James Nathaniel Ferguson, Appellant, *v.* DAILY JOHNSON, Appellee.

APPEAL FROM THE CIRCUIT COURT, SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 18, 20, 1974. Decided December 13, 1974.

1. When an answer in a proceeding both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint.
2. Granting of a motion for judgment during trial is not a matter of right, but rests in the sound discretion of the judge.
3. A will duly admitted to probate by a court having jurisdiction to do so is admissible against everyone except in a proceeding to set aside the will or the probate thereof.
4. Deeds and other writings are admissible against all parties to them and are also evidence against everyone of the transfer of all titles or rights transferred by them.
5. A document may be used on cross-examination when it has been introduced by the opposing counsel, without resorting to a subpoena *duces tecum* for its production.
6. A defendant is barred from introducing matter when his answer has been dismissed and he has been ruled by the court to a bare denial of the facts alleged by plaintiff.
7. Issues not raised during the trial will not be heard on appeal.
8. A bill of exceptions should include only errors attributable to the trial judge.
9. The purpose of a suit for discovery is to compel an adverse party to disclose facts and documents within his knowledge or control.
10. A bill for discovery constitutes an equitable claim.
11. Neither ejectment or any other action at law can undo what a probate court has done in respect to the probate of wills or deeds to real property.
12. Only a court of equity, where a bill has been timely filed, can review or cancel conveyances after title has passed.
13. A proceeding in equity may be instituted although other equitable relief is also available.
14. Title to realty must be legally vested in a plaintiff before he may institute an action in ejectment.
15. A court of equity upon obtaining jurisdiction of an action will retain it and can administer full relief, both legal and equitable, so far as it pertains to the same transaction or the same subject matter, including a matter of dispute over which courts of law and courts of equity have concurrent jurisdiction.

A suit for discovery was initiated by appellee against the surviving executor of the estate of his mother's husband. In the suit he asked that the executor disclose to him the location of the property and turn it over to him. The respondent appealed from the decree of the lower court issued against him.

The Supreme Court ruled primarily that the suit for discovery was proper in the circumstances and that the lower court's decree was validly pronounced. The judgment was *affirmed.*

Macdonald M. Perry for appellant. *Nete-Sie Brownell* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The late James Nathaniel Ferguson of Oldest Congo Town, Montserrado County, died leaving a last will and testament, which was probated on June 7, 1957, and in which he devised five acres of land situated in Oldest Congo Town to his wife, Enty Hannah Ferguson, mother of appellee Daily Johnson, her only surviving heir. The relevant portion of the will is set forth.

> "1st. I will and bequest to Mrs. Enty Hannah Johnson my dear wife of the Settlement aforesaid five (5) acres of land in said Settlement between the Baptist Church and Mr. Anthony Benson's present residence, in fee simple to use at will and for her personal benefit."

Appellant witnessed, and was also named as one of the executors in the will. It should be mentioned that the five-acre tract was purchased by James Nathaniel Ferguson from Mary Morris on August 17, 1898.

Appellee's mother died, while he was a minor, in Maryland County. Several years thereafter he allegedly met the appellant who informed him that his mother was the

late Enty Hannah Ferguson. Subsequently, appellee met Mrs. Jestina Ferguson, daughter of the testator, who showed him the will and it was then that he discovered that appellant Benson was an executor and a witness to the will. The other executor, Mr. A. B. Mars, had long since died. The appellee appealed to appellant to show and deliver to him the five acres of land devised to his mother who, it is alleged, had made no disposition of the land prior to her death.

Upon appellant's failure to turn over the property, appellee brought an action in equity in the Civil Law Court for the Sixth Judicial Circuit, praying that the appellant, the sole surviving executor, disclose his mother's property and turn it over to him. Pleadings were filed, the trial judge, ruling on the issues of law, dismissed appellant's answer and ruled him to a bare denial. The trial was held, and the court pronounced its decree.

> "Daily Johnson, petitioner, is entitled to regain custody, control, ownership and possession of the said five acres of land described in the title deed from the late Mary Morris to the late James Nathaniel Ferguson, henceforth and forever to hold said premises in fee simple against any other person claiming or holding title subsequent to the death of the late Mrs. Enty Hannah Ferguson, unless such person or persons can show a valid title or other disposition of said property from the late Enty Hannah Ferguson."

Appellant excepted to the decree and appealed to this Court. He thereupon filed a bill of exceptions containing five counts.

> "1. That, Your Honor erred when you dismissed appellant's answer and ruled him to a bare denial, to which the appellant then and there excepted.
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> "2. And also because appellant says that Your Honor denied appellant's motion for judgment in his favor, to which he excepted.
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> "3. And also because appellant says that Your

Honor overruled the objections posed by appellant against the admission of the purported will into evidence.

"4. And also because Your Honor overruled the (objections to the) irregular manner of petitioner's counsel receiving the purported will already admitted into evidence to cross-examine appellant thereon.

"5. And also because Your Honor decreed granting the petition of the appellee and ordering the eviction of persons allegedly occupying the purported five acres of land, although no person other than the appellant was made a party to the present suit."

We shall traverse these issues in the order in which they appear. With respect to count one of the bill of exceptions, recourse to appellant's answer shows his contention.

"1. That the court should refuse jurisdiction over his person as sole surviving executor because even though he does not dispute the execution of the will which carries his signature, yet he never associated himself with the estate as an executor; and the purported transfer deed from Mary Morris to James N. Ferguson was not genuine as admitted by Mary Morris herself, and therefore appellee could not recover;

"2. that the late Enty Hannah Ferguson admitted the deed was not genuine;

"3. that in a conference between petitioner's mother, the late A. B. Mars and respondent himself, he declined his appointment as co-executor of the will; and, therefore, it was incorrect and misleading to refer to him as the sole surviving executor."

It can be observed that even though he denied associating with the estate, yet, in the same count, he contends that the deed from Mary Morris was not genuine and, therefore, the testator could not devise the property. This answer is clearly evasive, contradictory, inconsistent and presents no triable issue with respect to disclosure

and recovery of the property. The answer tends to deny and avoid which, according to several opinions of this Court, is a bad plea. Where an answer both denies and avoids, the defendant will be ruled to a general denial of the allegations contained in the complaint. *Shaheen* v. *C.F.A.O.*, 13 LLR 278 (1958); *Butchers' Association of Monrovia* v. *Turay*, 13 LLR 365 (1959). Therefore, the trial judge did not err in dismissing the answer and count one of the bill of exceptions is not sustained.

Count two deals with the denial of appellant's motion for judgment. The applicable statute on motion for judgment during trial is found in our Civil Procedure Law.

> "After the close of the evidence presented by an opposing party with respect to a claim or issue, or at any time on the basis of admissions, any party may move for judgment with respect to such claim or issue upon the ground that the moving party is entitled to judgment as a matter of law. The motion does not waive the right to trial by jury or to present further evidence even where it is made by all parties. If the court grants such a motion in an action tried by jury, it shall direct the jury what verdict to render, and if the jury disregards the direction, the court may in its discretion grant a new trial. If the court grants such a motion in an action tried by the court without a jury, the court as trier of the facts may then determine them and render judgment or may decline to render any judgment until the close of all the evidence. In such a case if the court renders judgment on the merits, the court shall make findings as provided in section 23.3(2)." Rev. Code 1:26.2.

It is clear from the section just quoted that the granting of the motion is not a matter of right, but rather it is to be left to the sound discretion of the judge who, in an action tried by the court without a jury, may render a

judgment immediately if the motion is granted, or may decline to render a judgment until the close of all the evidence, as in this case.

This motion is analogous to a motion for a directed verdict, and should not be granted if the plaintiff has made out a prima facie case which is not controverted, or if there is competent or substantial evidence tending to support or prove the plaintiff's case. 53 AM. JUR., *Trial,* § 403. From the evidence presented by the petitioner, and the section just cited, the judge did not err in denying the motion, and, therefore, count two of the bill of exceptions is not sustained.

With respect to the admissibility of the will which is dealt with in count three of the bill of exceptions, the grounds offered by the appellant against admission are fraud and that the instrument does not conform to the statute on wills in that it fails to state that the subscribing witnesses signed in the presence of each other or that the will was declared by the testator in the presence of attesting witnesses. These are good objections if the instrument was being offered for probate. *Cole* v. *Sharpe,* 14 LLR 232 (1960). But in the instant case no objections were raised against probate of the will and, hence, it was probated and registered; and, except for the five acres which form the subject matter of this action, all of the property devised in the will was distributed in accordance with the will. Furthermore, the validity of the will was not in issue and was introduced into evidence only to prove its existence, since the appellee's contention of being entitled to the property was based on a devise contained in the will. According to the Civil Procedure Law: "A will regularly admitted to probate by a court having jurisdiction to do so is admissible against all mankind except in a proceeding to set aside such will or the probate thereof." Rev. Code 1:25.14. "Deeds and other writing shall be admissible against all parties to them and shall also be evidence against all mankind of

the transfer of all titles or rights transferred by them." Rev. Code 1:25.16. Aside from this, the objections of illegality and fraud are affirmative defenses which should be specially pleaded and not raised in an oblique manner as is apparent in this case. This Court has consistently held that a defendant is barred from introducing affirmative matter where his answer has been dismissed and he has been placed on a bare denial of the facts alleged by the plaintiff. *Saleeby* v. *Haikal,* 14 LLR 537 (1961); *Caulerick* v. *Lewis,* decided April 26, 1973. Again we find no error committed by the judge and, therefore, count three is not sustained.

Count four of the bill of exceptions was based on the occasion when the counsel for appellee, during cross-examination, asked the appellant a question: "Please look at this document marked by court PX/2 and say if it is the will that you said you signed and whether the signature, C. A. Benson, appearing on said will is your handwriting and signature?" The appellant objected: "That procedurally when a document has been duly admitted into evidence it becomes the property of the court and for a party to have same produced the procedure allowed by law is through subpoena duces tecum. . . . This not having been done, the same is a breach of practice and procedure."

The trial judge in overruling this objection said:

> "To us, the objection is a novelty. It is true that when documents are admitted into evidence and have formed part of the records they become the property of the court, but we do not agree that while the trial in which the documents were admitted is still in progress a party is deprived [of the use of the document] on cross-examination, in examining a witness testifying. . . .
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> "Where a case in which documents have been introduced into evidence has been finally determined and the records closed and turned over to the clerk

of court for custody, they may only be brought by way of a writ duces tecum. In the instant case, the trial is still in progress and the document in question is one to which the witness had testified and there is nothing amiss to have him identify the document which he referred to."

The ruling is clear, concise, and correct and, therefore, this count is not sustained.

The last count of the bill of exceptions alleges that the judge granted the appellee's petition and ordered the eviction of the present occupants of the premises, even though only the appellant was made a party to the action. It would seem that the appellant is alluding to the non-joinder of the occupants as parties, or perhaps he is contending that there is an adequate remedy at law. Whichever it is, it should be pointed out that neither issue was raised in the lower court so as to give the trial judge an opportunity to pass upon them. It is settled that questions not raised during the trial cannot be heard on appeal. *Bryant* v. *African Produce Co.*, 7 LLR 93 (1940). And that a bill of exceptions should include only errors attributable to the trial judge. *Benwein* v. *Whea,* 14 LLR 445 (1961). Moreover, the appellant did not mention the issue in his brief. All of this precludes us from reviewing this issue. However, since he did argue very briefly that there was an adequate remedy at law, we shall deal with this count of the bill.

First, we shall review the evidence before determining whether the occupants of the land in question should have been joined as parties, keeping in mind the purpose of a suit for discovery. The evidence adduced at the trial showed that the appellant is the surviving executor of the last will and testament of James N. Ferguson; that the five acres of land are contiguous to the site on which his residence is located, lying between appellant's residence and the First Baptist Church in Oldest Congo Town; that the other executor, the late A. B. Mars, gave deeds

to the other legatees in the will for property devised to them but, since the heirs of Enty Hannah Ferguson resided outside of Montserrado County, he did not dispose of the five-acre tract devised to Enty Hannah Ferguson up to the time of his death; instead, this portion of the estate was left in the hands of the other executor, who is now the appellant and who knew personally the testator and appellee's mother.

On the other hand, the appellant produced no evidence to show that he was removed as executor by the court or that he withdrew; and that Mary Morris did not own the property which she sold to James N. Ferguson, and which is now the subject of this action.

According to 23 AM. JUR., 2d, *Deposition and Discovery,* § 141, the sole purpose of a suit for discovery is to compel "the defendant to answer its allegations and interrogatories, and thereby to disclose facts within his possession, custody, or control, and it is usually employed to enable a party to prosecute or defend an action." In view of the above facts and circumstances, it is difficult to conceive how anyone other than the appellant could have been made a party to an action for discovery.

Insofar as the availability of a remedy at law is concerned, it should be pointed out that the power to enforce discovery is one of the original and inherent powers of a court of equity. In equity a bill of discovery can be filed for the discovery of facts in the knowledge of an adverse party, or of deeds, writings, or other things in his custody. Having said that a bill of discovery presents an equitable claim, we must state further that while the existence of an adequate legal remedy precludes the granting of equitable relief, the rule is otherwise where a party asserts an equitable cause of action.

The appellant, during his argument, contended that appellee should have brought an action of ejectment; but this Court has held that neither ejectment nor any other

action at law can undo what a probate court has done in respect to the probation of wills or deeds for real property; and only a court of equity, where a bill is timely filed, can review or cancel conveyances after title has passed. *King* v. *Scott,* 15 LLR 390 (1963). The essential issue in an ejectment action is title, not ties of blood. A plaintiff in ejectment may recover property which descended to him, if the title has legally vested in him. In the instant case, although the appellee is entitled to the land devised to his mother, by virtue of his being her sole heir, yet he could not have brought ejectment because title was not legally vested in him. The decree of the lower court ordering the issuance of a writ of possession facilitates the vesting of title in him. Having acquired title, the appellant is better able to bring an action of ejectment if he so desires and if it is necessary. It is then that the occupants of the land, if any, could be joined as parties.

As to whether an equity court has the power to put the appellee in possession, it is well settled as a general rule that a court of equity upon obtaining jurisdiction of an action will retain it and administer full relief, both legal and equitable, so far as it pertains to the same transaction or the same subject matter. 27 AM. JUR. 2d., *Equity,* §§ 109, 110.

Furthermore according to 27 AM. JUR. 2d., *Equity,* § 111, "as a general principle, equity may retain jurisdiction and dispose of the litigation if the case has any feature which authorizes equitable interposition, whether such feature appertains to relief which only a court of equity may accord or to a matter of dispute over which courts of law and courts of equity have concurrent jurisdiction." In this section last cited we also find that "where it is shown to have been proper and necessary to go into a court of equity for the purpose of discovery, the court will proceed to decide the case without remitting

the parties to their remedy at law, notwithstanding that if discovery had not been necessary, relief could have been obtained by an action at law."

Having determined that the suit for discovery was proper and necessary, that the joinder of the occupants of the property as parties was unnecessary, that there was no adequate legal remedy, and that where a court of equity takes jurisdiction for the purpose of discovery full relief in the case may be granted, we hold that the trial judge did not err and, therefore, this count too cannot be sustained.

In view of the foregoing, the decree of the trial court is affirmed, with costs against appellant. And it is so ordered.

Affirmed.