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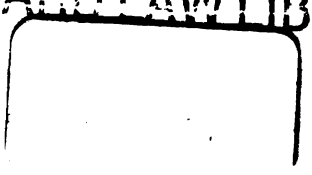

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REPORTS

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OF

CASES ADJUDGED AND DETERMINED

IN THE

COURT OF CHANCERY,

OF THE

STATE OF DELAWARE.

Under authority of the General Assembly,

BY

DANIEL M. BATES,
LATE CHANCELLOR.

VOL. I.

PHILADELPHIA:
T. & J. W. JOHNSON & CO.
1876.

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PREFACE.

These Reports are published under authority of a Joint Resolution of the General Assembly of Delaware, adopted, March 29th 1871, directing the Chancellor to "collect and publish such equity cases, heretofore determined in the Court of Chancery of this State, as, in his judgment, should be proper for public information;" also providing for the continued publication of such equity cases as should be thereafter determined. The present volume contains cases selected and prepared from the manuscript notes of the Chancellors, from the year 1814 to 1833. No manuscript notes are known to be in existence, of any equity cases adjudged between the organization of the Court of Chancery, under the constitution of 1792, and the year 1814—the date of the first case reported in this volume. The reporter has published all the cases found among the manuscripts, from 1814, to 1833, which seemed to be of any value to the profession, and in which there were written opinions.

It may not be amiss to add that the opinions have not, in every case, been published literally and fully, as they were found in the manuscript. In some instances, minute discussions of the evidence are omitted, the conclusion of the Chancellor upon the state of facts being sufficient to make clearly intelligible the legal principles decided in the cause. In a few instances, some transpositions of sentences and changes of phraseology have been made; but this has been done sparingly, and only when necessary to make clearer the meaning of the text. The

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arguments of counsel are not reported literally. The notes of argument in a cause made by a Chancellor, for his own use only, would not bear a literal publication. They present but the thread of the argument, sufficient to refresh the memory of the Chancellor in his investigation of the cause, but meagre to the reader. It was necessary, either to omit the arguments or to supply much which was lacking in expression, though evidently comprehended in the arguments as made. The latter course has been adopted, in order to satisfy the generally expressed interest of members of our Bar in the arguments of cases reported. The arguments reported in this volume are substantially as found in the manuscript notes; but they must of course fall short, both in force and fullness, of those actually made by the counsel,—able, and eminent in their profession, as all of the counsel were.

The reporter attempted to verify the citations of authorities made in the arguments of counsel and opinions of the Court, but not with full success. The references to adjudged cases in the Chancery Reports were tested, and are believed to be correct as printed; but the text books of the period covered by these reports have, many of them, since passed through successive editions, and the original paging cannot be traced. The effort to find the corresponding pages in later editions proved so unsatisfactory, that it became necessary to abandon it, and to leave the references as they stand in the manuscripts.

March, 1876.

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The following Chancellors have held office from the organization of the Court of Chancery, under the Constitution of 1792, until the year 1833, to which date the cases are reported in this volume.

WILLIAM KILLEN, appointed, Oct. 1793; resigned, Dec. 1801.

NICHOLAS RIDGELY, appointed, Dec. 1801; died, April 1st, 1830.

KENSEY JOHNS, SR., appointed, June 21st, 1830. Term of office expired with the Constitution of 1792.

KENSEY JOHNS, JR., appointed Jan. 18th, 1832; died, March 28th, 1857.

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CASES IN CHANCERY.

DELAWARE.

RICHARD C. DALE,

vs.

ROWLAND SMITH AND JOSEPH TERRAPIN.

New Castle, Aug. T. 1814.

Parol evidence of intention. in the absence of fraud, surprise or mistake, is inadmissible to vary the description of land in a written contract of sale.

Written contract for the sale of "a tract of land situated in Appoquinimink Hundred, *containing by deed* 200 *acres, be the same more or less.*" Upon a subsequent survey. made according to the description in the deed referred to, the tract was found to contain 317 acres *Held*, that parol evidence was not admissible to show that the parties intended the sale of a less quantity than the entire tract covered by the description in the deed.

Where the description in a deed calls for certain natural boundaries, these are controlling, and effect will be given to them in applying the description to the premises, although thereby a larger quantity of land may be included than the deed specifies.

BILL FOR SPECIFIC PERFORMANCE.—The complainant, Dale, by a written article of agreement, dated the 26th of September, 1812, contracted to sell and convey to the de-

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fendants, Terrapin and Smith, a tract of land in New Castle County; the written agreement being as follows, viz:

"Articles of Agreement, made and concluded on this 26th "day of September 1812, between Richard C. Dale of the "State of Delaware, of the one part, and Joseph Terrapin "of the State of New Jersey, and Rowland Smith, of the "State of Pennsylvania, of the other part, witness, that the "said Richard C. Dale, for the valuable consideration of "the sum of seven thousand dollars, does bargain and sell "to Joseph Terrapin and Rowland Smith a tract of land, "situated in Appoquinimink Hundred, *containing by deed* "*two hundred acres, be the same more or less;* for which he "binds himself to give a general warranty deed, upon the "said Terrapin and Smith making their first payment on "the 25th of December next ensuing the date thereof. It "is further understood and agreed between the parties, that "the present year's rent belongs to Richard C. Dale, who "promises to give the said Terrapin and Smith *immediate* "*possession and use of the woodland generally, and of all the* "*wood now cut and corded in the woods*, and quiet and peace-"able possession of the buildings and premises on the 25th "of March next ensuing the date hereof. All which condi-"tions on my part I pledge and obligate myself to comply "with. As witness my hand and seal this 26th of Sep-"tember, 1812.

"(Signed), RICHARD C. DALE. { L. S. }

Witness present,
"WILLIAM C. HANCOCK."

The deed referred to in the articles was an indenture of bargain and sale from Henry Drinker and wife to Bridget Colgate, who was the complainant's grandmother dated 7th September, 1771.

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Statement of the case.

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No survey of the premises was made prior to the date of the agreement, in order to ascertain the quantity of land contained within the lines of the old deed referred to. Pending the negotiation, the parties, while together, looked at the deed and calculated the quantity at 215 acres, 2 roods, 20 perches. The complainant then offered to throw in the excess beyond two hundred acres to the extent of two hundred and fifteen acres. Sometime after the written agreement had been executed the complainant caused a survey to be made, at which, on two occasions, first one and then the other of the defendants was present. This survey ascertained the contents of the tract to be three hundred and fourteen acres, being one hundred and fourteen more than the number of acres called for in the deed referred to in the agreement. Thereupon, the complainant, claiming the right to reserve the excess of one hundred and fourteen acres, tendered a deed for two hundred and fifteen acres, which deed the defendants refused to accept, insisting upon a conveyance of the whole tract. The defendants, having under the agreement received immediate possession of the woodland, (which embraced mainly the one hundred and fourteen acres found to be in excess) proceeded to cut off the wood. This bill in equity was filed to restrain the defendants from committing further waste upon the one hundred and fourteen acres; also to compel them to accept a conveyance of two hundred and fifteen acres, and to perform the agreement on their part.

The defendants, by their answer, admitted the treaty for the purchase of the land; also the written contract in the terms set forth in the bill, and the giving of security by bond for the purchase money; but they alleged that pending the negotiation and while the defendants, together with the complainant, were examining the land, the latter stated that the quantity would overrun the two hundred acres called for by the deed under which complainant held title; that they refused to purchase by the acre on survey,

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but made their offer of $7000 for the whole tract, according to the metes and bounds shown to them; and that the purchase was made with the understanding on their part that it should embrace the whole tract. The answer denied any agreement or understanding that the defendants were to pay for any surplus which might be ascertained upon a survey.

Issues were joined and depositions taken on both sides. The evidence consisted chiefly of acts and declarations, on the part of both parties, bearing upon the question what they respectively understood to be the meaning of the contract, whether it was a contract for the whole tract, more or less, covered by the old deed, or whether only for the two hundred and fifteen acres which was the estimated quantity pending the negotiation for sale. This evidence consisted mainly of declarations by both Terrapin and Smith to the effect that they had purchased two hundred acres for $7000, and that the complainant had given in fourteen or fifteen acres. On the other hand, it was proved that the complainant had frequently spoken of the sale in terms implying that it embraced the entire tract; that he once called it "his farm," at another time, "the old place," and at another, the "tract of land which came by his grandmother," who was the grantee in the old deed; and that on no occasion had the complainant spoken of having reserved any part of the tract; further, that he had, after the sale, spoken of his being left without fire wood from this tract, all the wood being on the one hundred and fourteen acres in dispute. It was also proved that, in showing the tract for sale, the complainant rode over the whole of it; also, that some years previously he had been informed by a surveyor that the tract contained one hundred acres more than the quantity called for in the deed.

The cause came before the Chancellor at the August Term, 1814, for hearing upon the bill, answer, exhibits and depositions.

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Opinion :—rule stated.

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Read, *Rodney* and *Van Dyke*, for complainant.

Rogers and *Broom*, for defendant.

RIDGELY, CHANCELLOR.—The articles of agreement, signed by the complainant on the 26th of September, together with the deed referred to, furnish the only guide by which the real contract of the parties can be ascertained. The intention of the parties must be sought there. The complainant's counsel rightly observed, that this is a question of intention and construction; but then, the intention must be discovered from the construction of the articles. And further, the deed of Drinker and wife to Colgate, of the 7th September 1771, became part of the agreement, and the extent of the agreement must be ascertained by that deed.

No circumstance has appeared by which it becomes necessary to resort to parol evidence. There is no surprise, no mistake, no fraud. Every act of the complainant was done with his eyes open, and with sufficient knowledge of the quantity of land, and without the least practice on the part of the defendants to draw him into any new or different agreement.

It is unnecessary to run through all the cases which this subject affords. They generally turn upon particular circumstances. Fraud will vitiate a deed, and parol proof may be given of the fraud; but then, the party obtaining the deed must be guilty of the fraud. And unless there be some *suppressio veri* or *suggestio falsi*—some circumvention—the deed must stand on its own ground. Here, there is no such thing; and moreover, the complainant was perfectly informed of every fact necessary in disposing of this land.

Fraud is what is done in secret, and where there is a concealment from the party in a matter which concerns his interest. 2 *Atk.* 559, 561. In 2 *Atk.* 383, 4, Lord Hardwicke says, "to add anything to an agreement in

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writing, by admitting parol evidence which would affect land, is not only contrary to the statute of frauds and perjuries, but to the rule of the common law before that statute was in being."

The reasoning of Lord Thurlow in the case of *Lord Irnham vs. Child*, 1 *Bro. Ch. Rep.* 92, is peculiarly applicable. That was a grant of an annuity. On settling the terms, it was agreed that the annuity should be redeemable, but the parties, supposing that this appearing on the face of the transaction would make it usurious, agreed that the grant from Lord Irnham to Child should not have in it a clause of redemption, and so it was drawn and executed. Upon a bill filed to redeem, alleging that such was the agreement, parol evidence was read, but the Lord Chancellor would not relieve. He said the rule is perfectly clear, "that where there is a deed in writing, it will "admit of no contract which is not part of the deed. "Whether it adds to, or deducts from the contract, it is "impossible to introduce it on parol evidence." Again, he says, "if the agreement had been varied by fraud, "the evidence would be admissible. The argument must "then be to impute fraud to the party. The rule of evi "dence is not subverted if there is clear proof of fraud. "The committing of the agreement to writing is an argu "ment against fraud. Then as to mistake or accident— "suppose it was a very clear thing that one agreement "was intended, and that by accident it was extended far "ther. But there is no such case in the books. If admitted "to be a mistake, the Court would not overturn the rule "of equity, by varying the deed; but it would be an equity "*dehors* the deed. Then it should be proved as much to "the satisfaction of the Court as if it were admitted. The "difficulty of this is so great, that there is no instance of "its prevailing against a party insisting that there was no "mistake."

In 1 *Vesey Jr.* 241, *Hare v. Shearwood*, where it was attempted

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to prove an agreement made on the purchase of an annuity that it should be redeemable, Mr. Justice Buller, sitting for the Lord Chancellor, said, that the case was an attempt to carry the rule of evidence in that court further than had ever been done, and that it was not supported by any precedent or authority; that it was not one of the excepted cases, which are cases of fraud and where the party will admit there was some agreement.

In 2 *Bro. Ch. Rep.* 219, *Portmore vs. Morris*, Lord Kenyon, then Master of the Rolls, in a like case, to prove by parol evidence that an annuity was redeemable, said, "before the statute of frauds, parol evidence could not "be admitted to contradict written agreements, except in "very particular cases indeed, and afterward deeds were "under the same rule. If fraud was imputed, it might be "done here; but it is dangerous to depart from the "deeds. It might be the intention that the annuity "should be redeemable, but I can only get at it by de-"molishing one of the foremost rules of law; therefore I "reject the evidence."

The case of *Brodie vs. St. Paul*, 1 *Vesey Jr.* 326 is very strong. There, there was a treaty between the parties about letting a farm. The defendant read from a paper certain items as the terms of their agreement, and an agreement was drawn up with reference to that paper; and that agreement, signed by both parties, was deposited in the hands of a third person. They were to meet again to complete the business. They met, but differed about the clauses read from the paper. A bill was filed for a specific performance of the agreement signed, according to such clauses as had been read from the paper. Parol proof was given. Buller, Justice, sitting for the Lord Chancellor, said, there was a wide difference between referring generally to a paper, and referring to such part as was read: "for where the reference is general, the paper if sufficiently described, speaks for itself; but here the

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whole is to depend upon parol;" p. 333. And again, he said, "the question here is, what is the agreement? "The whole depends upon parol. If the agreement is "*certain and explained in writing signed by the parties*, that "binds them; if not, and evidence is necessary to prove "what the terms were, to admit it would effectually break "in upon the statute, and introduce all the mischief, incon- "venience and uncertainty the statute was designed to "prevent. The only thing to support this case would be "to prove by parol evidence, which of these covenants "were read and which were not. That is directly prohib- "ited by the statute, and therefore the bill must be dis- "missed."

The last case which I shall cite is *Rich. vs. Jackson*, 4 *Bro. Ch. Rep.* 514. Stiles and Jackson were in a treaty about a lease. It was mentioned by Stiles and Jackson, in the presence of witnesses, that Stiles was to receive 80 guineas a year for the premises, *clear of all taxes*. Jackson drew up the memorandum in his own handwriting; the agreement to pay the taxes, or that the rent should be clear of all taxes, was omitted. This memorandum was signed by Stiles and Jackson.

Lord Chancellor Loughborough, said that, "believing "the witnesses, it was impossible to mistake the meaning "of the parties that the rent to be paid was meant to be a "clear rent, but the parties had concluded the matter by a "written agreement, which was that a lease should be "granted for twenty-one years, at eighty guineas a year, "and the tenant paying his twenty guineas a quarter, in- "cluding in it his land tax receipt. It can only be accord- "ing to the sense the law puts upon it."

Again, he says "I have looked into all the cases. I can- "not find that the Court has ever taken upon itself to add "to the form of the agreement; but in repeated instances "the Court has refused to do so, though it has been insisted

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"that the parol evidence of the adverse party has shown "the written agreement to be against conscience." And further he adds, "it is quite impossible to admit the rule "of law to be broken in upon, and that requires that noth- "ing should be added to the written agreement unless in "cases *where there is a clear, subsequent and independent agree- "ment varying the former, but not where it is of matter passing "at the same time with the written agreement.*"

Now, if we take these decisions as forming a rule by which the case under consideration should be determined, it is plain that the parol evidence read in this cause ought not to control nor in any degree to influence me in the construction of the articles of agreement made the 26th of September, 1812. In the articles, the complainant binds himself to convey a tract of land containing by deed two hundred acres, be the same more or less. The deed here referred to became a part of the contract, and the party is confined to the boundaries in that deed; that is, to grant to the defendants to the same extent that Henry Drinker granted to Elizabeth Colgate. According to that deed, an old corner maple, standing by the side of the branch, is the place of beginning; from thence, the first line was north two hundred and thirty perches to an old corner gum standing in a Pocoson. To give the proper effect to the distance of this line, it must extend to the gum. That is a natural boundary, in which there can be no mistake; and so the second line must extend to the white oak, and the third to the live oak, and thence to the first mentioned corner maple. If the first line stops at the end of two hundred and thirty perches, the gum, the white oak and the live oak are thrown out of the description of the land, and are made to mean nothing. And this would be directly contrary to the written agreement. According to this article, and to the deed referred to, we must go to the natural boundaries. This is the construction which has ever been given to papers describing or calling for natural

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boundaries, and it accords with justice and sound sense. Besides, the complainant, by the article, agreed to give the defendants immediate possession and use of the *woodland generally*, and of *all the wood then cut and corded in the woods.* By the "woodland generally," I understand *all the woodland*, and this construction is confirmed by the agreement to give up also all the wood then cut and corded in the woods. Wood had been cut promiscuously on the land, as well on that part which the complainant says he intended to sell, as on that part which Smith and Terrapin contend they also purchased. As the complainant agreed to give up not only the wood cut, but the woodland generally, without any limitation, I am at a loss to perceive how the defendants can be restrained to any particular spot. Their right equally extends over the whole, according to the description of the deed, and according to this agreement to give them the immediate possession and use of the woodland generally, and of the cut and corded wood. Viewing this case in all its parts and upon all the evidence, I can put no other construction on the transaction.

It appears that a survey was made after the contract had been executed, *but such survey was not a clear, subsequent, independent agreement, varying the former.* Although Smith acquiesced in its being made, yet he never agreed nor intended that it should supersede the boundaries limited and fixed in the deed of Drinker and wife. No agreement was made at the time of the survey. The articles of the 26th September were not dispensed with nor annulled. The survey seems to have been an experiment made by Dale on his part, probably with the intention of fixing the agreement of the 12th September to the neat distances called for in the deed, but not thereby to make a new, independent agreement. Neither did Smith, who was present, intend any alteration. This is not pretended. Indeed the survey is said in argument to have been made in execution of the agreement. The written agreement must then be resorted

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to as the only clear, satisfactory legal evidence of the contract made by the parties.

Let the injunction be dissolved and the bill dismissed.

On appeal, this decree of the Chancellor was affirmed by the High Court of Errors and Appeals at the June Term, 1817.

RICHARD C. DALE

vs.

ROWLAND SMITH AND JOSEPH TERRAPIN.

New Castle, Aug. T. 1815.

A petition for the re-hearing of a cause, upon the ground of newly discovered evidence, not granted—the Chancellor considering that the evidence, if before him, could not vary the decree to be made in the cause, as it originally stood.

PETITION FOR A RE-HEARING.—This is the same cause next before reported. After it had been argued, and the opinion of the Chancellor announced, directing a decree for a dismissal of the bill, but before such decree was entered, to wit, at the August T. 1815, the complainant preferred his petition, under oath, for a re-hearing. The ground of the application was the discovery of new and material evidence, since the hearing.

The original cause arose out of a written contract, for the sale by the complainant to the defendants of a tract of land for the price of $7000.00. The land was described in

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the contract as "containing *by deed* 200 acres, be the same more or less." After the execution of the contract, upon a survey of the land according to the description contained in the deed referred to, the tract was found to contain three hundred and fourteen acres, being an excess of one hundred and fourteen acres above the number specified in the contract. The main issue in the cause was, whether the complainant, who was the vendor, was bound by his contract to convey, at the price stipulated, the whole tract of three hundred and fourteen acres, or only the number of acres called for by the contract. The defendants having entered into possession of the whole tract before a conveyance, and having cut off part of the wood, the bill was filed by the complainant to restrain further waste, and to compel the defendants to pay the purchase money and accept a conveyance of two hundred acres in performance of the contract on the part of the complainant. Upon a hearing on the bill, answers and depositions, the Chancellor considered that the defendants were entitled to a conveyance of the whole tract, and directed a dismissal of the bill.

The petition for a re-hearing set forth that "the petitioner believes and expects that he will be enabled, by the oaths of Thomas Gordon, (a witness heretofore examined in the cause,) and Isaac Dunning, to lay before the Chancellor the following new and material evidence, discovered by him since the cause was decided, to wit: that the said Joseph Terrapin, in the latter end of October 1812, shortly after he took possession of the land in the bill mentioned, stated that *he the said Joseph Terrapin, had promised, and considered himself bound, to pay to complainant* $35 *per acre, for every acre the tract he purchased should, on actual survey, exceed* 215½ *acres, and that Terrapin entreated Gordon not to disclose, on his examination, this declaration of his promise to pay* $35 *per acre for the excess over* 215½ *acres.*"

RIDGELY, CHANCELLOR.—In the examination of David F.

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Gordon, in this cause, that witness stated, in substance, what I have heretofore noticed, and which amounts nearly to the evidence which, it is now believed by the complainant, could be obtained from Thomas Gordon and Isaac Dunning, upon a re-examination of the former and upon taking the deposition of the latter.

In the consideration of the case, it seems to me that my observations upon the testimony of David F. Gordon apply to the supposed testimony of Thomas Gordon and Isaac Dunning. The whole would be parol evidence of a supposed contract made before the article of agreement of the 26th Sept. 1812: and, if that evidence were before me, I should think myself bound by the rules of law to reject it, or rather not to give any effect to it; because it would vary a subsequent written contract made without any fraud on the part of the defendants.

The decree must be entered, as heretofore directed, dismissing the bill.

CHARLES TATEM AND JAMES CANBY.

vs.

JOSHUA GILPIN AND THOMAS GILPIN.

New Castle, June T. 1816.

Practice as to the admission of ex parte affidavits in support of the bill, upon motion for a preliminary injunction.

Affidavits are admissible to support the bill, though it be denied by the answer, in cases where the injunction may be necessary to prevent irreparable mischief.

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Statement of the case.

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An order for an injunction *pendente lite* cannot be appealed from, if it be such an order for an injunction as a court of equity, according to its established rules, can issue.

An injunction must be suspensive only, and must not operate so as to alter or affect the pre-existing situation of the parties. An order for an injunction having the latter effect may be appealed from.

After an appeal prayed and allowed in the Court of Chancery, the cause is out of the Court of Chancery, and cannot be further proceeded in until its return from the Court of Appeal.

INJUNCTION BILL.—The complainants were the owners of a mill site on the South side of the Brandywine Creek, on which they were about to erect a mill, above a mill site owned by the defendants. The bill charged, among other things, that the defendants had by a new dam constructed across the creek, below the mill site of the complainants, penned the water back upon the complainants to the height of two feet and three quarters of an inch above its usual and proper level, thereby depriving the complainants, of a sufficient fall of water for their contemplated mill, and preventing the erection of it. The prayer was for an injunction, to restrain the defendants from using or drawing off the water from the dam for the use of their mill, until it should be reduced two feet and three quarters of an inch to its proper level, so as not to interfere with the water rights of the complainants.

The Chancellor refused to order an injunction upon an *ex parte* application, and directed notice to be served upon the defendants, with sufficient time to appear and answer. Accordingly, the defendants appeared and filed their answer. The answer denied that the defendants had, by their dam, penned the water back upon the complainants' land to the height of two feet and three quarters of an inch, as in the bill was alleged, or that the water was raised above the ordinary and usual level; and the defendants claimed the right to hold and use the dam in its then present condition. The answer denied at large the equity of the bill.

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It is not material to the points decided, to set forth the title of the respective parties, as alleged in the bill and answer respectively.

At the hearing of the motion for a preliminary injunction upon the bill and answer (August 26, 1816), *McLane*, for the complainants, offered to read, in support of the bill, certain affidavits taken *ex parte* before Justices of the Peace, and, upon objection made, he insisted upon the regularity of such a course, on the ground that the application here made was in order to prevent irreparable injury. *Gibbs vs. Cole*, 3 *P. W.* 255. *Isaac vs. Humpage:* 1 *Ves. Jr.* 427: 3 *Bro. Ch. Rep.* 463. In *Robinson vs. Lord Byron*, 1 *Bro. Ch. Rep.* 588, where the bill was to restrain Lord Byron from letting an unusual quantity of water flow upon the complainant's mill, affidavits were read against the answer. In *Strathmore vs. Bowes*, 2 *Bro. Ch. Rep.* 89, affidavits in a case of waste were read in reply to an answer.

Broom and *Read*, for defendants.

It is a general principle that the answer is to be taken as true, and that it cannot be impeached by affidavits—especially when the object is to disprove title. We do not say that the rule is universal; but if this case is an exception, the complainants' counsel must show it.

The complainants have never had any use or enjoyment, but they seek to prevent the enjoyment of a long established property in the defendants. Even treating this as a case of doubtful title, a Court of Chancery will not now interfere by injunction. The right must be first established at law.

RIDGELY, CHANCELLOR.—This is a case which comes within the exceptions to the rule, and in principle is the same as the case of Robinson vs. Lord Byron cited in argument. By the overflowing of the land the complainants

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are deprived of the use and enjoyment of it. They cannot build on it while it is covered with water. It may possibly go to the irreparable destruction of it. At any rate, it obstructs all the alleged motives of the complainants in purchasing, by preventing them from building. Let the affidavits be read.

Before the case had proceeded further the defendants applied for leave to produce counter affidavits; whereupon, at the Chancellor's suggestion, it was agreed to postpone the hearing, with leave to take affidavits on both sides.

Afterwards, on the 30th August 1816, the motion for an injunction came again before the Chancellor, upon the bill and answer, and upon affidavits exhibited on both sides: whereupon the following order was made, viz: "It is ordered by the Court, that a writ of injunction be issued to restrain the defendants, their agents, &c., from damming up or penning back the waters of the Brandywine creek, above the natural or ordinary level of the said creek, at the line dividing the land of the complainants from the land of the defendants, by the dam lately erected by the defendants, or by any other obstructions to be made or erected, so as to overflow the land of the complainants, until this Court shall make further order to the contrary."

From the above order an appeal was taken, pending which, at the April Term 1817, the complainants filed an affidavit showing that the defendants had, since the last Term, dammed up the waters of the Brandywine above the natural level of the creek, and had overflown the land of the complainants, contrary to the order of the Chancellor heretofore made; and thereupon *McLane*, for the complainants, moved for an attachment, notwithstanding that an appeal had been prayed and allowed. No writ of injunction had as yet been issued.

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Motion for attachment—argument.

McLane and *Van Dyke*, for the complainants.

The question is whether the appeal suspends the order, made in the cause, for a writ of injunction. That depends upon the construction to be given to Art VII. of the Constitution, touching appeals. (1 Vol. Delaware Laws, p. XLIV, Digest of 1829, p. 27.) Jurisdiction is there given to the High Court of Errors and Appeals, "to receive and determine appeals from interlocutory or final orders or decrees of the chancellor." An interlocutory order is one which ascertains some right, or determines some matter or thing, on which the final decree depends,—something essential to the determination of the cause; such as an order for an account. An injunction is not an interlocutory order within the meaning of the constitution. It decides no fact, fixes no right, and is not at all necessary to the final determination of the cause. It is mere process of the Court, issued to hold *in statu quo* the subject matter upon which the decree is to operate, until the Court shall be enabled to ascertain and adjudge the rights of the parties. It is a process collateral to the suit, and is often issued upon petition before any bill filed. To give to an appeal the effect of suspending orders of this nature would practically annihilate chancery jurisdiction for many of its most important ends; as, upon an injunction to stay waste or to prevent other irreparable mischief, the defendants would need only to appeal and then utterly destroy the timber, or commit the very mischief which it was the object of the suit to prevent. So, upon a bill to perpetuate testimony, if the order to take the testimony can be suspended by an appeal, the witness may die before his evidence can be secured. So in the case of a writ of *ne exeat regno*: upon taking an appeal the party would be left free to go away and thus defeat the jurisdiction. The security taken upon an appeal affords no adequate remedy for injuries of this nature, but only for cases

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of debt or damages. Further, it may be noticed that to hold all proceedings between the commencement of a suit and the final decree subject to be suspended by an appeal would ronder a chancery suit perpetual. The clause of the Constitution giving an appeal must receive such a construction as will preserve and not destroy the necessary powers of a court of equity. The Constitution and laws of this State, (1 Vol. Delaware Laws, 130, Digest of 1829, p. 102-3) defining equity jurisdiction, meant to give the power to award injunctions as it is exercised in England. Under the English practice, an appeal lies only from a final decree, or, from an interlocutory order made for some purpose necessary to a final decree, 3 *Blk. Com.* 454 : 1 *Harrison's Ch. Pr.* 454 : not from orders of this nature. An appeal was disallowed in the case of an order to show cause only. 1 *Brown's P. C.*, 439–40 : so from an order for a commission of lunacy. 1 *Brown's P. C.* 450. In *Young vs. Grundy*, 6 *Cranch* 51, an appeal was held not to lie from an interlocutory order or decree dissolving an injunction. The present is the first attempt in this State to suspend the order for an injunction by appeal. The practice heretofore shows the sense in which the Constitution has been understood.

Read, *Broom* and *Wales*, for the defendants.

Upon two grounds, we insist that the Court cannot now interfere.

1. Whether this be an interlocutory order or common process, is not now to be questioned. The appeal has been allowed and security given. The case is taken from this jurisdiction. If the appeal is irregular, application must be made to the Court above. But,

2. This *is* an interlocutory order. An injunction never issues but by special order of the Court. It is collateral to the cause, and it is interlocutory or it is nothing : and the

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Constitution gives an appeal from all interlocutory orders. The right of appeal in this State is constitutional, and different from that to the House of Lords; therefore no decisions in England can control this right. With respect to the case in this country, cited from 6 *Cranch* 51, the laws of the United States forbid an appeal except from final decrees. Hence, that case does not apply here.

RIDGELY, CHANCELLOR.—My only doubt is, as to the power of this Court to act after appeal prayed and allowed. I have no idea that this order is an interlocutory order. It has been frequently intimated to me that appeals would be taken from orders for writs of injunction made at the time of filing bills. I have often considered the subject, and never supposed such an order to be an interlocutory order, from which the party could appeal. An interlocutory order is an order made upon a point whereby some right or principle is established in the cause, on which a final decree depends; or, it determines or directs some matter or thing which is necessary to the making of the final order or decree. Such is an order to account on a bill filed by one partner against another; as in a case from Sussex County, where an appeal was properly taken from such interlocutory order. For the order to account settled the principle; the rest was mere matter of fact and calculation.

This is not an interlocutory order; it is an original process. By an Act of Assembly injunctions to stay waste and suits at law may be awarded and issued *before* the bill is filed. This is in the nature of an injunction to stay waste. It determines nothing; it only saves the complainant from injury until the matter is finally heard and decided.

However, as the appeal has been allowed, the case is out of this Court, and now I cannot proceed in the cause in any manner until it returns from the High Court of Errors and Appeals.

The motion for an attachment is denied.

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Appeal—motion to dismiss.

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This cause came before the High Court of Errors and Appeals, at the June Term 1817, and the question whether, an appeal lies from an order of the Chancellor directing an injunction to be issued, came before that Court, upon a rule to show cause why the injunction should not be dismissed.

McLane, *Van Dyke* and *Rodney*, for the appellees

Read, for the appellants.

The motion to dismiss was very fully argued, but upon no new points, except that on behalf of the appellant the further ground was taken that the Chancellor's order went beyond the purpose of holding the matter *in statu quo*; that it was retrospective in depriving the defendants of the use of their dam, as it already stood and had long before been enjoyed, and was rather in the nature of an execution than a suspensive order; that for this reason, in addition to those before urged, an appeal should lie.

JOHNS, CHIEF JUSTICE, announced the following as the conclusions of the Court upon the points argued:

1st, That the words "interlocutory order or decree" in the Constitution must be taken in a technical sense, and that the right of appeal is not enlarged but secured by the Constitution.*

2nd. That an order for an injunction *pendente lite* cannot

* This point was decided upon the construction of the Constitution of 1792, which gives the right of appeal "from interlocutory or final orders or decrees of the Chancellor." The Court, in this case, held that these words were to be taken in their technical sense, and that the right of appeal was not enlarged but secured by the Constitution. Under the Constitution of 1831, now in force, the jurisdiction of the Court of Errors and Appeals is to determine "all matters of appeal in the interlocutory or final decrees and proceedings in Chancery." This clause has not yet received a judicial construction upon the point raised in the present case.

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be appealed from, if it be such an order for an injunction as a court of equity, according to its established rules, can issue.

3rd. But, if in an order for an injunction, the equity jurisdiction, in its direction, which is a part of the order, defines the nature of the injunction to be issued, and if in so doing, though the order is called an order for an injunction, it makes an order for issuing a writ to restrain the respondents from doing an act which a court of equity, by any known, established rules, never attempted to restrain; as, if an ejectment should be brought against A. B. by C. D. for a house which A. B. had been in the possession of more than twenty years, and C. D. should file a bill against A. B. and a court of equity should order an injunction to prevent A. B. from residing in the house, this would be such an order,—such a deciding or affecting the rights of one of the parties,—as ought to be reviewed by this Court; and an appeal ought to be used and does lie.

4th. The order in the present case is to restrain, alter, or prevent acts done or not to be done; and it does not describe what is not to be done or to remain, so as to mean anything, unless it is to be understood to refer to the natural or ordinary level of the water at the dividing line, without regard to the right or possession. And that is the great point of controversy in this case,– a something not to be ascertained till the right be decided. The order, if it is to be understood and used as the respondents here avow, is, in the opinion of this Court, an order of such a nature that it is not to be considered simply an order for process of injunction, but is such an act of the Court below as will entitle the appellants to relief by an appeal to this Court.

The Court are of opinion that the rule to show cause be discharged.

The cause then came before the Court upon sundry causes of appeal filed, among which were these:

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7th. That if the Chancellor could, upon any principle of equity, have made an order that a writ of injunction should issue upon the bill at the prayer of complainants, "then it could only have issued upon the principle, and so "to operate, as to prevent and enjoin the appellants from "erecting or putting up any further or other obstructions, "and not so as to alter or change the state and condition of "the said dam at the time of exhibiting and filing the said "bill in the Court of Chancery; wherefore the order is "excepted to."

11th. That the order of the Chancellor directs a writ of injunction to be issued to enjoin and restrain the appellants, their agents, laborers and workmen, from damming up, or penning back the waters of the Brandywine Creek above the natural or ordinary level of the said Creek at the line dividing the land of the said appellants from the land of the said respondents, by the dam lately erected by the said appellants or by any other obstructions to be made or erected, so as to overflow the land of the said respondents, until the Court of Chancery should make further order to the contrary; whereby the Chancellor not only orders an injunction to issue to enjoin and restrain the said appellants from placing obstructions in the bed and waters of the said Creek, but in effect, by restraining and enjoining the appellants by an injunction to be issued as aforesaid, would authorize and require the removing or reducing so much or such part of the said dam as in its existing condition and structure would be supposed to produce or occasion the damming or penning back the waters of the said Creek as aforesaid,—thereby divesting the appellants of their property and freehold, and so in fact altering the existing state of the said dam at and before the filing of the said bill.

The case was submitted, without argument; and the High Court of Errors and Appeals, upon consideration, sustained the appeal upon the two causes of appeal above stated, and directed the following order to be entered:

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Syllabus.

"And now, to wit, this 10th of June, 1817, this cause coming on to be heard,—It is thereupon ordered by the Court, that the order for the injunction be modified. And it is further ordered, that a writ of injunction be issued by the Court of Chancery to enjoin and restrain the said Joshua Gilpin and Thomas Gilpin, their agents, workmen and laborers, from damming up or penning back the waters of the Brandywine Creek upon the lands of the said Charles Tatem and James Canby, *which adjoin the lands of the said Joshua Gilpin and Thomas Gilpin*, to a greater extent or in a greater degree than the said Joshua Gilpin and Thomas Gilpin, or those from whom they derive title, *had ordinarily or usually done, or had been in the enjoyment or exercise of, antecedently to the 15th day of July*, 1815, by any erections or obstructions already erected or made, or that may be erected or made, by the said Joshua Gilpin and Thomas Gilpin, so as to overflow as aforesaid the said lands of the said Charles Tatem and James Canby, until the said Court of Chancery make further or other order therein. And it is ordered that the record be remanded to the court below; and that the costs in this court be equally divided."

JEREMIAH WOOLASTON, ET AL,

vs.

THOMAS MENDENHALL.

New Castle, Aug. T. 1817.

Under the statute, enabling the Court of Chancery to make orders for the sale of real estate, when necessary in order to give effect to its decrees, the Chancellor has power to order the sale of real estate of a defendant against whom a decree for the payment of money has been made after a return of *non est* to an attachment against him for the non-performance of the decree, and upon its appearing that his personal property has been exhausted by executions at law.

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After a cause has been removed into the Court of Appeals it cannot be further proceeded in by this Court, until the record shall have been remanded by order of the Court of Appeals.

MOTION FOR AN ORDER OF SALE.—A decree had been made by this Court, and affirmed on appeal, in favor of the complainants against the defendant for the payment of $1310.57. An attachment for the non-performance of this decree was issued and returned *non est inventus*. At the August Term, 1817, *Read, Jr.*, for the complainant, exhibited to the Court, the record of two executions against the defendant, issued out of the Supreme Court, in the hands of the sheriff, amounting to more than $2000.00; and the sheriff being examined in this Court, stated that the executions covered all the defendant's personal property. The complainants' solicitor thereupon moved for an order for the sale of the defendant's real estate or of so much thereof as would satisfy the decree,—such order to be founded on the Act of Assembly, 4 Del. Laws 444, 462, Sec. 26, * which provides, "that all lands, tenements and hereditaments "within this State, shall be liable to be sold by order of the "Chancellor, upon such terms and in such manner as shall "be directed by him, by the sheriff, or by any party to a "suit in chancery, when any such sale shall be necessary to "give effect to and to carry into execution a decree of the "Court of Chancery." This act, he insisted, was intended to meet such a case as this, in which the complainants were remediless by the ordinary process of this Court, the entire personal property of the defendant being consumed, and the process of sequestration merely taking hold of rents, which are wholly inadequate to the satisfaction of the decree.

Read, of counsel for the defendant, doubted whether such was the intention of the law; but supposed it was

* This provision is the same in substance as the present Statute, Rev. Code, 322, Sec. 12.

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intended for a class of cases where administrators, executors, and trustees might be ordered to sell, in order to effect the object of the trusts, &c.

The Chancellor observed, that such powers already resided in this Court, the Court possessing the same powers as the English Court of Chancery. The law must therefore have been intended to meet other cases, of which this seems to be one.

The order moved for was entered.

Note. It appears from Chancellor Ridgely's note of this case, that upon the affirmance by the High Court of Errors and Appeals, of the decree in the cause out of which the above reported proceedings arose, no order of that Court was made remanding the record to the Court of Chancery. A copy of the decree of affirmance, under the seal of the Court of Appeals, was filed in this Court, and thereupon an attachment for the non-performance of the decree was taken. This attachment was, upon motion to the Chancellor, set aside, it being considered by him that as the record from the Court of Appeals contained no order remanding the same, the cause was not in this court. At the next ensuing term of the Court of Appeals, June 1817, the proper order was obtained and entered in this Court, whereupon an *alias* attachment was sued out, and the proceedings had which are above reported.

THE STATE,

vs.

JOSHUA GILPIN AND THOMAS GILPIN.

New Castle, Aug. T. 1817.

An attachment for contempt in the breach of an injunction should not be granted unless the affidavit, on which the motion is grounded, allege service of the writ; nor, without such allegation in the affidavit, can the service be proved upon interrogatories administered to the defendant taken under the attachment.

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Statement of the case.

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A discharge from an attachment for contempt, for the want of a sufficient affidavit of service of the injunction, is no bar to a second attachment for the same cause.

ATTACHMENT FOR CONTEMPT.—This proceeding arose out of the case of Charles Tatem and James Canby vs. Joshua Gilpin and Thomas Gilpin, reported *ante p.* 13. After a writ of injunction had been awarded in that case, in accordance with the order of the High Court of Errors and Appeals, an attachment for contempt against the defendants was granted, founded upon an affidavit charging them with a breach of the injunction. The defendants being taken under the attachment and brought before the Chancellor, interrogatories were filed on the part of the complainants, Tatem and Canby, to be administered to the defendants respectively. The first of the interrogatories inquired whether the defendants had been "served with the writ of injunction issued in the cause, and by whom and at what time?" To this, and to other interrogatories, the defendants filed exceptions by way of demurrer, the ground of exception to the first interrogatory being that the affidavit upon which the attachment had been granted did not show service of the writ of injunction, but only charged the defendants with disobedience to it.

Read, in support of the exception.—The service of the injunction should have been sworn to in the affidavit. That is the necessary ground,—the substratum of the whole proceeding; and this defect in the affidavit renders the proceeding irregular. The defect cannot be supplied by interrogatories. The rule is that in prosecutions for contempt, grounded upon affidavit, the interrogatories shall not be extended beyond the matter contained in the affidavit. 2 *Harrison's Ch. P.* 4: 2 *Com. Dig.* 222: *Prec. of Chanc. Prac. Vol.* 1, *p.* 40: *Gilbert's Chancery* 199.

Van Dyke, contra.—The service of the subpœna is the

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groundwork of the proceeding. The interrogatory can do no harm to the defendants. It is rather beneficial to them. In contempt for not answering a bill the interrogatory is, did you appear to the said bill? So here, the interrogatory goes to the service of the writ of injunction.

RIDGELY, CHANCELLOR.—It is a general rule that where any motion or petition is made which is not of course, an affidavit of the facts alleged is necessary. 2 *Harrison's Ch. Pr.* 1. According to the English practice, an affidavit of the service of a subpœna to appear is necessary before an attachment can go to enforce the appearance of a defendant. So, in contempt for not answering there should be a previous affidavit of the service of the subpœna to answer, according to the form of which it is stated, that the defendant was commanded to appear and put in an answer to the plaintiff's bill. Thus, a foundation is laid to examine the defendant in the attachment as to his appearance. But it is so formal a thing in England, that if the affidavit is filed before the return of the attachment, the arrest holds good. 1 *Harrison's Ch. Pr.* 305: 1 *Vern.* 172. See 1 *Harrison's Ch. Pr.* 231, 296, 303: 2 *Com. Dig.* 220, as to affidavit of service of subpœna.

Our practice as to appearing and answering is different. In no instance has an affidavit of service of the subpœna been required. Upon the return of the subpœna, which is always served by the sheriff, on the non-appearance of the defendant a rule is laid for his appearance, and the attachment is awarded and issued as a matter of course, in case the rule is not complied with. So much so, that the standing order of the Court is (though perhaps unwritten) that the attachment shall be issued by the Register without the application or demand of the plaintiff. And this course is necessary, and arises out of the nature of our Court of Chancery, the length of our vacations, and I may say, the simplicity proper to be observed in our forms and

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practice, provided the due administration of justice is not frustrated. Our Court, although exercising a jurisdiction as extensive as the English Court of Chancery, is more simple and less expensive in its proceedings; and is limited to such forms and service as justice alone requires. Upon this principle then, and the inutility and inconvenience of so much complication, our practice has dispensed with the affidavits of service of subpœnas issued to bring defendants into Court.

As to attachments for contempt in committing breaches of writs of injunction, the cases are very different. Those writs are generally issued to preserve property pending a litigation, to restrain waste and suits at law, and to prevent irreparable injuries; and, in short, to prohibit wrongs which could not afterward be remedied; and, therefore, disobedience to them, or a breach of their commands, not only inflicts great private injury, but deprives the party of that security and protection which are the great ends of government. In such cases, the accusation becomes a criminal charge, and the accused, if guilty, is liable to punishment. Viewing the proceedings in this light, sufficient certainty in the charge of the offence becomes requisite, and of course an affidavit of the service of the writ of injunction is a preliminary step. The attachment goes (on the violation of the writ of injunction) upon affidavit of the service. 2 *Harrison's Ch. Pr.* 267: 1 *Harrison's Ch. Pr.* 209, 210. The interrogatory cannot be extended beyond the matter contained in the affidavit; and if any other be exhibited the party may demur: 1 *Harrison's Ch. Pr.* 458: 2 *Harrison's Ch. Pr.* 62: 2 *Com. Dig. Chancery* 222. For, the affidavit is the groundwork of the attachment. It forms the charge against the party, and should contain the matter which, if verified, constitutes the offence. The service of the writ, then, is all important: for without such service, or proper notice of it, there can be no breach of it; and without the affidavit the defendant

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cannot be interrogated as to the service. In 3 *Atk.* 609, on a motion for taking a defendant into custody for disobedience to an order to bring books into court, the motion was refused because there was no affidavit of the service of the order, although in an order obtained by the defendant for further time there was a recital of the order to bring books into court. With us, no other practice has obtained on attachments for breach of injunctions; and I think none other ought to obtain; for, the consequences in such a case may be very serious to offenders. Therefore, because there is no affidavit of the service of the writ of injunction, the first exception is allowed, and the defendants are discharged from this attachment.

After the discharge of the defendants from the attachment above reported, the complainants filed another affidavit, charging that the defendants had committed a breach of the injunction referred to, and also an affidavit showing due service of the injunction; and thereupon, the complainants moved for another attachment for contempt.

Hall and *Read*, for the defendants, objected.

The defendants have been once brought into court upon the same charge and have been acquitted. They cannot be again overhauled for the same matter. Their discharge from the former attachment was not for irregularity in the writ, but it was a discharge upon the merits for want of proof of service of the injunction. There was an inquiry before the Court touching the merits upon which interrogatories had been proposed. The complainant failed to make out the contempt in point of fact, and the result was an acquittal of the charge.

McLane, *Van Dyke* and *T. Clayton*, for the complainants.

The defendants were not discharged upon the merits,

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but for irregularity in taking out the attachment without an affidavit of the service of the injunction. The case is analagous to the discontinuance of a civil action, or to the quashing of a defective indictment, neither of which is a bar to a subsequent proceeding for the same matter. *Wyatt's Prac. Reg.* 57 : an attachment expired and nothing done ; a new attachment granted. In the case of Yates, 4 *Johns. N. Y. R.* 356, it was held that an attachment for contempt being *defective*, a new and competent warrant of commitment may be awarded for the same cause.

Hall, in reply.—In the case in Wyatt, the attachment first taken out had expired *without being served.* In the case cited from Johnson, the process was a nullity. Here, the attachment was good and the parties held under it. The proceedings from the time the defendants were brought into court were regular, but the defendants were discharged because the complainants, failing to prove service, could not bring them into contempt. 1 *Harrison's Ch. Pr.* 239.

RIDGELY, CHANCELLOR.—In *Hawkins*, 2 *vol.*272, *Chap.* 35, *sec.* 8, it is laid down that whenever an indictment, on which a man is acquitted, is so far erroneous that no good judgment could be given against the defendant, the acquittal can be no bar to a subsequent indictment, because, in judgment of law, the defendant was never in danger from the first; for the law will presume, *prima facie*, that the judges would not have given a judgment which would have been liable to be reversed. But if the error be only in the process, it seems agreed, that the acquittal will be a good bar to a subsequent prosecution, notwithstanding such error ; the best reason whereof seems to be, that such error is saved by the appearance. See *Chap.* 27, *sec.* 107. This is the law as to prosecutions for crimes at common law, or in courts technically of criminal jurisdiction. Here, there was a demurrer to the first interrogatory as

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well as to others. The cause of demurrer was that the interrogatory was extended beyond what was comprehended in the affidavit, and therefore the defendants refused to answer. The exception was allowed and the parties were discharged: for, it was held by the Court that the service of the writ of injunction had not been proved, and that the defendants were not bound to answer the interrogatory. The complainants then failed, not upon the merits, but because the defendants were not bound to answer, or in other words because the process issued improvidently. The appearance in the custody of the sheriff did not save the error. The merits, that is, the disobedience to the injunction, were not and could not be inquired into; and, although the defendants were brought into Court on the writ of attachment, they were not put in jeopardy and could not suffer in the proceeding.

The error here could not be said to be in the process. It was in charging the defendants with an offence which, so far as it appeared to the Court, they could not commit. For, without service, or notice of the injunction, they could be guilty of no contempt. And without affidavit of such service the defendants were not bound to answer, and were exposed to no liability. As the case stood, they could not suffer, and the alleged offence could not be examined into. On principle then, I see no application of the doctrine of a plea of a former acquittal; and none of the authorities read go to the discharge of the defendants from a second charge for the same supposed contempt. The proceeding of yesterday is no bar.

The attachment was accordingly issued and the defendants were again brought into court. Subsequently, the case was finally disposed of by a reference to arbitrators.

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JAMES CLAYTON, SAMUEL LOCKWOOD AND ARMWELL LONG,

vs.

JOHN MITCHELL.

Kent, Feb. T. 1818.

It is sufficient, in an affidavit to found a motion for a writ of *ne exeat*, to refer to the facts charged in the bill as shewing the ground of the complainant's demand or complaint, without re-stating them in the affidavit: *Provided*, the facts so charged are such as entitle the complainant to the writ.

In the case of a bill for an account, where the balance between the parties is yet to be ascertained by an account and settlement, it is sufficient, in an affidavit for a *ne exeat*, for the complainant to swear *to his belief* that a sum certain is due to him.

BILL IN EQUITY FOR AN ACCOUNT, &c.—Upon the affidavit of James Clayton, one of the complainants, it was moved that a writ of *ne exeat republica* issue against the defendant. The substance of the affidavit is set forth in the opinion of the Chancellor.

Hayes, for the defendant, objected.

This is an application to the sound discretion of the Court, for the safe exercise of which a ground must be well laid in the affidavit. The affidavit is defective in two points.

1. It does not set out the circumstances on which the debt is founded, directly, but only by reference to the bill. This is not according to the practice, which requires the affidavit to be full and complete on its face, alleging not only that the defendant is indebted but how he became so. 2 *Ves. Sr.* 489: 2 *Com. Dig.* 625.

2. The deponent does not swear positively to the sum

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alleged to be due. A sum certain must be positively sworn to. 2 *Com. Dig.* 625 : 3 *Bro. Ch. R.* 370 : 3 *Atk.* 501. It is true that in the latter case the Lord Chancellor, in denying the motion for want of a sufficiently positive oath, says that if the bill had been for an account, the oath of the complainant that he verily believes that the balance in his favor would amount to so much, would entitle him to a *ne exeat.* But that *dictum* does not support the present affidavit.

Thomas Clayton, for the complainants.

It is sufficient, as to the first objection, that the affidavit refers to the facts charged in the bill. With respect to the oath of indebtedness, this being a bill for an account between partners, it is impossible and is not necessary to swear positively to a sum certain.

RIDGELY, CHANCELLOR.—The affidavit states that John Mitchell is about to depart the State and to reside in the State of Maryland, with the view and intention of avoiding the payment of such sum of money as may be decreed to the complainants; that the said John Mitchell has declared his intention to remove out of the State; that he has purchased a large tract of land in the State of Maryland, as this deponent has heard and believes; that the said John Mitchell has sold and disposed of his share of the mill in the bill mentioned; and that this deponent verily believes that the said John Mitchell is indebted to the complainant on account of the matter charged in the said bill, in the sum of $16,000 and upwards, and that if the said John Mitchell is permitted to leave the State, the complainants are in danger of losing their just demands:

There are two objections to this affidavit.

First, that the affidavit does not sufficiently set out the facts or state the circumstances on which it is grounded; and,

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Second, that the debt is not positively sworn to.

As to the first objection, the affidavit refers to the bill and to the matters charged in the bill to show the demand of the complainant or the ground of his complaint. If the complainants shall make out their case, then they will be entitled to relief; and consequently, those facts or circumstances referred to by the affidavit state sufficiently or lay a sufficient ground of complaint, which does not rest on the opinion of the complainant, but, if supported, will make the defendant liable. In 2 *Vesey Sr.* 489, the facts stated in the affidavit were not sufficient to make the defendant liable. It was there necessary to state that assets had come to the hands of the administrator. Otherwise he could not be liable: and that fact not being laid in the affidavit, it was not sufficient to warrant the issuing of the writ.

2. The case cited from 3 *Atk.* 501 shows that the plaintiff need only swear to his belief, on a bill for an account. On such a bill (such as this is) the complainant could not possibly swear to a certain sum. The whole is a conjecture; for until the account be taken, he cannot know in what sum the defendant is indebted to him. The whole matter is in the knowledge of the defendant. The complainant can only state facts showing the liability of the defendant, and until a settlement be made, or account be taken, no certain sum can be known, or sworn to, by him.

Let the writ be issued, and the defendant, if he pleases, may move to supersede it.

The writ of *ne exeat* was issued and executed. The defendant appeared before the Chancellor, and it was ordered that he should enter into a recognizance, with surety, to abide the decree of the Court. A recognizance was thereupon entered into by the defendant, with sureties approved by the Chancellor; the same being taken in the

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Syllabus.

name of the complainants, in the penal sum of $36,000, and with condition " that if the above named John Mitchell, in the said bill of complaint named, his executors or administrators, shall pay to the said James Clayton, Samuel Lockwood aud Armwell Long, their executors and administrators, all and every such sum and sums of money, and all costs, that shall be decreed in equity to be paid by him the said John Mitchell, his executors or administrators, to the said James Clayton, Samuel Lockwood and Armwell Long, on the said bill of complaint, or otherwise shall abide the said decree, then this recognizance to be void, otherwise to be and remain in full force and virtue." The recognizance being entered into, the Chancellor ordered that the writ of *ne exeat republica* be superseded.

JOHN RODNEY, Admr. d. b. n. of Luke Shields, deceased,

vs.

WILLIAM SHANKLAND, Ex'r. of Mary Neill, deceased, who was Ex'x. of Henry Neill, dec'd., and Elizabeth Wright and Fretwell Wright, Ex'rs. of Peter F. Wright, dec'd, and Daniel Rodney, admr. of Henry Fisher deceased.

Sussex, July T. 1818.

A person for whose benefit a trust is created may, in equity, compel the performance of it, although he be no party to the contract which created it.

Pending execution against the debtor under several judgments, it was agreed in writing, between N. the first judgment creditor and those holding judgments subsequent to the second, that H. N. should be

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Statement of the case.

allowed to purchase, at sheriff's sale, a portion of the debtor's real estate, without "let or hindrance" by the subsequent creditors; and that in consideration thereof, he would hold the other lands of the debtor discharged from his judgment, and would pay the second judgment. Held that H. N. became a trustee for the second judgment creditor, and that the latter, although not a party to the agreement, had a remedy under it in equity.

BILL IN EQUITY FOR THE EXECUTION OF A TRUST.—John Little deceased being indebted to several persons, judgments were recovered against him at law, and after his decease other judgments were recovered against his executor, Nicholas Little, in the years 1785, 1786 and 1787. First, was a judgment recovered by Henry Neill, in the Court of Common Pleas, for Sussex County, in November 1785, for £484. 15. 4½. Next, was a judgment recovered by the administrators of Luke Shields, deceased, the complainant's intestate, in the Court of Common Pleas, in February 1785, for £100. Following these two judgments were two others, recovered in the Supreme Court, in February 1787, one by Thomas and S. R. Fisher, and the other by Jeremiah Warder & Co. Executions were issued upon the respective judgments of Neill and the administrators of Shields, and were levied upon the real estate of Henry Little deceased. Pending these executions an agreement in writing, under seal, dated February 10th 1787, was entered into between Thomas and S. R. Fisher, Jeremiah Warder & Co., by their attorney Henry Neill, and Nicholas Little, executor of John Little deceased, in the words following, viz;

"Whereas, judgments have this day been confessed in two causes depending in the Supreme Court for the County of Sussex, in one of which Thomas Fisher and Samuel R. Fisher are the plaintiffs, and Nicholas Little, executor of John Little, is defendant; in the other of which Jeremiah Warder and Company are plaintiffs, and the said Nicholas Little is also defendant; Now, it is agreed by all the parties plaintiffs, and the said Nicholas Little, the defendant, as

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aforesaid, that the said jugments are confessed on the following terms to wit; that whereas Col. Henry Neill, party hereto, did some time past also recover judgment against the said Nicholas Little, executor as aforesaid, and issue a *Fieri Facias* thereon; that the said Henry Neill shall be permitted to purchase, of the land of the aforesaid John Little, deceased, five hundred acres, to include the improvements whereon the said John Little lived, and where the said Nicholas now lives, and as much land adjoining the same as, in the whole, makes up the quantity of five hundred acres of land and no more, so that the same lie in one body and be part of the land on which the said Henry laid his execution on the judgment so as aforesaid obtained by him against the said Nicholas, and also fifty acres of land sold by the said Nicholas to Walter Hudson, without any let or hindrance from the said plaintiffs, their, or either of their agents, at the vendues to be advertised by the Sheriff of Sussex County on the executions to be issued on the judgments aforesaid, or any of them: the said Henry, in consideration thereof, hereby covenanting and agreeing fully and absolutely to discharge, and hereby release and quit claim, all and every part of the residue of the real and personal estate of the said John Little, or of the said Nicholas Little; and further, that the said Henry shall pay, or cause to be paid, to the representatives of Luke Shields, late of the County of Sussex aforesaid, the sum of money mentioned in the judgment obtained by them against the said Nicholas, executor of the said John, with the costs of the said suit. And also, whereas the said Nicholas, after the death of his father, the said John Little, did illegally contract with a certain Andrew Simpler for the sale of about one hundred acres, be the same more or less, according to the neat quantity hereafter to be ascertained, the said Henry doth hereby also promise, grant, and agree to and with the said plaintiffs, that he will well and truly pay to them such value, and so much, for the same as Peter Fretwell Wright,

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James Martin, and Peter Robinson, or any two of them, shall, under their hands, adjudge the same to be worth. But if the aforesaid plaintiffs, or any of them, shall disagree to the terms hereinbefore mentioned, the said two judgments are to be void and of no effect, and the said suits to be continued as if no such judgments had been entered; *provided*, that in case any of the parties should disagree as aforesaid, such entry shall occasion no delay in the trials thereof. In witness whereof, the said parties and their agents have to these presents set their hands severally, the tenth day of February in the year of our Lord, one thousand seven hundred and eighty seven."

The agreement was signed and sealed by the respective parties.

Pursuant to the above agreement the execution of Neill was proceeded in, and he purchased at Sheriff's sale the five hundred acres of land mentioned in the agreement, for the consideration of £620, without any let or hindrance from the other parties. He also purchased, at the same sale, another tract of 95 acres for £71. Deeds were duly made to Neill for the premises so purchased. After the sale, and on the day of the execution of the first of the Sheriff's deeds, to wit, September 5, 1787, Neill gave to Peter F. Wright, the Sheriff, a writing, acknowledging himself to be indebted to Wright in £71. 2. 4½, in the words following, viz:

"I, Henry Neill, of Sussex County, in the Delaware State, do hereby acknowledge myself indebted to Peter F. Wright, Sheriff of Sussex County, in the sum of £71. 2. 4½, in current, lawful money of the Delaware State: it being the balance remaining due to him for the purchase money of a tract of land purchased by me, as the property of John Little, deceased, late of Sussex County. Witness my hand the 5th day of September, 1787."

(Signed) HENRY NEILL.

Witnesses present.
WILLIAM PEERY,
JAMES MONROE.

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Statement of the case.

The sum specified in this writing (£71. 2. 4½) was the balance of the purchase money after deducting the amount due on Neill's judgment against Henry Little, deceased, and the costs. Subsequently, all the other lands of Little were sold under execution.

In May 1792, the administrators of Luke Shields, deceased, brought their action, in the Court of Common Pleas for Sussex County, against the executors of Peter F. Wright, deceased, late sheriff, to recover the amount of the Shields' judgment, as having been made by him out of the sales of the real estate. Pending this action, on the 17th of April 1797, an agreement was entered into and filed in the suit, between Luke Shields, the surviving administrator of Luke Shields, deceased, Fretwell M. Wright, one of the executors of P. F. Wright, deceased, and Henry Neill, as follows, viz:

LUKE SHIELDS' ADMINISTRATORS,
vs.
PETER F. WRIGHT'S EXECUTORS.

"Whereas Luke Shields' administrators obtained a judgment against Nicholas Little, executor of John Little deceased, and issued execution, which was levied upon certain lands, &c., which were afterwards sold by the defendant's testator as sheriff, and were bidden off and bought by Henry Neill, who became by agreement with certain judgment creditors of the said Little, and with the said then sheriff, by a note of hand, &c., liable *for the said plaintiff's share of the money arising upon the said sales of the said land;* Now, it is agreed by the parties to this suit and by the said Henry Neill, that the said debt shall be ascertained by William Peery, Esquire, and John Russel, Esquire, and if the said two referees cannot agree, they are to choose a third person, the report of any two of whom to be binding. *Ex parte*, rule on four days' notice. Signed this 17th day of April, A. D. 1797."

(Signed,) LUKE SHIELDS,
HENRY NEILL,
FRETWELL WRIGHT.

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Nothing was done under this reference thus agreed upon until Feb. T. 1809, when Peery, one of the referees, being dead, three new referees were agreed upon in writing filed in the suit. These referees afterwards met, and in Nov. 1816, made a report awarding a balance of $802.06 as due to Shields' administrators; but this award was set aside for an informality, and no further proceeding was had at law. It appears that Peter F. Wright, the sheriff, by whom Little's real estate had been sold, being under the impression that Henry Neill was bound under the agreement first above stated for the whole of the Shields judgment, had suffered the balance of the proceeds to go into the hands of the subsequent judgment creditors, Thos. and S. R. Fisher and Warder & Co. Luke Shields' administrators were not parties to the agreement and knew nothing of it until its existence was disclosed, pending their action against the sheriff's executors. Under these circumstances, they abandoned the action at law, and filed this bill in equity for a discovery and for a decree charging Neill as trustee of the lands purchased by him to the amount due on their judgment, pursuant to his agreement with the subsequent judgment creditors and with John Little's executor.

The defence taken by the answer of Henry Neill's executor was, that it was the true object and construction of the agreement, that Neill should purchase the land agreed for, and, after paying his judgment, should apply the balance to that of Shields, it being then not doubted that the land would be bid up to a figure sufficient to cover both these judgments; that an agreement to apply to the Shields judgment more than the balance of the purchase money would have been without consideration; that Shields' administrators were not joined in the agreement, for the reason that they were to be left free to collect any deficiency upon their judgment after applying the balance of purchase money; and that in accordance with this view of the arrangement, Neill had, on receiving his deed, given to

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the sheriff his note for the balance of the purchase money, the £71. 2. 4½.

Henry Fisher, whose administrator, d. b. n., was made a party defendant in this cause, was one of the original administrators of John Little, deceased. The executor of Neill claimed as credits against the Shields judgment some payments which had been made by Neill to Henry Fisher, he being then, one of the administrators of Luke Shields, which payments were on the contrary claimed to have been made upon private accounts between Neill and Fisher. Hence, the joining of Fisher's administrator, d. b. n., in this suit. Answers were filed by all the defendants, but only that of Henry Neill's executor, before set forth, is material to the questions decided. Issues were joined and depositions taken by both parties.

Some objections were made to the bill for the want of proper parties, which the Chancellor overruled. They are not deemed of sufficient importance to be reported.

The cause came before the Chancellor on the 24th July, 1818, for a hearing upon the bill, answers, exhibits and depositions. The case turned upon two questions, viz:

1st. Whether, by the agreement of February 10, 1787, Henry Neill became bound to pay the whole judgment of Shields' administrators? and

2d. If he did, whether the administrators, not being parties to the agreement, the complainant had any remedy under it against Neill's administrator? The present report of the case is made only with a view to the latter question.

Robinson, for the complainant.

The administrators of Shields, not being parties to the agreement, and having no remedy under it at law, may sue here. 8 *Levinz*, 138, shows that they could not sue at

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law. They are relievable here, on the ground of a trust attaching to the land in Neill's hands under the agreement. 1 *P. Wms.* 211, 222: *Equity Cas. Abr.* 739 *A. p.* 4. With respect to the question of consideration, Neill obtained by the agreement an advantage in purchasing the land free from the competition of the other creditors.

Wells, for Neill's executor.

There is no consideration to Neill under this agreement. His judgment was secure in all events, being the first lien on all of Little's real estate. 1 *T. R.*, 350, *note* (*a*) *Rann, Exr. &c., vs. Hughes.* No consideration appears here except what arises out of the formality of the instrument, it being under seal. Further, Neill never agreed to pay the whole of Shields' debt. The note given by him to the sheriff (for £72. 2. 4½) corresponds with the balance of the purchase money, and shows that Neill's liability was limited to this balance. But again, there was no privity between Neill and the administrators of Shields. They are strangers to the contract. They paid no consideration and have no interest in it. Their interest is in the balance of the money arising from the sales, after satisfying Neill's judgment, and their remedy is against the sheriff's executors.

RIDGELY, CHANCELLOR—upon examination, at some length, of the agreement of February 10, 1787, concluded that Neill was bound by it to pay the whole debt of Shields; and proceeding to consider whether the administrators had, in equity, any remedy under the agreement against Neill's executor, the Chancellor said:

The defendant, Shankland, contends that the administrator of Shields, and that Wright, the sheriff, were not parties to the agreement of 10th of February 1787; and, therefore, that there is no privity between the com-

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plainant and the defendant; and, consequently, that the complainant cannot prosecute this suit on the said agreement against Neill's representative; that if the complainant had any cause of action, it was against Wright, the sheriff, and his executors, for the money levied under the *Venditioni Exponas*, upon which the land was sold; and that his remedy was at law, both according to the rules of the common law, and the provision of the Act of the General Assembly entitled "An act for establishing Courts of Law and Equity within this Government."*

That Shields' representatives had a remedy at law against the sheriff for the balance of the sales of the land of John Little, after the payment of Neill's judgment, is too plain a proposition to be denied. Neill had recovered the first judgment, Shields' administrators the second; and consequently after the payment of Neill, the whole real estate of John Little was bound for this judgment of Shields' administrators. And at law, the Sheriff was liable for having applied any part of the purchase money arising from Little's real estate to the Messrs. Fisher or to Warden, in preference to Shields' administrators; but it would be monstrous in a court of equity to allow Neill to make such a defence in violation of his agreement of February 1787; and that too, after he has received the full benefit of that agreement. What would be the consequence? It would be this—Shields administrators must sue the sheriff; the sheriff must sue the Messrs. Fisher; and they must enforce at law the agreement of 1787 against Neill. Thus, a circuity of action must be produced, and justice could not be done. Such a course would be manifestly unjust; because,as nothing could be recovered at law, more than the nominal sums given for the several parcels of the land, the full amount of Shields' judgment, which

*1st. Vol. Del. Laws, 132: Digest of 1829, p. 103, sec. 25, passed between 1726 and 1736. This act expressly prohibits the old Court of Common Pleas, in which equity jurisdiction was then vested, from entertaining any matter for which there was remedy at common law.

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Neill agreed to pay, and which was part of the consideration for the five hundred acres of land, would be fraudulently withheld by Neill. He would thus take advantage of his own wrong; and that too, after he had agreed to be purchaser and had substituted himself as paymaster for the full amount, instead of the sheriff, to Shields' administrators. Now, the true question is, whether Shields' administrators, not being parties to the agreement of 1787, can compel Neill, or his representative, to execute that agreement. At law, it is certain that they cannot, because they were not parties to the contract; and if equity will not afford a remedy, their case is hopeless.

In speaking of privity, it may be necessary to take a very slight view of Uses at Common Law, as connected with this subject. To the execution of a Use two things were absolutely necessary,—confidence in the person and privity of estate. All who came in, in privity of estate, *or with notice*, or without consideration, are bound by it. And in 1 *Co. Rep.* 122. *b.*, it is said that although a stranger purchased land from a feoffee to uses *for a valuable consideration*, yet *if he had notice* of the former uses, he would be compelled to execute them. According to 2 *Com. Dig. Title Chancery*, 627. (4. *c*); *Title Notice* (4. *c.* 1), notice of a trust makes a person privy; as, a person with notice of a trust, judgment, mortgage or other incumbrance, shall be affected by it. Sec. 1 *Eq. Ca. Ab.* 332: 2 *Com. Dig.* 627, 717.

Now, it is evident that Neill had complete notice of this judgment of Shield's administrators; that he engaged to pay it; that he purchased the land subject to this judgment: and that the advantage or convenience which he derived from being allowed to purchase as he did was a sufficient consideration in equity. The question then occurs, whether Shields' administrators have any remedy in equity. The counsel for the complainant cited the case of *Dutton vs. Dutton*, 2 *Eq. Ca. Ab.* 739. *p.* 4. There, D, having more than £3,000 per annum, married M, the

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plaintiff, who had £10,000 portion, and settled £1,000 per annum upon her for her jointure; and the greatest part of D's estate was settled upon the first and every other son in tail-male successively, as is usual in marriage settlements. D, ran greatly in debt, and J, his eldest son, being of full age, D, on calculating his debts and estate, agreed with J to convey all his estate to him, and J covenanted to pay all D's debts and allow him £500, per annum as a rent charge for his life; and further (upon which the question arose) *that J should indemnify D from all his debts, and from the charges and expenses for the maintenance of the said M, she being then separated by consent.* M brought a bill against D and J, to have an allowance for her maintenance, &c., Lord Chancellor Cowper ordered M to be allowed £200 per annum. He said that by this covenant to indemnify D from maintaining M, his wife, J had taken upon himself the charge of maintaining her, and, as to this purpose, stands in D's place, who is bound to give his wife an allowance, if he voluntarily separates from her; and he said that he took J in this case to be in the nature of a trustee for the wife, so far as a reasonable allowance for her maintenance was concerned.

It is not easy to distinguish, in principle, the difference between the right of the wife in this case of *Dutton vs. Dutton*, and the right of Shields' administrators to sue in equity. In both cases the covenantors made an engagement for the benefit of a person not a party to the covenant, and as they both received a sufficient consideration it is quite as reasonable that Neill should be considered in the nature of a trustee for Shields' administrators, so far as to pay the judgment, as that J should be a trustee for the maintenance of the wife. The counsel for the complainant cited also *Lechmere vs. Carlisle* 3 *P. Wms.* 211, to this effect, that every *cestui que trust*, whether a volunteer or not, or be the limitation under which he claims with or without a consideration, is entitled to the aid of a court of

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equity, to avail himself of the benefit of a trust, (p. 222;) and that the forbearance of the trustees shall not prejudice him, (p. 215.) In these cases the principle seems to be fully established, that the person for whose benefit a trust is created may compel the performance, although he may be no party to the contract. It is to be observed that Shields' administrators were not mere volunteers. They had a lien, prior to Neill's engagement, on the land of John Little, which Neill, for his own accommodation, agreed to satisfy. I might refer to cases of marriage settlements,—*Osgood vs. Strode.* 2 *P. Wms.* 245: *Vernon vs. Vernon*, 2 *P. Wms.* 594: *Goring vs. Nash*, 3 *Atk.* 186,—where persons, not parties to the articles and from whom no consideration flowed, were permitted to enforce their specific execution. It is true, the principles of these cases do not strictly apply to this; but they prove that equity will not compel a person to sue upon a covenant, in the name of trustees, when circuity of action may be prevented, and when equity can afford a more adequate remedy to the person for whose benefit the covenant was made, by his suing in his own name; and that it is not an objection that the party claiming under a covenant is a volunteer, and that the consideration did not move from him, if the party making the articles had a sufficient consideration. In the Supreme Court of the United States, 5 *Cranch*, 322, *Riddle & Co., vs. Mandeville and Jameson*, it was decided that equity will decree the payment to be *immediately* made by the person *ultimately* responsible, *to the person who is actually entitled to receive the money.* That was a suit brought in equity by the holder of a promissory note, to recover its amount against a remote endorser. In a suit between the same parties, that Court had previously determined that the plaintiff was without remedy at law. Although there were some particular circumstances in that case, yet the Court, in the opinion delivered by Chief Justice Marshall, laid down the law broadly, that equity will make that party *immediately* liable, who is *ultimately*

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liable at law. There, as well as in this case, the plaintiff had no remedy at law. This doctrine is confirmed in a subsequent case in the same court, 7 *Cranch*, 69, *Russel vs. Clark's Executors*, as well as the doctrine that notice of a trust makes the person having such notice a trustee. The latter point is first mentioned by the Court (p. 97) thus; "it also "appears, that in September 1796, Robert Murray & Co., "assigned to Loomis and Tillinghurst certain personalities "in trust. This assignment was surrendered to Clark "(the plaintiff) and Nightingale (his deceased partner) "in consideration of notes to a large amount, in which "Loomis and Tillinghurst were bound for Robert Murray "& Co. It appears that Clark and Nightingale *are other-* "*wise secured with respect to these notes.* At least, there is "reason to believe that they are secure. Clark and Night- "ingale having taken this assignment, with notice of the "trust, take it clothed with the trust. They are trustees "for the same uses, and to the same extent with Loomis "and Tillinghurst. A paper appears in the cause which "purports to be the assignment to Loomis and Tilling- "hurst. The assignment is in trust; first, to repay them- "selves any sums which they may pay on account of cer- "tain undertakings made by them for Robert Murray & "Co.; and secondly, in trust to pay to Joseph and Wm. "Russell, all such monies as they shall be liable to pay, as "guaranty as aforesaid, to Nathaniel Russell upon bills, "&c., reciting the bills for which this suit is instituted. "It is settled in this court, that the person for whose ben- "efit a trust is created, who is to be the ultimate receiver "of the money, may sustain a suit in equity to have it "paid directly to himself. This trust being to pay Joseph "and Wm. Russell a sum which they are liable to pay to "Nathaniel Russell, and being created in such terms that "the money is certainly payable to them, the purposes of "equity will be best effected by decreeing it, in a case like "the present, to be paid directly to Nathaniel Russell.

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"Indeed, the court ought not to decree a payment to "Joseph and Wm. Russell without security that the debt "to Nathaniel Russell shall be satisfied."

This case pointedly supports the complainant in sustaining his suit to recover money directly to himself, of which he was to be the ultimate receiver. And it may be remarked that the plaintiff, Nathaniel Russell, was not a party to the assignment made to Loomis and Tillinghurst; neither was it a trust to pay *immediately* to him any money, but only "to pay to Joseph and Wm. Russell all such "monies as they shall be liable to pay as guaranty as "aforesaid to Nathaniel Russell (the complainant) upon "bills." There, the trust was for the indemnity of J. and W. Russell *on account of such monies as they shall be liable to pay to Nathaniel Russell.* But as the trust was ultimately for the benefit of Nathaniel Russell, although he was no direct party to the assignment (or deed of trust,) it was the opinion of the Court that the purposes of equity would be best effected by decreeing a payment of the money directly to him. In the case before us, Neill promises to make a direct payment to Shields' administrators; and on this agreement, I have no hesitation, upon the above authorities, and upon the reason and justice of the demand, to decree payment to Shields' administrators.

Afterwards the amount due on the judgment of Luke Shields' administrators against John Little's executor was ascertained, and a decree for its payment entered against the executor of Henry Neill, deceased.

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WILLIAM WARNER AND JOHN WARDELL, assignees of JOHN WARNER,

vs.

ABRAHAM ALLEE AND PRESLEY ALLEE, administrators of JONATHAN ALLEE, dec'd, AND GEORGE P. DAINES.

Kent, Aug. T. 1818.

Payments made by a surviving partner, on account of a partnership debt, are admissible in a suit against the representatives of the deceased partner, to take the debt out of the Act of Limitations.

Upon the insolvency of the surviving partner, a creditor is entitled to have his debt satisfied out of the estate of the deceased partner, unless his equity to relief has been lost by laches. Ordinary forbearance is not such laches.

The executors and administrators of a deceased partner are held to diligence in pursuing their remedy against the surviving partner, in a case of threatened mismanagement or insolvency; and their laches in this duty will preclude any equity they might otherwise have, growing out of laches on the part of a creditor of the partnership.

BILL IN EQUITY AGAINST ADMR'S OF A DECEASED PARTNER. —Jonathan Allee, dec'd, and George P. Daines were partners, as merchants, in 1810–1811. They became indebted to John Warner, and at the death of Allee, in 1811, there was a balance due Warner of $1,507.38. This balance was, after Allee's death, reduced by Daines, the surviving partner, to $638.15, the balance due at the filing of this bill. John Warner, in Aug. 1814, made an assignment to the other complainants for the benefit of his creditors, under which assignment the balance due from Allee & Daines passed. Daines continued to make some payments on account to John Warner up to May, 1814, when he became insolvent and left the State. Thereupon, this bill was filed to recover the balance of the debt out of the estate.

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of the deceased partner, Jonathan Allee. The prayer was, that the defendants, the administrators of Allee, might admit assets, set forth an account of the personal and real estate of their intestate, and be decreed to pay the demand of the complainants; or that the administrators and Daines might be decreed to pay the same.

The defendants, the administrators of Allee, pleaded the Act of Limitations, alleging that the goods were purchased more than three years before this bill was filed, and that no promise or agreement to come to any account of said debt, or to pay the same, had been made by the defendants, or by either of them, or by Allee in his lifetime, within three years before the exhibiting of the bill and the suing out of process. With the plea an answer was filed. It alleged that the partners, Allee and Daines, contributed each $1,600; that at Allee's death the joint stock amounted to $2,700, besides certain debts due the late firm, mostly solvent, to the amount of $3,733.81; that the partnership assets were more than sufficient to pay the debts of the firm; that after Allee's death Daines continued for more than two years to be solvent, with ample partnership funds for the payment of the debts; and that his failure to pay this debt resulted from the want of reasonable diligence on the part of the creditor; that no part of the partnership assets came to the hands of Allee's administrators, except the small sum of $85.19½, which was collected by them, in 1815, after Daines' insolvency and departure from the State; that there is due from the surviving partner to the administrators a sum exceeding $2,000 00 for Allee's share of the surplus assets after payment of the debts, which they have no expectation of being able to collect. The answer further alleged that, for nearly two years after Allee's death, Daines continued to carry on the business, and had dealings with John Warner, or with the firm of which he became a member,—Warner, Trimble & Co.; and that he paid to Warner and the said

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firm divers sums of money. The answer alleged that the personal estate of Allee had been exhausted by debts of a higher grade, but admitted real assets sufficient.

The answer of Daines admitted generally the facts alleged in the bill; and stated that after Allee's death and up to the middle of March, 1814, he made sundry payments to John Warner on account of this debt; that several hundred dollars was yet due, no payment having been made since the assignment by Warner.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor for hearing on the bill, answers, exhibits and depositions, at the Aug. T. 1818.

H. M. Ridgely, for the complainants.

1. As to the Act of Limitations. This bill was filed 10th July, 1816. Within three years of that date, as late as the 5th March, 1814, Daines made his last payment on account of the debt. Besides, in his answer he admits a balance to be due. The payment and the answer take the case out of the Act of Limitations. Such, unquestionably, is the effect of the answer as to Daines, and an acknowledgement operating as to one of several persons jointly liable, must operate as to all. The debt being joint, payment by one is payment by all, and the admission of one is the admission of all. This has been held in suits upon notes, though upon them the liability is several as well as joint. *Doug.* 652: 2 *H. Blk.* 340.

It makes no difference that the defendants are administrators. They stand in the same position as would their intestate, Allee, if he were alive and before the Court.

2. Upon the merits of the case,—the complainants are clearly entitled to relief. Every partner is liable for the whole debt upon a deficiency of partnership assets. 5 *Burr.* 2613: 3 *Ves. Jr.* 277. It is not proved that the

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partnership assets were sufficient. The goods were appraised at $2900.00. What were the solvent debts due the firm does not appear. No exhibit is made of them. If the defendants rely on the ground that there were sufficient partnership assets, they should have filed a cross bill. The complainants are not affected by want of diligence. From the death of Allee in June 1811, up to the year 1814, Daines continued to pay partnership debts to an amount, appearing in this cause, of over $1,000.00. He was supposed to be good. His insolvency, when it occurred, was wholly unexpected. Had the complainants sued previously, it would only have hastened his ruin and prevented the payments that were made, while a suit afterwards would have been fruitless. Besides, the administrators themselves were equally bound to diligence. They had their remedy against Daines to compel a settlement of the partnership affairs. A suit by them would not have shaken Daines' credit as a suit by creditors would have done.

Hall, for the defendants.

1. The cases cited to the point that an acknowledgment by one of several persons, jointly liable, takes the debt out of the Act of Limitations apply to an original cause of action. This is a distinct proceeding in equity against the administrators, proceeding upon the ground that there is no remedy at law on the original cause of action. These defendants were never liable with Daines; there was no joint cause of action as against them; and, therefore, they are not affected by Daines' acts or acknowledgments. As to the administrators, this is not a case between merchant and merchant.

2. At all events, the complainant has no equitable claim upon the administrators. At law, Allee's liability ceased upon his death. The partnership effects, and with them the partnership debts, survived to and against Daines.

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The surviving partner takes all, and is bound for all. If equity interferes, it must be under special circumstances, in order to prevent injustice—to take from defendants what they cannot under the circumstances hold according to good conscience. Are there such circumstances in this case? It does not appear that there were not sufficient partnership assets. That is a fact to be established before the partners can be pursued separately. 2 *Ves. Sr.* 265, 100, 371: 1 *Ves. Jr.* 236. There has been no settlement, and no sufficient reason appears why the creditor should not have recovered his debt from the surviving partner. Daines was solvent more than three years after Allee's death. Warner continued to deal with him, and received from him $595.73; and Warner, Trimble & Co., dealt with him to the amount of $1400.00,—in all more than double the debt of Allee & Daines. Daines had means to pay this debt, and with proper diligence it might have been collected. If Allee's administrators have it now to pay, they will sustain a clear loss which the creditor might have prevented; and so the interference of this Court will work manifest injustice. The administrators were not, as is insisted, bound to look after this debt of Warner's. It is for the creditors to collect their own debts. The interest of the administrators is only in the surplus after the debts are paid,—the same interest which the partner has. 4 *Ves. Jr.* 396. Their remedy is for the surplus only; and they could not have gone into equity except upon the ground that Daines was wasting the estate. But his insolvency did not occur for two years after Allee's death, and was not suspected until it was too late for remedy.

RIDGELY, CHANCELLOR.—One principal question in this cause rests on the Act of Limitations. Jonathan Allee died about the 1st July, 1811. At the time of his death the account was unpaid, and was not barred by any limitation. Daines, the surviving partner, in 1811, and in 1812, 1813 and

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1814, paid several sums of money. On the 8th of March, 1814, he paid $100,00, and in May of the same year, $12.00 more. These are facts proved in the cause, and not depending on the admission of Daines in his answer. That is laid out of the case as to these defendants.

The case of *Whitcomb vs. Whiting*, *Doug.* 651, goes the whole length of this now before the Court, unless the death of Jonathan Allee shall make a difference. There, the payment by one of the drawers of a joint and several promissory note, was adjudged sufficient to prevent the Act of Limitations from barring the recovery. And in *Jackson vs. Fairbank*, 2 *H. Blackstone*, 340, where one of the makers of a promissory note had become bankrupt, a payment made under a commission of bankruptcy prevented the other maker of the note from availing himself of the Statute of Limitations The opinion of the Supreme Court of the United States, in *Clementson vs. Williams*, 8 *Cranch*, 72, cited in argument, goes upon the ground that the *special* acknowledgement of one of the partners, made in the manner there stated, was no proof that the debt remained due at the time of such acknowledgment, and did not take the case out of the Statute of Limitations. "The acknowledgement," say the court, "must go to the fact that a debt is due." Here, there can be no doubt, that the debt was fully admitted to be due by the payments made in March and May, of the year 1814, and consequently was at the time a subsisting debt against the surviving partner and the administrator of the deceased partner. If, then, the demand was not barred in 1814, and was then admitted indisputably by the act of the surviving partner, what can prevent a recovery now? Certainly, no lapse of time between that period and the time at which the bill was filed and process served in the cause. When will the Act begin to run? Not in the life-time of Jonathan Allee; for the partnership began in 1810, and in that year, and in every year after, there was a running account between the creditor

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and the debtors: and payments were made, and so continued, till Allee's death; and then the surviving partner went on paying until May, 1814. Now, here is strong, conclusive evidence of a subsisting, unsatisfied, admitted claim until May, 1814; and since that time three years had not elapsed before this suit was commenced. The Act of Limitations, therefore, cannot avail the defendants.

Next, as to the equity of the case. This is a fair and honest debt, due from the partners in their life-time. The creditor comes into the court for satisfaction out of the assets of Jonathan Allee, and this he may fairly do, although there may be a legal remedy against Daines. 1 *Ves. Sr.* 106. As the demand survived against Daines, there was no remedy at law against the representatives of Allee, and as Daines' insolvency is admitted on all sides, this is the only remedy which the creditor can have to obtain satisfaction. He is clearly entitled to the assistance of this Court, unless his equity is rebutted by the superior equity of the defendants, arising from the laches of the complainant. Daines and Allee were partners in trade, indebted to Warner at the time of Allee's death in July, 1811, in $1507.38. Daines, the survivor, went on paying until May, 1814, when he reduced the debt to about $600: at which time his failure unfortunately happened,—a failure sudden and unexpected, and without any doubt having been entertained by Warner, or, as far as we know, by Allee's representatives. Daines' nearest neighbors, and those most intimately acquainted with him, never suspected danger. The representatives of Allee never suggested a doubt to Warner; and yet, without a single circumstance of alarm, it is insisted that Warner's forbearance shall be deemed such unwarrantable negligence as to discharge Allee's estate from any responsibility, or to cause him to lose his remedy, in this court as well as at law. Considering the credit given by merchants, and the policy sometimes of forbearance, and the circumstances of this case, I am very far from thinking that the

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delay of Warner can be considered so gross as to deny to him the aid of this court, or perhaps that it can be imputed to him as a fault at all. But, it may fairly be asked, why the defendants lay still after the death of their intestate? Why did they not inquire into Daines' management of the partnership? They had an ample remedy against him. They might have filed a bill in this court to call him to an account about the affairs of the partnership, and to compel him to pay the partnership debts. They had a remedy adequate to the exigency of the case. They should have proceeded in this way, and thereby all loss might have been prevented. This case is stronger than *Bishop vs. Cranch*, 2 *Ves. Sr.* 100, 371: and yet there, a court of equity set up the demand of an obligee against the heir and executor of a deceased joint obligor, when the other obligor had become bankrupt. The case of *Jacomb vs. Harwood* 2 *Ves. Sr.* 265, so far as it bears on this case, supports the opinion here given. *Hankey vs. Garret*, 1 *Ves. Jr.* 236, turned on a question which does not here arise. *Daniel vs. Cross* 3 *Ves. Jr.* 277, shows clearly the liability of the assets of the deceased partner, Allee. And as the defendants have not been able to rebut the equity of the complainants, it must be decreed that the representatives of Allee, the deceased partner, pay the balance of this account.

Decree accordingly.

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Statement of the case.

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PHILIP RAISIN,

vs.

JOHN WOOD.

Kent, Aug. T. 1818.

A written submission to arbitration directed that the award should be made in writing, indented, under the hands and seals of the arbitrators. The award was made in writing, but was not indented nor under seal. *Held*, to be void in equity as well as at law—that a Court of Equity will not decree performance of an award which is void at law, except upon a subsequent agreement between the parties to abide by it.

BILL FOR THE PERFORMANCE OF AN AWARD.—The complainant's interest in certain real estate was sold under execution process, issued out of the Supreme Court for Kent County, returnable to the Oct. T. 1809; and was purchased by the defendant for $105.65. At the return of the execution some dispute arose as to what interest the complainant held in the real estate. At the time of the sale his interest was supposed to be one equal ninth part, and he had obtained the legal title only to such share. The bill alleged that he in fact held an equitable title to eight ninth parts, having bought and paid for the additional shares and holding them under alienation bonds. The complainant being about to object to the confirmation of the sale, the matter was compromised by an agreement between the parties to submit the question of title, as also a dispute as to how the rent should be apportioned, to five arbitrators. The defendant entered into a written submission to abide by their award, and thereupon the sale was confirmed. By the terms of the submission the award was to "be made in writing, indented, under the *hands and* "*seals* of said arbitrators, or any three of them, &c."

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The arbitrators met, and upon hearing the parties, made and delivered their award in writing, whereby they apportioned the rent which had accrued, and further awarded that the defendant should pay to the complainant the sum of $366.00; in consideration of which, the complainant was directed to release and convey to the defendant all his right and claim to eight ninth parts of the premises. The award, however, was *not under seal*, as by the submission it was directed to be made.* The award being delivered to the parties, the complainant withdrew an objection he had previously made to the execution of a deed by the sheriff, and thereupon the sheriff conveyed the premises to the defendant, pursuant to the sale.

The defendant refusing to perform the award, this bill was filed.

*The submission was by an arbitration bond, dated 18th of March 1810. whereby Wood became bound to Raisin, and John Revell, (the tenant of the premises, who was joined on account of the rent being included in the reference) in $200.00 with condition "to stand to &c., the award of Jacob "Biddle, Lowder Layton, James B. Ralston, Thomas Winsmore and "Benjamin Potter, or any three of them, chosen to arbitrate for, upon or "concerning a matter in dispute respecting the house and lot and store "house occupied by Russell and Clifton, and also as it regarded the rent "for 1809, and all manner of disputes between said parties, for or by any "other matter or thing whatsoever, from the beginning of the world to this "date, so as the award be made *in writing, indented, under the hands and* "*seals* of the said arbitrators, or any three of them, to be delivered to said "parties on or before the 10th day of April next."

The award was as follows, viz:

"We, the subscribers, being amicably chosen to settle all matters in con-"troversy between Philip Raisin and John Revell, of the one part, and John "Wood of the other part, and after hearing the proofs and allegations of "both parties and duly considering the same. are of opinion that the said "John Wood shall pay the rent for the property where he now lives unto "Philip Raisin, up to the first day of January last, and from that time he "shall pay eight months of the rent for said property he now occupies to "John Wood, and that the said John Wood or his legal representatives "shall pay to the said Philip Raisin, or his legal representatives or assigns, "the sum of three hundred and sixty-six dollars, good and lawful money "of the State of Delaware, in consideration of which the said Raisin and

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The answer, setting forth the title to the premises, denied that the complainant was in fact entitled to more than the one-ninth part of the premises, as was supposed at the sale. It admitted, however, the facts alleged in the bill touching the submission to arbitration. The defence taken upon the merits was, that the submission was intended to include only the question of title and the apportionment of the rent, whereas the arbitrators entertained a claim by the complainant for certain repairs upon the premises, made before the sale, a claim which had not been in controversy; and that the sum awarded was in fact for such repairs. It was also objected that the award was void, because it had not been made under seal and indented, in conformity with the submission.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor for hearing on the bill, answer, exhibits and depositions, at the Aug. T. 1818.

Hall, for the complainant.

The award is not unreasonable. Raisin put on the repairs. Wood has the benefit of them. The objection mainly relied on is wholly technical, viz: that the arbitrators have not *sealed* the award. But Wood took the sheriff's deed the *day after* the award, and in consequence of it. To effect justice, this Court will execute it, although it may not be good at law by reason of some *accidental* circumstances. It is like the case of a joint bond upon the death of one of the obligors. Equity will carry it into effect against the executors of the deceased

"his representatives shall release all his right, title, claim, interest and "demand of all his eight-ninth parts of the house and lot now occupied "by John Revell. The above sum of three hundred and sixty-six dollars "is to be paid by the said John Wood or his legal representatives unto the "said Philip Raisin or his representatives or assigns, at or upon the 20th "day of September next, with legal interest thereon from the date hereof. "As witness our hands this 20th day of March, eighteen hundred and ten."

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obligor. In 2 *Vern.* 24, there was a submission to an award to be made by bond; the award was made; it was not binding by force of law; plaintiff was to pay £900; and release, &c., and defendant to assign securities. Plaintiff sold land to raise the £900, expecting defendant would receive it, *as he gave him intimation he would.* He tendered the £900, and a release was executed by him. Though there was no other execution of it on the part of plaintiff, and though the award was extra judicial and not good in strictness of law, yet it was decreed to be performed in specie. In 1 *Com. Dig.* 540, *Arbitrament* (*E.* 1.) an award not indented was held good, though the submission required it to be so; citing *Barnes* 55.

Hayes, for the defendant.

The award is both iniquitous and illegal:—

1. *Iniquitous.* It was made for repairs put on the lot, a matter not in dispute when the submission was entered into. No claim for repairs was set up until the arbitrators met. The award would not prevent a second recovery for the same claim, the repairs not being mentioned either in the arbitration bond or in the award. The award for the money is expressed to be in consideration that Raisin *shall release his right of property*, and not for repairs. Further, the repairs were put upon the lot *before the sale.* Wood then bought the improvements as well as the lot, and paid accordingly. It appears also from the testimony that Raisin held possession of this lot nine years before the sale, and he does not appear to have paid any rent to his co-tenants. It was worth $60 per annum or $540, a sum more than equal to the value of the improvements.

2. The award is *illegal*, in two particulars. *First*, It does not pursue the condition of the arbitration bond, being *not under seal nor indented.* 1 *Bac.: Abr.* 140 *E.* Award to be delivered under hand and seal, if under seal

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only, it is not sufficient. In *Cro. Jac.* 277, the submission was to the award of A. B. and C. to be made under their hands *and seals*. An award under their hands only, held not good. In 1 *Strange* 116, it was held that an award must pursue the submission in point of form as well as of substance. Further, the award is void, as well in equity as at law. 1 *Eq. Cas. Abr.* 48 : *par.* 1 : two submit :—award made of part only, so that it is void at law :—this shall not be made good in equity, *par.* 2 ; so, if the award differs from the submission, it is void in equity as well as at law. In the case cited by complainant's counsel from 2 *Vernon* 24, the decree executed the award on the ground of a *subsequent agreement* to abide by it.

Further,—the award is bad because it is unequal. Compensation is given for repairs, but the award does not direct a release of any future claim for the repairs. A claim might be maintained for the same repairs notwithstanding the award. The release directed for Raisin's share of the lot is a nullity. Wood had bought Raisin's share and interest in the lot. 1 *Bac. Abr.* 147 : *Arbitrament and Award, E. 5th Article.* Awards must end the controversy.

Hall, in reply.

Any rents accruing from the premises in the possession of the complainant before the sale form no part of this case, not being included in the bill and answer. Raisin, however, satisfied them to the co-tenants.

RIDGELY, CHANCELLOR.—The complainant comes into this Court to recover in equity the sum of $366.00, upon an award made on a submission to arbitrators by the complainant and defendant, according to certain bonds entered into by them in March, 1810. The penalties of the bonds are $200.00 ; the sum awarded is $366.00. The bonds

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required that the award should be made in writing *indented*, and under the *hands and seals* of the arbitrators. The award was *not indented*, and was not under the *seals* of the arbitrators; and, therefore, it is bad at law, because it was not made pursuant to the submission. *Cro. Ja.* 277: 1 *Str.* 116: 1 *Com. Dig. Arbitrament, p.* 557. (*I.* 6.) The question, therefore, is whether a court of equity will compel a performance or payment of the money, as the case has been made out.

According to 3 *P. Wms.* 187, a bill lies to compel a specific performance of an award to *convey an estate*, when the party submitting has received the money in consideration whereof he is to convey the estate. By this acceptance the defendant undertook to perform the award; he consented to it, and made his own agreement for a valuable consideration, viz: the money paid. And, so in the case of *Norton vs. Mascall*, 2 *Vern.* 24, the award was decreed to be performed upon the footing of an agreement of the party to accept the money, thereby affirming the award and making it his own agreement. And so, are all the cases cited. The note in 3 *P. Wms.* 190 states very clearly the difference between awards to pay money and awards to do anything in specie. In the latter case the acceptance of the money, or agreement to the award, is the true reason of compelling a specific performance; especially as the party might be relieved by a bill in equity against the penalty of the bond, on making satisfaction or complying with the award; but where money is to be paid there can be rarely any good reason to go into equity to compel it.

No case has been cited, and I can find none, where an award of any kind, unconnected with a subsequent agreement, has been carried into execution by a court of equity. On the contrary 1 *Eq. Cas. Ab.* 48 cites two cases where it has been determined that a void award, or an award differing from the submission, shall not be made good in

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equity. The case cited from 1 *Com. Dig.* 540, *Arbitrament* (*E.* 1,) that an award *not indented* is good, though the submission requires it to be so, is an addition made to that work, and refers to *Barnes* 55, which is an authority in no great estimation.

There is no proof that Wood ever agreed to pay the money, or in any sort, ever ratified by any promise, or by any act, the award; therefore, this case is not within the reason of the cases in 2 *Vernon and* 3 *P. Wms.*: nor within any principles upon which a court of equity should compel the payment of the money. In the bill, it is asserted that it was agreed by the parties, before the submission, that sheriff Lockwood should make no deed to Wood until the matters in controversy should be adjusted by arbitrators; and that after the award was made, the complainant wrote to Lockwood, consenting that he should make a deed to Wood; upon which, on the 21st of March 1810, a deed was accordingly made. All this is denied in the answer; and it is insisted that Lockwood, after the sale was confirmed, never refused to execute a deed. The sale was made on the 10th of May, 1809. The purchase money, $105.65, was paid to Lockwood on the 15th of August 1809, with a promise by Lockwood, that if the sale should not be confirmed, he would return the money. These are the facts; and it is impossible to infer anything like an agree- by Wood, subsequent to the award, to pay the money awarded. The only circumstance that seems to have a relation to the award is that the deed was made on the 21st of March, the day after the award. But it would be carrying presumption to a great length, to draw a conclusion from that solitary, equivocal fact, against the answer too, that Wood had agreed to the award. The delay in making the deed is not to be accounted for by any testimony in the cause; and, therefore, it can have no weight in establishing any agreement by Wood to the award.

This case was compared by the complainant's counsel to

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a joint bond, which a court of equity would set up against the representatives of a deceased obligor. The comparison fails in this respect. Such a bond is considered as an agreement in writing; and, therefore, though the obligation and penalty are gone by the legal demand being gone, yet the condition, taking it altogether, being considered as an agreement to pay the money, under hand and seal, the Court will set it up against the representatives of the person making such bond. But an award not made according to the submission, and therefore void at law and in equity, never could be deemed the agreement of the party; and, therefore, to set it up would be making a new agreement. I can find no case in which a joint bond has been set up against the heir of a deceased obligor, where the heir has not been named in the bond. Equity only gives a remedy but does not vary the agreement.

It is not necessary to inquire into the merits of the award. As to the receipt of the rents by Raisin, before the sale of the land, that makes no part of the case in the bill or answer.

Upon the whole, the bill must be dismissed, with costs.

ALLAN THOMPSON,

vs.

JOSEPH LYNAM.

New Castle, March T. 1819.

A purchaser of land at Sheriff's sale, the sale being not yet returned nor a legal title acquired, has nevertheless a remedy by injunction to stay waste of the premises purchased.

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Statement of the case.

PETITION FOR AN INJUNCTION.—This was an application *ex parte*, in vacation, for an injunction to stay waste, founded upon a petition of Allan Thompson, setting forth, that certain lands had been sold by the Sheriff of New Castle County, under a writ of *Levari Facias*, No. 8, to March T. 1819, in execution of a judgment in *Scire Facias* on a mortgage recovered in the Supreme Court for Kent county, by George Latimer and others, against William Pryce; that the premises were purchased by the petitioner on the 16th of January, 1819, at the Sheriff's sale; and that the premises were in the possession of several persons, as terre tenants, part thereof being held by Joseph Lynam. The petition further proceeded to set forth as follows, viz; "that previous to the recovery of the judgment upon the "mortgage, and while the proceedings under the *Scire* "*Facias* were pending, the persons in possession of the said "premises, knowing that there was no substantial defence "to the said proceedings, commenced cutting down the tim- "ber and carrying it off, to the great injury of the prop- "erty, to prevent which a writ of estrepement issued from "the Supreme Court to restrain waste of the premises dur- "ing the pendency of said proceedings. That since the sale "of the said premises, the said Joseph Lynam has com- "menced cutting down the timber and carrying it off from "the said premises; that in consequence of the ravages "committed as aforesaid, previous to the judgment, the "timber has become very scarce upon the said land, and that "the waste now being committed by the said Joseph Lynam "is on this account of more serious injury. That the "said Joseph Lynam has cut off twenty of the finest timber "trees, and that he threatens to go on (as the petitioner "is informed) cutting down and carrying off more. That "in addition to this he is pulling down the fences, and "threatens to carry off the manure to another farm ad- "jacent, and has threatened to continue to cut timber and "use the premises as he pleases." *Prayer*, for an injunc-

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tion to restrain from the cutting or felling of any wood or timber, and from the carrying away of what has already been felled or cut, and to restrain from the commission of any further waste, &c.

The return day of the writ under which the premises had been sold to the petitioner not having arrived, the sale had not been confirmed nor any conveyance made to the petitioner at the time of this application.

The petition was presented on the 26th of March, 1819. The Chancellor having held it under consideration until the 29th of March, awarded the injunction, assigning in his notes of the case, the following reasons :

It is a rule that a party applying for a writ of injunction to stay waste should have, or establish, a title to the place in which the waste is committed, before an injunction can be issued ; and in his affidavit the particular title should be set out. It is not sufficient to allege merely that the party is entitled to a fee simple estate. 2 *Atk.* 891 : 4 *Burr* 2400 : 1 *Brown Ch. Rep.* 57. But this rule has not been so tenaciously adhered to, that when the party could have no other remedy, the court would not afford this. In 2 *Brown Ch. Rep.* 552, *Hoskins vs. Featherstone*, a writ of injunction was granted to stay waste against the widow of a rector, at the suit of the patroness, during the vacancy, although, during the vacancy, the fee-simple was in abeyance. Here, though the plaintiff had no title, yet the right of patronage was a sufficient ground for the writ, and the want of other remedy.

In this case the plaintiff has had no conveyance of the land (none appears) from the sheriff, and the term has not arrived at which the sheriff can make return of the sale ; yet the plaintiff, supposing the sale to be fair and regular, has at least an equitable title to the land, and perhaps something more. Allan Thompson is liable to the sheriff for the purchase money, and after his return

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the sheriff can support an action for it. This has been decided in the High Court of Errors and Appeals in the case of *Davis vs. Manlove*, merely upon the sheriff's return, without an agreement in writing signed by Davis, the purchaser, and the sheriff. As Thompson is thus liable, he seems to be peculiarly entitled to the aid of this court until he can be prepared for a remedy at law. If he cannot prevent waste by a writ of injunction, he may receive a wrong without a remedy. What other remedy could he have?

There is another reason for ordering the writ. It appears from the affidavit that the premises in question had been mortgaged. The mortgagees sued a writ of *Scire Facias*, and recovered judgment in the Supreme Court, at November Term, 1818. Joseph Lynam was a party to that proceeding, and consequently was bound by it; and the writ of *Levari Facias* was taken out against him and the other defendants in that suit. Lynam was a terre tenant, and held, it is presumed, under the mortgagor. He, at any rate, was bound by the judgment. When land is mortgaged and the mortgagor is in possession, an injunction may be issued to stay waste, because the whole land is a security for the debt. 3 *Atk.* 210, 723. So, when there is an arrear of charge upon the real estate, an injunction shall go to prevent cutting timber upon the premises charged. 2 *Eq. Cas. Ab.* 758. *p.* 5. This is perfectly correct and just; and it is equally right, that until the whole proceeding is completed, that is, until the sale, return and conveyance is completed, all persons coming in under the mortgage, or claiming or being entitled to the land under any process of law grounded on the mortgage, should be secured against the destruction of the property, as well as the mortgagee. If, between the sale and return, the mortgagor, or any person in possession under him, may destroy the land, the security will be equally lessened as if such destruction were committed before any proceeding

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on the mortgage; for no person would be weak enough to throw his money away on land which he could not protect, and thus the sale might be defeated, and the value of the land diminished by the insecurity of the purchaser.

After the award and service of the injunction, no further proceedings in the cause appear to have been taken.

HENRY RICE,

vs.

STOGDEN SMALL.

New Castle, April T. 1819.

A party having been arrested under an attachment for contempt and having on his examination, under interrogatories, denied the contempt, *quere*, whether a commission can be taken out to prove the contempt?

Interrogatories filed under an attachment for contempt should be entitled in the name of the State as the prosecutor, and not of the party on whose application the attachment issued.

ATTACHMENT FOR CONTEMPT.—An injunction to stay waste had been issued and served. Upon an affidavit of service and of a breach of the injunction, an attachment for contempt issued, under which the defendant was brought into court. Being examined on interrogatories, he denied the contempt, unequivocally negativing every interrogatory.

McLane, for the prosecutor, then moved for a commission to prove the contempt.

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Opinion.

The Chancellor suggested a doubt whether, after the defendant had purged himself of the contempt, witnesses could be examined to prove it.

Mr. *McLane* stated that witnesses had heretofore been examined in other cases at the bar of this Court; and he read from 1 *Harrison's Ch. Pr.* 201–2, that a commission may be taken out to prove a contempt.

THE CHANCELLOR.—The examination of witnesses heretofore has been by consent. However, let a commission go, *at the peril of the party prosecuting.* The defendant, Small, is allowed to go at large, without any bond not to depart (1 *Harrison's Ch. P.* 202), so that the sheriff may have it in his power to bring him in at the next Term on this same writ, he still being supposed to be in the custody of the sheriff.

Note.—In this case, at the suggestion of the Chancellor, the title of the interrogatories were amended so as to stand in the name of ***the State of Delaware vs. Stogdon Small.***

In a previous case of attachment for contempt, viz: Tatem and Canby vs Joshua Gilpin and Thomas Gilpin, in which the interrogatories were entitled in the name of the parties (Ridgely's notes, 1817, p. 229) the Chancellor makes this note, viz: "*Quere.*—Is the title of these interrogatories right? Ought they not to have been,--***The State vs. Joshua Gilpin and Thomas Gilpin.*** Motions and affidavits for attachments in ***civil suits*** are proceedings on the civil side of the Court, ***until the attachments issue*** and are to be entitled with the names of the parties. But as soon as the attachments issue the proceedings are ***on the criminal side.*** ***United States vs. Wayne, Wallace's C. C. Rep.*** 134. See ***Tidd's Prac.*** 142: 8 *T. R.* 133, 253: 2 *T. R.* 643: 6 *T. R.* 640: 7 *T. R.* 439, the cases cited in Wallace."

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JOSEPH WEBSTER,

vs.

FRANCIS HOPKINS AND JOHN DEAKYNE.

New Castle, April T. 1819.

Objections to the competency of a witness must be made by articles filed, according to the rule of court, and cannot be taken at the hearing.

BILL IN EQUITY—OBJECTION TO COMPETENCY OF A WITNESS.—At the hearing of this cause before the Chancellor the deposition of Evan Webster, a witness for the complainant, being offered in evidence was objected to, upon the ground that the witness was the surety in an injunction bond which had been taken in a cause between the same parties, wherein the present defendants were the complainants seeking to restrain the collection of a judgment held against them by the present complainant. The validity of the judgment was a question involved in this suit, the result of the other suit depending upon the result of this one.

McLane and *Rodney*, for the complainants.

According to the rule of court,* articles should have been filed to the competency of the witness. He might then have been released; or, as in the case of special bail, the bond here might have been annulled, and another bond given by the complainant with other surety. The rule is positive, that articles must be filed to the competency of a witness or an objection to his testimony cannot prevail. See also 12 *Ves. Jr.* 406.

*Rule VII, at that time. The corresponding rules at present are Nos. 39 and 44.

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Opinion.

Van Dyke and *Black*, for the defendants.

Articles are not necessary in this case. The objection is apparent on the face of the proceedings. The records of the court show that the witness is interested, the bond being taken and filed here. The objection appearing on the record is notice, and the case is an exception to the spirit and intention of the rule. Besides, the witness cannot be discharged from the bond like special bail.* Here, in certain events, he is bound to pay the money; the obligation of special bail is only to have the body of the principal forthcoming.

RIDGELY, CHANCELLOR.—This rule was made, I believe, on some objection being taken either to the competency of a witness, or to the regularity of some proceeding, or to some other matter apparent on the face of the proceedings. The design was to settle the question and prevent any controversy on the subject. Although the objection appears, it was not certain that the party would make it. It may afterwards happen that the testimony of a witness taken on one side, may be desired on the other, although the witness is interested; and as it rests entirely in the breast of the defendant whether to object or not, he ought to file his articles, if he intends to insist on the incompetency of the witness. A witness may sometimes be released, or his testimony be made competent, upon notice of the objection by articles.

The deposition may be read.

*Held *contra* in Hall vs. Livingston and Stutzer, in Kent, at March T. 1870, to be reported in a subsequent volume.

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Statement of the case.

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WILLIAM CARLISLE,

vs.

JOHN RUST AND TRUSTEN HARDY.

Sussex, July T. 1819.

Depositions in a cause having been taken, returned, and published, upon affidavit of the discovery of new testimony and motion for leave to examine additional witnesses, it must appear from the affidavit, that neither the party, nor his solicitor, have read the depositions taken, nor made copies or abstracts thereof.

BILL IN EQUITY.—MOTION FOR LEAVE TO TAKE FURTHER TESTIMONY AFTER DEPOSITIONS RETURNED AND PUBLISHED. This cause was at issue and depositions had been taken on both sides under commissions returnable to the March Term, 1819. The depositions were returned and published, within six days next before the Term. The Chancellor, in consequence of sickness, did not attend at that Term, and the cause was continued to the ensuing July Term. At the July Term, a petition verified by affidavit was presented on behalf of the complainant, by Mr. Cooper, his solicitor, setting forth that the petitioner "had several "material witnesses (as he was advised and verily believed) "to examine in the cause, whose testimony he had dis- "covered since the last Term, and without the benefit of "whose testimony he could not safely proceed to a hear- "ing." He, therefore, prayed leave to make a further examination of witnesses, on the interrogatories before filed in the cause.

T. Clayton and *Robinson*, for the defendant, Rust objected, upon the ground that the petitioner had not sworn that *neither he nor his solicitor*, had seen, read or knew the contents of the depositions taken in the cause.

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Cooper, for the complainant, said, that when the depositions were published, prior to the last Term, they knew nothing of the testimony which the complainant has since discovered, and that even if the Chancellor had been here at the last term, this motion could not have been made. That he (the solicitor) had read the depositions but had taken no note or abstract of them.

Robinson said, that he had an abstract of the depositions.

RIDGELY, CHANCELLOR.—According to our Terms and mode of doing business, the English rules do not always apply or suit us. But even in England this matter seems to be discretionary. Here, if the party cannot have an examination of these witnesses, injustice may be done; for, if he did not know of, and had not discovered, this testimony before publication, he could not have made the affidavit; but the discovery being made since the last Term and after the publication, it is now the first opportunity that he has to apply. However, the affidavit states nothing respecting the complainant's or his counsel's knowledge of the depositions; and, therefore, it is not sufficient.

Afterwards, the complainant filed an affidavit, in which he said that he had not "seen, heard, or read the depositions "taken in the cause, nor is he informed of the contents "thereof." Mr. Cooper, the counsel, swore that he "had "read the depositions but had not any copies of them." The chancellor held this affidavit not sufficient; that it should state that he had not taken any notes or abstracts of them, nor any copies.

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JAMES D. WESTCOTT,

vs.

JONATHAN R. ALLSTON AND JOHN ALLSTON.

New Castle, Aug. T. 1819.

The rule of court, which requires that objections to the competency of a witness be filed within the first three days of the term to which the commission is returned, does not supersede the necessity of filing articles.

The defendant having, under the interrogatories, examined a witness for the complainant as to his interest, held that it was irregular to file objections after the return of the commission.

The answers of a witness taken under the interrogatories in chief and under the cross interrogatories form but one deposition, and the signature of the witness and certificate of the commissioner, though made only at the end of the whole, is sufficient.

BILL IN EQUITY. EXCEPTIONS TO ADMISSIBILITY OF A DEPOSITION.—At the hearing of this cause the deposition of Powell Garretson, a witness for the complainant, being offered in evidence, was objected to, on two grounds, viz: 1st., on the ground of interest in the witness, with respect to which exceptions had been filed, as required by the rule of court: and 2nd, because the witness had not subscribed his name to his answers to the interrogatories in chief; nor was there any certificate by the commissioner, appended to the answers to said interrogatories, that the witness had been sworn to such interrogatories: but following the answers to the cross interrogatories was the signature of the witness and the certificate of the commissioner in the usual form.

Rodney for the complainant, in support of the deposition.

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Argument.

The answers to the interrogatories in chief and to the cross interrogatories form together one deposition only. The deposition is not complete until the answers are taken to both sets of interrogatories. The whole of the answers should be taken, and then the whole subscribed and certified to as one deposition. 1 *Harrison's Ch. Pr.*, 328–9.

As to the objection to the interest of the witness,—such objection must be taken in one of two modes; that is, either by filing cross interrogatories to the point of interest and proving it out of the witness' own mouth, as on a *voir dire*; or by filing articles, in which latter case his competency can be sustained under cross interrogatories filed to the articles. Here, the defendant has examined the witness, as to his interest, on cross interrogatories; 12 *Ves. Jr.* 408 Both courses cannot be pursued in the same case. The election of one bars the other.

Van Dyke, for defendants, contra.

1. It is the practice to sign the original examination as well as the cross examination. We know of no case in which the examination has not been signed, both to the interrogatories in chief and to the cross interrogatories. The practice treats them as separate examinations, and the commission must be so construed. This commission therefore has not been complied with. The defect is one of substance. For, perhaps the witness would not sign the original examination. He might refuse that though he signs the cross examination. Here, there is nothing to show that the witness meant to become responsible for the examination on the original interrogatories. 1 *Harrison's Ch. Pr.* 329, *citing* 1 *P. Wms.* 414.

2. As to the interest of the witness. The rule at law, that you cannot examine a witness on his *voir dire*, and then show his interest by other evidence, does not apply here. We have no notice of the witnesses to be sworn. We did

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file an interrogatory as to the interest of the witness, but are not thereby precluded from further examination as to his interest. 1 *Harrison's Ch. Pr.* 401–2, *citing* 3 *Atk.* 643. Our proceeding is sufficient under the rule of court, exceptions being filed within the time prescribed by it.

RIDGELY, CHANCELLOR.—I am of opinion that the deposition of Powell Garrettson should be read in the cause. There were two objections to this deposition; first, that the witness is interested in the cause; second, that the witness has not signed that part of the deposition which contains his answers to the plaintiffs interrogatories; but after the examination was completed, that is, after the answers to *all* the interrogatories were given, then the deposition was signed at the end of it, and certified by the commissioner to be sworn and subscribed before him.

The rule of court which requires that *all objections to the execution of a commission or to the competency of any witness, should be made in writing on the third day of the term and not after*, was never intended to supersede the necessity of filing articles. Generally, until the commission is returned and publication passes, the opposite party knows not who has been examined. When he discovers that any of the witnesses are incompetent, he is then on the third day to file his objections.

This rule was made for the purpose of giving notice to the opposite side before the time of hearing, of objections, both as to the execution of the commission and the competency of the witnesses. If the objection is to the competency of the witnesses, then articles should be filed, so that the party producing the witness may sustain his credit or his competency by the examination of witnesses. Here, before any objections or articles were filed, the defendant examined in chief as to the interest of the witness, Powell Garretson, and then filed his objections, which was irregular.

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Statement of the case.

As to the form of the deposition, the only objection here is, that the witness did not sign his answers to the interrogatories of the plaintiff, as well as to the interrogatories of of the defendant.

The signature of the witness is a signing to all the answers as made to all the interrogatories. The whole makes the deposition. They are all connected together, and are but one deposition. The commissioner certifies to his swearing and signing, and it is sufficient, although the distinct answers to the interrogatories of the plaintiff are not distinctly and separately signed.

Let the deposition be read.

MADAME BEAUREAUX DE PUSEY, by her attorney in fact, GABRIEL DENIZOT.

vs.

ELEUTHERE IRENEE DU PONT AND JACQUES ANTOINE BIDERMAN.

New Castle, Aug. T. 1819.

Parol evidence of the indorsement of a promissory note, without the production of the note, held inadmissible, though not offered in order to charge the indorser.

The attorney in fact, by whom a bill in equity is filed, is not a competent witness for the complainant.

BILL IN EQUITY.—At the hearing of this cause before the Chancellor, the deposition of James Harper, a witness for the complainant, being offered in evidence, objection

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Argument:—opinion.

was made to reading such parts of it as were designed to prove that certain promissory notes had been indorsed by the defendants. The object of the proof was not to charge the defendants directly upon the notes, but to show mismanagement on the part of the defendants of a partnership business, which had been carried on by the parties.

Rogers and *Van Dyke*, for the defendants.

Parol evidence cannot be given of any matter in writing. Here the witness speaks of the indorsement of notes. Such proof should be made by the production of the notes and indorsements. Parol evidence is not admissible.

McLane, for the complainant.

Notice should have been given of this objection; for then we could have obtained the notes to which this testimony goes. We are taken by surprise. But there is nothing in the objection. For the evidence offered is of a fact *in pais:* i. e. that there were notes in the Farmer's Bank indorsed by the party. The execution of a deed may in some cases be proved, though the deed is not produced. We only wish to prove *the existence* of certain indorsed notes. These papers are not ours, nor in our possession. They were drawn or indorsed by the defendants, and have been paid and gone out of the bank, and are not in our possession. We don't charge the defendants with the notes,—but we wish to prove the execution of notes which they had no right to indorse.

RIDGELY, CHANCELLOR.—No inconvenience can arise by adhering to the rules of law. The notes and indorsements are the best evidence. They ought to be produced. If they are not in the power of the party, then he may give parol proof of them; but he must show why it is that he cannot produce them. There can be no surprise here.

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Argument.

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The rules of court were not designed to destroy the rules of evidence. This is more a question of evidence than of practice. The objection is that the proof is not competent, even if it were before the Court. It is not like the proof of the execution of a deed. The naked fact of the execution of a paper may certainly be proved under circumstances, without the production of the paper, when that fact merely, and not the effect or operation of the writing, is the matter at issue. Even then the circumstances must be very peculiar. Here, the effect of these notes and indorsements will go indirectly to charge the defendant. They must be shown themselves, or the plaintiff must account for their production. The deposition of Harper is rejected.

The complainant offered in evidence the deposition of Gabriel Denizot, the attorney in fact of Madame de Pusey, his name appearing on the record and in the bill as her attorney.

Objections to his testimony had been filed by the defendant. 1st. Because he is interested. 2d. Because he is a party to the record of the cause. 3d. Because he is answerable for costs. 4th. Because he was sworn to the truth of the bill filed in the cause.

Rogers, *Van Dyke* and *Rodney*, for the defendants, in support of the objection.

Denizot is a party to the record and is responsible for costs; therefore, he is interested and is not a competent witness. The rule excluding, as a witness, one bound for costs has been applied in many cases; as to an executor in trust, 3 *P. Wms.* 181. So, to a *prochein amy*. 3 *Atk.* 511: 2 *P. Wms.* 297. In 3 *Atk.* 547, even the wife of a *prochein amy* was held to be incompetent. In all cases a person

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whose name is on the record as a party is liable for costs, 1 *Ves. Jr.* 200; and the rule is general that a liability for costs is an interest in the event and a disqualification to testify. 1 *Phillips' Ev.* 46.

This attorney in fact is not like an agent, who may in some cases be examined *ex necessitate.* He has placed himself on the record, and is a party to the suit, so far as to be bound for costs. He has put himself fully in the place of the complainant, acting for her throughout, swearing to her bill, bringing and conducting the suit, and engaging all his sensibility on her behalf.

McLane, for the complainant, contra.

The attorney in fact is not a party to the cause. By filing the bill he has executed his function. His name stands on the record as agent only. As such he is not affected by the process of the court. An attachment would not lie against him for disobedience to its order. He is not, therefore, liable for costs; but only the party who originates and sanctions the suit, and against whom the decree goes. None but he who can be affected by process is liable for costs. The attorney at law is by statute liable for costs, but not the attorney in fact. Not being a party to the record nor bound for costs, he is not liable upon the ground of his being attorney in fact for the complainant. An agent is upon general principles a competent witness for his principal. A *prochein amy*, or a guardian, is liable for costs, because he is the recognized party. The infant cannot sue, nor execute a power of attorney. He is not liable for costs; and hence, necessarily, the liability of the *prochein amy* and guardian. 1 *Harrison's Ch. Pr.* 461. Executors and administrators are liable because they are principals in the suit, against whom the judgment may go. Yet, in England, it is by express statute that the administrator is made liable for costs. An administrator

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durante minori ætate is held competent after the administration determines, 3 *Atk.* 604. A party to a suit in a corporate capacity is not liable individually for costs and may be a witness. 3 *Phillips' Ev.* 57.

RIDGELY, CHANCELLOR.—I have no doubt that the matter of costs is completely in the discretion of the Court. Even an attorney or solicitor, who is guilty of gross neglect, may be made to pay costs. So may infants. In this case, although Mr. Denizot is not technically a party to the bill, yet he is a party to the proceedings, and may be made to pay costs, and the more strongly because Madame Beaureaux de Pusey is a foreigner, resident abroad.

If the doubt had not been started in this argument, I should never have hesitated in making an infant pay costs, in a proper case. The *prochein amy* pays costs, not because the plaintiff is an infant, but because he, the *prochein amy*, is the actor,—the person who has brought the defendant into court,—the agent on record, by whom the infant sues, and he is in the power of the Court.

Here, Madame Beaureaux de Pusey complains, "by her "attorney in fact, Gabriel Denizot, duly constituted and appointed;" and the bill is sworn to by him in her name. He is liable for the costs and his deposition cannot be read. *Vide Barret vs. Gore & Umfreville*, 3 *Atk.* 401:—a third person liable for costs cannot be a witness.

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MADAME BEAUREAUX DE PUSEY,

vs.

ELEUTHERE IRENEE DU PONT AND JACQUES ANTOINE BIDERMAN.

New Castle, Aug. T. 1819.

A provision for arbitration, in articles of partnership, does not bar a suit in equity as to matters not comprehended within the scope of the arbitration provided for.

Principles upon which a court of equity deals with provisions for arbitration in partnership articles.

BILL FOR DISSOLUTION OF A PARTNERSHIP AND FOR AN ACCOUNT.—The complainant and the defendants had been partners in the business of manufacturing gun powder, under certain articles of association, entered into 21st April, 1801. The partnership was limited by the articles to the 1st January, 1810; but subject to a provision for renewal, and also for a settlement between the partners at the expiration of the term limited in the event of a non-renewal, or for settlement with such as should elect to withdraw. At the expiration of the time limited, the partnership was renewed for nine years, to continue subject to the same articles. Before the expiration of the renewed term this bill was filed, praying for a decree to dissolve the partnership, on the ground that certain of the articles of association had been violated; also praying an account. The points wherein it was alleged by the bill that the articles had been violated respected mainly the outlay of an unnecessary amount of capital in the establishment of the manufactory; that the business had been unduly extended, so as to require the application of profits to the purchase of additional mill seats instead of dividing them; that a large quantity of gun powder had been pur-

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chased of the United States, outside of the course of the company's proper business; that liabilities had been incurred for purposes not connected with the business as it was contemplated by the articles; and that exploded works had been needlessly repaired, especially so, at a period near the close of the concern.

The answer of the defendants, in addition to the defence set up by it on the merits of the case, insisted by way of plea that the complainant was barred from relief in this Court by certain of the articles of association, in which special provision was made for a mode of settlement between the partners, upon the dissolution of the partnership at the expiration of the term limited, or upon the withdrawal of any of the partners. The particular articles relied on to support this defence were as follows, viz:

Article 15. If two-thirds or more of those interested *shall agree to renew the association*, those of a different opinion shall be repaid their proportion of the joint stock of the association, and of the profits that may have accrued, agreeably to the inventory of the 31st December, 1809, in three instalments of 3, 6, and 9 months, with interest at 6 per cent, on each of said payments.

Article 16. If two thirds of those interested in the said association *should not agree to renew it*, the final settlement of accounts shall be made by citizen Irenee Dupont, agreeably to the terms mentioned in the preceding article.

Article 17. In the cases foreseen by articles 15 and 16, the inventory of the establishment on the 31st December, 1809 shall be made by persons named by the two parties; and in case of necessity, the said persons shall choose an umpire.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor, at the August Term, 1819, for hearing on the bill, answer, exhibits and depositions. Various points of controversy

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arose at the hearing, but no questions of law were involved, except as to the effect of the articles above quoted upon the right of the complainant to relief in a court of equity. The arguments of counsel and the opinion of the Chancellor are reported on this point only.

McLane, for the complainant.

A mere agreement to refer does not oust the jurisdiction of the Courts. To have that effect there must have been an actual reference and an award. But at all events, the agreement to refer, if it can operate against relief by suit in any case, must be such as covers the whole matter in dispute, and must enable the arbitrators to give full relief. In *Wellington vs. McIntosh*, 2 *Atk.* 569, there was an agreement to refer *every thing*; yet a plea of such agreement was disallowed by Lord Hardwicke, because the arbitrators had no power to examine parties and witnesses under oath. In *Mitchell vs. Harris*, 2 *Ves. Jr.* 129, upon a bill of discovery in aid of an action of covenant at law, a plea of a clause in the articles that any dispute should be referred was over ruled. *Halfhide vs. Fenning*, 2 *Bro. Ch. R.* 336, in which such a plea was allowed, proceeded upon the additional ground, that there was a special clause against any suit at law or in equity. But the authority of that case is shaken by subsequent decisions. 2 *Ves. Jr.* 129: 6 *Ves. Jr.* 821: 15 *Ves. Jr.* 18. Even in Halfhide vs. Fenning the master of the Rolls states, that "if "the matters in controversy are not within the range of such "a reference, that objection would be fatal." This is sufficient to exclude the present case from the effect of that decision. See *Kyd on Awards*, 12, 16, citing the cases at large; *Watson on Partnership* 17,167,409. In this case, the provision for reference, Article 17, is for a single object, viz: the taking of an inventory; and that only when, at the expiration of the term, some of the partners should withdraw and some continue. But this bill is filed for a dissolution

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before the expiration of the term, by one partner charging a violation of the articles in the conduct of the business, in various particulars, embracing points of dispute which the arbitrators are now empowered to decide. The present controversy is, therefore, not within the range of the reference provided for, and as to it the complainant is not barred of his remedy by suit.

Rogers, for the defendants.

That a provision for reference may be so framed as to bar relief by suit, is admited by Lord Hardwicke in the case in 2 *Atk.* 569, and in *Halfhide vs. Fenning*, 2 *Bro. Ch. R.* 336; 2 *Dickens* 702, a plea of such an agreement was sustained. The latter decisions, while they hold that the jurisdiction of the Court is not ousted, establish, however, this rule, that the parties having agreed upon a mode of settling differences, the Court will require them to try that mode first, and will interfere only upon its proving ineffectual. Lord Eldon in *Waters vs. Taylor*, 15 *Ves. Jr.* 10, lays down that principle. In *Carlen vs. Druny*, *V. & B.* 153, he expressly applies it, refusing to interfere in a case of partnership, by injunction and the appointment of a receiver, until after the parties should have tried a method of redress provided for in the articles. Now, in this case, the articles make full provision for a settlement with a seceding partner; and such is the position in which the complainant puts herself. By the agreement, before she takes any thing, the property is to be valued by persons chosen by the parties, and upon the basis of this valuation a settlement of accounts is to be made by Mr. du Pont, agreeably to the terms of Article 15; and the complainant is to take her money in instalments of 3, 6 and 9 months. This is the mode of settlement, to which she has agreed by becoming a partner under the articles. The Court will not interfere until that mode has been tried and found to be ineffectual.

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RIDGELY, CHANCELLOR.—After stating the 15th, 16th and 17th Articles of Association, and the substance of the bill, and answer, the Chancellor proceeded to say:

It is evident that, in the events provided for, the arbitrators had no authority to do any other act than to make an inventory. Mr. du Pont had the authority to make a final settlement of the accounts on the non-renewal of the articles of association; but on his settlement there is no appeal or reference to arbitrators. The action of the arbitrators was to precede the settlement of the accounts and lay the foundation for it: but they could not inquire into any matter beyond the valuation or estimate of the joint property. None of the matters in controversy under the bill and answer are comprehended within the scope of the reference. They are not provided for, unless it is by the settlement of accounts to be made by Mr. du Pont, himself; and it has not been contended that he has made any settlement to bar an inquiry in this court; nor that the case has happened upon which he was to make a final settlement.

The authorities read by the counsel of both parties do not support the defendant's counsel in the position which he has taken, that the agreement of the parties ousts this court of jurisdiction, and that the case in the first instance must be submitted to arbitrators. In *Wellington vs. McIntosh*, 2 *Atk.* 569, which was a bill brought by one partner against another, to discover and be relieved of fraud, Lord Hardwicke would not allow the plea of an agreement, *that in case any difference should arise it was to be referred*, because there was no clause in the agreement giving the arbitrators power to examine the parties, as well as witnesses, upon oath. But this opinion of Lord Hardwicke is said, in *Halfhide vs. Fenning*, 2 *Brown Ch. R.* 336, to be misreported. In the latter case, Lord Kenyon then Master of the Rolls, allowed a plea to a bill for an account of the partnership, *that all matters in controversy were to be determined by arbitrators, and that there should not be any suit*

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at law or in equity, because the controversy which had arisen between the parties must have been the very matter provided for by the agreement, and more especially because it was agreed that there should not be any suit at law or in equity. *Vide* 2 *Vesey Jr.* 182. But he expressly declared that if the matters in controversy were not within the range of such a reference, the objection would be fatal. 2 *Dickens* 702, *S. C.* In *Mitchell vs. Harris* 2 *Vesey Jr.* 129: 4 *Brown* 312, on a bill of discovery in aid of an action of covenant, a *plea of a clause in the articles that any dispute should be referred*, was overruled. And there, the Lord Chancellor said, that where there was an express agreement *that there should be no suit at law or in equity*, the parties should not proceed contrary to their agreement, but he said that there was no case *in which an agreement to refer* had been set up as a bar to an action; that such an agreement would not stop a court of law; and that there never had been an idea of a bill to enjoin a party from proceeding at law, under a notion of giving specific effect to such a covenant when the parties were proceeding at law. And this opinion of Lord Loughborough certainly conforms to the decision in *Kill vs. Hollister*, 1 *Wilson* 129. It may also be remarked that he observed that *Halfhide vs. Fenning* was a singular case, and stood in opposition to the case in Atkyns, which, he said, was a clear authority, though the reporter had mistaken Lord Hardwicke's reasons; and that such a clause could not by possibility stop the discovery. In 1 *V. & B.* 154, decided in 1812, Lord Eldon refused to interpose, till the parties had tried the redress provided by the articles; but he declared that if the means of redress were not sufficient, the Court might interfere. Now, what are the means of redress provided for here? That on the expiration of the partnership an inventory shall be made by persons named by the parties. That is the whole amount of their duty. There is not a single point in controversy which falls within the range

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Syllabus.

of this reference. Not one of them is provided for. The agreement is totally silent in these particulars; and it would be a strange perversion of the spirit and words of the articles to force the parties to an arbitration of the matters brought into controversy by this bill and answer, because the parties had agreed that in certain events arbitrators should make an inventory. Not one of the cases goes the length to support this objection of the defendants; and it is very clear that the jurisdiction of this Court cannot be ousted, or rather suspended, unless the parties had unequivocally so intended, and had substituted a mode of decision by arbitrators of the several matters in controversy.

The defence set up by way of plea was over-ruled. Upon the merits of the cause the Chancellor decreed with the complainant for an account. The decree was afterwards affirmed by the High Court of Errors and Appeals at the June T. 1820.

JOHN FENNIMORE, adm'r d. b. n. of RICHARD RAHOW, dec'd,

vs.

ABRAHAM RAHOW, ex'r of LEVI STAATS, dec'd.

New Castle, Aug. T. 1819.

A re-hearing after decree made, will not be granted for the purpose of examining witnesses, or of admitting newly discovered evidence, as to matters which were in issue in the cause as originally heard.

Practice stated at large with respect to petitions for re-hearing; also, as to supplemental bills and bills of review.

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Motion to revive—order.

BILL IN EQUITY. MOTION FOR ORDER TO REVIVE FOR WANT OF ANSWER TO BILL OF REVIVOR. PETITION FOR REHEARING.—This was a bill of revivor. The original bill was heard at the August Term, 1817, in the lifetime of Levi Staats, the present defendant's testator, and a decree was then made against Staats for the payment of £92.7.6. Under the bill of revivor, the defendant appeared at the April Term, 1819, by N. Van Dyke, Esq., his solicitor, and was ruled to answer in three months, or attachment. At the expiration of the three months, without an answer being filed, the complainant's solicitor moved for an order to revive. Previous to this motion, at the April Term, 1819, a petition of the defendant for a re-hearing of the original cause had been filed.

Rogers, for the motion to revive.

Upon the rule answer and no answer put in, we are entitled to revive on motion. 1 *Harrison's Ch. Pr.* 130: *Cooper's Eq. Pl.* 72: *Hinds' Chanc. Prac.* 48: 3 *P. Wms.* 348.

RIDGELY, CHANCELLOR.—As default has been made in putting in an answer, and as it is presumed that defendant can show no cause against the revival of this suit, let it be revived, though no answer has been filed. The authorities cited fully justify this course. And this will not preclude a re-hearing, if a re-hearing shall be proper. See 1 *Harrison, Ch. Pr.* 437.

The order of revival was made as follows:

"And now to wit, this 27th day of August, 1819, upon "motion of the solicitor upon the part of the complainants, "and it appearing to the Chancellor that the said defendant "hath not answered the said bill of complaint according to "the rule, nor shown any cause against the prayer of the

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Petition for re-hearing—opinion.

"said bill; It is ordered by the Chancellor, that the said "suit, proceedings and decree, in the said bill of revivor "mentioned and set forth, stand revived."

And it is further ordered, that the said defendant pay the costs of this suit out of the estate of the said Levi Staats, or that attachment issue.

Note. The payment of costs out of the estate of Levi Staats was objected to by Mr. Van Dyke, for that the Executor, Rahow, may not have, and there may not be, any estate of Levi Staats to pay the costs. The Chancellor said that if it should so appear on the party's being brought in on a writ of attachment, that it would be a sufficient reason to discharge him from the attachment.

Afterwards, on another day, the same cause came before the Chancellor, upon the petition of Abraham Rahow, the present defendant, for a re-hearing. The petition set forth that in the original suit no testimony was taken, nor witnesses examined on the part of Levi Staats, the then defendant; that said Levi did not know of any person who could testify to facts material in the cause, &c.; that an appeal had been taken but not prosecuted; that the petitioner, the present defendant, has discovered that there are witnesses who can testify, and he refers specially to Robert White, Abraham Staats, and Gideon Emory, who are competent to prove, &c. Prayer, to open decree and grant a re-hearing.

Van Dyke, for the petitioner, cited 2 *Atk.* 152, 529.

RIDGELY, CHANCELLOR.—This petition for re-hearing, states that no testimony was taken, nor any witnesses examined by Levi Staats, before the hearing of this cause, and that he knew of no person who could testify in support

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of his claim, and the allegations in his answer; and further, that the petitioner, Abraham Rahow, executor of Levi Staats, has since the death of said Levi, discovered that there are witnesses who can testify to facts materially connected with the cause. In this petition there is no allegation of a discovery of *new matter* since the making the decree, which was in being at the time but was not known to the party until afterwards, and therefore, 2 *Atk.* 152, 529, does not apply. The petition goes on the ground, that the party, since the making the decree, has discovered witnesses who can testify to the facts of the cause. The facts were as well known to the party before the decree was made, as they now are to his executor. He, in his life time, *and prior to the decree*, never examined a single witness; and he cannot, consistently with the course of proceedings in chancery, now, after the decree is made, and after publication, and the proof in the cause is known, go into an examination of *other witnesses*, as to the matters then in issue between the parties. A re-hearing saves the necessity of an appeal, (2 *Mad. Ch. Pr.* 483) and is instead of an appeal On an appeal no other testimony can be received than what was read at the hearing; neither can it on a re-hearing. A re-hearing confines the Court to the case and testimony as they existed at the original hearing; otherwise, there would be manifest danger of perjury and subornation of perjury.

If there be *new facts* a supplemental bill should be filed. 2 *Mad. Ch. Pr.* 519. Supplemental Bills are brought upon a discovery of any *new matter*, since the original bill and answer and the proceedings had in the cause, in order to supply the defect in some former proceedings, where it is too late to amend the same. 1 *Harrison's, Ch. Pr.* 123.

And when a supplemental bill is brought *after publication*, the Court never gives the party leave to examine witnesses to any thing that was in issue in the former cause, by reason of the manifest danger of subornation of perjury

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and it is irregular to examine witnesses to *a matter that was in issue and not proved in the original cause ;* and such proof is not to be read. 1 *Harrison's Ch. Pr.* 123. On a supplemental bill an addition may be made to the first interrogatory, so as the new interrogatory contain nothing but what relates to the supplemental matter. 1 *Harrison's, Ch. Pr.* 124.

And if the Chancellor errs in his decree upon a matter of fact, this decree is final, and cannot be reviewed; because the parties cannot go into a new examination of witnesses *now ; for after publication this may not be done.* 1 *Harrison's Ch. Pr.* 452. But if the Chancellor errs in his conscience upon a matter of fact proved before him, there may be review of this matter, because there needs no new examination; but this may be reviewed upon the old depositions, which is usual. *Harrison's Ch. Pr.* 452; *vide* 137.

Now, if neither supplemental bills nor bills of review can be supported without the discovery of some new fact; and if, on such bills, no new examination can be made in the matter that was in issue in the original cause, it cannot be done on a re-hearing.

A re-hearing does not throw a cause open to a new inquiry and a new examination of witnesses; but it is a reconsideration of all the matters and testimony as they stood at the original hearing.

I should be perfectly willing to re-hear this case, and to correct any mistake in the original decree, if there is any mistake; but the party never can have leave to examine new witnesses to the matters that were then in issue, and then tried. This is a most dangerous doctrine. The precedent would lead to the greatest injustice. In such case, a party would have only to lie by, until he knew the proofs of his opponent and the decision of the Chancellor, and then come forward with a flood of contradictory testimony, calculated rather to meet the testimony originally given, and not to elucidate the truth. This would be subversive

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of all justice, and would finally destroy the whole system of equity.

A new examination of witnesses cannot be allowed, and therefore the petition is dismissed.

Note. As this case now stands *on the face of the record*, the decree in the original cause would seem to have been enrolled and signed before the petition for a re-hearing was presented. But the objection which this fact would have afforded against entertaining the petition for a re-hearing was not taken. It is to be inferred that the decree in the cause remained still in paper, and so was open to a petition for re-hearing.

JOHN VAN DYKE, ABRAHAM VAN DYKE, THOMAS ROBINSON AND SUSAN his wife, late SUSAN VAN DYKE AND ELIZA VAN DYKE.

vs.

KENSEY JOHNS.

New Castle, Aug. T. 1819.

The defendant, as adm'r of N. V. D., dec'd, sold, pursuant to an order of the Orphans' Court, certain lands of his intestate, for the payment of debts. At the sale the lands were bid off by G. M., for the defendant and at his request. The sale being returned to the Orphans' Court and confirmed by it, the lands were conveyed by the defendant, as adm'r of the intestate, to G. M. the bidder, and were subsequently re-conveyed by G. M. to the defendant, in fee simple. Upon a bill filed by the heirs at law of N. V D., dec'd, the intestate, to charge the lands with a trust for their benefit: *Held*,

1. That, upon the evidence, there was no *express* trust of the lands for the heirs at law—there being no proof of any declaration of trust between the parties; neither of any declaration in writing, under the Statute of 29, *Car. II. Ch.* 8; nor of any declaration by parol, supposing that Statute not to be in force in this State.

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2. That there was no trust *by legal implication*—there being no consideration between the parties which is necessary in order to raise a use upon a legal estate created by deed of bargain and sale—by which mode of conveyance the present title was made.

3. That the rule of equity that a trustee cannot purchase the trust estate is subject to some limitations. The English decisions seem to hold that such purchase, made through a third person, where creditors are the *cestuis que trust*, may afterwards be sanctioned by the Court, with the assent of a majority of the creditors. In the present case, the estate of the decedent being insolvent, his creditors, supposing there to be a trust, are *cestuis que trust*, prior in right to his heirs at law. The creditors have never objected to the sale and are not parties to this suit. The interest of the creditors and their non joinder, are alone a fatal objection to the bill.

4. That any equity of the complainants would have been lost by long delay and acquiescence in the defendant's title—the bill having been filed nearly thirty years after the lands were conveyed to the defendant, and twelve years after the youngest of the heirs at law had attained twenty-one years of age.

5. That the confirmation of the sale by the Orphans' Court, on the return thereof, was conclusive of title under the same, except upon appeal. The Orphans' Court is a court of public and general jurisdiction, and its proceedings cannot be impeached collaterally.

BILL IN EQUITY, TO ENFORCE A TRUST OF REAL ESTATE.—The defendant, Kensey Johns, as the administrator of Nicholas Van Dyke, deceased, sold, in execution of an order of the Orphans' Court of New Castle County, certain real estate of the decedent, for the payment of his debts. The order for the sale was granted by the Orphans' Court on the 21st July, 1789, upon the petition of the defendant as administrator, in the usual form, setting forth the insufficiency of the personal estate of the decedent to discharge his debts and praying an order for the sale of his real estate pursuant to the statute in that behalf. The premises were exposed to sale, in several parcels, on the 3rd October next following, and the whole were struck off to George Monro, he being the highest and best bidder therefor, at the gross sum of £1,617. There were written conditions of sale in the usual form, specifying the terms

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and mode of payment of the purchase money and the time for the delivery of possession of the premises. The right to purchase at the sale, either directly or by a third person, was not granted to the administrator by the Court, nor reserved in the conditions of sale, nor was any such purpose publicly announced at the sale. The administrator made due return of the sale to the Orphans' Court on the 6th October, 1789; and, no one appearing to object, the same was confirmed by the Court. On the 12th October, 1789, the defendant, as administrator of Nicholas Van Dyke, dec'd, executed and delivered to George Monro, as the purchaser, a deed conveying to him the interest and estate of the decedent in the premises sold, and on the next day, the 13th October, George Monro re-conveyed the same premises to the defendant, his heirs and assigns. The administrator, in an administration account passed the 6th April, 1790, duly charged himself with the amount of the purchase money, to wit, the sum of £1,617.

The present bill was filed on the 29th August, 1817, by the complainants, as children and heirs at law of the decedent, Nicholas Van Dyke. All the surviving children joined in the bill except Nicholas Van Dyke, the oldest son, and Ann, the wife of the defendant, who was a daughter of the decedent. It set forth the facts already stated, touching the decease of Nicholas Van Dyke, the grant of administration of his estate to the defendant, the application by him for an order of the Orphans' Court to sell the decedent's real estate, the granting of the said order, the sale of the premises, the return and confirmation of said sale, the conveyance of the premises to George Monro as the purchaser, and the re-conveyance of the same to the defendant. The bill then charged, that George Monro bid at said sale on behalf of the administrator and at his request; that Monro was only a nominal purchaser, whose name was used as the mere medium for conveying title to the administrator; and that the defendant represented to Monro,

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as well as to other persons present at the sale, that his object in seeking to buy in the real estate was to benefit the heirs of the decedent and not for his own advantage. The bill insisted that "the administrator acting as a trustee in rela- "tion to said real estate and the sale thereof, no purchase "made by said administrator to enure to his own benefit "could be valid, or could be supported on any principle of "equity; it being an equitable rule that he who undertakes "to act for another in any matter, shall not, in the same "matter, act for himself; from which is evidently deduci- "ble the natural inference that a trustee to sell shall not "gain any advantage by becoming himself the purchaser." The complainants, therefore, claimed that in equity a trust of the lands purchased was, by the very nature of the transaction, implied for the benefit of those whose interests were entrusted to the defendant. The prayer of the bill was, that the defendant might be decreed to be a trustee of the lands and premises purchased by him; that he should hold the same in trust for the benefit of the complainants; and that he should account to them for the rents, issues and profits thereof; and for general relief.*

The answer of the defendant admitted the general facts set forth in the statement of the case above given, as they occurred from the decease of Nicholas Van Dyke, until the sale of his real estate by the defendant as his administrator. The answer was very voluminous in its statements, many of which did not prove to be material to the questions decided by the Chancellor. The main issue of fact, upon which the controversy ultimately turned, was upon the defendant's denial of the allegation made in the bill, touching the object

* In addition to the case made by the bill respecting the real estate, there were allegations of errors in the accounts of the administrator touching the personal estate, and a prayer for a further account of the personal estate. But this branch of the case was not urged in the argument, and passed without notice by the Court. It is, therefore, omitted from this report it being wholly distinct from the main subject at issue, viz: the alleged trust of the real estate.

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for which he had purchased the premises in dispute. The defendant positively denied that he made said purchase for the benefit of the heirs at law of the decedent, Nicholas Van Dyke, or that at the sale of the premises he represented to George Monro, or to any other person or persons, that he was seeking to buy in the premises for the decedent's heirs at law. And the defendant alleged that he bought the premises in good faith on his own account, and had raised the means of paying the purchase money by the sale of his own real estate previously held. The answer further alleged that the sale of the premises in controversy was conducted fairly; that many persons attended; that there was a competition in bidding, chiefly among creditors; that an agent attended for the purpose of securing some particular debt; that a certain Mary Laroux, a wealthy creditor, was present and active in bidding; and that the premises sold for as much as could prudently have been given for them, under the circumstances, one farm being encumbered with a dower, and the whole being in bad repair without means to improve them; that it was certain the amount of sales was at least one half more than it would have been if the defendant had not interfered, but had left the estate to be sold by the sheriff; that no objection had been made, on the return of the sale, by any creditor or other person; that the value of the lands was better known then than it is now.

The answer further set forth, at great length, a history of the Van Dyke family, of the decedent's insolvency, of the defendant's transactions with the family and his efforts to aid them, of his negotiations with the creditors to save the estate from sacrifice, of the circumstances under which he consented to become the administrator, the mode in which he raised the purchase money of the real estate in controversy, and other matters which, as they do not bear upon the questions treated in the opinion of the Chancellor, are not here set forth.

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Besides the defence upon the merits before stated, the answer insisted upon several other grounds of defence, as follows: 1. That the widow and all the heirs of the decedent had always recognized his title to the real estate, and had ratified and confirmed the same by sundry acts, which were in the answer particularly set forth. 2. That the heirs had, for a long series of years, silently and without any notice of their pretended claim, permitted the defendant to expend large sums of money continuously in the repair and improvement of the real estate. 3. That the complainant had a remedy at law. 4. That the remedy of the complainants (if any) was extinguished by lapse of time; and the defendant claimed the benefit of the several acts of limitation of the State of Delaware.

Issues were joined and depositions taken by both parties. The only evidence material to the issues of fact raised and considered by the Chancellor, was that of George Monro, the bidder at the sale. His testimony is fully set forth in the opinion of the Chancellor.

The cause came before the Chancellor, at the April Term, 1819, for a hearing upon the bill, answer, exhibits and depositions. After the reading of the record the case was submitted to the Chancellor upon written arguments by counsel.*

Read, Sr., *McLane* and *Read, Jr.*, for the complainants.

The defendant is chargeable with a trust of these lands on two grounds;

1. The trust is *express*. George Monro purchased the property expressly for the widow and children. He conveyed it without consideration to the defendant, who

*The arguments of counsel in this case are drawn out at considerable length, and embrace many points which were not considered in the opinion of the Chancellor. The present report is an abstract only of the arguments upon questions ultimately decided.

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thereby took it subject to the trust with which Monro's purchase clothed it. The defendant is affected by the acts and understanding of George Monro, because it was at his instance and request that Monro made the purchase. The proof of what is here stated is found in the positive testimony of George Monro, corroborated by the general circumstances of the case. But,

2. The trust is conclusively established *by legal implication.* The rule of equity is, that a trustee cannot be a purchaser of the estate which he holds in trust. 2 *Powell on Cont.* 195 : 2 *Fonb. Eq.* 187 : 7 *Bac. Abr.* (*Wilson's Ed'n*), *Uses and Trusts*, 181–2 : *Newland on Cont.* 459 : 1 *Mad. Ch. Pr.* 91 : *Sugd. on Vend.* 391. This is a rule of public policy, depending, not upon the circumstances of the case, but upon general principles. However honest the circumstances of any individual case, the general interests of justice require the purchase to be avoided; Lord Eldon, in 8 *Ves. Jr.* 345. The reason is, "*emptor emit quam minimo potest ; vendor vendit quam maximo potest.*" There need be no proof of fraud or circumvention. It is the character sustained by the purchaser which is the foundation of the rule. *Ex parte Bennet*, 10 *Ves. Jr.* 385 : *Sanderson vs. Walker*, 13 *Ves. Jr.* 603 : 1 *Sch. & Lef.* 127 : 2 *Binn. Rep.* 296 : 3 *ib.* 54. In *Cookson vs. Whelpdale*, 1 *Ves. Sr.* 9, the validity of a purchase by a trustee was made to depend upon the assent of a majority of the creditors. But that limitation upon the rule has since been strongly disapproved of by Lord Eldon, in *Ex parte Lacey*, 6 *Ves. Jr.* 628. With respect to persons not *sui juris* the rule is, if possible, the more stringent. In such cases, the trustee can make himself a purchaser only by filing a bill in equity and obtaining the sanction of the Court. *Campbell vs. Walker*, 5 *Ves. Jr.* 678 : *Sugd. on Vendors* 401.

But it is objected that the proceedings in the Orphans' Court preclude inquiry into the sale. To this we answer that the Orphans' Court has no jurisdiction of frauds and

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trusts. The claim of the complainants is not inconsistent with the proceedings in the Orphans' Court. It only seeks to set up a trust founded on those proceedings. The deed to the defendant conveying the estate to which the trust attaches, was executed subsequently to the proceedings referred to. It may, however, be well argued that proceedings of the Orphans' Court can be examined in a collateral suit. It is a court of limited and special jurisdiction, created by statute. *Messenger vs. Kentner*, 4 *Binn. Rep.* 104 : *Snyder vs. Snyder*, 6 *ib.* 490.

Another defence rests on the Acts of Limitation, or the equitable bar by analogy to them. But equity does not apply these acts to trusts, and no length of time will bar a fraud. 1 *Fonb. Eq.* 328–9 : 1 *Mad. Ch. Pr.* 63, 75 : *Viner's Abr. Title Account, D. A. pl.* 7 : 3 *Atk.* 130 : 2 *Ves. Jr.* 581 : 2 *Freem. Ch.* 55 : 1 *P. Wms.* 354. The various acts of the complainant relied on to show an acquiescence in the defendant's title are at most equivocal, and are accounted for by ignorance of their rights and confidence in the defendant, who was their brother-in-law. *He* understood from the beginning the legal bearing and effect of all that was done, and it was his duty to put them in the way of ascertaining and asserting their rights. He cannot, under such circumstances, take advantage of their acts of ignorance.

Black, *Rodney*, *H. M. Ridgely* and *T. Clayton*, for the defendant.

There is no testimony to warrant the allegation of an *express* trust. The only evidence on this subject is that of George Monro, who does not pretend to state that he ever heard the defendant say, or insinuate, or give out, that he purchased for the widow and children. What they may have imagined or conjectured, or what may have been rumored, is not evidence. The trust must be established

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by positive and legal proof. All the circumstances of the parties, render such a trust improbable, if not absurd. The estate of Nicholas Van Dyke was insolvent; the widow left with a family of small children and utterly without means to purchase the property. The defendant was at that time a young man, himself without fortune, and he sacrificed his own property and embarrassed himself to make the purchase. It cannot be imagined that he intended the lands as a gratuity to the family, and as little can it be supposed that they were expected to pay for them.

With respect to the alleged *implied* trust, there is no rule in England that a purchase by a trustee shall, under no circumstances, be valid. 1 *Ves. Jr.* 678. The extent of the rule is that the *cestui que trust* may come in, within a reasonable time, and have a re-sale. After a great length of time,—the party lying by—the court will not suffer the *cestui que trust* to come in and speculate, *Ibid* 682; or, if acts be done confirming the title, the Court will not interfere. *Ibid*, 680. In this case, the complainants have lain by. The defendant has been suffered to improve the estate, and lay out large sums of money upon it. By numerous acts they have recognized the defendant's title. To allow them now, after the lapse of nearly thirty years, to come forward and assert a title, would be a fraud on the defendant. 1 *Fonb, Eq.* 330–31: 4 *Bro. Ch. Rep.* 258; *Newland on Cont.* 467.

Besides our denial of any trust, express or implied, there are several distinct defences to the whole case. One of these arises out of the fact that the lands in question were sold for the payment of Nicholas Van Dyke's debts, which still remain, to a large amount, unpaid; and that his creditors would be the only persons interested, and the real *cestuis que trust*, were there any trust. But the creditors have from the beginning acquiesced in the sale, and are not parties to this suit. This alone is a fatal objection.

We further claim that the title of the defendant is con-

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cluded by the action of the Orphans' Court. Although, in England, it is true, as a general rule, that he who undertakes to act for another in any matter, shall not in the same matter act for himself, the present case does not fall within the rule. In this State, lands are assets in the hands of the administrator for the payment of debts and may be sold by order of the Orphans' Court. If the administrator purchases at such sale it may perhaps be a good ground to set aside the sale; but if, upon the return of the sale, it is suffered to be confirmed without objection and without appeal, the confirmation is conclusive. The sale by an administrator may be likened to a sale by a Master in Chancery. Such a sale being at open auction, the master has been allowed to purchase. 1 *Cruise's Dig.* 551, *sec.* 36. An administrator or a master is not in the proper sense a trustee. The same *confidence* is as essential in trusts now as it was in uses at common law. 1 *Cruise's Dig.* 492, *sec.* 2. Trustees are chosen by the party, and have the estate from confidence; but an administrator is a mere officer of the law. A sale by the one is absolute, and no court has to pass upon it; in the other case, the Court has a controlling power and may confirm or reject it; and the action of the Court is conclusive.

Lastly, we insist upon the Act of Limitations. We do not set up the act as a positive bar, but claim that courts of equity will, by way of analogy, hold time to be a bar—that equitable rights will generally, by analogy, be affected by lapse of time in like manner as legal rights. 2 *Cruise's Dig.* 564, *secs.* 53, 54: 1 *Ves. Jr.* 678; *Sugd. on Vend.* 242, 572: 1 *Cox's Rep.* 149. The proposition that a trust is not within the Act of Limitations, applies only to cases between the *cestui que trust* and his trustee, *where there has been no adverse possession.* 2 *Cruise's Dig.* 565, *sec.* 55. In the present case there has been an adverse possession for nearly thirty years.

In the case of *Davy and wife vs. Patton's administrator*,

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in Kent, the Chancellor refused to investigate an old account because it had been settled according to the prevailing notions of the times, although not according to the present acknowledged principles of law. Thirty years ago, it was believed that an administrator might purchase the real estate of his intestate by the intervention of a third person, and that in such case no trust resulted, either to the creditors or to the heirs at law. Many estates are now held under such purchases; and if, after this lapse of time, such titles are to be unsettled, and the holders decreed trustees, it will open a wide and fruitful field of litigation.

RIDGELY, CHANCELLOR.—Upon two grounds it is insisted that the defendant is a trustee for the complainants of the real estate held by him under the deed from George Monro, who was the purchaser at the sale made by the defendant as administrator of Nicholas Van Dyke, dec'd, viz: *first*, that there is an express trust; and, *second*, that a trust arises by implication of law.

First. As to the *express* trust. That, it is supposed, is made out by the testimony of George Monro. This witness, after describing the lands and stating the time and place of the sale and the attendance of other persons, says that he does not know whether those who attended the sale thought that the real estate was to be bought in for the widow and children, for that he mixed very little with the people; that he knew his own object in attending the sale and had little or no communication with others. He went there at the request of the defendant and with the impression that he was to buy the real estate for the widow and children of Nicholas Van Dyke, and if he had not had such an impression he never would have attended the sale. He had a great regard for all the family and for the said Nicholas Van Dyke, and highly respected his memory. It was for this cause that he attended the sale and wished to

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buy in the real estate, for the benefit of said Nicholas Van Dyke's widow and orphan children.

He further says, that he does not know whether the defendant represented that it was either his object, or wish, or intention, to secure the said real estate for the widow and children, nor does this witness know whether the said defendant made *any* representation or explanation. All that he (the witness) knows in this respect is, that he had an impression on his own mind that he was to buy in the real estate for the widow and children, so that the property might not be sacrificed, but be used to the best advantage for the benefit of the widow and children. The witness does not recollect the sum he bid for the said land, but states that he did not purchase for himself; that he purchased for the defendant, for the use and benefit of the widow and children, and that the defendant did request the witness to bid for him. The witness cannot remember the reasons which the defendant assigned for this request, nor whether he assigned any, but he considered, from the connection of the defendant with the family of Nicholas Van Dyke, and also from the confidence which the witness placed in his intentions, that the defendant wished him (the witness) to attend the sale for the purpose of buying in the property for the widow and children. From the assurances which the defendant gave the witness that he should incur no risk or difficulty, and that the said real estate should not remain on his hands, but that the defendant would take it off of his hands and secure him, the witness bid off the land, as he then thought, for the widow and children. He further says, that he never paid any consideration for the said real estate.

The sale of this real estate to George Monro was made on the 3rd October, 1789. The return was made the 6th October, 1789. Kensey Johns' deed to George Monro, is dated the 12th October, 1789, and George Monro's deed to Mr. Johns, the 13th October, the next day.

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Opinion :—express trust.

In an administration account passed by Kensey Johns on the 6th April, 1790, he accounted for £1617, the amount of the sums bid by George Monro. It appears that the proceeds of the real estate fell far short of paying the debt of the decedent.

None of the other witnesses have any knowledge that the purchase was made for the benefit of the widow and children of Nicholas Van Dyke. Mr. Stockton rather contradicts that idea. Mr. Pearce had no communication with the defendant on the subject, but he understood among the people collected at the sale, that the property was purchased for the family and that on that account no person would bid.

This is the evidence upon which the express trust is supported. If this evidence is sufficient it will be manifest that this trust will grow out of the impressions of the witness and not from any express declarations of the defendant. George Monro attended the sale with the impression that he was to purchase for the benefit of the widow and children, and he repeats the convictions of his own mind more than once in the course of his testimony, but he declares that he does not know whether the defendant represented that it was his object, or wish, or intention to secure the land for the widow and children, nor does he know whether he, the defendant, made *any* representation or explanation. He does not remember whether Mr. Johns assigned any reasons for desiring him to attend the sale and purchase the land, but he considered from the connection of the defendant with the family of Nicholas Van Dyke and also from the confidence which the witness placed in his intentions, that Mr. Johns wished him to attend the sale for the purpose of buying in the property for the widow and children. In the whole of this transaction there is no evidence of any declaration of Mr. Johns. No terms, no conditions, no consideration, no limitation nor use of the land is talked of or agreed upon, by either Mr. Johns

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or George Monro; and yet it is expected that the impressions of the witness should be sufficient to amount to a declaration of trust. George Monro explains how it happened that these impressions were made on his mind. He considered, from the connection of Mr. Johns with the Van Dyke family and from the confidence which he placed in the intentions of Mr. Johns, that he was to purchase in the land for the widow and children.

Neither George Monro, nor the complainants, nor any one of Nicholas Van Dyke's family, ever paid any consideration for this land. The consideration or purchase money was accounted for by Mr. Johns in his administration account passed the 6th of April, 1790. Then, no valuable or meritorious consideration ever passed from George Monro or from any of the complainants: neither was any declaration made by parol or in writing at the time of the sale, nor when the deeds of conveyance were executed, nor at any other time, of any use of this land for the complainants.

An express use is where the use or interest is openly declared and expressed between the parties, upon the creation of the estate whereunto the use is annexed. *Sheppard's Touchstone*, 501. But, instead of any declaration or expression made between the parties of the use here claimed, we have merely the impressions of George Monro, without his knowing that Mr. Johns had any object, or wish, or intention to secure the land for the complainants, or even whether he made *any* representation or explanation in relation to this matter. To declare this to be an express trust for the complainants would be making the defendant a trustee upon the mere opinion or impression of George Monro, without any proof in relation to the defendant. The whole contract would be on one side, and the defendant's mind or intention would not be known.

Uses, it is said, may be created by word or parol agree-

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ment, as well as by deed or writing; as if a man, by verbal agreement, in consideration of money or the like, sell his land to another, or agree and promise that the bargainee shall have it for any time, although no use or estate will thereby arise (if it be a freehold that is sold) within the statute, (27 *H.* 8 c. 16,) because it is not by deed indented; yet a good use will arise at common law, and the bargainee shall have relief in equity for his purchase. *Shep. Touch.* 508. But it is because the consideration, in equity, raises the use. 1 *Bac. Abr. Bargain and Sale*, C. 468.

Since the statute of 29 *Car.* 2 c. 3, all declarations of trust, except such as arise by implication of law, must be in writing, and signed by the party who is in law enabled to declare such trust, or else it must be by his last will in writing. If the English statute extends to this State, then there could be no express trust, because there is no such declaration in writing.

However, without determining that matter, I think that the complainants have failed in establishing any express trust, even by parol; for, whatever George Monro's intentions were, it was evident that he considered himself altogether as the agent of Mr. Johns in purchasing in or bidding off the land, and that he was to give no direction to the limitation or disposition of the land. He paid no consideration; he incurred no risk or difficulty; he was a mere instrument in passing the estate and conveying the legal title in the land. He made no terms; and, in short, it is evident from his testimony that no contract was ever made, or trust declared by, or between him and Mr. Johns for the use or benefit of the complainants.

Second. As to a trust *by legal implication.* In all cases of uses and trusts which are not within the statute of uses, (27 *H.* 8, *c.* 10,) the law is now as it was before the statute was made, and all those matters are determinable in chancery. 7 *Bac. Abr. Uses and Trusts*, 135; *Shep. Touch.*

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506. In cases where uses pass by transmutation of possession, as by fine, feoffment, or common recovery, then the consideration is not material, for he who makes the estate may appoint the use without any consideration. But, in bargains and sales, and covenants to stand seized to uses, it is otherwise; for there the consideration is so necessary that nothing will pass, neither will any use arise, without a consideration, that is, some matter that may be cause or occasion meritorious, amounting to mutual recompense, in deed or in law—which must be expressed or implied in the deed whereby the use is created, or else supplied by averment and proof. 7 *Bac. Abr. Uses and Trusts*, 96, 97: 1 *Bac. Abr. Bargain and Sale, D.* 469: *Shep. Touch.* 570: *Mildmay's case*, 1 *Rep.* 175, *b.* 176. *a*: 3 *Bro. Ch. Rep.* 12, 13. And no court of conscience will enforce *donum gratuitum.* In this respect then, there can be no implied trust; for the complainants never paid any consideration.

But there is another rule in equity relied on by the complainants; that is, that a trustee cannot be a purchaser of the estate of which he is a trustee, and that this is a general rule of public policy depending, not upon the circumstances of the case, but upon general principles; that however honest the circumstances of any individual case may be, the general interests of justice require the purchase to be avoided in every case. But, notwithstanding the extent which is given to this rule in English decisions, it is not there without some limitation. In 1 *Ves. Sr.* 9, *Whelpdale vs. Cookson*, Lord Hardwicke said that if a majority of the creditors agreed to allow it (that is, a purchase by a trustee made for him by another person,) he should not be afraid to make the precedent; and in *Campbell vs. Walker*, 5 *Vesey Jr.* 678, the Master of the Rolls, afterwards Lord Alvanley, said that any trustee purchasing trust property is liable to have the purchase set aside, if, in any reasonable time, the *cestui que trust* chooses to say

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he is not satisfied with it. In that case it was referred to the Master to inquire, whether it was for the benefit of the plaintiffs that the premises should be re-sold. Also, in *Morse vs. Royal*, 12 *Ves. Jr.* 355, a purchase made by a trustee was established under circumstances. So that the proposition is not universally true, that, at all times and under all circumstances, a sale made by a trustee to himself is void; and the broad rule, which now seems to prevail in England, required years to bring it to its present maturity. See *Sugden on Vendors* 391, 394, 399. It is not even here desired that this sale should be declared void, but that the defendant should be decreed to be a trustee for the complainants of the land sold by order of the Orphans' Court, and that an account should be taken of the rents and profits. According to the general course of the cases in England, where the trustee remains in possession of the land which he has purchased of the *cestui que trust*, and the sale is questioned and disapproved of by the Court, the sale is declared void; but where the trustee has parted with the land at an advanced price, he is made to account for the difference in value. And when the sale is declared void or the difference in price accounted for, all who are interested in the estate, the *cestui que trust*, heirs, creditors, those entitled to the surplus, if any—all come in according to their respective interests. Nothing can be more equitable; for if the act of the trustee is annulled, all those in interest—no matter in what character or relation they stand to or are connected with the estate—all should and ought to come in and be restored to their original condition and relation to the estate, as near as time and circumstances will allow.

The prayer of this bill could never be allowed in its fullest extent, under the most favorable circumstances, to the complainants, because, if this sale should be declared void, then the creditors of Nicholas Van Dyke must in the first place be let in, for they have a superior equity to the complainants

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and a better title in law to have that estate applied to their use, and the complainants could be entitled only to the surplus after the payment of the debts. Upon no principle whatever can the heirs claim any advantage from this transaction in exclusion of the creditors. If the sale was void, then the creditors present themselves as having in law a superior right, and if the sale has been so managed as to make the defendant a trustee, he is a trustee for the creditors as well as for the heirs, so that there can be no implied trust exclusively for these complainants.

But there are other reasons that should have weight in the consideration of this case.

First, is the long delay of the complainants. The sale was made in the year 1789, now nearly thirty years ago. Abraham Van Dyke, the youngest child, was more than twelve years above the age of twenty-one when the bill was filed. Sugden in his treatise *on Vendors*, 404, remarks, that if a *cestui que trust* acquiesce for a long time in an improper purchase by a trustee, equity will not assist him to set aside the sale. He cites *Price vs. Byrn*, 5 *Ves. Jr.* 681, where Lord Alvanley refused the aid of the Court, because the bill had been delayed twenty-one years. There was no period of time from the first purchase of this land to the present moment that it was not known that the defendant was the purchaser. His deed to George Monro and George Monro's deed to him were quickly recorded. The defendant held the land. The widow during her life, and several of the complainants on their arriving at age, knew perfectly well the manner in which the title to this land was acquired, and there can be no pretence to say that this material fact was not as well known within one twelve month after the transaction as at any subsequent period.

Second. Another objection to the relief sought by this bill arises from the fact, that the sale was returned to and confirmed by the Orphans' Court. But it is said the

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Orphans' Court, is a court of limited jurisdiction, proceeding under the Act of Assembly, and 4 *Binney's Rep.* 404; 6 *Binney's Rep.* 490, are cited to show that a decree of the Orphans' Court may be examined in a collateral suit. It has been so decided in Pennsylvania, but I think not correctly, nor according to the general rules of law. Chief Justice Tilghman in 4 *Binney*, says, if the question were open (that is, whether a decree of the Orphans' Court, should stand until it were reversed,) I should think it well worthy of consideration; but it has been otherwise settled in Pennsylvania, and in 6 *Binney*, he says, it might be more convenient and render the law more uniform, if those proceedings (in the Orphans' Court) were reversible only on an appeal; but after the long practice, which has prevailed, of inquiring into these proceedings, in actions of ejectment, it is too late to attempt an alteration. It is evident that Chief Justice Tilghman is not altogether satisfied with the practice in Pennsylvania, and a slight consideration will show the inconvenience and frequent injustice of suffering those proceedings to be inquired into and reversed in every collateral suit.

The Orphans' Court does not exist by the Act of Assembly. A portion of the judicial power of the State is vested in the Orphans' Court, and with respect to the matters over which it has jurisdiction it is a court of as public and general jurisdiction as the Court of Chancery, the Supreme Court, or the Court of Common Pleas. It would be extraordinary that the judgment of a Justice of the Peace should be unimpeachable until reversed on a writ of *certiorari*, and that the decree of the Orphans' Court should stand for nothing or rather be liable to be impeached, reversed and annulled, before all and every tribunal in the State.

The Prerogative Court in England, is established for the trial of testamentary causes, where the deceased left *bona notabilia*, within two different dioceses. All causes relat-

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ing to wills, administrations, &c., are originally cognizable before the judge of that court. An appeal lies to the King in chancery, by statute 25 *H.* 8 *c.* 19; 3 *Bl. Com.* 65. It is a court of public and general jurisdiction. 3 *Bl. Com.* 61, 71. Private or special courts are Forest Courts, commissioners of sewers, and others mentioned. 3 *Bl. Com.* 71, 72.

In all matters which fall within the jurisdiction of the Orphans' Court, it is a court of equity, and proceeds on the same principles as the Court of Chancery; and so it is in Pennsylvania, 2 *Binney's Rep.* 299: *Cowper* 322, *Rex. vs. Grundon.* The temporal courts must consider the sentence of the ecclesiastical courts as final and conclusive, till reversed. In *Ambler*, 761, this doctrine was reviewed and confirmed.

Now, I can perceive no principle upon which proceedings of the Orphans' Court can be distinguished from those of the ecclesiastical courts in England, nor why its decrees should be examinable before every other tribunal in the State. If they may be examined here, or in the courts of law, so they may by any Justice of the Peace. In the case of *Robinson vs. Perkins*, in the High Court of Errors and Appeals, I understood that that court held itself bound by the decree made in the Orphans' Court, and made it the foundation of the account which was then taken between the parties. If the proceeding of the Orphans' Court may be examined in every collateral suit, the establishing of an appellate jurisdiction in the Supreme Court was worse than useless; for it tends to mislead and deceive.

As the Orphans' Court had complete power to inquire into all the matters touching the administration of Nicholas Van Dyke's estate and the sale of the land, I am of opinion that the proceedings of that court should be conclusive on this, until they are reversed.

Bill dismissed.

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THOMAS CANDY,

vs.

DAVID STRADLEY, ROBINSON WALKER, JOHN BROWN AND THOMAS COLLINS.

Kent, Feb. T. 1820.

A decree for partition will not be made unless either all the parties entitled shall have joined in it, or a summons shall have been issued for those not joining. It is not sufficient that an appearance gratis, and consent to a partition for the parties not joining, is indorsed on the petition.

PETITION FOR PARTITION.—This was a petition for the partition of certain real estate held by the petitioner and other persons as tenants in common. The prayer of the petition was that a decree for partition be entered, and that a commission be issued, pursuant to the Statute in that behalf. No summons in partition had been issued; but on the back of the petition was the following indorsement, made by the Register in Chancery, viz.: "1820, "February 25, David Stradley, Robinson Walker and "John Brown appear *gratis*, and Thomas Collins also "appears *gratis*, and they agree that partition be made."

THE CHANCELLOR.—The Act of Assembly requires that all the parties should join in the petition or that a summons should be issued, directed to the persons who may not have joined. I consider that one or the other of the courses directed by the act must be followed; and the more strongly in this case, as one of the parties is an infant.

The decree was refused.

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ANN CLARK AND ELIZABETH CLARK, admr's d. b. n. of RICHARD CLARK, dec'd.

vs.

MARY KEAN, MATTHEW KEAN AND JOHN STOCKTON, admr's of THOMAS KEAN AND GEORGE READ.

New Castle, April T. 1820.

The affirmance of a decree of the Chancellor by the High Court of Errors and Appeals, upon an equal division of that court, is of the same effect as a judgment of affirmance under ordinary circumstances.

BILL FOR AN ACCOUNT.—In this case there had been a decree for an account, with an interlocutory order for the filing of an account by the defendants, on or before a certain day. An appeal was taken, in which the High Court of Errors and Appeals, being equally divided upon the question of affirming the decree of the Chancellor, entered the following judgment, viz:

"June 19, 1819. This cause was argued by the counsel "on both sides and held under *curia advisare vult.* And "now, to wit, this first day of December in the year of "our Lord one thousand eight hundred and nineteen, this "court being equally divided,—It is ordered and decreed "by the Court, that the decree of the Chancellor in the "Court below be in all things affirmed, and that the appeal "be dismissed; and that the record be remanded to the "Court below."

The judgment of the High Court of Errors and Appeals was brought into and recorded in this court. Thereupon, *Mr. Rogers*, for the complainant, moved for another order for taking an account, in accordance with the decree heretofore made, the time limited in the original interlocutory order for the account having expired pending the appeal.

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Rodney, for the defendants, objected.—He insisted that the Court, on the appeal, being equally divided, the whole matter of the interlocutory order was left open for investigation in this court; and he proceeded to argue that the order was erroneous, it having been made upon the overruling of the defendants' plea of the Act of Limitations, whereas the order upon the overruling of such plea, ought to have been that the defendants answer, or that the plea stand for an answer with leave to except; and he cited to this point, *Barton's Bill in Equity* 113: *Blake's Chanc. Prac.* 117: 3 *Johns. Ch. R.* 384: 1 *Vern.* 185: 3 *P. W.* 143: 4 *Price's Exch. R.* 103: 1 *Peters' S. C. R.* 356, 362, 363.

RIDGELY, CHANCELLOR.—The High Court of Errors and Appeals have rendered a decree, that the decree of this court shall be in all things affirmed. Therefore, there can be no inquiry into the subject matter of the decree of this court. That is now the decree of the High Court of Errors and Appeals, and if I were to alter or annul it I should reverse the judgment of that court. By what means the Court arrived at the judgment it is immaterial to inquire. The legal effect of that judgment is conclusive. That Court could not have rendered any other judgment than such as they did; for it is only where a judgment or decree is reversed, that that court shall render or pass such judgment or decree as this court below should have rendered or passed. In *Pratt and Kirtzing vs. Bredon and Kirk*, the time limited for filing the accounts had expired, and there we made such an order as Mr. Rogers now moves for.

Mr. Read then prayed an appeal, which the Chancellor refused to allow but entered the prayer and the refusal.

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Statement of the case.

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JOB JEFFERSON AND JESSE JEFFERSON,

vs.

ELIHU HOLLAND.

Sussex, April T. 1820.

A person indebted by bond paid a balance due upon it in notes of an insolvent bank, which was not known, at the time, to have stopped payment. *Held*, not to be a discharge in equity of the debt, but that the creditor might recover the balance due before such payment.

BILL IN EQUITY.—The complainants sold to the defendant a tract of land, taking his bond for the purchase money. $1548.00. On the 5th of January, 1818, the defendant paid one half the debt in specie and in bank notes, which were current at par;—on the 1st of July, 1818, he paid the residue in notes of the Farmers' Bank, at Snow Hill, and took up the bond. It appeared in evidence that the Bank had stopped payment on the 10th of June, but its notes continued to pass current, at some discount, in Baltimore Hundred, Sussex county, where the parties resided. The notes of the Bank wholly ceased to circulate on the 1st of July, the day on which the payment was made. Wm. S. Hall, a witness who was present at the settlement of the bond and assisted in it, testified that Job Jefferson, by whom the notes were received, observed on taking them, that he supposed it was good money, to which Holland replied that it was. On the 10th of July, Job Jefferson tendered the notes back to Holland, requesting him to receive them and make payment in good money. Holland refused, and said he would not pay unless he was compelled by law. The bill alleged that when the first half of the bond was paid, i. e. in January, 1818, the defendant promised that, should there be any difficulty in passing the paper then given in payment, he

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would take it back and replace it. The answer denied this allegation, and there was no evidence to support it. No promise was alleged, to take back the notes of the Farmers' Bank, in which the last payment was made. The answer stated that the defendant had received the notes for a debt due him in Somerset County, Maryland; that when he paid Holland they were known to be depreciated, but that he did not then know of their having ceased to circulate.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor at the April Term, 1820, for a hearing on the bill, answer, exhibits and depositions.

Cooper and *Wells*, for the complainants.

There is no legal payment but in gold or silver. When paper is accepted, it is upon the understanding that it is what it imports to be. It is settled that a payment in counterfeit paper is a nullity. *Markle vs. Hatfield*, 2 *Johns R.* 455, which overrules the dictum to the contrary in *Wade's case*, 5 *Coke*, 114. There is no difference in principle between this paper and counterfeit notes. The paper, though genuine, is of no value, no more than is base metal. *In value* it *is* counterfeit. By the stopping of the Bank the notes ceased to be money. In *Merrick vs. Vaucher*, 6 *T. R.* 52, one being arrested for debt gave his creditor a draft for part of the demand and agreed to settle the residue in a few days. The draft was dishonored. The debtor was then arrested upon the same affidavit, and it was held regular. In *Owenson vs. Morse*, 7 *T. R.* 64, the seller of goods took notes for them, without agreeing to run the risk of their being paid. The notes being worthless, were considered as not a payment. In *Ward vs. Evans*, 2 *Lord Raym.* 930, a distinction is made, which meets this case, that paper is no payment where there is

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a precedent debt, though it is payment for goods sold at the time, because of the tacit agreement that it should be received in satisfaction for the goods.

Thus far we have treated the case as if both parties were innocent; but the proof is sufficient to show that Holland knew of the stopping of the Bank and that the notes had ceased to circulate. Besides, the first payment being made in specie and paper at par shews an understanding as to what the paper should be, and the defendant on making the payment said it was good money.

Robinson, for the defendant.

No inference is to be drawn from the making of the first payment in specie and par paper that the second payment should be made in like paper. By saying that the paper was "good money" the defendant meant only that it was not counterfeit. There was no engagement to take back this paper. The case, then, depends upon general principles and upon the question who, as between two innocent parties, should bear the loss. The proof is, that up to the receipt of the news of the stopping of the Bank, which came by stage on the 1st of July, this paper formed the circulating medium of Baltimore Hundred. The payment was made between eleven and twelve o'clock on that day, before the intelligence was received, both parties supposing the paper to be current money. That it had before passed at a discount was known to both alike. The complainant, Job Jefferson, chose to accept it with the risk, and the complainants should bear the loss. In *Wade's case*, 5 *Coke* 115, Lord Coke held that even counterfeit money, if accepted, was at the risk of him who took it. *Dyer* 82, *a*. Bank notes are money, and are a good tender if not objected to. 1 *Burr* 457: 3 *T. R.* 554. There being no warranty or agreement to take the notes back the case is in principle like *Parkinson vs. Lee*, 2 *East* 314,

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Opinion.

where, upon a sale of hops with warranty that the rest answered to the sample, it was held that a warranty was not implied that the commodity should be merchantable, though a fair price was given. There being a latent defect, unknown to the seller and without fraud on his part, he was held not to be answerable. Here, Holland gave no warranty, and paid the notes without fraud, knowing no more about them than the complainants.

The money in this case is not, as insisted, a nullity, as in the case of a counterfeit, or as in the case cited from 6 *T. R.* 52, where the drawer had no funds. These notes have some value.

RIDGELY, CHANCELLOR.—The justice of this case is entirely with the complainants, and I cannot do better than to adopt the opinion of Kent C. J. in the case of *Markle vs. Hatfield*, 3 *Johns*, *R.* 455. This, indeed, is rather stronger on the part of the complainants. It may be doubted whether the defendant had not knowledge of the state of the Snow Hill notes at the time of the payment. At any rate, he assured the complainant, Job Jefferson, that they were good. Hall (who had himself stopped taking the money before this settlement) cannot be considered as an agent, so as to bind either party by his act. He merely was present and assisted in counting the notes and in settling the business.

There must be a decree for the complainants.

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Statement of the case.

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EBENEZER VINSON, MILLEY DORMAN AND SARAH SAUNDERS, three of the heirs at law of GEORGE VINSON, dec'd, a lunatic.

vs.

GEORGE H. VINSON, trustee, in the lifetime of GEORGE VINSON, of him the said GEORGE VINSON.

Sussex, July T. 1820.

Heirs at law of a deceased lunatic were admitted to except to the accounts of the trustee of the lunatic,—the attorney in fact of the trustee, who had acted for him and passed the accounts, being the administrator of the lunatic.

Under exceptions, the accounts of a trustee, although they have been passed by the Chancellor, are open to re-examination.

EXCEPTIONS TO ACCOUNTS OF TRUSTEE FOR A LUNATIC.—Joseph Betts had in the lifetime of George Vinson, a lunatic, acted as attorney in fact for the trustee, George H. Vinson. He had the management of the person and estate of the lunatic, and passed all the accounts. Upon the death of the lunatic, Betts took letters of administration upon his estate. Sundry trustee accounts had been filed in the Court of Chancery during the lifetime of the lunatic, all of which, except the last, had been passed by the Chancellor. The last account was presented at the March Term, 1820, and was directed by the Chancellor to be filed, with the following indorsement thereon, viz.: "March Term, 1820. This account is to remain open until "the next Term, with leave to the heirs of George Vinson, "to except to the accounts of the said Joseph Betts at any "time after the first day of May next, on or before which "time the whole of the vouchers are to be filed with the "Register by the said Joseph Betts."

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The case came before the Chancellor at the ensuing July Term, upon exceptions filed to the account.

Mr. Cooper for Betts, suggested to the Court a doubt, whether the *heirs* of the lunatic could except to the account. He said that the personal representative was the proper party to contest the accounts; that the heirs at law can only look to the administrator, and if the administrator shall not do his duty, he, as administrator, will be responsible to them.

RIDGELY, CHANCELLOR.—This course of proceeding will be more convenient and less expensive to the parties than to force the heirs at law to have recourse to a bill in chancery. Betts was the attorney in fact, and was the accountant. He receives all the allowances made by the Court, and all the compensation made to the trustee enures to his benefit. He will hardly object to his own accounts. A bill in chancery filed by the heirs could not more effectually enable a correction of the accounts than will a revision in this mode. The form would be different but the effect the same, as to the adjustment. But the expense would be monstrous in comparison with the course now proposed by the exceptants. An inquiry can be made at the bar on these exceptions; and as no practice has hitherto obtained in such cases, it seems best to adopt the mode now proposed by the heirs of the deceased lunatic. Besides, these accounts are not yet finally closed here. The entry at last Term contemplated giving the heirs an opportunity to re-consider, review and re-examine the accounts.

The Chancellor proceeded to hear the exceptions.

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LEMUEL WEST and CATY his wife, late CATY AKE and JABEZ TURNER, administrator of MARY TURNER, late MARY AKE.

vs.

MARY EVANS, administratrix, of ELI EVANS, dec'd.

Sussex, July T. 1820.

A bill to recover legacies was filed by two residuary legatees under a will against the administrator of the executor, the executor having been also, in his life-time, guardian of the legatees. One of the legatees, before the filing of the bill, had brought a suit at law on the guardian bond. *Held*, that the legatees must elect, whether to proceed at law on the guardian bond, or to prosecute the pending suit in equity.

Two or more residuary legatees under a will must be parties to a suit in equity for the recovery of the residuary legacy. If one will not join as a party complainant, he must be made a party defendant.

BILL IN EQUITY—ELECTION OF REMEDIES.—The complainant, Caty West, and Mary Turner, deceased, were residuary legatees under the will of their father, Riley Ake. Eli Evans, the defendant's intestate, was executor of the will, and also was guardian of the legatees, Caty West and Mary Turner, deceased. Prior to the filing of this bill a suit at law had been brought by Lemuel West and Caty his wife on the guardian bond given by Evans on his appointment for her. No suit had been brought on the guardian bond given for Mary Turner, deceased. The present bill was filed by West and wife and by the administrator of Mary Turner, deceased, to recover the residue of the personal estate of Riley Ake, deceased, bequeathed to Caty and Mary as the residuary legatees, and also to recover the rents and profits of their lands which went into the hands of Eli Evans, as their guardian. The suit of West and wife on the

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guardian bond was for their proportion of the residuary legacy and for their share of the rents and profits.

Cooper, for the defendants, moved that the complainants be put to their election, whether to proceed at law or to prosecute their bill here, as to those matters which were recoverable in suits on the guardian bonds. He cited 1 *Harrison's Ch. Pr.* 251: 1 *Ves. Jr.* 91: 2 *Atk.* 85: and 3 *P. Wms.* 90.

RIDGELY, CHANCELLOR.—The question is whether, as West and wife and the representatives of Mary Turner, have *joined* in a bill against the administratrix of Eli Evans, and as West and wife *alone* have brought a suit at law, these joint parties shall be compelled to elect to proceed either in equity or at law, one of them only having sued at law. I am of opinion, that they both should elect to proceed on this bill, or to take their remedy at law. I think, that as both necessarily must be parties in the bill, they both must proceed in equity, or not at all. They must somehow be parties in equity, and if one withdraws the other cannot proceed alone. Two residuary legatees must both join. If one will not do so she ought to be made a defendant, so as to bind her by the proceeding. There should not be two suits by different residuary legatees. All must be parties; and if one will not prosecute a bill, he may be made a defendant.

The order of the Chancellor, together with the election of the complainants under it, was then entered, as follows:

"And now, to wit, 26th July, 1820, this case coming on, "and it appearing that Lemuel West and Caty his wife, "are prosecuting a suit at law, upon the guardian bond of "Eli Evans to said Caty; and the said Lemuel West and "Caty his wife, being put to their election, whether they "will proceed here in this suit, or at law, on said bond, "touching the matters of Eli Evans' guardianship of the

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"said Caty; they, the said Lemuel and Caty do elect to "proceed at law on said guardian bond. And further the "said Jabez Turner, administrator of Mary Turner, late "Mary Ake, doth elect to proceed at law on the guardian "bond of the said Eli Evans to the said Mary, mentioned "in the bill and answer in this suit. And it is ordered by "the Chancellor, that the said complainants pay to the "defendant her costs, or such part of her costs, of this suit, "as have accrued in relation to the matters of the said "guardianship, and that the bill be dismissed touching "such matters."

ALEXANDER McFARLAN,

vs.

WM. CLARK FRAZIER, administrator of WM. FRAZIER, dec'd.

New Castle, Aug. T. 1820.

Satisfaction of a judgment having been entered of record, upon the representation of the debtor that a specified balance was due and upon his promise to pay it. a bill was filed by the creditor. alleging a larger balance to be in fact due, and praying relief: *Held*, that a court of equity has jurisdiction in such case to decree an account and the payment of the true balance.

BILL IN EQUITY.—William Frazier was indebted to the complainant, Alex. McFarlan, upon a judgment recovered on the 23d October, 1806; the same being originally for £720. On the 20th day of February 1810, there being a balance unpaid, Frazier wrote to McFarlan as follows, viz:

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"Dear Sir;

"Please write to the Clerk of the "Supreme Court to enter satisfaction, and I will pay the "balance to you in thirty days, which is somewhere "between sixty and eighty dollars; and you will much "oblige, your friend, &c.,

Wm. Frazier,"

February 20th, 1810.

On receiving this note, and on the day of its date, McFarlan, by a letter addressed to the prothonotary, caused satisfaction to be entered upon the record of the judgment. This bill alleges that a much larger balance was due upon the judgment than the sum stated in Frazier's letter; that satisfaction was entered upon the faith of Frazier's paying what might be the true balance, and that Frazier's statement of it was a mistake. It prays an account between the parties and a decree for the payment of such balance as upon the account shall be ascertained to be due.

The answer alleged that the defendant had paid the full amount due upon the judgment. Issue was joined and depositions taken by both parties. The cause came before the Chancellor, at the August Term, 1820, for a hearing upon the bill, answer, exhibits and depositions. The main question of controversy, at the hearing, was one of jurisdiction.

Booth, for the complainant.

We claim to recover on the judgment. The letter written by McFarlan to the prothonotary was not a sufficient authority for entering the satisfaction. The entry should have been made by McFarlan in person or by his attorney duly constituted. But, if the judgment be held to be sat-

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isfied, we are still entitled to recover upon Frazier's letter; and we are not concluded by the balance there stated. The letter had not the effect of a settlement; nor is McFarlan, by his entering the satisfaction, to be taken as having assented to the statement as one showing the true balance. He only meant to gratify Frazier's wish to have the judgment satisfied, relying upon a settlement to be duly and correctly made.

Van Dyke and *Rodney*, for the defendant.

The entry of satisfaction is sufficient, and has discharged the judgment. In a court of equity, the letter directing satisfaction to be entered is a sufficient authority. But, were it otherwise, and supposing the judgment to be still in force, the complainant might proceed at law upon the judgment. He has no remedy in equity.

The judgment being satisfied and the letter of Frazier being the ground or promise upon which the satisfaction was entered, that letter furnishes a cause of action at law, upon which the complainant has an adequate remedy without the aid of this Court. There is no fraud, accident or trust. McFarlan chose to accept the promise contained in this letter in lieu of his judgment, and must abide by it.

Rogers, for the complainant, in reply.

The judgment is not extinguished in equity, though we can have no remedy upon it at law, the defendant being by the entry of satisfaction in possession of a complete defence upon a plea of payment. But at all events, whether by holding the judgment as undischarged or by a direct decree for an account and payment, a court of equity should relieve us. It is argued that our remedy is by suit at law upon the letter of Frazier; but that remedy

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is not adequate to the justice of the case; for, in a suit at law we could not recover beyond the sixty or eighty dollars mentioned in the letter, however large might be the balance actually due to us.

Ridgely, Chancellor.—This case comes within that class of cases which are relievable in this Court on account of accident or mistake; and it must be governed by its own peculiar circumstances. There existed a fair and honest debt due to the complainant, and it is apparent, that, at the solicitation of William Frazier, he intended to enter satisfaction on the judgment without actually receiving the money due to him. It is not contended that William Frazier paid the debt on the 20th of February, 1810; and it is not denied that satisfaction was entered on the ground of the note or letter written to the complainant by William Frazier on that day. It is not stated that any account was settled by the parties, or that they had by any means actually ascertained the sum precisely which was due to Mr. McFarlan.

It is proved by Samuel Thomas, that in 1809 or 1810, he and Mr. Frazier were in treaty about Mr. Frazier's farm; that about that time Mr. Frazier endeavored to borrow money; and it seems very reasonable to suppose, that the satisfaction of the judgment was connected with the circumstance.

Afterwards, in the year 1815, it appears on the testimony of three witnesses, that Mr. Frazier and this complainant, had a conversation in relation to the complainant's demand, and that Frazier admitted the account was not settled, but seemed surprised at the amount of it. Under all these circumstances, it would be harsh and contrary to equity and good conscience, and contrary to the understanding of the parties, to turn the plaintiff round and direct him to proceed at law for the sixty or eighty dollars, stated in Frazier's

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letter of the 20th of February, 1810, to be somewhere about the sum due to Mr. McFarlan. Upon that letter, at law, the plaintiff could only recover the sixty or eighty dollars. In truth, a much larger sum seems to be due; and if he cannot recover in this Court, he must lose the difference between sixty or eighty dollars, and the sum actually in arrear. It is evident, that without the aid of this Court, McFarlan cannot obtain redress; and upon numerous authorities and the principles of a court of equity the plaintiff should be relieved. An account must be taken to ascertain the sum actually due to McFarlan, and the balance thus ascertained must be decreed to be paid to the complainant.

Decree for an account.

FRANCIS O'DANIEL,

vs.

LEONARD VANDEGRIFT.

New Castle, Aug. T. 1820.

The rule of court for the filing of a list of exhibits applies as well to records and documents which prove themselves as to papers proved by witnesses.

BILL IN EQUITY—EXHIBITS.—At the hearing of this cause. the complainant offered in evidence a guardian account, which had been passed by the defendant as the guardian of a certain Hester McMillen. The account had not been included in the list of exhibits, and its admission was objected to on that ground.

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Argument—opinion.

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McLane, for the complainant.

According to the rule, the list of exhibits to be filed is required to include only such as are to be proved *by witnesses*. It mentions no record, nor any evidence which is proved by itself. The rule is designed merely to allow a party to prove at the bar what otherwise must be proved by a commission. It was made for the convenience of parties and to relieve them from the expense of a commission. The provision for notice to the party is in order that he may have opportunity to rebut the evidence. It is useless with respect to records, which prove themselves, and are evidence in all cases. This paper requires no notice; it is evidence of itself.

Read, on the same side.

The rule only requires exhibits of papers necessary to be proved at the hearing of the cause. Prior to the adoption of the rule, exhibits could not be proved at the bar without special order. The rule made such special order unnecessary. The notice is required only with a view to proof; and no list of exhibits need be filed except of such papers as are to be proved.

Van Dyke, for the defendant, in support of the objection.

The rule requires a list of exhibits of all papers, whether they prove themselves, or are to be proved by witnesses, or by the party himself. The paper offered in evidence goes back to the year 1804. We never expected this paper, and have had no notice of its production. We know not what we may have to resist. The inquiry may extend to all the transactions of this guardian and his ward; such as we are not prepared to explain.

RIDGELY, CHANCELLOR.—This is a new point of practice.

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Syllabus.

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This account, and other papers which may be records of a court, and which are proved by themselves, come as much within the meaning of the rule requiring a list of exhibits to be filed six days before the term, as papers to be proved by witnesses. The former part of the rule refers to such papers as must be proved by witnesses; the latter part, to all papers which are exhibits in the cause. This account has not been included in any list of exhibits, nor annexed to the bill or answer, and no notice has been given of it in any shape. According to the rule, it cannot now be read. It is therefore rejected.

Note.—The rule in question, then in force, was as follows :—

RULE 9. "That the parties at the hearing of each cause be at liberty to "make and prove exhibits of deeds, receipts and other instruments "of writing by the instrumentary witnesses, or proof of handwriting; and "also books of accounts, by the oath of the party, his personal represent-"ative or other person: and that a list of the exhibits be filed with the "register at least six days before the term at which the cause may be "ruled for hearing.

ROBERT S. KIRKWOOD,

vs.

JOHN MITCHELL, administrator *de bonis non* of JOHN MITCHELL, dec'd.

Sussex, March T. 1821.

A legatee may file a bill for his legacy against the personal representative of the deceased executor of the testator (the executor having received assets to pay the legacy) without making the administrater c. t. a., d. b. n. of the testator a party.

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Statement of the case—opinion on demurrer.

The deceased executor having left a will and appointed an executrix thereof, who, after taking letters testamentary, died: *Held*, that her personal representative was a necessary party to a bill filed for the legacy against the administrator c. t. a.,d. b. n. of the deceased executor of the testator under whose will the legacy was claimed.

BILL IN EQUITY TO RECOVER A LEGACY.—Alexander Smith, by his will, bequeathed a legacy to Robert S. Kirkwood. The bill was filed by the legatee against the defendant as the administrator *de bonis non* of John Mitchell, dec'd, who in his lifetime was the surviving executor of Alexander Smith, the testator. At the July Term, 1819, a demurrer to the bill was filed, and the following causes of demurrer assigned, viz: 1. That the complainant, did not in his bill set forth that he, the complainant, had sued out administration on the estate of Alexander Smith, the testator; and, therefore, he hath not entitled himself to receive said legacy. 2. That the complainant could not discharge the defendant of said money if the defendant should pay it, the complainant not being entitled to receive it. 3. That Alexander Smith is dead, and his executor or administrator is not a party to the bill. 4. That the complainant hath a remedy at law.

Robinson, for the complainant.

Cooper and *Wells*, for the defendants.

THE CHANCELLOR was of opinion* that the legatee might sue in this Court the personal representative of the executor who had received assets of the testator sufficient to pay the legacy.

The demurrer was overruled, and the defendant ordered to answer.

The Chancellor's order was afterwards, at the June

*This opinion is not drawn out, nor are the arguments of counsel given in the Chancellor's notes.

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Term, 1820, affirmed by the High Court of Errors and Appeals.

Afterwards, at March Term, 1821, this cause came again before the Chancellor, for a hearing upon the bill, answer and exhibits. Pending the hearing it appeared that John Mitchell, deceased, who in his lifetime was the surviving executor of Alexander Smith, had made a will appointing his wife, Rhoda Mitchell, the executor thereof; that Rhoda Mitchell had, after taking letters testamentary, died, having made her will and appointed James Windsor and James Wiley her executors:– that they had renounced, and upon their renunciation Nancy Wiley had taken out administration c. t. a., d. b. n. of the said Rhoda. Nancy Wiley was not a party to this bill.

RIDGELY, CHANCELLOR.—The administratrix of Rhoda Mitchell is a necessary party. Rhoda may have paid the debt, which her representatives alone can show; but it is particularly necessary in this case that her representative should be a party, because John Mitchell devised land to be sold by his executrix, Rhoda, for payment of his debts. She sold the land and ought to account for the proceeds of such sale, to be applied to the payment of this debt, if any thing shall be found due to complainant, unless it should appear that she applied the proceeds to other debts.

Let the cause stand over, with leave to amend the bill by making Nancy Wiley, administratrix, c. t. a., d. b. n. of Rhoda Mitchell, deceased, a party.

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Syllabus—statement of the case.

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JOHN HICKMAN,

vs.

RICHARD HICKMAN.

Sussex, March T. 1821.

A bill to perpetuate testimony need not be verified by the complainant's affidavit, nor is it essential, in order to support such a bill, that the witnesses to be examined shall be aged, infirm, non residents of the State or likely to remove therefrom. Distinction, in these respects, between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*.

Distinction at large between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*, and the practice under the two proceedings respectively.

If the bill has not made a sufficient case to entitle the complainant to an examination of witnesses. whether it be to perpetuate the testimony or to take the testimony *de bene esse*, the defendant should demur. It is too late, after the commission has been ordered, to object that the complainant has failed in any matter necessary to give him the benefit of this course of proceeding.

In the examination of witnesses under a bill to perpetuate testimony, the complainant is confined to the matters for proof alleged in his bill, and to the interrogatories annexed to the bill as the interrogatories to be propounded to the witnesses; but the objection to an examination beyond this limit is waived by the defendant's joining in the commission and filing cross interrogatories.

Depositions taken *in perpetuam memoriam rei* are not to be published except by special order of the Court.

The defendant is generally entitled to costs under a bill to perpetuate testimony.

BILL TO PERPETUATE TESTIMONY.—This bill alleged that the defendant had conveyed to the complainant, by deed of bargain and sale, dated the 7th day of April, A. D., 1812, a tract of land in Sussex County; that the deed was signed, sealed and delivered in the presence of two attest-

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ing witnesses; that the complainant had gone into possession and had made improvements; that, nevertheless, the defendant had refused to acknowledge the deed, claiming that the complainant took no title under the deed, and threatening that he would avoid it, at least after the witnesses should be dead. The bill further alleged that the witnesses were aged and infirm, and that should they die before proving the execution of the deed it might be avoided, and the complainant's title defeated. And forasmuch as the complainant being in possession could not by an ejectment, or other suit at law, establish his title to the premises, and could not without the aid of this Court examine the attesting witnesses for the preservation of their testimony, the bill prayed that the complainant might be at liberty to examine the said witnesses to the proof of the deed for perpetuating such proof, upon the interrogatories to the bill annexed; also that the defendant might answer, &c. Two interrogatories were annexed to the bill; the first, touching the witnesses' knowledge of the parties; the second, as to the execution of the deed. No affidavit of the complainant was annexed to the bill.

The answer of the defendant admitted the execution of the deed, but alleged that it was a deed executed as a gift of the land to the complainant, (who was the defendant's son,) in consideration of love and affection only; and that it was intended and understood by the defendant to pass only an estate for the life of the complainant, and not the fee simple: that the complainant had fraudently procured the deed to be so drawn as to convey the fee-simple, and the defendant confiding in his son's integrity, had executed it without causing it to be read to him, being himself unable to read writing. The answer further alleged, that the attesting witnesses were not aged nor infirm; and it insisted that the relation in which the complainant stood to the defendant in regard to the manner in which he had obtained the land or the consideration for the same did

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not justify him in calling the defendant into this Court, upon the case stated in the bill and for the object prayed for.

To this answer there was a replication; and a rule was entered in the usual form to take the depositions upon interrogatories filed The complainant filed his interrogatories on the 11th of January, 1821. These interrogatories went into a full inquiry, concerning the execution of the deed; as to who drew the deed; whether the defendant knew its nature and contents; whether it was read to the defendant; the objections, if any, which the defendant made to it; what conversation passed at the time of the execution; and whether, at another time, the defendant had not talked of conveying this land to the complainant. Also, inquiries were made as to the improvements on the land at the time the complainant took possession of it, the quantity of land in cultivation, and the buildings erected by the complainant. The defendant filed cross interrogatories on the 24th of January, 1821. They related to the writing of the deed; whether it was read to the defendant or explained to him; and whether, in a conversation prior to the execution of the deed, the defendant did not declare that he intended to convey a life estate only. The cross interrogatories, also inquired as to the improvements put upon the land, the size of the house, &c.

The depositions of the two attesting witnesses to the deed, Major Benson and Eben Benson, were taken; also of Burton Waples, Armer M. Long, Isaiah Long and Noah Lockwood, all being witnesses for the complainant. No witnesses were examined for the defendant.

Before the return day of the commission, which was at the March Term, 1821, the defendant filed exceptions to the commission,—also to the interrogatories and depositions of the witnesses taken in the cause. The exceptions were these: 1. That the order for the commission was made without any affidavit of the complainant to his bill, or

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proof that the witnesses to be examined were aged or infirm, or resided out of the State, or were about to remove from it; or that their testimony was material. 2. That the testimony of the attesting witnesses was taken upon other interrogatories than those annexed to the bill, and not upon the interrogatories annexed to the bill, according to the prayer thereof. 3. That witnesses had been examined upon matters other than the execution of the deed, and which were not prayed for in the bill. 4. That it did not appear that said witnesses, or any of them, were 70 years of age or upwards, or were infirm, or that they resided out of the State, or were about to remove from the same.

The depositions were returned at the March Term, 1820, and published as in ordinary cases, and the cause was set down on the list, usually made by the Register in Chancery, of causes at issue and upon demurrer, for hearing.

Wells, for the complainant.

Robinson, for the defendant.

RIDGELY, CHANCELLOR.—There are two kinds of bills to preserve testimony; one, is to perpetuate the testimony, or to examine witnesses *in perpetuam rei memoriam*; the other, is to examine witnesses *de bene esse*. The former lies where the party is in actual, undisturbed possession; or where lands are devised by will from the heir at law; or where no action has been brought, but the party intends to commence a suit. In these, and in similar cases, this bill will lie, because no suit being brought, the party has no opportunity to examine his witnesses, and is exposed to a future attack or to a future loss, in case such testimony cannot be preserved until a judicial investigation.

The bill to examine witnesses *de bene esse* is different

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Opinion:—bills to perpetuate testimony—nature and object.

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from the bill to perpetuate testimony, and is directly the reverse of it. It is brought by a person out of possession, whose witnesses are aged or infirm, or where the knowledge of the matter rests with a single witness, or with two only, and is in aid of a trial at law or in equity, where the testimony is in danger of being lost before the matter to which it relates can be examined into by the proper tribunal. It is commonly brought after the commencement of a suit at law or in equity; or it is made part of a bill in equity brought in a case in which such testimony has a direct bearing and reference.

If a party could not perpetuate his testimony by a bill in this court before suit brought, he might lose the opportunity of establishing his right; for his adversary need only delay a suit until his witnesses are dead, or the testimony be otherwise lost, and then the party would be without remedy or protection, however legal and honest his defence might be.

The books of practice are extremely confused on this subject, and generally blend the two kinds of bills together, and do not plainly distinguish the rules applicable to one from those applicable to the other. And, indeed, in the adjudged cases, the language of the reporters seldom makes any distinction, though by attention to the cases, the difference may be plainly observed. *Cooper's Treatise on Equity* throws more light upon this subject, and arranges and methodises it more clearly than any other practical work that I have seen. See *Gilbert's Equity* 119, 120; 6 *Vesey Jr.* 251.

Bills to perpetuate testimony are substantial, original bills, which have no other design but to secure the evidence of some right or interest which may be endangered or lost, if the testimony upon which it depends be not preserved. Upon the same principle the Court will lend its aid in bills *quia timet*, to secure a party against the neglect, inadvertence, or culpability of another. And so,

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in bills of discovery, for discovering facts resting in the knowledge of the defendant, or deeds or other writings or things in his power or custody,—in these instances the Court acts to secure a right, or to prevent a loss or injury, and not to redress a wrong.

In bills to perpetuate testimony, no relief is prayed. 3 *Atk.* 439, 2 *Vent.* 114, *Prec. in Ch.* 532: and so, in bills of discovery, 3 *Vesey Jr.* 4, 343: 2 *Ves. Jr.* 459: 2 *Bro. Ch. Rep.* 319: 4 *Bro. Ch. Rep.* 480. This is because the object of such bills is attained as soon as the testimony is taken, or the discovery made.

We find many instances of bills to perpetuate testimony or to examine witnesses *in perpetuam rei memoriam.* In *Dorset vs. Girdler*, *Prec. in Chanc.* 531, there was a bill brought by one *in possession* of a fishery, to examine his witnesses *in perpetuam rei memoriam*, to establish his sole right of fishery. It was suggested in the bill, that the defendant pretended a sole right, and threatened to bring an action and to disturb the plaintiff when his witnesses should be dead. The defendant demurred, for that the plaintiff had not verified his title at law, and had no right to bring his bill in the first instance. The demurrer was over-ruled, because *one in possession and not disturbed* cannot sue, and the facts to which the testimony relates cannot be immediately investigated in a court of law. If the defendant had *actually disturbed* the plaintiff, the defendant ought to have pleaded this, and that the plaintiff should seek his remedy at law; or, if the plaintiff had shown in his bill that the defendant had actually disturbed him by fishing, then the demurrer would have been proper, but not for barely threatening. There, the defendant had by his answer insisted on his right of fishery and hoped to prove it, and yet by his demurrer would debar the plaintiff from proving anything at all. See 1 *Atk.* 284.

Here, the defendant, Hickman, admits by his answer, that the complainant is in possession, but he denies that

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Opinion:—bills to perpetuate testimony—cases cited.

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he ever intended to convey to the complainant an estate in fee simple, and says that he cannot read writing, that the deed was not read to him, and that if he ever executed such a deed as the complainant hath set out in his bill, it was by imposition. This answer admits everything necessary to give this Court jurisdiction; and the bill makes out precisely a case fitted for the examination of witnesses to perpetuate their testimony.

Lord Nottingham, it is said by *Cooper* in his *Treatise on Equity, p.* 51, decided the first and leading case upon this sort of bill; and he held that it might be exhibited for leave to bring a deed into Court, and to perpetuate the testimony of witnesses to it; and that the plaintiff should set forth a title and pray to examine to it. The case is cited, *Rep. Temp. Finch* 391.

In *Parry vs. Rogers* 1 *Vern.* 441, a demurrer to a bill to perpetuate testimony touching the title of lands was allowed, because there was no impediment that hindered the plaintiff from trying his right at law. See 1 *Vern.* 308: 1 *Atk.* 571.

Suffolk vs. Green, et. al., 1 *Atk.* 450, was a bill to perpetuate the testimony of witnesses to a bond charged to be usurious, alleging that the defendant, Green, whom the plaintiff wanted to examine, was very aged and infirm. Green, who was a nominee only in the bond, demurred, as the bill sought to subject him to a penalty, and also as the plaintiff did not offer to pay what was really due. If the demurrer had stopped at the first part of the bill, which sought to subject the defendant to a penalty, it would have been good; but, as to perpetuating the testimony, it was bad; for the plaintiff was entitled to perpetuate the testimony, notwithstanding his not offering to pay. And Lord Hardwicke says, a man may bring a bill to perpetuate his testimony in many cases where he cannot bring a bill for relief without waiving the penalty, as in waste—or in the case of a forged deed—or in the case

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of insurances, after a commission to examine witnesses beyond sea as to fraudulent losses; and yet, in many cases fraudulent losses are subject to a penalty, even sometimes felonious. The bill is to perpetuate testimony to a plain fact. What may be the consequence of that fact is of another consideration. This case of *Suffolk vs. Green* is full and clear; for it appears that though the party may be subjected to a penalty, or even to felony, the testimony may be perpetuated.

I may refer to the practice of perpetuating the testimony of witnesses to wills. Wills of land are not proved in England as they are with us. There, they may be proved in chancery, and at law. When lands are devised from the heir, the devisee in order to perpetuate the testimony of the witnesses, exhibits a bill in chancery against the heir, and sets forth the will *verbatim*, therein suggesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue as in other cases and examine the witnesses to the will, after which the cause is at an end without proceeding to any decree, no relief being prayed by the bill. This is what is usually meant by proving a will in chancery. 2 *Harrison's Ch. Pr.* 130: 2 *P. Wms.* 285. The form of such bill and answer may be seen in 2 *Harrison's Ch. Pr.* 210 to 213, and of the interrogatories, 2 *ib.* 419.

In none of these cases is any affidavit necessary. The ground or reason for perpetuating the testimony is set forth in the bill. If they are not sufficient the defendant may demur. If he should deem this course not proper, then he must answer, and if the facts stated in the bill are not denied the commission necessarily follows.

The plaintiff must show his title or interest in the matter or thing to which the evidence relates. 1 *Harrison's Ch. Pr.* 110: *Cooper's Eq.* 52: 1 *Vern.* 105: 1 *Eq. Ca. Ab.* 233–4: 3 *Bro. Ch. Rep.* 481. The bill ought sufficiently to describe the right claimed. If it is so general that the

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defendant cannot know the point upon which the examination is to be made, the bill will not be allowed. 1 *Ves. Jr.* 449: 1 *Vern.* 312: 3 *Bro. Ch. Rep.* 481

After the witnesses are examined, the plaintiff must not set his cause down to be heard; for the end is answered by the examination. If he does, the bill will be dismissed with costs, but so as not to prejudice him in perpetuating the testimony. 2 *P. Wms.* 162: *Ambler* 237: 1 *Harrison's Ch. Pr.* 115.

The bill to examine witnesses *de bene esse*, is generally brought by a person out of possession, and is brought by a person having a suit at law or in equity, whose witnesses are aged, infirm, sick, absent, or going beyond sea: and there must always be an affidavit annexed to it, showing the circumstances by which the evidence intended to be perpetuated is in danger of being lost. *Cooper's Eq.* 57: 1 *Eq. Ca. Ab.* 233.

In *Philips vs. Carew*, 1 *P. Wms.* 117, the bill was to discover a title to land, for an account of profits, and to perpetuate testimony. There was an answer as to title, and also a demurrer as to perpetuating evidence, on the ground that the plaintiff might bring his ejectment, and examine his witnesses at the trial. Upon an affidavit that the plaintiff's witnesses were infirm and unable to travel, the demurrer was over-ruled. Without such affidavit the demurrer would have been allowed. In that case the plaintiff was *out of possession*, but his bill was for a discovery and for an account of profits; and the examination must have been *de bene esse*, from the nature of the case; for it was auxiliary to the remedy. As a suit was depending, and the examination of the witnesses was asked for out of the ordinary course of proceeding, the affidavit of the party was required to entitle him to this unusual means of obtaining his evidence. It is like a bill brought to be satisfied of a debt upon a bond lost. The plaintiff must make affidavit of the loss, for if the bond were not lost, a

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court of law, and not a court of equity, would have jurisdiction. 2 *Eq. Ca. Ab.* 13. *c.* 1

In *Shirley vs. Ferrers*, 3 *P. Wms.* 77: the matter to be examined into lay only in the knowledge of *one* witness and was of great importance. On affidavit that there was no other person privy to the transaction, the examination was ordered, though there was no affidavit of age, infirmity, or danger of dying. Here, there was an original bill to avoid a forged deed, and before an answer a supplemental bill was filed to examine this witness *de bene esse*.

In *Hankin vs. Middleditch*, 2 *Bro. Ch. Rep.* 641, on affidavit that a witness was the *only* witness to a fact material to the cause, though no age was sworn to, he was examined *de bene esse*. In *Cholmondsly vs. Oxford*, 4 *Bro. Ch. Rep.* 157, *two* persons were examined *de bene esse*, being the only persons who had knowledge of the material facts, without a statement of their age. The affidavit is not mentioned but it certainly must have been made.

It is a rule in England, when the examination *de bene esse*, is taken on account of age, that the affidavit shall state the witness to be seventy years old; but that was dispensed with in a case where the witness was sixty years old and upwards, and greatly afflicted with the gravel. *Ambler* 65. Considering the life of man in this State, a shorter period probably ought to be adopted. Sixty years here are probably not more than seventy in England.

Many of these examinations are made on motion or petition,—2 *Harrison's Ch. Pr.* 89, 44, and always with an affidavit.

It is evident, in this case of *Hickman vs. Hickman*, that it is not an objection to these depositions, that there is no affidavit, and that the witnesses are not seventy years of age; because this is not an examination *de bene esse*. It is an examination obtained by the party in possession, who cannot sue, and who has no other means to preserve

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the testimony to the deed on which he relies as evidence of his title. No relief is prayed ; and in the answer it is admitted that the complainant is in possession, and nothing is put in issue but the fairness of the execution of the deed, which is the subject matter sought by the bill to be inquired into.

When a defendant supposes that a complainant has not made out a case in his bill to entitle him to an examination of witnesses to perpetuate their testimony, or *de bene esse*, he ought to demur. It is too late, after the commis sion is ordered, to object that the party has failed in some matter necessary to give him the benefit of this course of proceeding. This might be an answer to the want of an affidavit, if such affidavit were requisite in this case.

There are two other objections to these depositions : 1, That the witnesses have been examined upon interrogatories other than those annexed to the bill, and not upon those so annexed ; and 2. That they have been examined upon matters not prayed for, and upon matters other than the execution of the deed.

All these exceptions are to be considered as on a motion to suppress the depositions. The question now is, whether for the two last reasons these depositions ought to be suppressed.

The rule is this. If the defendant had merely answered and had not joined in the commission to examine the witnesses, the plaintiff would have been confined to the interrogatories annexed to the bill. In that case, the commission or rule to examine witnesses would have been for the benefit of the plaintiff only, and he could not have gone beyond the interrogatories annexed to the bill. But when the defendant joined in the commission or rule, and thereby had the liberty to examine as largely as he pleased, according to the rules of practice the plaintiff had a right to exhibit such interrogatories as he pleased, and to extend

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his examination to any matters suitable to his case. 1 *Harrison's Ch. Pr.* 114, 115.

I have before noticed that causes of this kind should not be set down for hearing. Under the English practice, if the plaintiff does set his cause down for hearing the bill will be dismissed with costs, because the end is answered by the examination. The setting down a cause for hearing follows the publication of the depositions. The publication of depositions and setting down causes for hearing in England are much more important matters than with us, and are not matters of course. They are done by consent, by rules and orders, and with notice by process. Here, they are matters of course, and are done by the Register under the orders, rules, or practice of the Court. The reason why the bill is dismissed, if it is set down for hearing, is, because it is unnecessary, is productive of expense to the other side, and is contrary to the rule of this court, which does not permit the publication of evidence taken in this way, because these witnesses may hereafter be examined in chief, and it is contrary to the practice, which there, in all things almost, is much according to the notion of the civil law that no act of the Court may be done, *altera parte inaudita. Gilbert's Chan.* 151. So that a decree cannot be made without a subpœna to hear judgment. 1 *Harrison's Ch. Pr.* 362.

These reasons, however, do not apply here; because we have no practice in such cases, this being the first bill of the sort in this State, and particularly, as the plaintiff would, at law, have the benefit of these depositions.

Depositions like these, upon an original bill brought by one in possession, or on similar principles, taken *in perpetuam rei memoriam*, are not to be published until after the death of the witnesses, without a special order of the Court, because they cannot be used so long as the witnesses are living and may be had, to be examined by a jury. *Prec. in Ch.* 531–2; *Prax in curia cancellari*, 26.

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And so, the depositions taken *de bene esse* are not to be published unless the witnesses die or are absent, so that it is impossible to have an examination of them in chief; and then, not without the special order of the Court. 1 *Harrison's Ch. Pr.* 110, 111: 2 *Vesey Sr.* 336–7: 1 *P. Wms.* 567.

There certainly has been an irregularity in publishing these depositions; but as this happened inadvertently, and according to the general rules of the Court (though this kind of case is an exception to those rules,) it will not be a sufficient reason for their suppression. It was not the act of either party, except that they or their counsel did not apply to the Court to take this case out of the general operation of the rule; and, inasmuch as the case is new and the publication passed by mistake and without being brought into the view of the Court, we will now, to save expense, and as no injury can arise to either party, and especially to the defendant, do what should have been done at first. The interrogatories and depositions must be sealed up, under an order to be made for that purpose, the order further directing that they shall not be again published without the special order of the Court; and if any of the counsel or parties have copies or notes of the depositions, they should be brought into court and here delivered up.

In future, it will be considered as the settled practice of this Court, if any depositions shall be taken upon any bill filed to perpetuate testimony, or upon a bill, motion or petition to examine witnesses *de bene esse*, that if they be published without the special order of this court they shall be suppressed.

As to costs,—the defendant must be paid his costs. It is laid down in *Bidulph vs. Bidulph* 2 *P. Wms.* 285, that on a bill by a devisee to perpetuate the testimony of witnesses to a will, the heir must be paid his costs, notwithstanding he cross-examines the plaintiff's witnesses, and although he refused, after the will was proved, to release

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Statement of the case.

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his right to the premises; for the plaintiff had the fruit of his suit and the benefit of perpetuating the testimony of his witnesses. And Lord Hardwicke said, in *Clifton vs. Orchard* 1 *Atk.* 610, that costs are never given against the defendant on a bill brought to perpetuate testimony. This is when he cross-examines only; but where he encounters the will by examining witnesses, he shall not have his costs. 3 *Atk.* 387: see also 8 *Vesey Jr.* 69: 9 *Vesey Jr.* 103: 1 *Mad. Ch. Pr.* 195.

GEORGE MATSON, administrator of BETTY MATSON, late BETTY WALTERS, now deceased, a legatee under the last will and testament of WILLIAM WALTERS, deceased,

vs.

WILLIAM WALTERS AND JOHN PALMER, executors of WILLIAM WALTERS, deceased.

New Castle, March T. 1821.

Bequest to the testator's daughter, "during her natural life," of "*the yearly interest*" on one half the proceeds of certain land directed by the will to be sold. The premises were sold on the 25th March, 1808. Interest on one half the purchase money was paid to the legatee regularly up to 25th March, 1817. She died, 23d December, 1817. *Held*, that her administrator was entitled to interest up to the day of her death.

CASE STATED IN EQUITY—APPORTIONMENT OF INTEREST.—This was a case stated in equity, by consent of parties, in lieu of a bill and answer. The case stated was as follows, viz:

"William Walters, the testator, by his last will and

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Statement of the case.

testament, dated the 31st day of the 3rd month, 1807, among other things, devised in the words following to wit: "Item, I order the tavern house and land where my "son-in-law, George Matson, now dwells, to be sold to the "highest bidder as soon as convenient after my decease, "hereby empowering either of my executors to execute a "full and clear deed of conveyance for the same; and one "half of the purchase money arising from such sale, I "give to my daughter, Beulah Palmer, and the yearly "interest of the other half I give to my daughter Betty "Matson *during her natural life*," as by the same will may appear; and the testator appointed the said William Walters and John Palmer executors thereof. The tavern, house and land mentioned in the devise were sold by the said executors to Samuel Pennell for the sum of $2,515, on the 25th of March, 1808. And the said William Walters, one of the executors, duly paid to George Matson, husband of said Betty Matson, the interest of one half of said purchase up to the 25th day of March, A. D. 1817. Betty Matson died the 23d day of December, in the last mentioned year, and letters of administration upon her estate have been duly granted to her late husband, George Matson.

George Matson, as administrator of said Betty Matson, claims interest on the said one half of the before mentioned purchase money, from the 25th day of March, 1817, to the said 23d day of December in the same year, the day of the said Betty's death; and the said executors refuse to pay the same, alleging that the said administrator is not entitled to the said interest.

The above statement of facts, together with the will of Wm. Walters, deceased, is by consent substituted in lieu of a bill and answer; and it is agreed that the said case be entered on the docket of the Court of Chancery of New Castle County, as of the present Term, and be submitted to His Honor the Chancellor, for his opinion and decision

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touching the said claim of interest. And it is agreed that the Chancellor may decree between the said parties touching the same matter, as to him shall seem proper.

The case as above stated was signed by the solicitors of the parties respectively.

Van Dyke, for the complainant.

McLane, for the defendant.

The case was submitted, without argument, to the Chancellor, who afterwards delivered the following opinion:

The administrator of Betty Matson is entitled to the interest which accrued between the 25th of March, 1817, and the 23rd of December, in the same year, the day on which Betty Matson died. By the words in the will the testator intended possession for his daughter *during her natural life*; and the words *yearly interest* only fixed the rate at which the annuity should be charged on a moiety of the purchase money arising from the house and lot ordered to be sold.

In the case of *Edwards vs. Lady Warwick*, 2 *P. Wms.* 171, 176, *interest payable half yearly*, was apportioned, where the person entitled to it died in a broken part of the half year. And so, on the will of Lord Chief Justice Holt. In 3 *Vin. Ab.* 18, *pl.* 3.: 2 *Eq. Ca. Ab.* 83, *pl.* 4, it is said that interest on money given for life, though payable half yearly, is always computed to the day of the death of the tenant. The case of Lord Holt's will, the Lord Chancellor, in *Ambler* 279, said, must have been by consent; but there he is speaking of the interest of *money in the funds*, which is never apportioned; 3 *Bro. Ch. Rep.* 101. In 2 *Vesey Sr.* 672, *Wilson vs. Harman*, the case of Lord Holt, as to money in the funds, is denied; but Lord Hardwicke seems to make a difference between dividends on South Sea Annuities and all annuities of that kind, and the interest of money.

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See 3 *Atk.* 502, *Sherrard vs. Sherrard*; 3 *Atk.* 261, *Pearly vs. Smith.*

As to the funds, the reason given in 2 *Com. Dig.* 359, *Title Chancery*, (2 *E.*) *Apportionment*, is, because by Act of Parliament the dividends on these annuities are made payable on certain days.

Considering this as a provision made by a father for a daughter, *during her life*, I do not perceive how she could have the full benefit of it, without extending the payment of interest to the last day of her life. He certainly designed to give her the use in the interest of a moiety of the purchase money as long as she lives.

Decree for the payment to complainant, as the administrator of Betty Matson, of interest on one moiety of the purchase money from the 25th day of March, 1817, to the 23rd day of December of the same year, the day of Betty Matson's death.

JOHN ROSS,

vs.

SARAH SINGLETON.

New Castle, June T. 1821. (In vacation.)

A married woman, whose husband was reported and believed to have been killed in battle, but who was in fact living, contracted to sell and afterwards conveyed her maiden property. An ejectment for the premises was brought by the wife after the husband's death and judgment recovered against the purchaser; *Held*, that there being no fraud he could not be relieved in equity.

A married woman cannot, after she becomes sole, be compelled to make good or execute a contract which was void in its origin, or which she was legally incompetent to enter into.

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Statement of the case.

A court of equity cannot, in the absence of fraud, accident or mistake, give validity to a contract which is void in law.

A court of equity will not relieve a complainant against the consequences of his negligence, or of a risk voluntarily assumed by him.

INJUNCTION BILL.—This was a motion *ex parte* for an injunction, under the following circumstances, set forth in the bill:

In the year 1785, certain real estate, situated in New Castle County, being held by Joseph Singleton and his wife, the defendant, in her right, Singleton's interest therein was sold in execution of a judgment against him, and purchased by Daniel Thompson and Andrew McIntire. Afterwards the title under the Sheriff's sale came to Thompson solely. Joseph Singleton, about the year 1791, enlisted as a soldier in the troops commanded by General St. Clair, and was in the battle fought by General St. Clair with the Indians on the 4th of Nov. 1791. The rumor of his death gained circulation and general credit with his family and in the neighborhood. The defendant, his wife, soon afterwards applied to the complainant to purchase the land from her, and assured him that she had made the most particular inquiries after Singleton and had obtained such information as fully convinced her that he had been killed in the battle with the Indians. The complainant at that time declined the purchase; but upon her renewing the application afterwards, with an offer to sell the land at fifty shillings per acre, he agreed to purchase, confiding in her assurance that she had reason to believe that Singleton, her husband, was dead. A contract in writing was drawn and signed, dated 1st of December, 1794, whereby the defendant agreed to sell and the complainant to buy the land, being sixty-one acres and eighty perches, at fifty shillings per acre, amounting to £153.15; of which £56.05 was to be paid down, and the residue when a good title should be made and the possession delivered. A memorandum, appended to the contract, referred more particu-

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larly to the title as being in the defendant by descent from her father, and that Joseph Singleton, her husband, was dead. The £56.05 was paid to the defendant, and materially aided in the support of herself and children. The complainant, by an arrangement with Daniel Thompson, the purchaser at the sheriff's sale, obtained possession of the land, and has since made repairs and been at considerable expense. After these transactions above stated the defendant removed to Philadelphia, and the complainant being on a visit to that place in 1800 she insisted upon the performance of the contract, again alleging that she had received information warranting the belief that her husband had been killed in the battle with the Indians. He had not in fact been heard of up to that time, which was more than seven years after the battle. Upon her solicitations and assurances, and under the advice of Samuel Cochran, who drew the contract and was a mutual friend, and also of Thomas McKean, Chief Justice of Pennsylvania, who acted as Mrs. Singleton's friend in the business, the complainant consented to accept a deed and to pay the residue of the purchase money, all which was done on the 23d of April, 1800. The deed set forth, in connection with the statement of title, Joseph Singleton's death.

About the year 1808, Joseph Singleton returned, and went to Philadelphia to see his wife; but she refused to cohabit with him, as the complainant had been informed. Singleton then went off to Kentucky.

In 1818, Joseph Singleton having meanwhile died, the defendant brought an ejectment for this land in the Supreme Court for New Castle County, and a trial was had at the April Term, 1821. The Court, in that action, charged the jury that any such contract or deed made by a married woman, and executed as the contract and deed in question appeared to have been, was void in law. Consequently, the plaintiff recovered a verdict and judgment

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in the ejectment. Thereupon, this bill was filed, praying that the defendant may make to the complainant a good and sufficient deed; that the complainant may be quieted in his possession of the land; and for an injunction to restrain further proceedings under the judgment in the ejectment.

The facts set forth in the bill, connected with the execution of the contract and deed, were fully verified by the deposition of Samuel Cochran, a witness in the action of ejectment,—a copy of the deposition being annexed to the bill.

This bill was presented to the Chancellor, in vacation, in May, 1821. After consideration of the bill, the Chancellor refused to grant the injunction, assigning his reasons as follows:

The general question here is, whether a *feme covert*, after she becomes sole, may be compelled to make good or to execute a contract, which was void in its origin and which she could not enter into.

In this case, no fraud can be imputed to either of the parties. The death of Joseph Singleton was equally unknown to both of them, and it appears by Mr. Cochran's testimony, which is annexed to the bill, and makes part of it, that on the 1st of December, 1794, when the articles of agreement were executed, the defendant only expressed *her belief*, of his death, and said *she thought he must be dead although she had no evidence of it.* Afterwards, when the deed was executed, in April, 1800, the length of time between his supposed death and that period, alone seemed to confirm the parties in the opinion of his death. There was no imposition practised on Mr. Ross, and no fact was concealed from him which she ought or could communicate to him. The purchase of the land was a hazard, a risk incurred by Mr. Ross voluntarily, and without any deception. Indeed, considering the notoriety of the transaction

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and the persons consulted, it is not to be believed that Mr. Ross was led into an error by any act, or concealment, or false suggestion. I am satisfied from the deposition of Mr. Cochran, that there was no fraud in the case at the time of the execution of the articles of agreement and deed, nor at any other time. Neither can I find in the whole affair any like accident or mistake. Ignorance is not mistake; neither is error in judgment a ground of relief. The parties blindly entered into a negotiation about the purchase of the land; and after more than five years, Mr. Ross took a deed and paid the purchase money, without a knowledge of the death of Singleton, the husband of the grantor, upon whose death the legality of the contract depended. To relieve in this case would be to relieve against the imprudence of Mr. Ross. He did not know that Sarah Singleton was a *feme sole*. He knew that if her husband was alive she could not convey or grant the land; and knowing that although the woman expressed her belief of his death she had no evidence of it, he ventured on the purchase. It was altogether a calculation of chances, and he trusted to the chance. The probability, indeed, was that the man was dead; but it was only a probability. In short, his eyes were open, and he must abide by the event.

But it is alleged in the bill that this woman executed the deed, received the purchase money, and enjoyed great benefits from it; also, that the complainant expended considerable sums in repairs. All this, in the present stage of the proceeding, we must take to be true; but it is not sufficient to give validity to a transaction that is absolutely null. A contract made by a married woman, without the consent of her husband, is void; and a court of chancery cannot give validity to a contract void in law. The case of *Kenge vs. Delavall*, 1 *Vern.* 326, has some resemblance to this. Sir Ralph Delavall and his lady, by reason of some discontents in the family, agreed to live separately,

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and there was a separate maintenance settled on the lady, but determinable on the death of either of them. She contracted several debts during the separation. Her husband died. A bill was then brought to subject her jointure to the payment of the plaintiff's debt. The Lord Keeper said that had the separate maintenance continued, there might be some reason for the creditors to follow that, and make it liable to their satisfaction; but that being determined by the death of the husband, he did not see which way the jointure could be charged with it. The reason why the separate estate might be charged was because, according to *Peacock vs. Monk*, 2 *Ves. Sr.* 190 and *Hulme vs. Tenant and wife*, 1 *Bro. Ch. Rep.* 16, 20, a *feme covert*, acting with respect to her separate property is competent to act in all respects as if she were a *feme sole*; but, in all cases of separate property, the power which the *feme covert* has over it arises from the agreement of the husband before or after marriage; and without the agreement, she can do no act to affect it. 2 *Ves. Sr.* 190: 1 *Ves. Sr.* 163, 229, 517.

A married woman can enter into no contract that will bind her after her coverture. If she gave a bond she could not be sued upon it. She cannot personally bind herself, nor her executors or administrators; 4 *Bro. Ch. Rep.* 483, 487, *Sockett vs. Wray*. In *Smith, and Helen his wife, vs. French*, 2 *Atk.* 243, the case is stronger than this, and the principle is clearly laid down by Lord Hardwicke. A bill was brought for satisfaction of a breach of trust. The husband, after the marriage, conveyed his wife's fortune to the wife's mother, as her trustee, for her separate use. The trustee, at the importunity and repeated solicitation of the daughter, the *cestui que trust*, committed a breach of trust by disposing of the trust money for the benefit of the husband, at his instance and request. The wife promised to release; and after she became a widow confirmed the promise. This confirmation alone secured

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the trustee. The promise of the wife during coverture could not bind her; and, although the case was extremely hard, Lord Hardwicke would have decided against the trustee, had he not found in the promise of the *cestui que trust*, after she became sole, a defence sufficient to rebut the plaintiff's equity. He compared it to the case of an infant under age, who, contracting a debt during his minority, shows his consent to it by confirming it after he comes of age; which shall effectually bind him, though it was voidable at his election. So here, said he, a promise by the wife to release during the coverture, it is certain, could not bind the wife; but if, after the death of her husband, she repeats the promise, that is a confirmation of it and is good. In that case there was cited from *Hobart* 225, a case, 7 *Ed.* 4, 14, in which the wife being a *cestui que use*, she and her husband sold the land. She received the money. They both required the feoffee to make the estate to the vendee; yet she, after her husband's death, in a court of equity, was relieved against the feoffee, and it was held she might also be against the vendee if he were privy to the use.

These cases, and the reason of them, fully establish the principle, that a married woman can make no contracts during her coverture which shall bind her after she becomes sole, unless they be made conformable to certain rules established to operate upon and bind married women. And if Sarah Singleton could be compelled to make a further conveyance to John Ross for the better assurance of this land; or, if she could be restrained from prosecuting to execution her judgment at law recovered in this action of ejectment, she might be compelled, directly or indirectly, to give effect to a contract void both at law and in equity.

Supposing that the complainant has made out his whole case in his bill, with the depositions annexed, I see no ground upon which I can order the writ of injunction;

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and although I have been obliged to form a decided opinion upon this application for a writ of injunction, yet, I shall be extremely willing to change my opinion, if the plaintiff shall be able to satisfy me that it is erroneous. It certainly is a hard case, and I regret that I cannot comply with the prayer in the bill for a writ of injunction. See *Bolton vs. Williams*, 2 *Vesey Jr.* 138 : *Jones vs. Harris* 9 *Ves. Jr.* 486.

This case afterwards proceeded to a final hearing before the Chancellor, at the April Term, 1823, on bill, answer, exhibits and depositions ; and a case of intentional fraud on the part of the defendant having been established by the proofs to the satisfaction of the Chancellor, a decree was made, perpetually enjoining the defendant from prosecuting to execution her judgment in the action of ejectment at law. This decree was affirmed by the High Court of Errors and Appeals, at the June T. 1824.

JOHN WILKINS,

vs.

ELISHA EVANS.

Sussex, March T. 1821.

Under a lease of lands, for the term of six years, with the right in the lessee to purchase the same, upon paying a stipulated price therefor, within the six years—

Held, that the lessee, having paid the purchase money within the time limited therefor, was entitled to a decree for specific performance, though after the six years had elapsed :—

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Statement of the case.

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Held also, that even though the purchase money had not been fully paid within the time limited therefor, the purchaser was nevertheless entitled to relief, if full payment were prevented through the default of the vendor.

A contract in writing for the sale of lands cannot be discharged by a parol agreement, except that equity will relieve where the parol agreement has been acted upon and the condition of the parties thereby changed.

It seems, that under the Delaware Statute about contracts and assumptions a written contract for the sale of lands cannot be waived except in writing.

BILL FOR SPECIFIC PERFORMANCE.—This bill was for the specific performance of a written contract for the sale of lands, which was in the words following, viz:

"Articles of agreement, between Elisha Evans of the "one part, and John Wilkins of the other part, witness, "that the said Evans doth agree, for his part, to let said "Wilkins have a plantation that he bought of Mr. Conoway "of Wm., for the term of six years from the first day of "last January; and said Wilkins doth agree, for his part, "to give said Evans eighteen dollars per year for said place, "and to put the said place under a good fence, and to put "a good framed house eighteen feet long and sixteen wide, "with two good floors, and to be covered with shingles, and "a good brick chimney, and to be pillared well with brick; "and to build a good smoke house and a good corn-crib, "and to dig and frame a good draw well for water, and "at the expiration of the above mentioned six years, said "Wilkins doth agree to give up the said place to said Evans "with the above mentioned items, all in good order, unless "the said Wilkins should see proper to buy the said place, "and if he sees proper to pay the said Evans three dollars "per acre for said place *before* the expiration of the above "mentioned six years, then said Wilkins is to have the "place; but, be it remembered that the above mentioned "eighteen dollars per year for the use of said place, for "which said Evans has said Wilkins' notes, is not to be

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" included in the price of said land, if said Wilkins should " see proper to purchase it. And for a true performance " of the above mentioned agreement, we bind ourselves to " each other in the penalty of $600. As witness our hands " and seals this 27th day of February, 1813."

(Signed,) ELISHA EVANS, { L. S. }

his

Witness present, JOHN X WILKINS, { L. S. }

his mark.

(Signed,) SCUYLER X SPICER,

mark.

JOSHUA MCCALLEY.

The complainant, upon the execution of the contract, gave single bills for the stipulated annual rent of $18.00, payable in the six successive years of the renting, and entered into possession of the land as lessee. There was evidence shewing sundry payments made by him to the defendant and goods and grain delivered, during the six years of the tenancy, which, it was insisted on his part, were credits on account of the purchase money in the written contract mentioned. Disputes arose between the parties touching some of these payments, the amount of them, and whether they were applicable to the purchase money. It was also in dispute whether a certain balance of account, due from the defendant to the complainant prior to the contract, was applicable to the purchase money, the complainant claiming it so to be, while the defendant insisted that this account had been extinguished by the single bills given for the rent under the contract. The defendant also claimed to be allowed, in the settlement, the value of some of the improvements which, under the contract, the complainant as lessee was to put upon the land, but which he had failed to make. In consequence of these disputes no settlement was reached be-

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Arguments.

fore the six years limited in the contract for completing the purchase had elapsed, and no conveyance had been made. The six years expired, the 1st of January, 1819. This bill was filed, the 18th of May, 1820. The defence taken against a decree for specific performance was, (1) the expiration of the six years' limitation of time, which it was insisted was of the essence of the contract; and (2) that the contract had been abandoned or waived by parol. To this latter point some evidence was adduced of declarations on the part of the complainant to the effect that he had given up the land.

The cause came before the Chancellor, for a hearing upon the bill, answer, exhibits and depositions, at the March T., 1821.

Wells, opened for the defendant.

How far time is material in a contract depends upon the intention of the parties. It is material if they have made it so, and such is the fair construction of the contract in this case. 1 *Bac. Abr.* 109, (*Wilson's Ed'n*); 1 *Fonb. Eq.*, 392 : 4 *Bro. Ch. Rep.* 332 : 3 *Ves. Jr.* 693 : 4 *Ves. Jr.* 686 : 5 *Ves. Jr.* 730 : 5 *Cranch* 278.

Further, the evidence proves that Wilkins gave up this contract. The relief by a decree for specific performance being discretionary with the Court, it will not interfere when the contract has been discharged or abandoned by the parties, though such discharge were by parol.

Robinson, for the complainant.

As to *time*, the cases cited do not apply. They apply where *nothing has been done;* but where a purchaser has paid part or nearly all of the purchase money, the defendant shall not rely on time. 1 *Mad. Ch. Pr.* 328 &c. With respect to *waiver*, the rule is, that a parol agreement, unless

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it has been executed or acted upon, will not discharge a written contract. 2 *Eq. Cas. Abr. c.* 44. *p.* 33: 1 *Vernon* 240: *Sugd. on Vend.* 96—98.

RIDGELY, CHANCELLOR.—The defendant has contended that a specific execution of this contract should not be decreed, because, as he alleges, the complainant did not before the expiration of the six years pay the purchase money. He says that the time is made the essence of the contract; that, therefore, it is material; and that, as the complainant failed to perform his part within the limited period, a specific performance ought not to be compelled.

It becomes necessary to examine the evidence and see whether Wilkins paid, within the six years, the stipulated price of the land, and if he did not, by whose default it happened; and then to consider whether, according to the principles of equity, he still may be allowed to pay the balance, if any, and have a decree for the conveyance of the land to him.

[The Chancellor here entered into a detailed examination of the evidence touching sundry payments made by the complainant to the defendant, and their applicability to the purchase money.]

Upon an examination of the evidence, I am of the opinion that the several sums which ought to go to the credit of Wilkins, in payment for the land, considerably exceed the purchase money. But supposing a balance of the purchase money to be due, it is proper to inquire by whose default this happened. In this inquiry, I have no difficulty in fixing the whole blame upon Evans.

It is evident that Wilkins endeavored to effect a settlement with Evans in Dec. 1818. He went to the house of Evans; he produced his account; and then, for the first time, Evans objected that the notes for the rent had extinguished all charges in the account against him prior to

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their date, though it is obvious from the testimony, that he considered, when the contract was made, that these charges of Wilkins were to be applied to the purchase of the land. Evans then proceeded to state the accounts himself, and struck a balance of $150 or $200, in his own favor. In this statement he included the supposed expense of erecting the buildings, &c.; which, upon no pretence, could be due to him, because the six years had not expired and no right to compensation had accrued to him. Wilkins, if he had determined to abandon the purchase, had the whole term of six years to erect the buildings and make the improvements; and consequently, Evans, then had no claim for compensation on account of any default in that respect. Evans then proposed to submit to the arbitration of Thomas Pepper and James Maul his estimate of the value of the supposed buildings; but he never proposed to submit the whole accounts, and without yielding to his own charges and allowances no settlement could be accomplished. Evans, in this business, acted with a view of re-possessing the land and retaining all the money paid on articles furnished, although they amounted to more than double the six years' rent. Evans annexed a condition, certain to frustrate any settlement. His own statement was to be accepted, except as to the price of the buildings, the balance made out by himself was to be paid, and the land was to be yielded up. This was not the only attempt which Wilkins made to adjust this matter. Before or after the meeting at Evans' house, Wilkins, aided by Doctor McIlvaine, wrote to William Russell and Eli Pepper to assist in the settlement with Evans. The letter being shown to Evans, he immediately rejected it, alleging that he was not on friendly terms with Russell. All these proceedings clearly demonstrate two things; *first*, that Wilkins was extremely anxious to adjust the accounts and discharge the balance, if any; and *second*, that Evans resisted every proposition, unless he were permitted to be

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the sole arbiter. In cases of this kind, where a variety of payments had been made, in the various productions of the land, on account of the purchase money, with the express understanding of the parties, it would be a monstrous doctrine, indeed, if there were a small balance due and all attempts to ascertain that balance were rendered abortive by the party bound to convey, to say that time is so essential that unless the payments were completed to the very day the contract should be annulled. I have met with no such cases. Evans himself interposed the difficulties to prevent a compliance by Wilkins; and now he attempts to take advantage of a failure (if there were any failure) of which he was the cause. Wilkins, it is true, if any balance were due, might have made a tender; but the arrangement of the parties in the origin exempted Wilkins from this necessity. The accounts were to be kept by McColley; various articles had been delivered and services rendered by Wilkins in performance of his part of the contract; and a settlement became necessary before the expiration of the six years. Hence, it was, that Wilkins became urgent for a settlement; and hence it was, that Evans objected, made difficulties, and in the end succeeded in preventing an adjustment and in preventing Wilkins from discharging the balance, if any were due.

Several cases have been cited on the part of the defendant, as authorities to show that the plaintiff is not entitled to a specific execution of this contract. The facts in those cases are totally variant from the facts in this cause, and the principles contained in them justify a decree in favor of the plaintiff.

In the *Marquis of Hertford vs. Boore*, 5 *Ves. Jr.* 719, in a note, is cited *Milward vs. Earl Thanet*, at the Rolls, March 24th, 1801, where a bill for a specific performance was dismissed. Lord Alvanley, then Master of the Rolls, observed, that Lord Kenyon was the first who set himself

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against the idea that had prevailed, that where an agreement was entered into either party might come at any time; but that it is now perfectly known, that a party cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager.

In *Omerod vs. Hardman*, 5 *Ves. Jr.* 722, 736, the time for the performance was held to be material, and Graham Baron said, that in *Whittaker vs. Whittaker*, 4 *Bro. Ch. Rep.* 31, it appears, Lord Kenyon re-called the true rule, holding that a vendor was not to await the arrangement of a testator's affairs, and therefore directing a contract to be delivered up.

In *Lloyd vs. Collett*, 4 *Bro. Ch. Rep.* 469, and 4 *Ves. Jr.* 689, in a note to *Harrington vs. Wheeler*, the Lord Chancellor says; "there is nothing of more importance than that "the ordinary contracts between man and man, which are "so necessary in their intercourse with each other, should "be certain and fixed; and that it should be certainly "known when a man is bound and when not. There is a "difficulty to comprehend how the essentials of a contract "should be different in equity and at law. It is one thing "to say the time is* so essential, that in no case in which "the day has by any means been suffered to elapse the "Court would relieve against it, and decree performance. "The *conduct of the parties, inevitable accident, &c., might* "*induce the Court to relieve.* But it is a different thing to "say, the appointment of a day is to have no effect at all; "and that it is not in the power of the parties to contract, "that if the agreement is not executed at a particular "time the parties shall be at liberty to rescind it. In "*most of these cases there have been steps taken.* Is there any "case in which, without any previous communication at "all between the parties, the time has been suffered to

*In the case as reported in Vesey and the note in Brown, the word "not" occurs here, evidently by mistake.

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"elapse? I want a case to prove that, *where nothing has been* "*done by the parties*, this court will hold, in a contract of "buying and selling, a rule, that certainly is not the rule "at law, that the time is not an essential part of the con- "tract." The Lord Chancellor then considered the par- ticular circumstances of the case, and decreed upon them against the plaintiff, because he not only had done nothing but absolutely refused to complete it. In the principal case, *Harrington vs. Wheeler*, the *plaintiff had done no act*, and his bill was dismissed with costs.

The principle upon which the Chancellor acted in those cases is not be controverted, for the parties who claimed the assistance of the Court had taken no steps, and had suffered the time to elapse considerably beyond the period for a completion of the contracts without an attempt to execute them. How different is this case? Wilkins commenced immediately his payments, continued them to December, 1818, and then endeavored to effect a settlement to pay the balance, if any were due.

In the case of *Eaton vs. Lyon*, 3 *Ves. Jr.* 690, 692–3; the Master of the Rolls says, "at law a covenant must "be strictly and literally performed; in equity it must be "really and substantially performed, according to the true "intent and meaning of the parties, so far as circumstances "will admit; but if by unavoidable accident, or if by fraud, "by surprise, or ignorance not wilful, parties may have "been prevented from executing it literally, a court of "equity will interfere; and upon compensation being "made, the party having done everything in his power and "being prevented by the means I have alluded to, will give "relief. It is true, that has been formerly carried to a "length that became, in some degree, alarming. They got "into a habit of construing terms and conditions of cove- "nants, as being only *in terrorem*: but undoubtedly, in "modern times, that has been much restrained, and it is "now perfectly understood, *that even in the purchase of an*

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" *estate*, if money has been covenanted to be paid at a given " day, at law no action will lie; but if the party can show, that " he took the means of paying it, and has been prevented by " accidents not in his power, the Court will dispense with " the strict performance of it, because, as it was formerly " said, it is not of the essence of the contract; but it may " be of the essence of the contract, and the party shall not " avail himself of equitable circumstances, unless he shows " that there has been no willful neglect or misconduct on " his part."

These cases are subsequent to *Milward vs. Earl Thanet*, and moderate the terms, "*ready, desirous, prompt and eager*," said to have been used by Lord Alvanley, to a reasonable rule of construction. They are founded upon common sense and justice. Indeed, it would be a mockery of all equity and good conscience to suffer a party, to prevent the performance of an agreement and then to claim its avoidance under a failure produced by himself. Wilkins was constantly ready and willing. Evans created the difficulties. Wilkins did everything in his power. He took the means of paying; there was no wilful neglect; and if there is any balance unpaid, the Court will dispense with the strict performance.

As to the ground of defence that the contract was abandoned, the whole evidence taken together does not sustain the allegation. But even if the parol agreement were unequivocally proved, it would not be sufficient to rebut the plaintiff's equity; because, the situation of the parties, in no respect, was altered by it. There was no part execution, and Evans has not sustained the slightest loss or inconvenience by it. *Vide* 1 *Mad. Ch. Pr.* 323. And were all other objections to this supposed parol agreement removed, I should doubt extremely whether it could operate against the written contract. To waive the written contract would be as much a contract about lands as to make it; and our Act about contracts and assumptions, 1

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Del. Laws 327, has declared that an agreement upon any contract or sale of lands, or any interest in, or concerning them, shall not be binding; unless it be reduced to writing. And it should be admitted upon strong and positive proof and to rebut a hard and oppressive claim.

In the case of *Goman vs. Salisbury* 1 *Vern.* 240, it was held that an agreement in writing might be discharged by parol. And in 5 *Vin. Abr. pl.* 38 and *Legal vs. Millar*, 2 *Ves. Sr.* 299, evidence was given, on the ground of part performance, to discharge a written by a subsequent parol agreement; but this was done to rebut an equity, in one of the cases where the written agreement was a hard one; and in both, because the parol agreement had been partly executed. Lord Hardwicke, in *Buckhouse vs. Crosby*, 2 *Eq. Ca. Ab.* 32, 86, *pl.* 44, said, in such cases he should expect very clear proof. Now here, the written agreement is not hard upon Evans, but is highly advantageous to him, although it should be strictly executed by him. Upon Wilkins, as appears from the testimony, it is, under the most favorable circumstances, extremely hard. The terms in the agreement itself are severe beyond any that I have ever seen.

Upon the whole, I am very clear that the defendant should be decreed to convey this land to the complainant.

Let a decree be entered for a specific execution of the contract.

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Statement of the case.

The PRESIDENT, DIRECTORS & COMPANY of the FARMERS' and MECHANICS' BANK of DELAWARE,

vs.

WILLIAM POLK, THOMAS TOWNSEND, WILLIAM MOORE, JR., PETER G. WOOTTEN, ISAAC COOPER, HENRY BACON, AND GEORGE PARKER AND NANCY his wife, late NANCY MOORE, administrators of SOLOMON MOORE, deceased.

Sussex, July T. 1821.

In a suit by a bank against a late cashier and the sureties in his official bond, upon the death of the cashier insolvent, the cause will proceed against the sureties, though no administrator of the cashier may have been appointed and made a party defendant.

Practice in equity with respect to the necessity of joining as parties all persons interested, and the exceptions to the rule stated.

The charter of the Farmers' and Mechanics' Bank of Delaware required that a bond should be taken from the cashier, with surety, &c. and "with condition of good behavior." The condition of the bond taken in this case was that the cashier should "well and truly, and with fidelity, perform and discharge the duties enjoined on him as cashier of the Farmers' and Mechanics' Bank of Delaware, agreeably to the laws and regulations therein made and provided, &c." *Held*, that the condition of the bond was a sufficient compliance with the direction of the charter, and that it was valid.

Where the transactions material to ascertain the sum for which a party is liable are complicated, involved in confusion and difficulty, and require minute investigation, such as a jury cannot give, they are a proper subject of relief in a court of equity, by a decree for an account

BILL FOR AN ACCOUNT.—This bill was filed against the defendant, William Polk, late cashier of the Farmers' and Mechanics' Bank of Delaware, and the other defendants as the sureties of the cashier in his official bond. The bill alleged a deficiency in the cashier's accounts, to an amount exceeding $5,000.00, and prayed a decree that an account

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be taken under the direction of the Court, in order to ascertain the amount of the deficiency, and that the defendants be decreed to pay such deficiency when ascertained.

After the filing of the bill, William Polk, the late cashier and principal defendant, died insolvent. No administration was raised; nor any new party made to represent his estate.

Answers were filed on behalf of the surviving defendants, in which they admitted the execution of the bond, with sureties, as alleged in the bill. They disclaimed any knowledge of the cashier's accounts, alleged that the sureties had taken no indemnity in their suretyship, and for a defence insisted upon several grounds, viz: (1) that the complainants had an adequate remedy at law, upon the bond; (2) that by the terms of the bond, the defendants were answerable only for the first year of William Polk's cashiership, within which the alleged default did not occur. (3) That the complainants had been guilty of negligence in permitting Polk to be absent from the bank, and that other persons beside Polk had held the custody of the cash, so that his liability could not be fixed.

Issues were joined and depositions taken on both sides. There was much evidence as to the transactions of the cashier, which, however, was not material to the points argued and decided.

The official bond of the cashier was as follows, viz:

"Know all men by these Presents, That we, William "Polk, &c., are held and firmly bound unto the President, "Directors and Company of the Farmers' and Mechanics' "Bank of Delaware, in the penal sum of $25,000.00, good "and lawful money of the State aforesaid; to which pay-"ment, well and truly to be made, we bind ourselves, our "heirs, executors and administrators, jointly and severally,

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"firmly by these presents. Sealed with our seals, and "dated this 24th day of September, A. D. 1812.

"*The condition of the above obligation is such*, that if the "above bounden, William Polk, shall and doth, well and "truly, and with fidelity, perform and discharge the duties "enjoined on him as cashier of the Farmers' and "Mechanics' Bank of Delaware, agreeably to the laws and "regulations therein made and provided, then the above "obligation to be void and of no effect, or else to remain "in full force and virtue in law."

A warrant of attorney to confess judgment was annexed to the bond.

The Act of Assembly which incorporated this Bank, (4 Laws of Delaware, 542) enacted, that "the cashier or "treasurer before he enters on the duties of his office "shall be required to give bond, with one or more sure-"ties, to the satisfaction of the directors, together with a "warrant of attorney to confess judgment or judgments "thereon, in a sum not less than $25,000.00, *with condition* "*of good behaviour.*"

The cause came before the Chancellor for a hearing upon the bill, answer, exhibits and depositions, at the July Term, 1821.

Robinson and *Hall*, for the complainant.

1. The first objection taken in defence is that William Polk, one of the defendants, having died since the filing of the bill, no administrator has been made a party in his place. Were the objection sustained, the Court would not, on that ground, dismiss the bill, but would order the cause to stand over until proper parties should be made. But the objection is not tenable. The suit was properly brought, in the first instance, all the obligors in the bond being joined. The death of Polk and the absence of an administration is an event beyond the control of the com-

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plainant. The complainant in a cause is not bound to raise an administration on the the estate of one deceased defendant, in order to get the benefit of his proceeding against the other defendants. It is for them to raise an administration if their interests are involved in having one. The Bank, as a corporate body, cannot administer, nor, if it were an individual, could it properly represent the interest of the adverse party. Neither, as a corporation, has it authority to employ a person to administer. It could not legally indemnify a person so employed. It results then, that from necessity the cause must proceed against the surviving obligors; for, otherwise, there would be a failure of justice to the complainant. At the same time the defendants can suffer no injustice; because the case shews that Polk died insolvent, and there is no interest or benefit in raising an administration. Further, this is a joint and several bond, under which the cause of action survives. *Collins vs. Griffeth*, 2 *P. Wms.* 313: *Eq. Cas. Abr.* 168, *pl.* 19: *Madox vs. Jackson* 3 *Atk.* 406: *Cranburn* and *Boyce vs. Crisp et al.*, *Finch* 105: *Durand vs. Whittingham*, *Mosely*, 85: 1 *Blk. Com.* 504: 2 *Mad. Ch.* 154: 1 *Johns R.* 438.

2. Another objection is to the official bond. This, it is insisted, is illegal and void, because the condition is not in the form prescribed by the charter. To this objection the answer is two-fold. In the first place, the Bank has the power, without special authority, to take bond and security from its officers or servants in any form it pleases. The charter, as a security to the public, requires bond and surety in a prescribed mode: but this does not disable a corporation from taking a bond in another form, in the exercise of its general power; nor does it invalidate such a bond, if it be valid on general principles. This bond is good in form as an obligation, and is upon a sufficient consideration, which is the giving of the office of cashier to the principal. In the next place, the charter does not prescribe in what

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words the condition of the bond shall be taken, and the condition as taken is a substantial compliance with the charter. The bond is required to be taken "with condition of good behavior." The condition of this bond is, that he "well and truly and with fidelity, perform and discharge "the duties enjoined on him as cashier of the Farmers' "and Mechanics' Bank of Delaware, agreeably to the laws "and regulations therein made and provided." Now, whatever would be a breach of the condition of the bond as it was taken, would be a breach of a condition taken in the words of the Act. "Good behavior," is conduct conformed to the by-laws and regulations. Any violation of them is bad behavior.

3. As to the question of jurisdiction. This case peculiarly belongs to a court of equity. It is one of complicated accounts, involving the examination of many books, and which, as a witness states, it would take three months to adjust and settle. It matters not that in such a case a court of law may have jurisdiction. That does not exclude the concurrent jurisdiction of this Court,—5 *Ves. Jr.* 794: more especially so, in doubtful or difficult cases,—1 *Ves. Jr.* 424. The action of account at law has fallen into disuse. This mode of relief has come to be considered peculiarly appropriate to courts of equity, from their ability to deal more effectively with such subjects. There are many cases, similar to this, in which equity has relieved. 2 *Ves. Sr.* 371: 3 *Atk.* 383: 2 *Atk.* 141: 1 *Atk.* 126.

Again, this bond is not within the Statute, 8 and 9 Will. III, there being a warrant of attorney. 1 *Tidd* 511. The complainant might have entered a judgment and taken out execution; in which case, the defendant could have been relieved only in equity. If this be so, the complainant is also entitled to come into this Court; for the remedy must be mutual.

J. D. Wells and *Wm. H. Wells*, with whom was *Cooper*, for the defendants.

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Argument for defendants.

1. We insist upon the general rule which requires all interests to be represented in the cause, and that the bill be dismissed for the want of proper parties. The cases cited for the complainant stand upon grounds of exception to the rule, which do not here apply. The complainant says, that being a corporation it could not administer. But it could have caused an administration to be raised; and this was its duty, not ours.

2. The bond does not pursue the form prescribed by the charter, and is therefore void. It is a defect which cannot be cured. Acts done under a special authority, which may affect third persons, are void if they do not pursue the authority. 1 *Burr.* 120: *Dyer* 263, 6, *pl.* 36: 3 *Viner* 421: 2 *T. R.* 169: 1 *T. R.* 707: *Doug.* 554: 5 *Co. Rep.* 4: 1 *T. R.* 707. If less be done than is commanded, the act is wholly void; if more be done, it may be good for what is commanded but void for the excess. 1 *Co. Inst.* 56, 252 *a.* This bond is void at law, and equity will not relieve against the defect, because that would be to charge sureties, which equity will not do further than they are chargeable at law. 2 *Comb.* 668: 2 *Com. Dig.* 672, 4, *D*: 3 *Atk.* 92.

3. The case is not within the jurisdiction of this Court, the complainant having ample remedy at law. The claim is for a sum certain, or which can be made certain by the accounts of the Bank. The bill shows this. It states what the cashier has received and what he is chargeable for. It then alleges that an account with the cashier was stated, showing a balance due the Bank;—further, that the cashier retains the statement and makes no objection. That, if true, is equivalent to an account stated, recoverable at law. What necessity then is there to come into this Court?

The bill is for an account. The jurisdiction of this Court for an account is concurrent, and will be exercised only in sound discretion, and where the circumstances require it. 1 *Ves. Jr.* 424: 5 *Ves. Jr.* 794.

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Argument for defendants.

Such a bill properly lies only against a defendant who has something to show by way of account, necessary to the complainant's relief; as where an account is sought against a tenant for rents and profits received, or against a trustee respecting the trust fund; or, at least, where some discovery is sought of matters within the defendant's knowledge, requisite to enable the complainant to state an account. No account lies for a sum certain, ascertained or ascertainable without a discovery. 1 *Bac. Abr.* 36: 1 *Harrison's Ch. Pr.* 69: 3 *Black Com.* 437. In this case, the defendants, who are sureties, know nothing and can show nothing. They have received nothing to account for, and no matter requiring discovery on their part is shown by the bill.

It is argued that this bond, not being under the Statute of William III, the complainant could have entered a judgment and issued execution, in which case the defend ants could have been relieved in equity only; and that as defendants could then have been relieved in equity, so may the complainant now be. The substance of this argument is that by doing a wrong the complainant could have forced the defendants into equity, and therefore the complainant may go into equity. That is a clear *non sequitur*.

The real object and effect of this bill is to enable a corporation, which has got its books wrong, to call on this Court to aid it as a clerk in stating an account. The Court will undertake no such office, nor subject us to the cost of a proceeding for such a purpose.

It matters not at what stage of the cause a want of jurisdiction is discovered. In no case will the Court proceed to a decree without jurisdiction. 2 *Com. Dig.* 564: 1 *Ves. Jr.* 371: 4 *Dallas* 336: 1 *Harrison's Ch. Pr.* 69.

RIDGELY, CHANCELLOR.—Three principal objections are made by the defendants to this bill. *First*, that there are

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Opinion.

not proper parties before the Court. *Second*, that the bond was not made according the Act of the General Assembly: and *third*, that this is such a case that the Court ought not to decree an account.

1. *As to parties.* The rule is, that all persons materially interested should be parties to the suit, either as complainants or defendants, so that the Court may determine the rights of all the persons interested in the subject matter of the suit, and make a complete decree. But if some of the persons interested reside out of the jurisdiction of the Court, or cannot for any other reason be brought before the Court, and the fact is charged, that forms an exception. An impossibility cannot be required. If it is not in the power of the party to bring every person interested in the matter before the Court, then the party may proceed without such person. William Polk was made party to this bill; he has since died, and administration has not been taken on his estate. Besides, he died insolvent. It is most evident then, that the complainants can obtain no satisfaction from Polk, if he were a defaulter; nor from his representative, if he had any; neither could the defendants; and as to any discovery or disclosure, neither party is bound to administer. The Bank could not by itself, and it is not its duty to constitute an agent for that purpose. Any of the defendants may, but as this has not been done the objection cannot be sustained.

2. *As to the bond.* The bond is good at common law. The Act of Assembly has not prescribed a particular form in which it shall be taken, and it has not made a bond void, if not taken in the words of the Act. In *Mitchell vs. Reynolds*, 1 *P. Wms.* 181, Parker, Chief Justice, in delivering the resolution of the Court, says; "all the instances "of conditions against law in a proper sense, are reducible "under one of these heads: *First*, either to do something "that is *malum in se*, or *malum prohibitum*. 2 *Co. Inst.* 206. "*Second*, to omit the doing of something that is a duty.

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"*Palm.* 172: *Hob.* 12: *Norton vs. Sims. Third*, to "encourage such crimes and omissions. *Fitzherb*, *Title*, "*Obligation*, 34: *Dyer*, 118. Such conditions as these the "law will always, and without regard to circumstances, "defeat; being concerned to remove all temptations and "inducements to those crimes; as in 1 *Co. Inst.* 206;—a "feoffment shall be absolute for an unlawful condition,— "a bond shall be void."

Here, the bond differs from the Act of Assembly in words only. The condition is to "discharge the duties enjoined "on him as cashier, &c., agreeably to the laws and regu- "lations therein made and provided," which amounts to a condition of good behavior, because it was his duty to conform to the laws and regulations established. However, the bond is according to all the rules of law, and is binding on the parties. This is not so strong a case as *Beaufage's*, 10 *Co. Rep.* 99, in relation to bonds given to Sheriffs under the *Act*, 23 *Hen.* 6, *ch.* 10: and there, although bonds taken in any other form than that prescribed by the Statute are declared to be void, yet there are several instances cited where bonds which did not essentially differ by addition, alteration or diminution were adjudged to be good. Here, the Act does not make void a bond which may differ from it; and if it is not, as this bond is not, to commit *malum in se*, or *malum prohibitum*, or to omit the performance of a duty, or to encourage such crimes or omissions, it is good in law; and then, according to the cases cited by the complainant's counsel, the defendants are bound by it in this Court.

3. Is this such a case that the parties should be decreed to account? Upon that point I have no doubt. These transactions are so complicated, so long and intricate, that it is impossible for a jury to examine them with accuracy. They will require time, assiduous attention and minute investigation, and are involved in so much confusion and difficulty that no other tribunal, by reason of the forms of

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proceeding of the courts of law, can afford the plaintiff a remedy.

An interlocutory decree for an account was entered.

THE CHANCELLOR afterwards adverted to this case, and remarked that in ordering the account he had not at all determined the extent of the liability of the sureties and the ultimate right of recovery in this Court. He considered that the reasoning of the complainant's counsel and the authorities cited warranted the decree for an account; but how extensively the sureties were responsible for the acts or defaults of William Polk was a question yet to be determined, after it should have been ascertained by the account whether any default had been committed.

The decree of the Chancellor for an account was reversed by the High Court of Errors and Appeals at the June Term, 1822. The reversal did not proceed upon a difference of opinion on the points above decided by the Chancellor; but the appellate court considered that, upon the proofs, the complainant had been guilty of laches and breach of duty in its dealings with the cashier, such as to absolve the sureties from responsibility; and, therefore, that any inquiry, under the decree for an account, into the alleged defalcations of the cashier was unnecessary. It was on this ground that the decree was reversed.

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Syllabus.

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JOHN CONNER,

vs.

OTHO PENNINGTON AND TIMOTHY CUMMINS.

New Castle, Oct. 8, 1821. (*In vacation.*)

The defendant in a *scire facias* at law on a judgment, which had been entered under a warrant of attorney for the confession of judgment upon a bond, claimed to be allowed certain credits against the bond, which were disputed. By an entry on the docket of the *scire facias*, it was agreed between the parties that judgment should be confessed, with stay of execution for three months, the confession not to preclude any equitable relief the defendant might be entitled to in chancery. The present bill was filed by the defendant in the *scire facias* in order to obtain the benefit of the credits claimed by him against the judgment at law, the credits being for certain payments which he had made for the obligee in the bond in the course of settling the affairs of a former partnership between them. *Held*, That the defence against the bond being one which could have been effectually made at law, a court of equity will not interfere.

Notwithstanding the judgment at law was entered under a warrant of attorney, relief could have been had at law against the judgment for payments and matters of discount. For, as to payments made upon the bond *prior* to the entry of judgment, the court of law was competent, to that extent, to vacate the judgment, on motion; while payments and matters of discount accruing *after* judgment entered might have been pleaded in the *scire facias*.

The Statute of 4 *Anne, Ch.* 16, *Sec.* 12, enabling a defendant in an action of debt or *scire facias* on a judgment to plead payment, in bar of such action, is in force in this State; and such has been the practice.

In the present case, in addition to the complainant's right to discount or set off against the bond his alleged payments for the defendant, the complainant had his action for money paid, and in that view there was an adequate remedy without the aid of a court of equity.

BILL FOR AN INJUNCTION.—The case made by this bill was as follows:

The complainant and the defendant, Pennington, hav-

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ing been partners in the business of retailing goods, at Staunton, prior to the year 1816, under the firm of Otho Pennington & Co., dissolved the partnership by mutual consent in April of that year, and undertook to make a final settlement of the partnership transactions. Owing to the condition of some outstanding debts, including both debts due from and debts due to the firm, they were unable then to make a complete settlement. So, they made an adjustment exclusive of the debts. As the result of this adjustment, the complainant purchased Pennington's share of the stock, for which he gave his judgment bond in the sum of $324.00, dated Dec. 25th, 1816. With respect to the outstanding debts it was agreed that the complainant should proceed to collect such as were due to the firm and to discharge its liabilities. He was to account to Pennington for one moiety of all the debts due to the firm which he should collect, subject to the usual commissions; and for Pennington's share of all debts from the firm, which should be paid by the complainant, the latter was to be credited on his judgment bond before mentioned. The bond contained an express stipulation to the effect that if the complainant (the obligor) "should be compelled " to pay any portion of the debts due from the concern he " should be allowed a credit on his said bond for the proper " share of the said Pennington."

The judgment bond was afterwards assigned (though not in the form prescribed by the Statute in that behalf) to the other defendant, Timothy Cummins, for whose use a judgment was entered in the Court of Common Pleas for New Castle County, in May, 1817. A *scire facias* upon the judgment was issued to the Dec. Term, 1819, to which the complainant, Conner, being the defendant in the *scire facias*, appeared and pleaded, giving notice that he should claim to be credited, against the judgment, the amount of Pennington's share of certain debts of the partnership, which he, Conner, had paid. At the May Term of the Court of

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Common Pleas, 1821, the *scire facias* being called for trial, it was agreed, by an entry made upon the docket, that the pleas should be withdrawn and judgment entered for the plaintiff, with stay of execution for three months; and it was expressly stipulated, in the entry on the docket, that the confession of judgment should not preclude the defendant in the *scire facias* (Conner) from any equitable relief he might be entitled to in chancery, and that the costs at law should abide the event of the cause in chancery, if the defendant should file his bill in chancery before the expiration of the three months stay, giving security in the usual form, and should prosecute his suit in chancery with effect.

The credits claimed by the complainant against the judgment were, $172.25, for Pennington's share of certain debts of the partnership paid by the complainant, and $50.22, for sundry private debts of Pennington paid by the complainant at his request and for merchandise furnished to Pennington after the bond was given,—the whole of the credits amounting to $223.47. The bill alleged that Pennington's share of the debts due to the firm, and collected by the complainant was the sum of $99.45;—that the amount of the bond, with interest to May 15th, 1818, was $331.55; which together with Pennington's share of the debts collected ($99.45) made the gross sum of $431.00; that deducting therefrom the credits before stated ($223.47), and $10 claimed by the complainant for commissions, there would remain due upon the bond a balance of $197.53, which the complainant submitted himself as ready to pay.

The complainant insisted, that he was entitled to the credits claimed by him, notwithstanding the assignment of the bond to the defendant, Cummins, because, as he believed and alleged, the payments for which he claimed the credit had been made by him prior to the date of the assignment; but at all events, he insisted that such pay-

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ments had been made without notice of any assignment and upon the supposition that the bond was still held by Pennington; that subsequent to the making of the payments he had conversed with Pennington about the bond, and had received from him no intimation of his having made any disposal of it.

The bill further alleged, that the term of three months limited in the agreement entered upon the record of the *scire facias* for a stay of execution had been subsequently extended by consent of parties; that such limitation was intended to apply only to the issuing of execution upon the judgment, and not to limit or affect any remedy the complainant might have in equity; "it being always understood that the matters of defence should be heard somewhere, and that it would conduce to the mutual interest of both parties that the subject should be fully investigated in the Court of Chancery." The bill further alleged that on the 19th of September, 1821, a *fieri facias* had been issued upon the said judgment, which was pending at the filing of this bill, (October 8th, 1821.) The *prayer* was, that the defendants should be decreed to come to an account with the complainant with respect both to the monies paid and the monies collected by the complainant on account of the defendant, Pennington, and to allow as credits upon the said judgment all payments made by the complainant on account of said Pennington previous to his receiving notice of said assignment; and that the defendants should be compelled to accept, in satisfaction of the judgment and execution, whatsoever balance should be found due after crediting the complainant with such payments as aforesaid; and that upon the payment of such balance the judgment and execution should be decreed to be satisfied and a perpetual injunction awarded; and for general relief, &c.

The cause came before the Chancellor upon a motion for a preliminary injunction.

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McLane, for the complainant.

THE CHANCELLOR refused to order the writ of injunction, and assigned the following reasons:

The ground upon which a writ of injunction issues is, that the party is making use of the jurisdiction of a court of law, contrary to equity and good conscience; and it is commonly suggested in the bill, that the complainant, for some reasons therein stated, is not able to make his defence in such court, though he has a good discharge in equity; or that the court refuses some rightful advantage, or does injustice to him in the proceeding, or has not power to do him right. 1 *Atk.* 515, *Hill vs. Turner*: 1 *Mad. Ch. Pr.* 109: *Wyatt's, Pr. Regr.* 232. In this case, it is not even pretended that the complainant could not make a defence at law, but only that when the *scire facias* was called up for trial, it was considered to be the mutual interest of both parties that the matters of defence in the said cause should be heard and investigated in this Court. What advantage either party could have by proceeding in equity, which he could not have at law according to the practice in this State, is not to be conceived. It appears by the bill, that the bond is dated December 25th, 1816, and that judgment was entered by warrant of attorney in the Court of Common Pleas for New Castle county, on the 15th of May, 1818. Between the date of the bond and the date of the judgment all the payments of money by Conner, claimed by him as credits upon the bond, and also the sale of the merchandise to Pennington, had been made; and the defendant had no notice of the assignment of the bond to Timothy Cummins until the service of the writ of *scire facias* in the winter of 1819. The judgment was entered for the use of Timothy Cummins, and consequently the bond was not assigned according to the form of the Act of Assembly. There could then be no objection to pleading any discount on account of the assignment, because the complainant

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had no notice of the assignment. So it was understood by the complainant's counsel, for he pleaded to the *scire facias* and gave notice of the discount.

But it may be said that this was a judgment entered by a warrant of attorney and that the defendant could, at law, plead nothing in bar which might be pleaded to an original action; that this being a judgment without writ, nothing could be pleaded in bar at law, and that the party could have a remedy in equity only. As to all payments and matters of discount which accrued *before* the 15th of May, 1815, the date of the judgment, the Court, according to *Cooke vs. Jones*, *Cowper* 727, would have interposed on a motion to vacate the judgment, and would have afforded a relief which the party could not otherwise have had. 2 *Str.* 1043: *Cas. temp. Hard.* 233: *Cro. El.* 588: 1 *Sid.* 182. The only difficulty which this part of the case offers is whether the payments and discounts which accrued *after* the date of the judgment could be pleaded in bar to this *scire facias*. In *Hartzell vs. Reiss*, 1 *Binney*, 289, the Court doubted whether, in England, the party in such a case could have any relief in a court of law. He certainly might, it was said, in equity. But there is no good reason why the Court might not interpose in the one case as in the other. In *Cooke vs. Jones*, where the defence arose before the judgment, Lord Mansfield said, the party had no opportunity of pleading unless the Court interposed. If, then, the party could not plead, and the Court was compelled to interpose for the sake of justice, why should not the Court in this case afford the party relief by allowing him to plead according to the state of the transaction? By the *Stat.* 4 *Ann. c.* 16, *sec.* 12, it is enacted that "where "any action of debt shall be brought upon any single bill, "or where an action of debt or *scire facias* shall be brought "upon any judgment, if the defendant hath paid the money "due upon such bill or judgment, such payment shall and "may be pleaded in bar of such action or suit." By this Statute, which is the Act for the amendment of the law,

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and the better government of justice, and is in force in this State, the defendant at law, might well plead payment of this judgment. Before this Statute payment was no plea to a debt upon record, because a payment being against matter of record cannot be a discharge unless by matter of record. *Cro. Car.* 328 : 5 *Com. Dig.* 782, *Pleader* (3 *L.* 12.) It is, I believe, the constant practice, in the courts of law in this State, to plead to a *scire facias* payment, or any other plea which goes to show that the debt is satisfied, or that the party should not have execution. However this may be, it is not pretended that the complainant could not make a defence at law ; and no ground is laid in the bill to show that this Court ought to interpose, as that the complainant is deprived of some rightful advantage at law, or that injustice will be done him, or that the court at law has not power to do him right.

There is, though, a stronger objection. This bill is not brought for the settlement of a partnership concern. Every thing seems to have been adjusted (debts due to and from the partners excepted) and Conner fell in debt to Pennington, including Pennington's share of the goods and stock in trade, in the sum of $324, for which he gave his judgment bond. Conner was to pay and collect the debts. Then, as to all money received, Conner was liable to Pennington for a moiety ; and for debts paid, Pennington was liable to Conner in the same proportion. Conner also claims commissions. Conner alleges that he paid, at the request of Pennington, debts of Pennington to several persons, and sold him goods before the assignment of the bond, amounting in all to $50.22. These make a fair claim against Pennington, for which Conner, either by way of set off or in an action for money paid, &c., for the use of Pennington and for goods sold, may have a remedy at law. Conner collected debts, but paid away more than he collected, so that for a moiety of the excess of payments, Pennington would be liable to him. For this sum,

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then, Conner can have no difficulty. He has the proof all in his own hand, and has no necessity of applying to chancery for relief. And so, as to the commissions, if he is entitled to any, all which could be settled in a court of law. Now there is not an allegation made of any fact as to which Conner is not in possession of the proof. The whole may be settled at law. If this Court were to sustain the present bill, all cases of payment, set off, release and discharge of all kinds, might with equal propriety be brought here for adjustment. This is not a bill for an account between partners; but merely to obtain a credit by way of set off for matters entirely within the knowledge of the complainant, the proof of which is also in his power. The party might, on the issue joined in the court of law, have had a complete remedy at law, and therefore the writ of injunction should not be awarded. See 1 *Mad. Ch. Pr.* 69, 70: 6 *Vesey Jr.*, 136, *Dinwiddie vs. Bailey.*

The injunction is refused.

JAMES KILLEN, WILLIAM KILLEN, ANN KILLEN AND ELIZABETH KILLEN, infants, by THOMAS REED, their guardian.

vs.

JOHN ADAMS, executor of BENJAMIN DOWNS.

Kent, Feb. T. 1822.

The Statute which provides that no suit at law for a legacy shall be instituted against an executor until security to refund, in case of a deficiency of assets, be given or tendered, does not control the Court of Chancery.

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Statement of the case.

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This Court has, by virtue of its general jurisdiction, the power to require of any complainant, in a proper case, security or indemnity. To adopt the Statute would narrow the power already held, and which is more ample for purposes of complete justice than is the authority given by the Statute to courts of law.

BILL IN EQUITY FOR A LEGACY—SECURITY.—This was a bill filed on behalf of the complainants to recover from the defendant, as executor of the last will and testament of Benjamin Downs dec'd, a legacy of $50.00 bequeathed to each of the complainants by the testator, to be paid in one year after his decease.

The defendant filed the following plea, viz: "That no "offer hath been made to the said defendant by the com- "plainants, or either of them, of any surety, nor hath any "surety been given to him, that if any part or the whole "of the said legacies shall, at any time hereafter, appear to "be wanting to discharge any debt or debts, legacy or "legacies, which he this defendant, executor as aforesaid, "shall not have other assets to pay, that then the said leg- "atees respectively will return their said legacies, or such "part thereof as shall be necessary for the payment of "said debts, or for the payment of a proportional part of "said legacies, nor any surety whatever of like purport or "effect; all which matters the said defendant doth aver and "plead in bar of the complainants' said bill of complaint; "and he prays to be hence dismissed, with his reasonable "costs."

The cause came before the Chancellor upon the plea.

Hall, for the defendant, insisted that the Statute which requires, in a suit at law for a legacy, that security be given or tendered, to refund in the event of a deficiency of assets (1 Laws of Del. 410, sec. 6,)* should govern the Court of Chancery also; that equity follows the law and

*See, for present corresponding statute, Rev. Code, 805.

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adopts its principles in relation to the same subject. He cited 4 *Burns' Ecc. Law*, 300, 320: 2 *Ves. Sr.* 194: 3 *Bac. Abr. Legacies, H.* 488.

T. Clayton, for the complainants.

RIDGELY, CHANCELLOR.—Were the Act of Assembly to regulate the proceedings in this Court, it would defeat the powers of the Court; for in all cases, where the security was given according to the Act, the Court would be obliged to decree a payment, without the power of imposing any terms, however proper, just as a court of law would be. Already, the Court may compel a complainant to give security to refund, or to indemnify the executor, and it is not necessary to adopt by analogy any new power or authority under the Act. That Statute applies strictly to cases at law, and gives the courts of common law a jurisdiction which they did not possess, but which this Court possesses more amply than is given by the Act to courts of law. By the *Stat.* 2 *Geo.* 2, *c.* 23, *sec.* 23, an attorney cannot bring an action unless he has delivered his bill one month; but he may take out a commission of bankruptcy for fees, while his bill is under taxation. The reason, Lord Eldon says, is that a commission of bankruptcy, being a prompt remedy, the object would be defeated by waiting a month. 15 *Ves. Jr.* 479, 480, 487, 489. To him the remedy in this Court being more complete, an adoption of the Statute would narrow the power of the Court, so that in all cases complete justice might not be done.

The plea was overruled and the defendant ordered to answer.

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FRANCES L. COCHRAN, by her next friend, ALBERT G. LEWIS,

vs.

ELIZABETH MCBEATH, administratrix of JOHN MCBEATH, deceased, and SAMUEL METHER.

New Castle, April T. 1822.

By articles, executed before marriage, it was agreed that the intended wife should, after the marriage, hold to her sole and separate use, and subject to her disposal, certain real and personal estate to which she was previously entitled. No trustee for the wife was created in the contract. *Held*, nevertheless, that a court of equity will protect the wife against creditors of the husband, who were proceeding, under judgments against him at law, to take in execution the property so settled upon her.

Under a marriage contract a separate estate may be created in the wife, without the intervention of trustees. And this is true both as to real and personal estate, and whether the claim of the wife in the particular case be against the husband, or against his creditors. With respect to *personal* estate, the appointment of a trustee for the separate use of the wife has never been deemed necessary; and, upon the weight of authority, a trustee is not necessary to a separate use of *real* estate. The decisions on this point fully reviewed.

Marriage is a valuable consideration to support a contract between husband and wife. In equity the form of the contract, so that it be in writing, is not material. Equity, on account of the consideration, will compel the execution of the contract; and, for that purpose, will hold the husband to be a trustee for the separate use of the wife during her life-time, of the rents and profits of her real estate, and of her goods and chattels, as also it will hold her heir at law to be a trustee to carry into effect any disposal of her real estate made by way of appointment under the marriage contract.

There is no difference, with respect to the principles before stated, between devises to the separate use of the wife without trustees, and marriage articles without trustees,—except that the reason for protecting the rights of the wife under marriage articles is stronger than under a a devise, because under the former her rights rest upon a valuable consideration, whereas a devise is voluntary.

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Statement of the case.

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It is not necessary to the validity of a marriage contract that it should be recorded, nor that any publicity or notoriety should be given to it Secrecy or concealment, in such case, is therefore not evidence of fraud Nor is it necessary that any schedule or inventory of the goods and chattels secured to the separate use of the wife should be annexed to the contract. Nor is it necessary, in order to bind creditors, that the contract shall expressly secure the wife's property against liability for the husband's debts. Creditors stand on the same footing with the husband, and whatever binds him binds them.

The signature of the wife to the marriage contract is not essential to give it validity. It operates as a grant by the husband, in consideration of the marriage, and takes effect against him upon her acceptance of it and intermarriage with him.

The pretended burning by the complainant of the marriage contract, in order to pacify the dissatisfaction of her husband's mother, who had no interest in it, is not evidence of fraud, to affect the complainant's rights under it as against other persons.

The joint possession by the husband and wife of the goods and furniture stipulated to be for her separate use is not evidence of fraud nor a bar to the wife's claim,—such joint possession, after marriage, being consistent with the wife's title under the contract.

The mere acquiescence of the wife in her husband's receipt of the rents, profits and income of her separate estate though it may make his acts already done under such acquiescence valid, and may discharge him from any subsequent account for sums received by him, is not an abandonment of her separate estate; and her inattention or laches in this respect cannot prejudice her.

BILL IN EQUITY FOR AN INJUNCTION.—This bill was filed on behalf of the complainant, Frances L. Cochran, a married woman, by her next friend, to restrain the defendants, who were judgment creditors of her husband, Joseph W. Cochran, from further proceeding in an execution which had been levied by them upon certain goods and chattels to which she claimed to be entitled as her separate estate under an anti-nuptial contract. At the time of her marriage with Cochran, on the 26th of January, 1808, the complainant enjoyed by the will of her first husband, Doctor Thomas Evans, the third part of the rents and profits of his real estate, which was of considerable amount; also the interest

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of £400,—all during her life, to be paid annually. Also, as the widow of Philip Lewis, deceased, she held her dower in his real estate. Besides, she had furniture and other articles of personal estate about her. Cochran and his wife used the goods and furniture, as in ordinary cases of husband and wife, and he was in the receipt of her rents and interest from the time of the marriage until the year 1819. In the years 1818, 1819 and 1820, his affairs became embarrassed, and sundry judgments were recovered against him. Among other judgments against him was one recovered at the suit of Samuel Black, trustee of Sarah Armitage, in the Supreme Court for New Castle County, at the November T. 1819. This judgment was recovered in a suit against Cochran on a recognizance entered into by him, in the month of August 1814, as the original trustee of Sarah Armitage. Having been removed from his trusteeship and Samuel Black appointed to succeed him, the suit upon the recognizance was brought by Black for the recovery of certain trust funds which had come to his (Cochran's) hands. Like suits were also brought by Black against John McBeath and Samuel Meteer, who were Cochran's sureties in the recognizance. Judgments were recovered against each of the recognizors for $3194,96. McBeath and Meteer, the sureties, paid the money for which the judgments were recovered, and thereupon took an assignment of the judgment against Cochran, pursuant to the statute in that behalf. They then proceeded as the assignees of the judgment, to sue out *fieri facias* attachments under it, which were levied upon the goods and furniture claimed by the complainant, Frances L. Cochran, under the marriage contract. The rents devised to her by Doctor Evans, and the rents of her dower in the real estate of Philip Lewis, were attached in the hands of the tenants. The present bill, setting forth the above state of facts, was filed to restrain the assignees from further proceedings at law against the goods and rents.

The answer of the defendants admitted the intermarriage

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of the complainant with Joseph W. Cochran, on the 26th of January, 1808, and that she had title, at the time of the intermarriage, to the property in the bill set forth: also it admitted the proceedings upon which the judgment held by the defendants against the said Cochran for $3194,96 was founded, and that, upon the assignment of said judgment to them, they had proceeded, as in the bill alleged, to collect the same by *fieri facias* attachments against the rents of the real estate held by the complainant at the time of her intermarriage and by execution levied upon certain goods and chattels which were in the joint possession of the complainant and her husband, the said Cochran. But that the goods and chattels levied on were the same which had been the property of the complainant at the time of her intermarriage the defendants did not admit. And with respect to the alleged marriage contract, the answer set forth that the defendants had never heard of the same, or that any marriage contract whatever had been executed, until the year 1819, when the alleged existence of such a contract first became generally known in connection with a bill in equity filed by the said Cochran and his wife, the complainant, against Hugh Gemmill and John Stoops, in which bill a marriage contract between said Cochran and the complainant was alleged to have been executed. That the execution of such a contract was not generally known at the time of the intermarriage, but on the contrary the same was studiously concealed until the filing of the bill in equity against Gemmill and Stoops. That in consequence of such concealment the said Cochran was supposed to have acquired by the marriage considerable property, and that he thereby gained an extensive credit. And the defendants alleged that it was in consequence of the credit so acquired, and of their ignorance of the existence of any marriage contract as is now set up, that they were induced to become the sureties of the said Cochran in the recognizance entered into by him as trustee for

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Sarah Armitage,—and which they were obliged afterwards to pay.—The answer denied that the complainant had, subsequent to the marriage, held and enjoyed any separate and exclusive use or estate in the property in controversy; but, on the contrary, it alleged that Joseph W. Cochran, the husband, had from the time of the intermarriage held and possessed the said property, receiving the rents, profits and income thereof, and acting in all respects as the owner of the same, without interference by the complainant, until within a year of the bringing of this suit, when the complainant filed a bill in equity against the said Cochran, in which she claimed for the first time a separate estate in the said property, and sought to restrain her said husband from further control over the same; and the answer insisted that the concealment of the marriage contract, if any such in fact existed, and the possession by the said Cochran of the property in controversy operated as a fraud upon the defendants, who were the creditors of the said Cochran, and should, in equity, protect them from the claim now set up under the alleged contract.

Other defences were taken in the argument at the bar, and were considered at large by the Chancellor, which do not appear in the answer on file,—particularly, the ground, strongly relied upon, that the marriage contract was invalid for the want of a trustee for the wife appointed in it; and also the defence founded upon proof, as hereinafter is stated, that the complainant had on one occasion pretended to destroy the marriage contract.

Issues were joined and depositions taken by both parties. It was proved that a few days prior to the marriage of Cochran to the complainant, to wit, on the 20th of January 1808, a marriage contract in writing was signed and sealed by him alone; that several persons then knew of it, but it was not generally known; that afterwards, in the year 1811, the mother of Cochran becoming dissatisfied with the contract, the complainant, in order to pacify her, pre-

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tended to destroy it by folding up a piece of paper, similar in appearance, and throwing it into the fire. All present, except the complainant, supposed it was burnt. This was not done with the previous knowledge of the husband. It was proved that Cochran, the husband, had always recognized the separate interest of his wife, and that in April, 1819, he had joined her in a bill to restrain one of his creditors, Hugh Gemmill, from proceeding, under an execution against him, to take the goods and furniture secured to her by the marriage contract. It was further in evidence that at the date of the marriage contract Cochran was not in debt; that then and for some time afterwards he was in good credit; that he had been accepted by the Court of Common Pleas and by the Orphans' Court, as surety for other persons, in several instances and for large amounts; that he had since become dissipated and insolvent, and his property had all been sold by the Sheriff. A bill in equity had been filed by the complainant, on the 9th of September 1820, to restrain him from future interference with her rents.

The marriage contract was in the words following;

"These articles of agreement, made and concluded the "20th of January 1808, shall and are by the parties intended "ever to witness, that, in consideration of and preparatory "to a marriage contemplated to be had and solemnized "between Joseph W. Cochran, male, of the one part and "Frances L. Lewis, female, widow of Philip Lewis, Esq., "deceased, of the other part, both of the county of New "Castle and State of Delaware, she the aforesaid Frances "L. Lewis, hath demanded and covenanted with, and he "the said Joseph W. Cochran, doth agree to, and by these "presents hath formally and solemnly covenanted, that the "aforesaid Frances L. Lewis, shall and may, after the "intended marriage has been solemnized, as though it "never had taken place, be at full and perfect liberty,

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Statement of the case.

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" without coercion or prohibition from him, to retain, use, " or convey, or in any manner she thinks proper dispose " of, all or any part of her property and estate, either real " or personal, which may or in any wise can be supposed " or considered as belonging to her, at the date and time " of the aforesaid marriage, as well as a constant and con- " tinued privilege and legal power to collect, raise, and " apply to her own particular purposes, and as her own " inclination or pleasure may incline or direct, all and " every part of the rents, profits, or advantages arising, or " which in any way may arise, from the aforesaid property; " by which means I do hereby renounce, disclaim, and " forego all profits or advantages, which custom or the " laws of this State might otherwise allow me, giving and " granting to her, the aforesaid Frances L. Lewis, in addi- " tion to the privileges herein before mentioned, that of " an uncontested right and power of making and bequeath- " ing by will, at her death, to whomsoever she pleases, all " or any part of her property aforesaid, both real and " personal, which at that time may be in her possession, " and the same to be enjoyed and possessed by her legatees " or legatee, in conformity to the letter and sense of her " last will and testament, immediately after her decease, " uninterrupted or undisturbed, in any way whatsoever, " by any interference or pretensions of him the aforesaid " Joseph W. Cochran, contrary to the letter of the will of " Frances L. Lewis aforesaid, or contrary in any way to " the intention or expressions of these articles and cove- " nants herein before mentioned and subscribed to. And " for the true, faithful and religious performance of, and " adherence to the above mentioned covenants and agree- " ments, I, the aforesaid Joseph W. Cochran, have hereunto " set my seal, accompanied with my friend, ———, of the " County and State aforesaid. Both of us jointly, and each " of us separately, do consider and hereby acknowledge our " heirs, executors, or administrators, bound and firmly

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"held to the aforesaid Frances L. Lewis, or her legal "representatives, in the penal sum of five thousand dollars, "to be demanded, levied, and raised by a legal and speedy "process, in case of non-adherence to the aforesaid articles "and agreements in every item, from any goods or chattels "which we, or either of us, may be found to possess, and "which in its full extent to be applied to the immediate "use of the aforesaid Frances L. Lewis, or her heirs or "assignees, &c. In consent, acknowledgment and witness "to which we have each of us hereunto set our hands and "affixed our seals this day and date before within written."

Signed, Sealed and delivered in presence of

(Signed,) FRANCIS BURK, JOHN T. COCHRAN.

(Signed,) JOS. W. COCHRAN. L. S.

The cause came before the Chancellor at the April Term, 1822, for a final hearing upon the bill, answer, exhibits and depositions.

Van Dyke, for the complainant.

Marriage is a consideration sufficient to support the contract. It is a consideration highly favored in equity. The Courts have gone further to sustain marriage contracts than the present case requires,—holding that even *executory* contracts for a settlement upon the wife should be enforced. 2 *T. R.* 684, 695 : 1 *Wilson's Bac. Abr.* 507, *Baron and Feme*, (*M.*) : 5 *T. R.* 381 : 2 *P. Wms.* 243. The appointment of a trustee was not necessary to the validity of this contract, there being no creditors at the time it was entered into. There are numerous authorities to this point; 4 *Woodeson's Lect. part* 3*rd pp.* 443–4 : 2 *Ventris* 343, *Haymer vs. Haymer* : *Reeves' Dom. Rel.* 162–3–4, and cases there cited. It has been held that even articles after marriage, though voluntary, are good against all who were not

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creditors at the the time, if the husband were then solvent. *Ambler* 121; *Chanc. Cases* 92. It is not material in this case that the goods, after the marriage, came into the possession of the husband and so remained; because such possession was consistent with the trust. From necessity, the personal property must, during the coverture, remain in the joint possession of husband and wife. Such possession is no badge of fraud. *Cowper* 436. It may be argued that the possession of the goods gave the husband a false credit, and deceived persons who contracted with him. The answer is, that the contract was not fraudulent—nor was the possession of the goods by the husband,—that the law secures to the wife the benefit of the contract, and she cannot be deprived of it by the fact that persons afterwards contracted with the husband. The trust attached before the defendants had any claim, and having once attached they cannot defeat it. Again, the absence of any inventory of the goods and furniture is wholly immaterial. An inventory serves for the better identifying of the goods, but they may be identified by any other sufficient evidence. The identity of the goods in the present case is not in controversy. *Campion vs. Cotton*, 17 *Ves. Jr.* 264, covers this case in all points. There, it was held that the consideration of marriage will support a settlement, even of personal effects, against creditors of the husband, and that neither the joint possession of furniture, nor the want of an inventory, nor the fact that the settler was indebted at the time and that his wife knew it, will affect the settlement.

Black, Rogers and Read, Jr., for the defendants.

We might object to the article as not being sufficiently executed. Mrs. Cochran was not a party and no delivery was proved. But, waiving all objections of form only, we pass to the defences taken upon the merits. These are four, viz:

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Argument for defendants.

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1. The article was secretly executed and studiously concealed, from its date in 1808 until 1819; and then it was brought to light in consequence of Gemmill's execution against the goods and furniture. No witnesses outside of the family had any knowledge of it prior to the year 1819; or, if any had such knowledge, it was only gathered from conversations within the family circle. Such a contract, affecting as it did the rights of Cochran's creditors and disappointing their just expectations, ought to have been recorded, and notice to the world thus given. In England, marriage settlements are by statute required to be registered. Our law does not require them to be recorded; but the omission to record, connected with a studious concealment, goes strongly to the question of fraudulent intent. It was well understood, that Cochran married the complainant for her money, and it was supposed that he got it. As a consequence, he received a false credit, whereby the defendants have been injured. The material question is, whether, admitting the articles to be effectual as between Cochran and his wife, she stands in such an equity, that this Court will, at her instance, interfere against the legal rights of the creditors? The position of the defendants is further strengthened by the fact that they were sureties, who have paid their money for the husband without any consideration to them.

2. The contract, even if originally valid, was abandoned. Cochran was permitted to deal with the property as his own. The complainant has herself, by her bill against Cochran in 1820, confirmed the testimony on this point,—alleging, as she there did, that he had taken the rents. Besides this, he received the money paid by the executor of her deceased husband, Doctor Evans. She also permitted him, without objection, to sell two of her houses. It was not, as has been argued, a case of *joint* possession. He separately took the rents, and dealt with the property as his own, whereby his creditors were misled. All this

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was done with her permission. She caused the evil and should herself bear it. A party enabling another to commit a fraud is answerable for it. 1 *Madd. Ch. Pr.* 256. Coverture is no excuse for drawing in an innocent person; not even is infancy. 1 *Fonblanque's Eq.* 71: 2 *Eq. Cas. Abr.* 188–9.

3. The complainant pretended to burn the contract, in the presence of Cochran's family, in 1811; and her subsequently claiming under it was a fraud. By pretending to destroy it she gave out to the world that her claim under it was extinguished and her husband's marital rights revived. Whatever notoriety the contract may have previously possessed she thus put an end to. Her act was an open fraud, and the doctrine is that once a fraud always a fraud. In 2 Eq. *Cas. Abr.* 478, a brother gave to his sister, who was about to be married, £150. She executed a bond to repay the money, and then married. The husband died. Though it was her own agreement she was relieved from the bond, because it was a fraud on the husband.

4. The want of a trustee for the wife under the marriage contract is fatal to its validity, as against the husband's creditors, however it might be valid as between the husband and wife. The legal estate, being left to vest in the husband, became liable at law to execution against him. The wife's interest under the contract was but an equity. We also have an equity as creditors and sureties,—an equity superior to the wife's; and we are therefore entitled to hold our advantage at law. Were the equities but equal, even then our legal right must prevail. Hence, in all cases where creditors are concerned the intervention of trustees is necessary. In the cases cited for the complainant, either the claim set up was by the wife against the husband or his heirs; as in 2 *Ventris* 243: 2 *T. R.* 684: and 2 *P. Wms.* 243: or, the trust was created by a devise to the wife, which may be supported without a trustee; as in 1 *Madd. Ch. Pr.* 376–7, and in the cases cited from

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Woodeson and *Reeves*. In *Campion vs. Cotton*, cited from 17 *Ves. Jr.* 264, we apprehend there were trustees There is no case in which the husband has been permitted, without the intervention of trustees, to divest himself of the title to his wife's property, so as to defeat creditors. It has been held in some cases that, even as against the heirs at law of the husband, an agreement before marriage for a settlement is not good without trustees. 2 *Ves. Sr.* 190: *Ambler* 467, 468.

Read, for the complainant, in reply—

This is not an executory agreement, nor have we come into court for a specific performance. It is an executed agreement, which by its own terms fixes the rights of the parties. It seemed to be conceded in argument that such an article is competent to secure personal property, but that it is not sufficient as to real estate without a trustee. Now, one of the settled principles of equity is, that a trust shall never fail for the want of a trustee. The Court itself, if necessary, will become the trustee. Equity looks only to the substance and merit of the agreement and not to the form. If there be a consideration, the Court will supply all needful form. Marriage *is* a consideration,—one the most favored. 17 *Ves. Jr.* 262–3–4: 2 *P. Wms.* 243: *Ambler* 565: 1 *Madd. Ch. Pr.* 371.

Next,—the contract, if valid in equity, as to its form, is not impeachable for fraud in its original purpose. There were, when it was entered into, none to be defrauded by it,—no creditor, children, nor heirs at law. It is argued that there was concealment. This is not true in point of fact, but were it even so, concealment is no evidence of fraud, to impeach the agreement, unless there were an obligation on the parties to make it public. Our law, however, does not require publicity. No record of marriage settlements nor any form of notoriety is required.

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They are treated as matters which concern the family and not the public.

Again,—to all efforts to impeach this agreement by the subsequent acts of the parties, there is one answer. A contract of this sort, once made and valid, is indestructible by any after conduct of the party. The wife may permit another to take her rents, and so for the time may deprive herself of them : but she cannot by such conduct invalidate the agreement itself, or her future rights under it. The act chiefly relied on in argument, viz : the pretended burning of the contract, was no fraud, such as to affect the contract. It had no fraudulent purpose, being done merely to restore the peace of the family. It deceived no one but the mother-in-law, who had no right or claim under the contract.

RIDGELY, CHANCELLOR.—The great point in this cause arises on the effect of the contract, and how far it can be enforced in this Court, against creditors of the husband, at the suit of the wife, in the life time of the husband and wife. The principal objection is the want of a trustee on behalf of the wife, and because the right or estate in the goods and furniture, real estate and the rents, and the interest of £400,—all being the property devised to her by Doctor Thomas Evans, and also her dower in the estate of Philip Lewis, had not been conveyed to a trustee but remained in her at the time of the marriage.

This is not a question between the wife and the heir of a husband, nor between the husband and the heir of a wife, nor whether a wife by a will made before or after marriage can devise real estate in the life time of her husband, the legal estate being in her, in pursuance of an agreement to that effect, but the question is, whether this Court will secure to a wife, against the husband and his creditors, the benefit of a contract made by the husband with her before marriage, in consideration of marriage, by

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which he agreed that she should have to her separate use, to dispose of at her pleasure, her whole personal and real estate.

The case first cited for the complainant, is *Haymer vs. Haymer*, 2 *Vent.* 343. There the husband, by articles entered into by him with his wife before marriage, agreed to settle certain lands, before the marriage should be solemnized, on him and his intended wife and the heirs of his body by the plaintiff, but died before the settlement. The marriage was celebrated, and after his decease she exhibited her bill against the heir at law of the husband, and it was decreed against him. Here, it was objected that the marriage was a waiver of the articles, and that the contract not being made with a trustee on behalf of the wife the marriage before the settlement operated as a release in law. The case cited is not important. It merely shews that the contract was enforced, although the agreement was made without a trustee.

Cannel vs. Buckle, 2 *P. Wms.* 242, cited also by the complainant's counsel, is similar to *Haymer vs. Haymer*, with this difference, that in *Cannel vs. Buckle*, the intended wife agreed with her intended husband to convey her lands to the husband and his heirs, and before the marriage gave bond accordingly. After the death of both, the heirs of the husband brought a bill against the heirs of the wife, and Lord Chancellor Macclesfield said, that "the impro- "priety of the security, viz., a bond from a woman to a "man whom she intended to marry, or the inaccurate "wording of such bond, is not material; for it is sufficient "that the bond is a written evidence of the agreement of "the parties; that the *feme*, in consideration of marriage, "agrees the man shall have the land as her portion; and "this agreement, being upon a valuable consideration, "shall be executed in equity. It is unreasonable that the "marriage, upon which the bond is to take effect, should "itself be a destruction of the bond; and the foundation of

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Opinion:—want of trustee—principle stated.

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" that notion is that, in law, the husband and wife being " one person, the husband cannot sue the wife upon this " agreement, whereas, in equity, it is the constant experi- " ence that the husband may sue the wife, or the wife the " husband; and the husband might sue the wife upon this " very agreement in the principal case."

These cases, and many others to be found in the books, establish these positions, that in equity the form of the agreement, so that it is in writing, is not material; that marriage is a valuable consideration, and that the husband and wife may, in equity, sue each other and compel the execution of such a contract. Here I will remark, that if a woman marries on the faith of an agreement made to secure to her the separate enjoyment of her own estate, and that agreement is not performed, and she cannot enforce it, she is notoriously wronged and the laws are deficient in justice. She cannot be unmarried and return to her former condition, and can in no way be compensated; and, therefore, justice requires that she should be able to obtain all the advantages promised to her by the husband when he undertook to yield to her his marital rights, or some of them, to induce her to become his wife. Such contracts are prudent, and if they were oftener made the happiness and safety of wives and of their children would reward them for their foresight and caution.

The opinion of Lord Hardwicke in the case of *Peacock vs. Monk*, 2 *Vesey Sr.*, 190, cited by the defendants' counsel, is supposed to bear hard on the complainant's pretensions; but even that opinion, as to the present subject of controversy, if not in express terms yet by clear inference will justify a decree in her favor. We must keep in mind that the only property here in dispute consists of the furniture and goods which she possessed at the time of her marriage, the rents and interest of £400 devised to her by Doctor Thomas Evans, and the rents of her dower in the real estate of Philip Lewis, over all which he had full power during

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their joint lives. There is no question about any estate of inheritance in land nor about the validity of a will of a *feme covert.* Were either Cochran or the complainant to die there would be an end of all interest in Cochran and in his creditors (putting this agreement totally out of sight) in all future rents and in the interest of the £400. Lord Hardwicke's opinion arose concerning lands held in fee-simple by the wife. In that case it is to be collected that his opinion was formed on a supposed case of this kind. A woman having a real estate before marriage, in consideration of that marriage, entered into an agreement with her husband that she might by writing, under her hand and seal, executed in the presence of witnesses, or by will, dispose of her real estate, there being no trustee, that is, the legal estate not being conveyed to a trustee but remaining in the wife. The question was whether it would pass by her will, she being a *feme covert* at the making of it and at the time of her death. Lord Hardwicke said that her real estate would descend to her heir at law, but that she might dispose of it by a proper conveyance (by fine, if a married woman) by way of trust, or of a power over an use; as,in the first instance,supposing her to be a *feme sole,* she may convey it to trustees in trust for herself during coverture for her separate use, and afterward in trust for such persons as she should by writing, under her hand and seal, or in nature of a will, appoint Then if she marries and makes such appointment, that would be a good declaration of the trust,—one which the Court would support. So, she might do it by way of power over an use; as,if she conveyed her estate to the use of herself for life, remainder to the use of such persons as she by writing, &c. should appoint,—this is a power reserved to her, and it has been determined that a *feme covert* can execute a power. But then Lord Hardwicke asks, " can a *feme covert* do this, so as to bar " her heir, by a bare agreement, without doing anything " to alter the nature of the estate ? Can a woman, having

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"a real estate before marriage, in consideration of that "marriage, enter into an agreement with her husband, "that she may by writing under her hand executed in the "presence of witnesses, or by will, dispose of her real "estate? This rests in agreement, and if she does it, though "it may bind her husband from being tenant by the "curtesy, that arises from his own agreement; but what "is that to the heir? Still, she is a *feme* under the disa- "bility of coverture at the time of the act done, and if "she attempts to make a will the instrument is invalid. "The only question that could arise would be, whether "such an agreement between her and her husband would "not give her a right to come into a court of equity, after "the marriage, to compel the husband to carry this into "execution and to join with her in a fine to settle the "estate, either on such trusts or to such and such uses. "And if it is such an agreement as the Court would decree "to be further carried into execution by a proper convey- "ance, then the question may be whether her heir at law "is not to be bound by the consequences of that agreement? "That is the only way by which it could be brought in. "But if the agreement cannot be carried into execution, "though she might have power to bar her husband, it "being a voluntary claim from her, and the law casting "the descent on her heir at law, I very much doubt how "it could be done." Now, in this case put by Lord Hardwicke in relation to the real estate, he admits that by such an agreement the husband may be bound from being tenant by the curtesy, which arises from his own agreement, and that if the agreement could not be carried into execution as to the heir, still she might have power to bar her husband. And if so, in the supposed case, why may not Cochran be bound by his own agreement not to take the rents devised to her and the rents of her dower in Lewis' estate? She herself has only an interest for life, and this agreement cannot possibly relate to or affect an

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heir. It does not concern an estate of inheritance, and as the husband may by his agreement bar himself from being tenant by the curtesy, I conclude, without a doubt, that he may bar himself from this interest of the wife in the real estate of Doctor Thomas Evans and Philip Lewis. In the preceding part of the case of *Peacock vs. Monk*, Lord Hardwicke says, " as to personal, undoubtedly, where there " is an agreement between the husband and wife before mar- " riage that the wife shall have to her separate use, either " the whole or particular parts, she may dispose of it by " act in her life or by will. She may do it by either, " though nothing is said of the manner of disposing of it, " but there is much stronger ground in that case than can " be in the case of real estate, because that is to take effect " during the life of the husband; for if the husband sur- " vives he is entitled to the whole and none can come into " a share with the husband under the Statute of Distribu- " tions. Then, such an agreement binds and bars the " husband, and consequently bars everybody." The doctrine in this case directly applies to the present bill. This whole agreement is to take effect in Joseph W. Cochran's life time. As to the rents and interest of the £400, the death of himself, or of his wife, would terminate his interest in them, and nobody could controvert his right to the goods, so that his agreement could affect nobody but himself, and, upon this reasoning of Lord Hardwicke, *Peacock vs. Monk* is a clear authority. It is decisive of the question between these parties. Nothing is comprehended in the contract now in controversy but such as Cochran might absolutely relinquish to the wife without affecting any other person and, therefore, in the words of Lord Hardwicke, the " agreement binds and bars the husband and conse- " quently bars everybody."

In *Harvey vs. Harvey*, 1 *P. Wms.* 125, there was a devise of personal estate to a *feme covert* for her separate use without naming trustees. Lord Cowper said it was a great

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question whether the husband should be compelled to let the wife enjoy this personal estate to her own use, for it being given to a married woman,and no contract precedent or subsequent from the husband that he will not intermeddle with it, the " husband's title to this estate is sub- " sequent to the will and the intention being repugnant to " the rules of law, viz : that a *feme covert* should have a " property in personal goods, it seems to me to have some " difficulty in it. Wherefore, let it be reserved as a case " to be argued. But as to the mortgage,where the husband " has contracted or declared under his hand that he would " not intermeddle with it, though such declaration may " be voluntary yet it must be presumed to proceed from a " sense the husband had of the testator's intent that the " wife should enjoy this mortgage separately, and to be " founded on natural justice though not on contract." For which reason the Court was clearly of opinion that the husband should be bound by this agreement. Here there was no doubt with the Chancellor as to the mortgage, part of the personal estate bequeathed to the wife, because he had agreed by writing under his hand that the wife should enjoy it to her separate use. But the Chancellor said that " if a real estate were devised to a *feme covert* for " her separate use, and a declaration that the husband " should not intermeddle with the profits, but that the " wife should enjoy them separately, he doubted this would " be a repugnant clause and the husband would still enjoy " it." Mr. Cox, in his note to this case, says that it does not appear by this report, or by that of 2 *Vernon*, 659, nor even in the Registers' Book, what was Lord Cowper's final determination on this point (as to the real estate) : but the case of *Bennet vs. Davis*, which was determined at the Rolls in December, 1725, seems to have settled it. But even in *Harvey vs. Harvey*, as to the personal estate and the mortgage the Chancellor had no doubt and, therefore, it opposes no difficulty to the claim of the complainant in the present cause.

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even in *Harvey vs. Harvey*, as to the personal estate and the mortgage, the Chancellor had no doubt, and therefore it opposes no difficulty to the claim of the complainant in the present cause.

The case of *Bennet vs. Davis*, 2 *P. Wms.* 316, is material as to the question of trustees and in relation to creditors. There, the testator devised lands which he held in fee to his daughter, the wife of Bennet, for her separate use, exclusive of the husband, to her and her heirs, and that the husband should not be tenant by the curtesy, nor have these lands for his life in case he survived his wife, but that they should, upon the wife's death, go to her heirs. The husband becoming a bankrupt, the commissioners assigned the lands thus devised to the defendant, Davis, in trust for the creditors, and upon Davis bringing his ejectment the bankrupt's wife, by her next friend, preferred her bill against Davis, the assignee, and her husband, to compel them to assign over this estate to her separate use. The Master of the Rolls took it to be a clear case, that it was a trust in the husband, and that there was no difference whether the trust was created by the act of the party or was, as here, by the act of the law. "If," he says, "I should devise that my lands should be charged with debts or legacies my heir, taking such land by descent, would be but a trustee, and no remedy would lie for these debts or legacies but inequity. So, in the principal case there being an apparent intention and express declaration that the wife should enjoy these lands to her separate use, by that means the husband, who would otherwise be entitled to take the profits in his own right during the coverture, is now debarred and made a trustee for his wife. And admitting the husband to be a trustee, then the argument of the creditors having the law on their side was immaterial; as if the bankrupt had been a trustee for J. S. his bankruptcy should not, in equity, affect the trust estate, and that in this case though the husband, the bankrupt, might be ten-

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ant by the curtesy, yet he should be but trustee for the heirs of the wife. Also, when the testator had a power to devise the premises to trustees for the separate use of the wife, this Court, in compliance with his declared intention, will supply the want of them, and make the husband trustee; and the defendant, the assignee, who claiming under the husband can have no better right than the husband, must join in the conveyance to a trustee for the separate use of the wife,"—which was decreed accordingly. See also *Lee vs. Priaux*, 3 *Bro. Ch. Rep.* 381.

I have been more particular in quoting at large the opinions of Lord Cowper and of the Master of the Rolls, in the two cases cited from Peere Williams, because the defendants' counsel have insisted that in cases of contract between the husband and the wife, by which the husband agrees that the wife shall hold the property to her separate use, trustees are indispensably necessary, and that when the creditors have gained a legal advantage, or have the law on their side, and have a superior equity, there being no trustee, they must prevail. The first case *Harvey vs. Harvey*, shows expressly that Lord Cowper had no doubt, where the husband had agreed by writing under his hand that the wife should have the mortgage to her separate use, that trustees were not necessary; not because it was the case of a devise, but because the husband had made a contract. And in *Bennet vs. Davis*, the Master of the Rolls took it to be a clear case that it was a trust in the husband and that there was no difference whether the trust was created by the act of the party or by the act of law.

In *Mitchell vs. Mitchell*, cited in 2 *Eq. Ca. Abr.* 26, *c.* 29, there was a gift by the husband to the wife, without the intervention of trustees, and it was held good. So in *Rolfe vs. Budder*, *Bunb.* 187 : 1 *Eq. Ca. Ab.* 153, *c.* 17, a devise of a bond to a wife, for her sole and separate use, was held to give her the bond to her sole use as much as if it had been vested in trustees. And in *Moore vs. Freeman*, *Bunb.* 205 :

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2 *Eq. Ca. Ab.* 26, *c.* 29, articles of agreement between husband and wife were held binding in equity, without the intervention of trustees. In truth, there is no reason for the distinction; for if the devise or gift or agreement is made without a trustee, by one who has a power over the subject matter, he in whom the legal interest remains will be held a trustee, whether husband or any body else; for it is the intention of the parties and not the form which, in equity, gives essence to the contract. See *Darly vs. Darly*, 3 *Atk.* 399, where a husband was held to be a trustee for the wife. Also, in 5 *T. R.* 386, Lord Kenyon says, this is the constant, uniform practice of the Court of Chancery. Many other cases have been cited in the argument, which carry the doctrine much beyond what is necessary to support this marriage contract. The importance of the subject, the novelty of the case, and my respect for the gentlemen concerned for the parties, induce me to examine all the authorities, although those already discussed are sufficient to establish the validity of this contract.

In *Bramhall vs. Hall*, *Ambler* 467, articles were entered into by which George Bramhall covenanted that his intended wife should have power, by deed or will, to dispose of her estate after her decease to any person whatsoever, and that he would do any act to confirm the same. After marriage she conveyed it, by lease and release to take effect after her death, to trustees, to the use of her natural son, with remainder over, but afterwards joined with her husband to levy a fine to different uses. Lord Chancellor Northington held, that the wife having the legal estate in her, the lease and release were not good to pass her estate as a conveyance or execution of a power, and that it passed by the fine. From this short note of the case it would seem that Lord Northington fell into the opinion of Lord Hardwicke, and that because the wife had not, before or after the marriage, parted with the legal estate to trustees, in trust to her separate use during coverture

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and then in trust for such person as she should by deed appoint, that this conveyance by lease and release could not be sustained—or, in other words, that the legal estate still remaining in her, she could not dispose of the estate according to the agreement, but that it must be done by fine, according to the form required for a married woman. But in the next case, *Wright vs. Englefield*, *Ambler* 468, he said that in *Bramhall vs. Hall*, he was of opinion there was no meritorious consideration. If then there had been a meritorious consideration, it may be presumed that the conveyance by lease and release, being a deed according to the covenant by the husband to the wife, would have been supported. So that the ground of the decision appears to be, not that the wife had not parted with the legal estate, but that it was not a proper case for a court of equity to enforce. This, I think, is the clear inference from what can be collected from the case.

The case of *Wright vs. Englefield*, *Ambler*, 468, was this. Marriage articles were entered into by Peter Holford, of the one part, Constantia Wright, widow, of the other part, and Smith and Bramston, of the third part, whereby, after reciting the intended marriage and mentioning the various kinds of estates and interests of the wife, it was agreed that they should be to her separate use, and be applied and disposed of, from time to time, as she should, by any deed or deeds executed in her life-time, or by her last will and testament, appoint notwithstanding her coverture. Holford, the intended husband, covenanted with Smith and Bramston, that he would do all acts, deeds, &c., for vesting all such estates and interests in such person or persons as she should appoint, in trust for her sole and separate use, and to be subject to such disposition as she should make thereof, by any act or deed or by her last will and testament. The legal estate in the real property was by a previous settlement vested in trustees, and Constantia, the wife of Holford, was entitled to a moiety of the trust inheritance.

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By her will, made during the marriage, she devised her moiety of these premises, by virtue of the power reserved to her by the said articles, to trustees, to the use of her husband for life and then to trustees for five hundred years to raise portions for the younger children by Holford, with several remainders over. A bill was filed by Wright, her eldest son and heir at law, and one of the questions was whether the appointment by Mrs Holford's will was good. Lord Chancellor Northington was of opinion that the appointment by her will was good. It was held in this case that if a woman before marriage retains a power over a legal estate, to be exercised by way of execution of a power, she may do it, and that the construction of trusts must be the same as of legal estates. And Lord Camden says, in *Rippon vs. Dawding*, *Ambler* 565, that the principle of determination is the same in both, as it certainly is. This case of *Wright vs. Englefield*, was carried into the House of Lords, where it was decided that articles executory will bind the heir as much as a conveyance executed. This then is a decision against the opinion of Lord Hardwicke in *Peacock vs. Monk*. And it is to be remarked that the wife herself had done no act, either before or after her marriage with Holford, so as to convey her estate or reserve any power, but that the whole vested on the articles entered into before her marriage. The legal estate, it is true, was not in her, but then trusts are to be construed the same as legal estates; and Lord Northington says, no rule is so strictly adhered to in equity and so dangerous to depart from as that the construction of trusts must be the same as of legal estates.

Rippon vs. Dawding, *Ambler* 565, was not a trust estate. The wife was seised of a freehold estate, and previous to her marriage with Deeping, her second husband, he entered into a bond with a condition empowering her to dispose of her freehold estate, by deed or will, notwithstanding her coverture. The wife afterwards, by will made during her

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coverture, gave her estate in fee to her younger children. The eldest son being dead and leaving a daughter, his only child, the younger children filed a bill against this daughter to have a conveyance. A conveyance was decreed. Lord Camden said the agreement was made on marriage, and the wife might have compelled the husband to join with her in a fine. "Though" he says "the two cases (this and *Wright vs. Englefield*,) differ in respect that the wife had only an equitable interest in one and the legal interest in the other, yet the principle of determination is the same in both. Equity follows the law; and as the Court decreed performance of the agreement in *Wright vs. Cadogan, et al.* (the same case as *Wright vs. Englefield*, but in the House of Lords called *Wright vs. Cadogan, et al.*) which was a trust interest, it will do so in this, which is the case of a legal interest."

These cases in Ambler seem to have settled the point which Lord Hardwicke doubted, especially as *Wright vs. Englefield*, alias *Cadogan*, was carried into the House of Lords and there solemnly decided. As it, then, has been finally adjudged that the will of a married woman, although she did not part with the legal estate, is valid and may be executed so that the estate shall be conveyed accordingly, being made in pursuance of a previous written marriage contract, *a fortiori*, this marriage contract is available and ought to be enforced.

George, on the demise of Thornbury, vs. ——, *Ambler*, 627, is a case at law, where the will of a married woman, devising lands of inheritance in pursuance of articles entered into previous to the marriage, was adjudged not to be valid. The Court said, "we must determine according to the strict "rules of law, but courts of equity can go further than we can." The Court further said, that a husband could not give a wife power to make a will of lands in prejudice of the heir at law. This case is perfectly correct; for it was a question of law decided in a court of law; but then it

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was admitted that a court of equity could go further than a court of law, as all the before cited cases demonstrate.

Doe vs. Steple 2 *T. R.* 684, was a case at law. Before marriage there was an agreement, not sealed but signed by the parties, that the fortune of Catharine Culver, the wife, should be settled or remain to their joint use for her life, or the life of the survivor, and if she should survive the said James Hibbins, the husband, then her whole fortune, together with her plate and jewels, to be settled to her own use; and if the said Catharine Culver should happen to die first, then the aforesaid fortune to be at her own disposal; and proper settlement deeds were to be prepared. On the same day and year, she made her will, duly executed to pass real estate, and after giving the whole interest of her fortune to James Hibbins, her intended husband, for life, and after several specific devises in which the reversion in the premises in question was not mentioned, she devised the residue of her estate and effects to the said James Hibbins, whom she appointed executor. On the same day and year the marriage took effect, and on the 7th day of April, 1759, Catharine Culver died, without issue, in the lifetime of her husband. In the argument, the counsel for the plaintiff admitted that it might be too much to contend that Hibbins, the husband, did not take a life estate under the agreement; for, if he took a clear equitable estate for life, the Court of Chancery might compel the plaintiff's lessor to pay costs in equity for taking a larger judgment at law than he is equitably entitled to. And Lord Kenyon, in delivering his opinion, remarking on the case of *Peacock vs. Monk*, says, "he (Lord Hardwicke) doubted whether even a court "of equity could carry into execution a bare agreement "for that purpose, to the prejudice of the heir at law. "However, that which was then considered a doubt no "longer remains so; for in *Wright vs. Cadogan et. al.*, it "was determined that a court of equity would compel the

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"heir to make a conveyance to the party in whose favor "such an agreement was made. That point was very ably "discussed in the House of Lords, on the doubts which "Lord Hardwicke had thrown out in *Peacock and Monk*, "though his doubts were not sufficient to induce the "House to determine against such an agreement." Thus, Lord Kenyon adds the weight of his judgment in support of a disposition of lands of inheritance, in pursuance of a bare agreement, to the prejudice of the heir at law. And if such an agreement may be carried into execution against the heir at law, how much more certainly would a court of equity execute against a husband his own agreement, made in consideration of marriage, by which the inheritance or the heirs at law never can be affected.

The same case afterwards, by the names of *Hodsden vs. Lloyd*, and *Lloyd vs. Hodsden*, 2 *Bro. Ch. Rep.* 534, came before Lord Thurlow on a bill filed by the heirs at law of Catharine Culver, the wife, and her heirs in gavelkind, praying an account, among other things, of the rents and profits of the estate which came into the hands of James Hibbins, the husband. A cross bill prayed, among other things, that the will of the wife, Catharine Culver, might be declared to be well proved. Lord Thurlow, in relation to the agreement by which an equitable estate for life was given to the husband, said, "the terms of the agreement are these;—where Catharine Culver recites her property "to be real and personal, and agrees that her whole fortune "so described should belong to the longest liver, that is, "to her or her husband who should survive the other; by "virtue of this agreement, though there was no actual "conveyance, the heir will hold that estate subject to the "life interest therein of Hibbins, and consequently not as "present possessor, but as seised of the legal interest in "the estate for Hibbins. I think under these circum-"stances the plaintiffs are entitled to the account only "from the time of Hibbins' death, who, being the equita-

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" ble tenant for life, was entitled to the rents and profits " during his life." As to the will of the wife, the Lord Chancellor was of opinion, that the will, being made before the marriage, was not a will according to the power; because the power to make a will after marriage could not be held a power to make a will antecedent to it. In speaking generally whether a *feme covert* can make a will to pass real estate in pursuance of the agreement of the husband, he said, " with regard to chattels, both real and " personal, the husband, by contract anterior to the mar- " riage, resting only in agreement, could authorize her to " make a will; but in order to make a will of real estate " he must part with the legal estate to trustees, for by " agreement,—while resting in agreement only,—he cannot " bind the heir, but can only bind himself, and the legal " estate ought to be conveyed by legal conveyances." In this latter point, Lord Thurlow certainly accords with Lord Hardwicke in the case of *Peacock vs. Monk*, and dissents from the opinions of Lord Northington, Lord Camden and Lord Kenyon, and also from the decision of the House of Lords in the case of *Wright vs. Cadogan, et al.* Chancellor Kent, of New York, thinks that there is a mistake in this part of the report; but whether it is so or not, it is not material in the case before us; for Lord Thurlow agrees with Lord Hardwicke and the other Chancellors, and with Lord Kenyon, that a man may, by an agreement made with his wife before marriage, bind himself; so that his opinion upon the question arising under this contract of Joseph W. Cochran and the complainant confirms all the preceding authorities. This case of *Hodsden vs. Lloyd* is extremely strong in support of Frances L. Cochran's claim under her marriage contract, because, in that case, the title of Hibbins, the husband, rested on the agreement only. No actual conveyance had been made, and yet the Chancellor considered that the heir would hold the estate subject to the life interest of Hibbins, not as present pos-

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sessor but as seised of the legal interest in the estate for Hibbins. This was giving full effect to the agreement so far as the life interest trenched upon the inheritance, and carried the doctrine as applicable to this case as far as any of the preceding decisions or opinions. It may be observed that in this case, and in *Rippon vs. Dawding*, and in others, there was no trustee for the wife and no conveyance of the estate to trustees subject to the will or disposition of the wife, and no objection was made on that account.

The case of *Compton vs. Collinson*, 2 *Bro. Ch. Rep.* 377, arose on a surrender of a copyhold by a *feme covert* having a power under articles of separation to dispose of her estate, the husband not having joined in the surrender. The question was whether without any custom the surrender was good. Buller, J. who sat for the Lord Chancellor, said it was a legal question, and had a case made and sent to the Court of Common Pleas for their opinion. He observed that, as to any interest of the husband, he has formally abandoned it, and does not now insist on or pretend to have any. Besides, after the husband's covenant this must be taken to be a surrender with his assent. So that Justice Buller held the husband to be so bound by his covenant as not to have any interest in this estate of his wife.

The case of *Fettiplace vs. Gorges*, 3 *Bro. Ch. Rep.* 8, corresponds with all the other cases, so far as it goes, but it has little bearing on this suit.

The last English case upon this subject, to which I shall refer, is *Campion vs. Cotton*, 17 *Vesey, Jr.* 264, where a settlement in consideration of marriage was sustained against creditors, notwithstanding false recitals that the property was the wife's; and it was adjudged that neither the joint possession of furniture, nor the want of an inventory, nor the fact that the husband was indebted at the time and that the wife knew it, would affect the settlement.

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Opinion :—want of trustee—authorities reviewed.

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There are two American decisions, not cited at the bar, which confirm the decisions made in *Wright vs. Englefield* and *Rippon vs. Dawding*, and consequently go beyond the principles necessary to sustain this marriage contract. One is the case of *White, lessee of Barnes, vs. Hart*, 2 *Dallas R.* 199, 1 *Yeates R.* 221. The question there was, whether a *feme covert* seized of a real estate in fee could, in consequence of a power contained in articles executed between her husband and herself before their marriage (the legal estate not having been conveyed to trustees) give away such estate, by will or instrument in the nature of a will, during the coverture. McKean, C. J.,and Shippen, Yeates and Bradford, Justices, were unanimously of opinion, that the devise of the wife, during coverture, operated as a good appointment and bound the heir at law, although the legal estate had not been vested in trustees. The other decision was made in *Bradish vs. Gibbs et al.*, 3 *Johns. Ch. Rep.* 523, by Chancellor Kent. There the wife, before marriage, had entered into an agreement with her intended husband that she should have power, during the coverture, to dispose of her real estate by will, and she afterwards devised the whole of her real estate to her husband. This was held a valid disposition of her estate in equity and the heirs at law of the wife were decreed to convey the legal estate to the devisee.

In both of these cases, and especially in the opinion delivered by Chancellor Kent, all the English adjudications were minutely and laboriously examined, and the result was that the case of *Rippon vs. Dawding* was considered never to have been shaken ; that it is not necessary that the legal estate of the wife should be vested in trustees, and that she might dispose of her real estate in pursuance of an agreement made with her husband before marriage so as to bind the heir. Judge Shippen at first doubted on the old distinction between trusts and legal estates, as to the wife's power of appointment in pursuance of marriage

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articles, but on more deliberate consideration his doubts were removed.

I then conclude that this marriage contract between Cochran and his wife is good, because it was made in consideration of marriage and is to take effect during the life of the husband, and because he had full and absolute power over the subject matter of the contract during the joint lives of him and his wife, and, as to the goods and furniture, forever.

The defendants have not rested this cause upon the alleged invalidity of the contract, but they say that the legal estate in this property was fixed in the husband, there being no trustee, and that it was liable to execution for his debts; and that as they have, by their writs of execution, gained a legal advantage and have a superior equity, the Court will not deprive them of this advantage.

I have already shown, that though no trustee was named in the contract this can be no substantial objection, because the husband will be considered a trustee for her.

I have met with no case of an execution against a husband on which the goods settled on the wife to her separate use were seized; but the cases of bankruptcy contain the principles by which this question should be decided. In those cases the assignees take by the operation of law, and the same principle should decide this case; for it is by the operation of law that the defendants here claim.

In *Bosvil vs. Brander*, 1 *P. Wms.* 458, the following circumstances appeared. A *feme sole*, being a mortgagee in fee, married a tradesman who became a bankrupt. A commission of bankruptcy being taken out against him the commissioners assigned over all his estate, real and personal. The husband, at the marriage, gave a note that the wife should have £200, part of her portion. On the death of the husband the wife brought her bill against the assignees for the writings relative to the mortgage and to

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have the benefit thereof. The Master of the Rolls gave his opinion against the wife as to the mortgage, but he said, if there had been any articles before the marriage purporting that this mortgage money should continue in the wife as her provision or should be assigned in trust for her, they would have been a specific lien upon the mortgage and have preserved it from the bankruptcy. As to the £200, the Court held that the same was specifically bound by the husband's note, and with respect to that the plaintiff was relieved and the bill as to the mortgage was dismissed. In this case the assignees had gained a legal advantage by the assignment of the commissioners, but on a bill by the wife she was relieved to the extent of her husband's contract.

Bennet vs. Davis, 2 *P. Wms.* 316, is still stronger, because the assignees had proceeded to bring an ejectment for the land of the wife assigned to them by commissioners in the life-time of the husband, he being at law entitled to an estate for life in her lands held in fee, and having the legal estate; and, consequently, the legal estate being vested in the assignees by the assignment. A father had devised to his daughter, the wife of the bankrupt, lands in fee, to her separate and peculiar use exclusive of her husband, to hold the same to her and her heirs, and that the husband should not be tenant by the curtesy nor have these lands for life in case he survived the wife, but that they should go, upon her death, to her heirs. The husband becoming bankrupt, the commissioners assigned the lands to Davis in trust for the creditors. Davis brought an ejectment. The bankrupt's wife, by her next friend, preferred her bill against Davis, the assignee, and her husband, in order to compel them to assign over this estate to her separate use. The Master of the Rolls took it to be a clear case that it was a trust in the husband, and, admitting the husband to be a trustee, then the argument of the creditors having the law on their side was immaterial, as

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Opinion :—no distinction between devise and marriage articles.

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if the bankrupt had been a trustee for J. S., his bankruptcy should not, in equity, affect the trust estate; and the defendant, the assignee, who claimed under the husband, could have no better right than the husband, and must join in a conveyance to a trustee for the separate use of the wife, which was decreed accordingly.

The counsel who argued for McBeath and Meteer made a distinction between devises to the separate use of the wife without trustees and marriage articles without trustees, but no such distinction is to be found in the books. The case of a marriage contract is stronger than a devise, because the marriage is a consideration for the contract, whereas the devise is voluntary. The case of *Bosvil vs. Brander*, as to the £200, grew out of the marriage contract without a trustee, and *Bennet vs. Davis*, was a devise without a trustee, and in both cases the wife was relieved.

In *Walker vs. Burrows*,1 *Atk.* 93–94, Lord Hardwicke lays down the law clearly that assignees under a commission of bankruptcy stand only in the place of the bankrupt, and are bound by all acts fairly done by him, notwithstanding they gain the legal estate; and this proves, he said, that assignees of bankrupts are not considered as purchasers of the legal estate for a valuable consideration for every purpose. Mr Cox, in his note to *Bosvil vs. Brander*, says that Lord Hardwicke in *Jewson vs. Moulson*, 2 *Atk.* 420, expresses great doubt whether a court of equity would interfere where the husband,or his general assignees (who stand exactly in the same situation), could get possession of the wife's property without the aid of equity; but that where the property is a subject of equitable cognizance it does not seem material whether the wife, or the husband, or his representatives or general assignees, come for the aid of the Court. He then cites the case of *Grey vs. Kentish*, 1 *Atk.* 280, where a particular assignee, that is, the assignee of the husband, took with notice of an equity in the wife, and the assignees under a commission of bankruptcy were

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decreed to take subject to the same equity; and he there cites *Bushman vs. Pell*, which I have seen no where else in print, in which case Lord Thurlow declared that "where the equitable interest of the wife was transferred to the creditor of the husband by the mere operation of law, he stood exactly in the place of the husband, and was subject precisely to the same equity in respect of the wife." It is because this is a case of equitable cognizance that the Court can interfere and prevent these defendants from proceeding at law to take the separate property of the wife for the husband's debts. If this were not a proper subject for the Court,—if no sufficient ground has been shown by the plaintiff in her bill for a court of equity to interfere, then the defendants might have demurred for want of equity in the complainant's case to support the jurisdiction of the Court. But this is a case peculiarly belonging to a court of equity; and, therefore, it may afford its aid to the complainant in the same manner as if the defendants had been obliged to come into this Court to obtain the benefit of the property in dispute. Upon this principle, in *Bosvil vs. Brander*, the Court relieved the wife as to the £200 :—and so in *Bennet vs. Davis*. In both these cases the questions were subjects of equitable jurisdiction, and in both the wives were plaintiffs, seeking the aid of the Court. See *Sidney vs. Sidney*, 3 *P. Wms.* 269 : *Legard vs. Johnston*, 3 *Ves. Jr.* 352, 360.

The complainant has been charged with fraud; and the instances pressed upon the Court in support of this allegation are,–*first*, that this marriage contract was concealed until the bill in equity was filed against Gemmill in the year 1819 : and *second*, that the complainant pretended to burn it and thereby committed a fraud on old Mrs. Cochran, the mother of her husband ; and 1 *Fonb. Eq.* 161: 9 *Mod.* 38 : 2 *Eq. Ca. Ab.* 488–9. *c.* 1 : 6 *Ves. Jr.* 174, *Evans vs. Bicknell*, were cited to prove that infancy and coverture were no excuses for fraud, and that if the intention

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is fraudulent, though not pointing exactly to the object accomplished, yet the party is bound.

The secrecy or concealment of the marriage contract is no evidence of fraud. The complainant was not bound to proclaim or record it. There is no law nor principle requiring either. It was, as has been properly said by the complainant's counsel, a family concern, which neither she, nor any other party, was under any necessity to divulge. In England, marriage settlements and marriage contracts, as such, are not required by law to be registered or recorded. They are, as with us, kept in the pockets of the parties until some special necessity requires that they should be produced. Lord Kenyon, in the case of *Jarman vs. Woolloton*, 3 *T. R.* 618, speaking to an objection made in that case that a schedule of the goods conveyed to the separate use of the wife had not been annexed to the marriage settlement, remarks that "a schedule conveys "no information to the world. If it were annexed to the "settlement, its existence would only be known to the "parties interested in it, and therefore such a transaction "as this would be equally open to fraud, if there had "been a schedule of this furniture, as it now is." In *Campion vs. Cotton*, there was no schedule. Hence, it may be clearly inferred that it is not necessary that a marriage contract should be recorded, and if there is no law for recording it, how should it otherwise be made known? No such objection is to be found in any of the cases upon this subject, and if such circumstance were of itself evidence of fraud, it would not have passed in silence. No case has been produced to the Court by the defendants' counsel, to support their doctrine. A purchaser from the husband of any of the goods, or a payment to him by Dr. Couper of the interest of the £400, or a payment of rents by any of the tenants, without notice, would have shielded them. In this want of notice all persons purchasing or paying Cochran would have been safe.

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Opinion:—pretended burning of contract.

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As to fraud in pretending to burn the marriage contract, in order to pacify old Mrs. Cochran, it may be observed that she was neither affected nor injured thereby. She was not a party to it, and could not derive the remotest benefit or advantage from it. The contract had been made without her knowledge, so far as we have any proof, and she was not in any manner concerned in it. The case of *Evans vs. Bicknell*, 6 *Ves. Jr.* 174, applies in this respect, to show that where no fraud was intended no fraud could be committed. Lord Eldon, (p. 192,) says, "if the intention "is fraudulent in any respect, though not pointing exactly "to the object accomplished, yet he will be bound." Lord Eldon refers to Lord Thurlow's doctrine in *Beckett vs. Cordley*, 1 *Bro. Ch. Rep.* 353, where Lord Thurlow says, "there is no case in the books but where the party to "whom the fraud is imputed was cognizant of the treaty "in which the fraud was practised; but, although there "is no such case, yet if it appeared that the parties were "confederating together to cheat some one, although the "particular person was not known, the case would fall "within the same principle and must receive the same "determination." And Lord Erskine, in *Clifford vs. Brooke*, 13 *Vesey, Jr.*, 131, speaking of *Evans vs. Bicknell*, says, "the defendant did not mean to defraud the plain-"tiff; but if evidence had been produced that he "parted with the deeds for the purpose of defrauding any "one, Lord Bacon's maxim would apply to such a case "of fraud, intended against one person, taking effect upon "another."

This pretended burning happened in 1811, when it does not appear that Joseph W. Cochran owed a single dollar to any one. He had not then become trustee for Sarah Armitage, nor had he become a surety, nor was he then indebted, and therefore a fraud could not at that time be committed upon any person. Old Mrs. Cochran had no interest,—no right,—no claim whatever, in this

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contract, nor in any consequence flowing out of it. I do not see how a fraud could be intended or committed upon a person who had no right; and neither old Mrs. Cochran, nor any other person had then any claim upon the husband. Whom did the plaintiff design to cheat by this pretended burning? or upon whom did this fraud take effect? It pacified an unreasonable old woman, who had no interest in the matter, and it took effect upon nobody; for Cochran then had no creditor and the defendants in this cause had no knowledge of the contract until the plaintiff filed her bill against Gemmill in the year 1819; so that this pretended burning could not have induced them to become sureties in the year 1814, when the recognizance was entered into in Sarah Armitage's trusteeship. The truth is, that no fraud was or could be intended, from the nature of things, by this pretended burning and none was committed, and therefore this objection cannot prevail.

The joint possession of the goods and furniture by the husband and wife was consistent with the contract. It could not be supposed that the wife should part with them, and if they remained in her possession the husband must also have the possession. *Cadogan vs. Kennet, Cowper* 432: *Jarman vs. Woolloton*, 3 *T. R.* 618, *and Campion vs. Cotton*, 17 *Vesey, Jr.* 264, show the whole doctrine on this subject, and that this is no evidence of fraud nor sufficient to bar the claim of the wife.

And it is no objection, that a schedule of the goods and furniture, interest money, rents, and real and personal estate intended for the wife's separate use, was not annexed to the contract; for, as Lord Kenyon says, it would give no information to the rest of the world and its existence would only be known to the parties. 3 *T. R.* 618: 17 *Vesey, Jr.* 264.

It is evident from the testimony that the husband received the rents and profits and interest of the complainant until the year 1819, and that until that period, when she

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filed her bill against Gemmill, she had never enforced this contract against her husband or any other person. This is what the defendants' counsel called an abandonment of the contract; but no case in support of that position has been shown. In *Pawlet vs. Delavel*, 2 *Vesey, Sr.* 663, the wife was barred from claiming her separate estate after the death of her husband, but then they had called in the separate estate, discharged the trustees, and the money was placed out by the husband and managed by him, and after his death the wife, as his executrix, received the interest, gave receipts and mixed it with other parts of his estate. Afterwards, she married again and by a deed made by her and her second husband, treated this as the estate of her first husband. Under all these circumstances, the Lord Chancellor thought that the weight of evidence was in favor of the claimants under the deceased husband and decreed accordingly. There was in that case not mere acquiescence, but she performed repeated acts, while she was a wife and while *sole*, by which she treated the money as the property of her deceased husband, without any claim on her own separate account. And, what particularly weighed with the Chancellor was, that in the deed made by her and her second husband no notice was taken of any claim to this money, and although there were words importing that there was something to her separate use, there was nothing relative to this. It is evident from the whole case that all these acts combined induced the Lord Chancellor to decide as he did. Her acts while *sole* were alone sufficient. In *Powell vs. Hankey and Cox*, 2 *P. Wms.* 82, the wife was not permitted to recover from the executors of her husband the interest received by him, of securities and bonds assigned to her separate use, because she had for ten years together permitted the husband to receive this interest, without making the least objection, either to her husband or to the debtors who paid the money, or to her trustees, and it was therefore presumed that she had consented to his

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receipt of the interest; but, as to such part of the principal of these securities as he received, it was decreed that his executors should make the same good, with interest from his death. Upon the same principle this husband, Joseph W. Cochran, should not account for the rents and profits and interest of the wife's separate estate which he has received, but after the bill filed by her in 1820 he has no right to receive, nor any debtor of his wife, for the separate property, to pay money to him. There is no evidence that she did any act, or made any express or implied agreement, to abandon or yield to her husband her interest in this separate estate; and the inattention or laches of a married woman cannot prejudice her. 2 *Atk.* 545. Lord Eldon, in *Murray vs. Lord Elibank*, 10 *Vesey, Jr.* 90, says that "previously to a bill a trustee who has the wife's "property, real or personal, may pay the rents and profits, "and may hand over the personal estate to the husband. "Lord Alvanley, in *McCaulley vs. Phillips*, 4 *Vesey Jr.* 19, "has laid it down, that after a bill filed the trustee cannot "exercise his discretion further,—that the bill makes the "Court the trustee, and takes away his right of dealing "with the property as he previously had." The wife's acquiescence makes the previous acts done valid, but it is not an abandoment, for she may resume her right, and by her bill stop all further payments to the husband.

It was mentioned in the argument, but not pressed, that this marriage contract does not secure the property from liability to the husband's debts, because there was no special covenant nor agreement in it to that effect. The answer is, that he by his contract agreed that it should be her separate property, and if he could do this, it consequently was not his and could not be liable for his debts. By his agreement he barred himself and every body else, as Lord Hardwicke said in *Peacock vs. Monk*; and all the cases establish this, so that reference to them on this head is not necessary. His creditors must stand on the same footing as does the husband.

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No objection was made by the counsel for the defendants, that the complainant did not execute this contract, and that point was properly omitted, because she granted nothing by it. The husband alone made the grant. He thereby yielded up his rights, and his execution alone was sufficient; but she accepted the contract and married him accordingly, and thereby became a party to it.

Let a decree be entered for a perpetual injunction, according to the prayer of the bill.

The decree of the Chancellor was affirmed, upon appeal, by the High Court of Errors and Appeals, at the June T. 1822.

WILLIAM H. WILDS AND JOHN H. WILDS,

vs.

JOHN LAYTON, THOMAS J. WILDS AND MARY C. WILDS.

Kent, April, 1822. (*In vacation.*)

Injunction granted to restrain a tenant, holding a farm under a writ of elegit, from tilling it contrary to the established rotation of crops on the farm, and to the usage of the country in which it is situate. Such improper tillage, when tending to depreciate the value of the inheritance, is waste.

Waste may be committed as well of land as of houses and timber.

BILL FOR AN INJUNCTION TO RESTRAIN WASTE.—This was a motion *ex parte* for an injunction to restrain waste by the over-tilling of land. The case, as set forth in the bill, was as follows:

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John Wilds died indebted to sundry persons by whom judgments were recovered against his administrator, Thomas Wallace. Among other judgments was one recovered by John Fisher in the Court of Common Pleas for Kent County, December 7th, 1818, for $74.98; and also another judgment recovered by John Denny and James Tribbet, in the same Court, May 8th, 1821, for $82.44. Writs of *fieri facias* were issued upon these judgments and levied upon the real estate of the decedent. Inquisitions were held, under which it was found, and so returned, that the lands taken in execution would rent for a sufficient sum, clear of all reprizes, to pay the liens against them within seven years. Thereupon, writs of elegit were issued. Meanwhile, the two judgments upon which these proceedings were taken, had been marked on the record for the use of John Layton, one of the defendants. The lands were delivered under the *elegits* into his possession, and he now holds the same.

The bill further alleged that John Wilds, the decedent, left to survive him, a widow, viz: Sarah Wilds, and five children and heirs at law, viz: the complainants, William H. Wilds and John H. Wilds, the defendants Thomas J. Wilds and Mary C. Wilds, and another child, James Wilds, who has since deceased; that the widow intermarried with John Layton, one of the defendants; that said Layton thereupon entered into possession of the real estate of the decedent, and received to a large amount the rents and profits of said real estate; that said rents and profits were legally applicable to discharge the debts of the decedent remaining unpaid after exhausting the personal estate, and that they were sufficient, if faithfully applied, to discharge all of said debts, and thereby the real estate might have been saved from execution; that, nevertheless, the said Layton held the said rents and profits for his own use, and applied no part thereof to the debts of the decedent.

The bill further alleged, that the mansion farm of the

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decedent, (being part of the lands held by John Layton under the *elegit*) had always been divided, for the purposes of cultivation, into three fields, of nearly equal extent, and that at and before the death of John Wilds a rotation of crops had been observed in the tillage of said mansion farm, according to which rotation the practice had been to till and cultivate only one of said three fields yearly, by planting the same in Indian corn in the spring, and seeding the same in wheat in the fall; that the fields had never been tilled faster; that in settling the price and extent of the lands under the inquisition, the jurors had taken into consideration this rotation of crops as the fixed and settled mode of tillage for the mansion farm, and had determined the price and extent of the mansion farm in view of such rotation of crops, and under the consideration that the same would be observed and practiced by the tenant who should hold the lands under said extent;—that, nevertheless, the defendant, John Layton, since he had come into possession of said lands, had claimed the right to till them as he pleases; that he had disregarded said rotation of crops, and was proceeding for the present year to till and cultivate two of said fields of the mansion farm in Indian corn, being two-third parts of said farm, and all of the same except the field which was tilled in Indian corn last year. The bill alleged that the rotation of crops which had previously been observed in the tillage of the mansion farm was according to good husbandry, and the custom of the country where the farm is situate; that a faster tillage was against the established rotation of crops upon the farm; that it was against good husbandry and the usage of the country; and that, if persisted in, it would greatly waste and impoverish the farm. And the complainants insisted, that the defendant, John Layton, being in possession of the farm by legal process, was bound to observe said rotation of crops. The prayer of the bill was that the defendant, Layton, might be decreed to

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account for all the rents and profits of said lands which he had received, and to apply the same toward discharging the unpaid debts of the decedent, John Wilds; also that he should be restrained by a writ of injunction from tilling in Indian corn for the present year, more than one of the said three fields of the mansion farm, that being the field which was in tillage in the year 1819, and which, according to the aforesaid settled rotation of crops, was in course to be tilled in Indian corn for the present year; and for further relief.

Hall, for the complainants, presented the bill to the Chancellor, and moved for an injunction.

RIDGELY, CHANCELLOR, granted the order, assigning the following reasons, viz:—I am of opinion that it would be waste to till the farm contrary to the established rotation of crops on it, and contrary to the usage of that part of the country. I also think that the tillage complained of was contrary to good husbandry; but more especially was it improper, as on the *elegit* the price and extent had been made with a view to this established rotation of crops. Whatever tends to the destruction of the inheritance, or to its depreciation in value, is considered by the law as waste; and waste may be committed of land as well as in houses and timber. A defendant may be restrained from opening mines. 2 *Atk.* 182-3. So an injunction may go to restrain a tenant from doing damages, and from removing crops and manure except according to custom of the country. 16 *Ves. Jr.* 173. The cultivating or using of land in a grossly unhusband-like manner, it is said in 1 *Mad. Ch. Pr.* 138, may be restrained by injunction. Any abuse of the land by the tenant, which tends to its injury, ought to be restrained. The working a field two years successively in Indian corn is reputed to be highly injurious.

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Syllabus.

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In the case of *Lord Barnard*, *Prec. Ch.* 454; 1 *Eq. Ca. Ab.* 400, cited in 2 *Harrison Ch. Pr.* 182, where the defendant had defaced the mansion house and was going on entirely to ruin it, a writ of injunction was granted, and a commission was ordered to issue to six commissioners, whereof the defendant was to have notice, and to appoint three on his part, or, in default thereof, the six commissioners to be named *ex parte*, to take a view and to make a report of the waste committed.

Injunction awarded.

CHARLES DUSHANE, AND AGNES, his wife,

vs.

ALRICH RYLAND.

New Castle, Aug. T. 1822.

After a final decree in the cause and pending an attachment for its non-performance, leave was granted to the defendant to file a bill of review. After some delay, without any bill of review filed, the defendant being still held under the attachment, and the complainant proceeding to enforce the same,—upon motion, the Chancellor discharged the defendant, but with leave to the complainants to take out another attachment, unless the defendant should, before a certain day appointed in the order, file a bill of review, and should also make affidavit of his inability to pay the money decreed and give bond, with surety, for the payment of the same, or of so much thereof as should not be otherwise ordered and decreed under the bill of review,—such security, if given, to have the effect of suspending the original decree until the event of the bill of review.

ATTACHMENT FOR NON-PERFORMANCE OF A DECREE.—A final decree had been made in this cause on the 2d of September, 1820, whereby the defendant, Ryland, was

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decreed to pay to the complainants, Cornelius Dushane and Agnes his wife, $297.12. On the 21st of February 1821, an attachment for the non-performance of the decree was issued and returned by the sheriff "*cepi corpus* and in custody." On the 6th of September,1821, a rule was laid upon the sheriff to bring the body of the defendant into court at the next April Term. At that term the defendant's solicitor obtained leave to file a bill of review, and further proceedings under the attachment were suspended. After some delay, and no bill of review being filed, and the complainants being about to proceed to enforce the attachment,—*Read*, for the defendant, on the 28th of August 1822,moved for his discharge from the attachment, on the ground that leave had been granted to file a bill of review.

Van Dyke, for the complainants.

A bill of review, even had it been filed, would not prevent the execution of the decree impeached. The party would be allowed to obtain the object of his bill, supposing there should ultimately prove to be no error in the proceedings. Where money is to be paid under a decree, the Court will sometimes accept of good security to await the event of a bill of review. That is the only mode of staying execution of the decree. 1 *Harrison's Ch. Pr.* 138-9. 2 *Bro. P. C.* 24: 1 *Chanc. Cas.* 42, 86: 1 *Chanc. Rep.* 139: 2 *Chanc. Rep.* 48. In this case no bill has as yet been filed.

Read, for the defendant, cited *Hind's Ch. Pr.* 61, 62, 59.

The Chancellor directed the following order to be entered, viz:

Aug. 28, 1822. It is ordered by the Chancellor that if a bill of review be filed on or before the 15th day of October next, and if Alrich Ryland, the defendant in the

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original cause, make affidavit before the Register of this Court that he is unable, and hath not the means in his power, to pay the money decreed to be paid to Cornelius Dushane and Agnes his wife, in the original decree; and shall, on or before the 20th day of October next, enter into a bond with security to be approved by the Register of this Court to pay to the said Cornelius Dushane and Agnes his wife the sum of $437.49, decreed in said original cause to be paid to them the said Cornelius Dushane and Agnes his wife, with interest from the 2d of February, 1821, in case the original decree made in this cause shall not be reversed, or to pay so much of such money as shall not by such decree on such bill of review be otherwise ordered or decreed than in such original decree, then that the execution of the original decree shall be suspended and await the event of the said bill of review.

And it is ordered by the Chancellor, that the said Alrich Ryland be discharged from the attachment heretofore issued in this cause, on the payment of the costs and service thereof; and that the complainants, Cornelius Dushane and Agnes his wife, be at liberty to take out an attachment on the original decree in this cause, in case such bill of review be not filed, and affidavit made, and bond with security be given as above ordered, within the times above limited.

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Statement of the case.

Ex parte WILLIAM BURGESS, et al.

New Castle, Aug. T. 1822.

The widow of a deceased tenant in common, who is entitled to dower in his undivided share of the lands held in common, cannot join in a petition for partition of the lands until after her dower has been assigned to her in the Orphans' Court, without metes and bounds.*

The proceeding for partition lies between tenants of the freehold. A widow, prior to the assignment of her dower, is not such a tenant, and therefore she cannot join in a petition for partition.

After dower, without metes and bounds, has been assigned and the widow enters, she is a tenant, and holds her undivided dower; and then, by the equity of the Statute, 32 Hen. VIII., c. 32, and of the Statute of this State, partition may be made between her and the tenants in common.

PETITION FOR PARTITION—DOWER IN AN UNDIVIDED SHARE.—This was a petition for partition among tenants in common of certain real estate, situated in New Castle county, devised by the last will and testament of John Hook deceased, to his two children, Henry Hook and Agnes Hook. Henry Hook, one of the original tenants in common, died intestate, leaving to survive him a widow, named Ann, who afterwards intermarried with James Hanson; also leaving two children, his heirs at law. The widow of Henry Hook, together with her husband, James

* The law is now otherwise under the present statute of partition, *Rev. Code, Chap.* 86, *Sec.* 22, as amended by Act of Jan. 18, 1867; 13 Laws of Del., 150. By this Act, in order that the title under a sale in partition may be clear of curtesy and dower in an undivided share, and that a corresponding interest in the purchase money may, by the decree for distribution, be secured in lieu of the curtesy or dower, the husband or wife entitled is required to be a party to the proceeding. The Act of 1867 was declaratory of a practice already in force,—having grown out of the statutes providing for the sale of lands in proceedings for partition, which could not be divided without detriment to the parties interested.

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Hanson, joined in the petition for partition, no assignment of dower having been yet made to her. It was this feature of the case which came under the special consideration of the Chancellor.

The petition was as follows :

"The petition of William Burgess, Henry Burgess, Josiah Bunker and Sarah his wife, late Sarah Burgess, and James Hanson and Ann his wife, late Ann Hook, who was the widow of Henry Hook, deceased, and Samuel McVay and Jane his wife, late Jane Hook, and Henrietta Ann Hook, by her guardian and next friend, the said James Hanson, humbly showeth ;—

That a certain John Hook, late of St. Georges' Hundred, New Castle county and State of Delaware, was in his lifetime and at the time of his death, lawfully seised in his demesne as of fee, of and in a certain plantation or tract of land, bounded by lands of James Houston, George Vandegrift, Samuel Thomas and Archibald Alexander, situate in said hundred and county, and containing one hundred and eighty acres, more or less ; and being so thereof seised, the said John Hook duly made and executed his last will and testament in writing, bearing date the 14th day of December, A. D., 1783, whereby among other things, he devised to his two children, Henry Hook and Agnes Hook, in fee, all the said plantation or tract of land, to wit, two-third parts thereof to the said Henry and one-third part thereof to the said Agnes. That afterwards the said John Hook departed this life without revoking or altering the said last will and testament, leaving to survive him the said children, Henry and Agnes. That the said last will and testament of the said John Hook was duly proved, and now remains in the office of the Register of Wills in and for New Castle County. That the said Agnes Hook and Henry Hook, after the death of the said John Hook, became seized in fee as tenants in common of the

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said plantation, to wit, the said Agnes of one full, equal and undivided third part thereof, and the said Henry of the remaining two full, equal and undivided third parts of the same tract. And the said Agnes intermarried with a certain William Burgess, and died about the year of our Lord. 1810, a widow, intestate, leaving to survive her three children, her heirs at law, viz : William, Henry and Sarah Burgess, who are now living, and to whom the said equal and undivided third part of the said plantation descended and came, Sarah having intermarried with and being now *covert* of a certain Josiah Bunker. That the said Henry Hook died intestate, on or about the 15th of August, 1813, leaving to survive him a widow named Ann, now *covert* of a certain James Hanson, and two children, now in full life, to wit, Jane Hook, who since intermarried with a certain Samuel McVay, and Henrietta Ann Hook, to whom the remaining said two full, equal and undivided third parts of the said plantation descended and came, subject to the right of dower of the aforesaid Ann therein.

That the said William Burgess and Henry Burgess are each entitled to one-ninth of the aforesaid plantation, and the said Josiah Bunker and Sarah his wife, in right of the said Sarah, are entitled to another ninth part thereof, making together the one-third part of said plantation which descended to them from the said Agnes Burgess as aforesaid. That the said Samuel McVay and Jane his wife, in right of the said Jane, and the said Henrietta Ann Hook are entitled to the remaining two thirds of the aforesaid plantation, to be equally divided between them, subject to the right of dower of the said Ann Hanson as aforesaid.

That the said William Burgess, Henry Burgess, Sarah Burgess, and the said Josiah Bunker in right of his wife, the said Sarah, do elect to hold their third part of the aforesaid plantation in common among themselves, but

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separate and distinct from the other two-third parts thereof.

That the said Ann and James Hanson, in right of his wife, the said Ann, and the said Samuel and Jane McVay, in right of his wife, the said Jane, and the said Henrietta Ann, by her guardian and next friend the said James Hanson, do elect still to hold among themselves, their shares or parts of the tract of land aforesaid in common.

Your petitioners, uniting in this petition, therefore pray your honor that partition of the aforesaid plantation be made among the parties interested therein, according to their aforesaid rights and the election of your petitioners as hereinbefore stated and set forth, and according to the form and effect of the several Acts of Assembly in such case made and provided, and to do what else may be by law required.

(Signed, &c.)

The petition was presented to the Chancellor at the August Term, 1822, by *Read, Jr.*, counsel for the petitioners.

The Chancellor, upon consideration, declined to make the order, as prayed for, and afterwards assigned the following as his reasons:

By the last will of John Hook, his children, Agnes and Henry, became tenants in common, Agnes in one-third, and Henry in two-thirds, of the land devised. Agnes married William Burgess, and having survived him died intestate, leaving three children, William, Henry and Sarah now the wife of Josiah Bunker. Henry died intestate leaving a widow, Ann, now the wife of James Hanson, and two children, Jane, the wife of Samuel McVay and Henrietta Ann.

The object of the petition is to assign to William Burgess, Henry Burgess and Josiah Bunker and Sarah his wife, their third part of the land to be held by them in common; and to assign to James Hanson and Ann his

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wife, who was the widow of Henry Hook, and to Samuel McVay and wife and Henrietta Ann Hook the other two thirds, to be held by them in common, according to their respective interests.

The objection that I have is, that James Hanson and Ann his wife do not hold any part of the land. Ann is entitled to dower in Henry Hook's two-thirds part, but until the dower shall be assigned to her she does not hold the land; and even supposing she should, on the assignment of dower, become tenant in common for her life, yet until the assignment she cannot in any character be a party to the partition.

The following authorities seem to be explicit. In *Co. Lit.* 34 *a*, it is said "and so it is, when the wife of one "tenant in common demands a third part of a moiety, yet "after judgment she cannot enter until the sheriff deliver "to her the third part, albeit the delivery of the sheriff "shall reduce it to no more certainty than it was." Again, in the same place, it is said, "for as concerning dower at "common law, there must be an assignment, either by the "sheriff (as hath been said), by the King's writ, or else by "the heir or other tenant of the land by consent and agree-"ment between them." In these passages, Lord Coke is commenting on the 39th *Sec. of Littleton*, where it is said, that on an endowment at the church door the widow may enter without other assignment, but as to dower at common law, he means to say, there must be an assignment before she can enter. See *Co. Lit.* 37 *a*, *b*, *Sec.* 43, 44: 3 *Lev.* 84: 2 *Bac. Abr.* 127, *Dower*, *B*: 3 *Bac. Abr.* 189, *Joint tenants and tenants in common.*

The word *tenet* in a writ doth always imply a tenant of the freehold And, therefore, if one parcener maketh a lease for years, yet a writ of partition will lie; but if one or more make a lease for life, a writ of partition doth not lie between them; for that *non tenent insimul et pro indiviso*, they do not hold the freehold together, and the writ of

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partition must be against the tenant of the freehold. And so, if one be disseised by the other, no writ of partition lies; and so, if one make a lease for life, the writ shall not be against her, but against her lessee; but if one make a lease for years, the other may have a writ of partition against her, *Co. Lit.* 167, *a*, *b*, 175–6: 16 *Vin. Abr.* 225, *pl.* 2.

In *Mundy vs. Mundy*, 2 *Ves. Jr.* 122–124, the Lord Chancellor asks, "cannot a dowress come here, as a coparcener can come, for a partition?" And afterwards, page 125, from the remark on *Smith vs. Angel*, *Farresley's Rep.* 40, it would seem that dower being assigned the widow becomes seised, and the partition would lie.

Partition between tenants in common and joint tenants by Stat. 31, Hen. VIII, was extended by Stat. 32, Hen. VIII, to limited interests for life or years; and the same right exists in equity by bill as at law by writ (*Baring vs. Nash*, 1 *V. & B.* 551), and the owner of the inheritance of the share of tenant for years need not be a party.

As soon as the dower is assigned and the widow enters, she is a tenant, or holds her undivided dower, and by the equity of the statute 32 Hen. VIII c. 32, and of our Acts of Assembly, partition may be made between her and the tenant in common

I have met with no case in the books of such a petition. But a writ of partition lies against the tenant by the curtesy, because he continueth the estate of co-parcenary; and so he shall have a writ of partition upon the Stat. 32 Hen. VIII c. 32; for although he is not joint tenant nor tenant in common, yet he is in equal mischief as another tenant for life and is also within the equity of the statute. *Co. Lit.* 175, *a*, *b*. Upon the same principle a tenant in dower should have partition. She, as to her dower, continues the estate, and the words, as well as the reason and equity of the statute, comprehend her equally with a tenant by the curtesy, or any other tenant for life. The only

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difference between her and the tenant by the curtesy is, that he continues the estate in the whole land, she in a third only. But I cannot perceive how that should create any difference; for their estates are the same although the portions of land differ. And Coke on Littleton says that her estate lies in the whole land, and that her dower must be assigned in common, for that she cannot have it otherwise than as her husband had it.

Suppose the heirs of both tenants in common to have partition without her dower being assigned, and without making her a party:—she might still proceed against all of them for her dower, for she derives her title from her husband, who held the land in common with Agnes.

After her dower is assigned to her in common, without metes and bounds, she must obtain her particular part by metes and bounds, or she can never enjoy it in severalty.

If she were to release her dower to the heirs of Henry Hook, then they and the heirs of Agnes might prefer a petition and have partition made without noticing her, or if the tenants in common should have partition without any release, and without noticing her, and she should acquiesce and agree with the heirs of Hook, I do not perceive any objection; but for the security of all parties an agreement in writing should be made by all of them.

The difficulty which presents itself on the present petition is, that as her dower has not been assigned she can make no entry, and does not hold the land and cannot be a party in the petition.

In Sussex county a similar case occured in 1820. Paul Waples held one-fourth of six hundred and eighty acres, and John Smith Waples held three-fourths, as tenants in common. John Smith Waples died intestate, leaving a widow and five children. A petition was presented to the Orphans' Court to assign to the widow of John Smith Waples her dower, without metes and bounds. This was done.

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After confirmation of this assignment of dower, a decree for partition was made in chancery, and the share which the widow held as her dower was assigned to her by metes and bounds, as if she had been one of the tenants in common. This was the first case of the kind, and the only one until this petition of the Hook family. When Mr. Wells, who was counsel in the Waples case, brought the subject to my attention, I confess it was new to me; but on looking into the books and considering the reason of it, and that it came within the spirit of the Statute of 32 Hen. VIII, and of our own Acts of Assembly, I did not hesitate to give my sanction to that proceeding. But in the present case, the dower of the widow of Henry Hook, dec'd, not having been assigned, a partition cannot be decreed upon this petition.

The petition was dismissed.

At the next term of the Court a new petition was preferred for partition among the tenants in common under the will of John Hook, dec'd, in which James Hanson and Ann his wife, the widow of Henry Hook, dec'd, were not joined as parties. Upon this petition a decree was granted by the Chancellor, under which a partition was duly made and confirmed.

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Statement of the case.

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PETER HALL, administrator, d. b. n. of DAVID HALL, dec'd.,

vs.

DAVID WALKER, administrator of DAVID HALL, JR., dec'd, AND FREDERICK ROW AND ELIZABETH his wife, administratrix of JOSEPH HALL, dec'd.

Sussex, March T. 1828.

D. H. died intestate in 1784. Administration of his estate was granted to his widow and two sons. The widow entered into possession of the real and personal estate and died in 1796. One of the two sons died in 1796, and the other in 1817. No inventory and appraisement of the estate had ever been filed by the administrators, nor had any administration account been passed. In 1818, a surviving son of the intestate filed a bill for an account against the representatives of the two deceased sons of the intestate who had joined with the widow in the administration. *Held*, that this was a stale demand, for which a court of equity will not relieve.

BILL IN EQUITY FOR AN ACCOUNT.—David Hall, in the year 1784, died intestate, leaving to survive him a widow and seven children, viz: Joseph Hall, David Hall, Jr., Simon Hall, Nathaniel Hall, Peter Hall, the complainant, Jane Hall and Mary Hall. The intestate left considerable real and personal estate. Letters of administration were granted to Mary Hall, the widow, and to two of the sons, Joseph Hall and David Hall, Jr. Joseph Hall, one of the administrators, died in 1796, and administration upon his estate was granted to his widow, Elizabeth Hall, one of the defendants, who afterwards intermarried with Frederick Row. Mary Hall, the widow and another of the administrators of David Hall, the elder, died in 1797, and administration upon her estate was granted to David Hall, Jr. The bill charged that David Hall, Jr., became possessed of all the personal estate of David Hall, the elder, which had gone into the hands of Mary as one of the administrators. David Hall

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Jr., the sole surviving administrator of David Hall, the elder, died in the year 1817, and administration upon his estate was granted to David Walker, another of the defendants. Of the other children of David Hall, the elder, Simon and Nathaniel died prior to the filing of this bill, intestate and without issue, and no administration had been raised upon their respective estates. Jane had intermarried with Simon Kollock, and was also deceased before the filing of the bill, and no administration had been raised upon her estate. Mary had intermarried with James P. Wilson. They had refused, as the bill alleged, to become parties to this suit. At the Orphans' Court for Sussex County, in Nov. 1796, an order was granted for partition of the intestate real estate of David Hall, the elder; and such partition was made, returned to the Court and confirmed on the 24th of Nov., 1797. On the 12th of June, 1818, administration *d. b. n.* upon the estate of David Hall, the elder, was granted to Peter Hall, the complainant.

The bill charged that the original administrators of David Hall, the elder, entered upon his real estate, and possessed themselves of his personal estate; that they returned no inventory and appraisement of the goods, and had passed no account of their administration. The prayer was for a discovery and for an account of the personal estate of David Hall, the elder, deceased.

The answers of the defendants, admitting generally the facts set forth in the bill, alleged for a defence, that the widow of David Hall, the elder, upon his decease, entered into the real estate and held the same until partition thereof was made in the Orphans' Court, and that she took possession of the personal estate; that with the means thus acquired she had kept together and maintained, during her lifetime, the younger children of the family; that no part of the personal estate of David Hall, the elder, ever came into the possession of either Joseph Hall or

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Opinion.

David Hall, Jr. And the defendants insisted upon the benefit of the lapse of time since the decease of David Hall, the elder, and the laches of the complainant, as being an equitable bar to any demand which could otherwise have accrued against them by reason of the premises.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor, for a hearing upon the bill, answers, exhibits and depositions, at the March T., 1823.

Wells, for the complainant.

Robinson, for the defendants.

RIDGELY, CHANCELLOR.—This is a very stale demand. David Hall, the elder, died thirty-seven years before the filing of the bill. The proof is that a considerable part, if not all, of the personal estate went into the hands of Mary Hall, his widow, who administered with her sons Joseph and David ; and, considering how the younger children were kept together with her, it is extremely probable that this was the case. The rents of the real estate, it is most likely, were taken by her. She died in 1796 or 1797, and the real estate was, immediately after her death, divided by proceedings in the Orphans' Court. This was done in November, 1797 ; so that until her death it is most likely she retained the whole. The two sons, Joseph and David, seemed to have been in a situation to live, independently of their father's property. Nay, Joseph Hall had lent his father money. These sons are both dead. Joseph died in 1796, before his mother ; David in 1817. The defendants, the representatives of these administrators, can render no account. They answer that they have no means ; that they can find no book nor paper in relation to the subject. The Register's office furnishes no inventory, nor a single document by which an account can

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be taken. Peter Hall, the complainant arrived at age in 1787 or 1788, thirty-two years before the bill was filed. In 1806 he became a debtor to his brother David, by bond, in £42.

Now, under all these circumstances, no account can be taken that would lead to any reasonable result. There is no certainty nor probability that justice could be done. All the evidence as to the quantity of personal estate is mere conjecture. The plaintiff has acquiesced for thirty-two years in the management of the estate by his mother and brothers, if any of it ever went into their hands.

It is my opinion that the bill should be dismissed.

Bill dismissed.

JOHN ROBINSON,

vs.

WILLIAM JEFFERSON, administrator of OTIS PAINE, dec'd., WILLIAM D. WAPLES, SAMUEL SLATOR and ESTHER his wife, late ESTHER PARKENSON, executrix of ROBERT PARKENSON, deceased, and JOHN MITCHELL, SAMUEL LOCKWOOD and ARMWELL LONG.

Sussex, March T. 1828.

Injunction granted to restrain the collection of two single bills, given in consideration of an assignment, to be thereafter made, of an interest under a patent,—the obligees having, after obtaining the bills, refused to make the stipulated assignment

Parol evidence admissible to prove the consideration for which the bills were made, although the consideration did not appear upon their face.

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Statement of the case.

The assignee of bills, given under such circumstances, takes them subject to the equities affecting them in the hands of the obligees.* Such *it seems*, is the effect of an assignment, even when made under the Statute of Delaware for assigning specialties.

A denial, by answer, of the equity of the bill is not evidence, under the rule requiring two witnesses, &c., to controvert it, unless it be made by a party cognizant of the transactions out of which the complainant's equity arises.

An answer setting up, as a defence, new matter is not evidence, but must be proved.

BILL FOR AN INJUNCTION.—This was a bill for an injunction to restrain the collection of two single bills, or obligations under seal, which had been given by the complainant,—one being dated the 11th of July, 1815, for the payment of $90.00, on the first of December, 1815, to Otis Paine, now deceased, and the other being of the same date and for the payment of the like sum on the 1st of March, 1816, to Robert Parkenson, now deceased. Both bills were afterwards, and after the time appointed for payment, sold to William D. Waples. The bill given to Parkenson was indorsed on the back to the use of Waples. With respect to the bill given to Paine there was a separate paper signed by Paine's administrator, the defendant William Jefferson, acknowledging that the bill was for the use of Waples.

The bill of complaint alleged that Otis Paine, deceased, the obligee in one of the notes, held in his life-time a patent right for sawing shingles; that he offered to sell to the complainant the right under the patent to saw shingles in several of the Hundreds of Sussex County, and that Robinson agreed to purchase the right,—the consideration to be $180.00; that Paine then informed the complainant that he had previously assigned one moiety of the patent to Robert Parkenson, of the City of Philadelphia, and proposed that Robinson should execute a single bill to him, Paine, for $90.00, and another for the like amount, to Parkenson; that Paine promised the complainant, that, on receiving the bills, he would go to Philadelphia, and bring or send

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to the complainant an assignment, to be executed by himself and Parkenson, securing the right for which the bills were given; that this agreement was made on the 11th of July, 1815, and the bills executed on the same day. The bill then alleged that no assignment of the patent right purchased by the complainant was ever in fact made to him, but that Paine and Parkenson had, in their life-time, refused and neglected to make the same, as had their representatives since their respective deaths. The complainant by his bill insisted that the consideration for which the single bills were given had failed, through the fraud of the obligees, and he prayed an injunction perpetually restraining the defendants from collecting the same by legal process, and that the same might be delivered up to be cancelled, &c.

The answer of William Jefferson, administrator of Otis Paine, set forth that he knew nothing of the alleged purchase by the complainant of an interest in Paine's patent right, nor of any agreement respecting the assignment of the right or the giving of the single bills That Paine died in the month of November, 1817; that in the next following spring or summer the complainant called upon this defendant and inquired respecting the bill given to Paine; and that this defendant having stated that he had found no such bill among the papers left by Paine, the complainant assured him there was such a bill and requested him to search for it, saying that it was good and not disputed. That afterwards this defendant ascertained that the said bill was held by William D Waples, under an equitable assignment from Paine, and he has permitted said Waples to proceed at law in his name to collect the same.

The answer of William D. Waples alleged by way of defence, with respect to the single bill originally given by the complainant to Robert Parkenson, that the same was held by this defendant in the fall of the year 1816, as the

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agent of Parkenson for collection; that the complainant, on being called upon by this defendant for payment, made no objection to the bill, and promised to pay the same by the month of April next following; that afterwards, in the month of February, 1817, Parkenson having died, and his widow and executrix being in need of money, this defendant, relying upon the assurance previously given by the complainant that he would pay this single bill in April, was induced to advance to Parkenson's executrix the amount thereof and to take the same for his own use; that in the month of April following, this defendant having according to a previous understanding with the complainant, left a statement of the amount due on the said bill with Isaac Tunnell, at Georgetown, for payment, the complainant refused to pay the same, and then for the first time set up against it the objection now alleged in the bill of complaint. The answer further alleged that this single bill had subsequently been assigned by this defendant to one Matthew Hinson, from whom it had come into the hands of the defendants, Mitchell, Lockwood and Long. And with respect to the other of the two single bills, being the one given by the complainant to Otis Paine, this defendant alleged that in the latter part of the year 1816, he took the same from the said Paine, in part for the payment of an antecedent debt and in part for a further advance of money, the circumstances of the consideration being detailed in the answer; that in the month of October 1817, this defendant called upon the complainant for a settlement of the said bill, and the complainant then paid him ten dollars on account of the same, but that the complainant has since refused further to pay the said bill. And the answer of the defendants, Jefferson and Waples, admitted the proceedings taken for the collection of the said single bills.

The defendants, Mitchell, Lockwood and Long, by their answer disclaimed all knowledge of the transactions

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Arguments.

alleged by the complainant, upon which the equity of his bill rested. They admitted that the bill given by the complainant to Robert Parkenson had, by sundry assignments, come to the firm of Clayton, Mitchell & Co., of which they were the co-partners, and that the same had been sued upon in the name of that firm. The remaining defendants, Samuel Slator and wife, had not been served with process and did not appear and answer in the cause.

Issues were joined and depositions taken on both sides. The depositions of I. P. W. Kollock and Charles M. Cullen were taken for the complainant, to prove that the proposed assignment of the patent right was the consideration for which the bills were given. No evidence was adduced in support of the allegations in the answer of Waples. The cause came before the Chancellor, at the March Term, 1823, for a hearing on the bill, answers, exhibits and depositions. The argument at the hearing mainly concerned the admissibility of certain parol evidence which was read to show the consideration of the bills. There was also a question as to the effect which should be given to the answer of William D. Waples, the assignee of the single bills, as a denial of the equity of the bill.

Wells, for the defendant.

Parol evidence is inadmissible to vary or add to the condition of a deed or obligation under seal, or to the terms of an agreement. 1 *Esp. N. P.* 221: *Phillips on Ev.* 423, 426, 444, 447. The same rule has been frequently applied in equity. 1 *Ves. Jr.* 241: *Irnham vs. Child et al.* 1 *Bro. Ch. Rep.* 92: *Brydges vs. Duchess of Chandos*, 2 *Ves. Jr.* 422: *Lord Portmore vs. Morris*, 2 *Bro. Ch. Rep.* 219. Another defence arises out of the answer of the defendant, Waples. It is, in its effect, a denial of the equity of the bill; and not being contradicted by two witnesses, or by one witness with corroborating circumstances, it must prevail. 1 *Harrison's Ch. Pr.* 224.

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Opinion.

Robinson, for the complainant.

We do not seek to contradict or to vary the terms of these bills. We admit they were given as they appear on their face; but we say they were given for a consideration collateral, i. e. the assignment of the patent right, and that this consideration has utterly failed, so that it is now against equity to enforce the bills. It has been held, in the case of bonds, that equity will relieve against one given without consideration; as in *Osborn vs. Fitzroy*, 3 *P. Wms.* 129; 2 *Com. Dig. Chancery*, 636. So, where a bond has been given upon an agreement not performed, 2 *Com. Dig. Chancery*, 643. So, generally, where upon any equitable consideration a bond is held void in this Court, it will be cancelled. 1 *Johns. Ch. R.* 517. The assignment of the bills to Waples does not affect the right of the complainant. The assignee of a *chose in action* takes it subject to all equities affecting it in the hands of the original party. With respect to the answer of Waples, he was not a party to the original transactions, and was not cognizant of the matters out of which the complainant's equity arises. His answer sets up a new case, and is not within the rule which requires two witnesses to controvert it.

RIDGELY, CHANCELLOR.—The parol evidence offered to show the consideration of the bills in question is not inconsistent with them. It neither contradicts nor impugns them, but leaves them as they were originally made. Nevertheless, the evidence shows that at the time they were executed an agreement was made that Paine should assign, or cause to be assigned, certain rights in a patent obtained for sawing shingles, and that such assignment was the consideration of the bills. No consideration is expressed on the face of them. The bill of complaint charges all the circumstances, and shows that a fraud was practiced upon Robinson by Paine.

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Under these circumstances, the parol evidence is competent to prove that the complainant obtained no consideration, and that the whole was an imposition on the part of Paine.

In *Villers vs. Beaumont*, *Dyer*, 146, *a.* it was adjudged that where no consideration is expressed, a consideration may be averred outside of the deed. And in *Shove vs. Pincke*, 5 *T. R.* 129, Lord Kenyon said that a fact not stated in a deed may be alleged as a consideration. In *Peacock vs. Monk*, 1 *Ves. Sr.* 128, Lord Hardwicke admitted, that where no consideration is mentioned you may inquire into the consideration. In *Pitcairne vs. Ogbourne*, 2 *Ves. Sr.* 375, parol evidence was allowed to show that though a bond, on a marriage, was for £150, per annum, yet the agreement was for £100. And in the *King vs. Scammander*, 3 *T. R.* 475, it was held in the King's Bench, that other considerations might be proved than those in a deed. And so, if my memory does not deceive me, it was ruled in the Supreme Court of Pennsylvania, when Mr. McKean was Chief Justice. In *Osmond vs. Fitzroy*, 3 *P. Wms.* 129, cited by the complainant's counsel, it was considered that if a bond be insisted on, to have been given for a consideration, where it appears there was none, equity will relieve against it.

Unless parol proof be admitted in such cases fraud cannot be detected when it does not appear on the writing. Here, the bills are not denied. They are admitted by the complainant. The testimony of Kollock and Cullen clearly shows their execution, and that there is not a word upon them that the parties did not intend should be there. But the same testimony shows that these bills were made for a supposed consideration, and that Paine obtained them through fraud and imposition. He made an agreement which he never fulfilled,—which was distinct and separate from the bills, and only connected with them to show that it was the consideration upon which the bills were given.

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Opinion.

This is not like the case of *Lord Irnham vs. Child*, 1 *Bro. Ch. Rep.* 92, where the agreement attempted to be set up, contradicted the deed. And the case of *Lord Portmore vs. Morris*, 2 *Bro. Ch. Rep.* 219, was precisely the same as *Irnham vs. Child.* The parol evidence was designed to vary the written agreement. I do not exactly perceive the bearing of *Conolly vs. Lord How*, 5 *Ves. Jr.* 700, on this case. There, the question was whether the declarations of a party to a deed should be read in evidence, but that is nothing like this case. The declarations in support of the deed, made previous to its execution, were read; those subsequent and impeaching it were rejected. As to *Brydges vs. the Duchess of Chandos*, 2 *Ves. Jr.* 422, it was a great question on the revocation of a will, and how far that might be by subsequent deeds; and also whether a particular estate remaining unsold was to be considered real or personal. Evidence was offered of some circumstances,—of some facts,—in writing; but the Chancellor rejected it; not because it was parol,—for it was not,—but because he could take no notice of the circumstances as operating on the question before him. That case has no application.

It has been urged that the defendant, Waples, has denied the allegations in this bill; and that no decree for relief can be made without the testimony of two witnesses against the answer, or of one witness with strongly corroborating circumstances. But the answer does not, and cannot, positively deny the allegations of the bill; for Waples was not a party to, nor concerned in, the original transactions, and had no immediate knowledge of them. He states new and distinct facts, not originally existing, and which are not supported by any proof. The allegations of the bill, as to the specialties and the consideration, are supported by the testimony of Kollock and Cullen; and there is no plain and positive denial of any assertion in the bill necessary to the complainant's

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case. Waples, by his answer, certainly makes a new case; but, in my judgment, all the testimony and circumstances in the cause tend clearly to its contradiction.

It should be remarked that these bills are not assigned according to the form of the Act of Assembly. The assignments are, therefore, equitable only; and the bills are liable in the hands of the assignee to all the equities to which they were liable in the hands of the obligee. But, even if they had been assigned in the manner prescribed by the Act of Assembly, the assignee would have taken them subject to the same objections which might have been made against them by the obligor in the hands of the obligee. This is the well known and established law, and the assignee, before he takes the assignment of a specialty, ought to inquire whether it is liable to any plea, discount, or impeachment whatever. Such is the law in Pennsylvania, 1 *Dall. R.* 23: 2 *Binn. R.* 154, 165, 166, 168.

Let a decree be entered for a perpetual injunction, according to the prayer of the bill.

The Chancellor's decree was affirmed, on appeal, by the High Court of Errors and Appeals, at the June T. 1827.

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Statement of the case.

JOHN ROBINSON,

vs.

EDWARD ROSS and SAMUEL CADE.

Sussex, March T. 1823.

Bill in equity by the assignee of a single bill against two prior holders and assignors, the debtor having become insolvent. *Held*, that the first assignor, who was the payee in the bill, was discharged by the neglect of his assignee to proceed against the debtor, who, at the time of the first assignment, was in good credit. *Held also*, that the second assignor was liable to the complainant, because he had neglected to collect the bill while he held it, the debtor being then solvent, and had assigned it to the complainant about the time of the debtor's insolvency.

BILL IN EQUITY.—This bill was filed against the defendants to recover the amount of a single bill or obligation, under seal, made by Cornelius Carey, bearing date the 25th of March, 1815, for the sum of $400.00, payable, with interest, on demand, to Samuel Cade, one of the defendants. Cade, on the 3d of July, 1816, assigned the bill, for value received, to the other defendant, Edward Ross, who, on the 19th of November, 1818, assigned it to the complainant, to secure him in a debt of Ross, for which the complainant was surety, and which he was afterwards obliged to pay. About the time of the assignment by Ross to Robinson, to wit, in the year 1818, Carey, the maker of the note, became insolvent and left the State. He died in May, 1819. The complainant brought an action in the Court of Common Pleas, against the administrators of Ross, and on the 24th of March, 1820, recovered a judgment for $275.25,—some payments having been made upon the single bill by Carey in his lifetime. A writ of *fieri facias* was issued upon the judgment, on which there was a return of *nulla bona*. There-

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upon, this bill of complaint was filed, to recover the amount of the judgment, being the balance due on the single bill.

The complainant by his bill set forth the facts above stated, and further alleged that after the assignment to him of the said single bill he had been induced to forbear proceeding to collect the same from Carey, the maker, in his lifetime, at the request of the defendant Cade, and upon his promise that he would see the same paid at or before the time when the money should be required to indemnify the complainant in his suretyship for the defendant, Ross, for which purpose he had taken from Ross an assignment of the said bill. The bill prayed that the defendants, or one of them, should be decreed to pay to him the judgment recovered for the balance due on said single bill.

The defendant, Cade, by his answer admitted the execution of the single bill, the several assignments thereof, and the considerations for said assignments, as the same were in the bill set forth. He denied that the forbearance of the complainant to collect the said bill was at his, the defendant's, request. He further alleged that while the bill was held by Ross sundry payments had been made by Carey, which were not credited, and that, for the balance justly due upon it Carey was solvent, while the bill was held by Ross, and for sometime after it had been assigned to the complainant. That, in fact, Carey was able to pay until the time of his death, which occurred by shipwreck sometime after the month of February, 1819. This defendant insisted upon these circumstances as an equitable defence, and additionally he claimed the benefit of the Act of Limitations. The defendant, Ross, by his answer, admitted at large the facts set forth in the bill and alleged no ground of defence.

Issues were joined and depositions taken by both parties. The evidence adduced went mainly to prove the

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insolvency of Cornelius Carey, by whom the single bill was made; which insolvency was shown to have commenced in the year 1818. Carey appeared to have been previously in good credit.

The cause came before the Chancellor, at the March Term, 1823, for a hearing on the bill, answers, exhibits and depositions.

Robinson, for the complainant.

An assignment is an implied contract to pay the debt if the debtor fails. Carey, the debtor, is proved to have been insolvent. The complainant has no remedy at law, and is therefore, entitled to relief in equity.

Cullen, for the defendants.

RIDGELY, CHANCELLOR.—The bill must be dismissed as to Cade. He assigned to Edward Ross the single bill of Cornelius Carey on the 3rd of July, 1816, and no proceedings were had upon it until suit was brought by John Robinson, the second assignee, after Carey's death, against his administrators in the Common Pleas to the October Term, 1819. From the 3rd of July, 1816, to November 1818, Carey was in good credit. Indeed, it appears from the testimony that his credit was very high, and that if demand had been made he could, previous to that time, have readily paid the debt. There was manifest neglect in delaying to sue Carey after the assignment to Ross, at least until November, 1818. Some attempt has been made to charge Cade, the original assignee, with a promise to John Robinson about the time Ross assigned the bill to him, which was on the 19th of November, 1818; but Cade made no such promise. He desired Robinson to give Carey notice before suing him, under a persuasion that Carey would pay the debt; but there was nothing like a

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promise and none was intended. It is said that Robinson, when he got the bill, told Cade that he, Cade, was liable as assignor Whether this was from ignorance in Robinson, or whether it was done to lead Cade to some engagement cannot be determined; but Cade made no engagement, and never assumed any responsibility. Cade is not liable.

As to Ross, it may be said that his neglect caused the loss of the debt. More than two years elapsed from the date of the assignment of the bill to him, during which he never demanded nor attempted to recover it from Carey. Then, about the time Carey became embarrassed, he assigned the bill to the complainant. It does not appear that while the complainant held the bill it could have been recovered from Carey. Under all the circumstances, it is equitable that Ross should be held liable to Robinson.

Let a decree be entered accordingly.

MARK DAVIS, administrator of ELIZABETH DAVIS,

vs.

MARY DAVIS.

Sussex, July T. 1823,

A court of equity will entertain a bill for an account against a guardian, notwithstanding the guardian may have given security by bond, and may be liable to an action at law.

The Act of Assembly requiring a guardian to give bond, with surety, was intended to provide an additional security for the ward, and not to take away the jurisdiction of this Court. The remedy at law on the bond is not, for all purposes, so complete as a bill in equity.

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Statement of the case.

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In the present case, rents of real estate of the ward were received by the guardian after the guardianship ceased. These rents are, unquestionably, the subject of an account in equity.

BILL IN EQUITY AGAINST A GUARDIAN.—The complainant's wife, Elizabeth Davis, now deceased, was in her lifetime a daughter, and one of the heirs at law, of Thomas Davis, deceased, who died intestate, in May, 1811; and she was entitled to a share of his real and personal estate. The intestate died seised of certain real estate, of the annual value of about $600.00, and of personal estate to the value of $632.60, after the payment of his debts, funeral expenses and other just charges against his estate. He left to survive him a widow, the defendant, and six children, two of whom afterwards died intestate and without issue, so that the four surviving children became entitled to the whole real and personal estate of the intestate, Thomas Davis, dec'd, subject to the rights therein of his widow. The defendant after the decease of the intestate, being his widow, remained in possession of his real estate, and held and cultivated the same until the time of filing this bill. She also took letters of administration upon the personal estate of the intestate, and was appointed by the Orphans' Court for Sussex county, guardian of the intestate's four surviving children, including Elizabeth Davis, the deceased wife of the complainant. The complainant and the said Elizabeth were married in the month of December, 1816, and said Elizabeth died in the month of April, 1818. Two several guardian accounts were passed before the Register of Wills by Mary Davis, as guardian of the said Elizabeth; one passed on the 8th of March, 1814, shewing a balance then due the ward of $74.10, and a second guardian account, passed on the 14th of December, 1818, shewing a balance then due the ward of $81.15. Elizabeth Davis, the wife of the complainant, left to survive her, as her heir at law, one child, which died in

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infancy. Administration of her personal estate was granted to the complainant.

The present bill was filed by the complainant, claiming, as heir at law of the deceased child, to be entitled to a share of the rents and profits of the real estate of the intestate which had been in the defendant's possession, and also claiming, as administrator of Elizabeth Davis, dec'd, the balance due from the defendant as her guardian. The prayer of the bill was for an account of the complainant's share of the rents and profits of the real estate and that such share, when ascertained, together with the balance of personal estate due from the defendant as guardian of the said Elizabeth, might be decreed to be paid to him; and for further relief.

The answer of the defendant admitted the facts above stated, and which were set forth in the bill; but the answer further alleged that with respect to the share of the said Elizabeth in the rents and profits of the real estate held by the defendant, such share had been credited to said Elizabeth from year to year in the guardian accounts passed by the defendant, as in the bill set forth; and that the balance shewn by the second guardian account passed on the 14th of December, 1818, ($81.15) was the whole amount then due on account of said guardianship, including the rents; that said second account was not final, but that the defendant expected yet to make a final settlement of her guardianship before the Register of Wills, the result of which settlement would shew that nothing was due from her to the complainant on account either of the rents and profits of the said real estate or of the personal estate of the said Elizabeth Davis, deceased. And the defendant insisted that the complainant had an adequate remedy at law by appeal from the guardian accounts of the defendant passed, or which she might pass, before the Register, and by an action upon her guardian bond, and

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that, therefore, a court of equity ought not to entertain the present bill.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor at the July Term, 1823, for a hearing upon the bill, answer, exhibits and depositions. The case, at the hearing turned upon the question of jurisdiction.

Robinson, for the complainant.

This is a matter of account, over which courts of law and of equity exercise concurrent jurisdiction. It is no answer, therefore, to say that there may be a remedy at law. *Caines' cases in Error*, (*N. Y.*) 38. Again, a guardian is a trustee, and on that ground this Court has jurisdiction. It has been held that a bill in equity will lie against the guardian, notwithstanding he has executed a bond on which he might be sued at law. *Munford's* (*Va.*) *Rep.* 298. At all events there can be no question of the right to an account of the rents and profits of the real estate accruing after the marriage of Elizabeth Davis, in December, 1816,—upon which event the guardianship closed. The rents which accrued after the marriage could not have been recovered upon the guardian bond. Our remedy for them is in this Court only. It may be observed further, that after the defendant has answered, it is too late to contest the jurisdiction of the Court. The objection should have been taken by demurrer. *Caines' cases in Error*, 52.

Wells, for the defendant.

It is argued that this is a matter of account and that this Court has a concurrent jurisdiction. That may be true, and yet it does not follow that in all matters of account the Court will exercise its jurisdiction. Where there is a remedy at law this Court will not interfere. With respect

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to the rents received by the defendant after the guardianship ceased, it was under color of authority as guardian that she received them, and she continues liable for them at law—or, if not liable at law as guardian, she is at all events liable as administratrix. For where the administrator holds the real estate and receives the rents, he is to account for them before the Register of Wills. With respect to the time of objecting the want of jurisdiction, the rule is that at whatever stage of the cause a court discovers itself to be without jurisdiction it will proceed no further.

RIDGELY, CHANCELLOR.—This is a case clearly within the jurisdiction of the Court. An infant, after he becomes of age, may bring a bill for an account against his guardian, and before he comes of age such bill may be brought by him, by his next friend. 2 *P. Wms.* 119. This is a matter of account, and is peculiarly proper for investigation in this Court. It was not inintended by the Act of Assembly, requiring guardians to enter into bonds with sufficient sureties, to take away the jurisdiction of this Court, but the design of the Act was merely to obtain in favor of wards additional security for their estates. According to our practice the remedy under the bond, even with the aid of the Orphans' Court, is not so complete as by a bill in this Court; for, in such cases, at law, the burden of proof lies on the ward. In Chancery, the guardian may be compelled to give a full account, under oath, of the whole estate of the ward. The same powers which a court of chancery exercises in England, as a court of equitable jurisdiction, belong to this Court.

In the case of *Robert S. Kirkwood vs. John Mitchell, administrator, d. b. n. of John Mitchell, deceased*, *who had been executor of Alexander Smith, which was a bill for a residuary legacy, the defendant demurred, among other

* Ante, p. 180.

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Syllabus.

grounds, because the complainant had a remedy at law. The demurrer was overruled. On an appeal, the High Court of Errors and Appeals affirmed the decree of this Court, among other reasons, because it was a matter of account.

In *Killen et al. vs. John Adams, executor, &c.** on a bill for a legacy, the defendant pleaded in bar the Act of Assembly by which a legatee is required to give the executor security to refund in case of outstanding debts. The plea was overruled and a decree made against the defendant. These are the only cases which have been decided, although bills of the same kind have been brought, in which the jurisdiction of the Court has not been questioned. Upon general principles, I am of opinion that the bill may be sustained. If we look into the particular circumstances of the case, the jurisdiction of the Court is less to be doubted. It is alleged that after the guardianship expired the defendant received the rents and profits, by color of the authority first vested in her as guardian. I will not say that the complainant could not sue at law for these rents and profits, but his remedy there could not be as certain nor as effectual as in this Court. The decisions cited from *Caines' cases in Error* and *Munford's Reports*, go upon the same principles which have been adopted in this Court.

Let a decree be entered for an account.

Ex parte JOHN DIXON, executor of AMOS DIXON, dec'd.

New Castle, April T. 1824.

One of two defendants in a joint judgment at law died. After his death his lands were sold in execution of another judgment which had been recovered against him alone. The proceeds of the sale went into

* Ante, p. 184.

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Statement of the case.

the sheriff's hands and were sufficient to pay the joint judgment. Subsequently the lands of the surviving defendant were sold in execution of a decree in chancery and the proceeds of such sale brought into the Court for distribution. There being a surplus after satisfying the decree, a motion was made on behalf of the creditor in the joint judgment at law for the payment of that judgment out of the fund in equity raised by sale of the lands of the surviving defendant. *Held*, that the judgment had been satisfied by the sale of the lands of the deceased defendant and the receipt by the sheriff of the proceeds of sale, such proceeds being legally applicable to the judgment.

The death of one of two joint debtors in a judgment at law does not exonerate from the debt the lands of the deceased debtor, but they continue subject to the lien of the judgment.

In this case the deceased defendant in the joint judgment having been the principal debtor, his lands on that ground alone would be subjected in equity to the debt, and the sheriff would have been held responsible for its amount to the judgment creditor, so as to bar a claim by the latter in this Court to receive satisfaction out of the lands of the surety.

DISTRIBUTION OF FUNDS IN EQUITY.—SURVIVENCY OF JOINT JUDGMENT.—A decree had been made at the April Term, 1823, in a suit in equity between Joseph Wollaston and Thomas Phillips, for the payment by Phillips of the sum of $811.19. After several ineffectual proceedings for its collection, an order was made at the August Term, 1823, for the sale of certain real estate of Phillips to satisfy the decree. The land sold for $10,000, being more than sufficient to satisfy Wollaston and to discharge many other of the liens upon it, but not all. On the return of the order for sale, the money was brought into court and after the sale had been approved and confirmed by the Chancellor, and portions of the money applied to satisfy Wollaston's decree and also to pay some judgment creditors, *Brinckle*, on behalf of John Dixon, executor of Amos Dixon, deceased, moved the Chancellor that a debt or judgment recovered by Thomas Chandler, for the use of Amos Dixon, against the said Thomas Phillips jointly with one John Phillips, now dec'd, might be paid out of the money thus brought into court. *Wales*, on behalf of a subsequent judgment

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creditor opposed the motion. The questions raised were then brought before the Chancellor, upon a case agreed upon by the counsel, setting forth the following facts.

On the 29th of January, 1799, John Phillips and the aforesaid Thomas Phillips executed a bond to Thomas Chandler, jointly and severally, in £400, with a condition for the payment of £200, on the 29th of January, 1800, with interest,—annexed to which bond was a warrant of attorney to confess judgment. Afterwards, judgment was entered jointly against the obligors, in the Court of Common Pleas, on the 25th of February, 1799, as of December Term, 1798. The interest was paid regularly by the obligors to the 29th of January, 1807, and there were two other payments subsequently made, one of $80, on the 21st of February, 1811, and the other of $32, on the 21st of April, 1812. John Phillips afterward died,—on the 25th of March, 1817. After his death his real estate in New Castle County was sold by Francis Haughey, sheriff of that county, upon process sued out upon a judgment in the Supreme Court for the same county, rendered as of April Term, 1815, at the suit of John McCalmont and George McCalmont against the said John Phillips. The proceeds of the sale were $1575.00. The judgment of Chandler was the oldest judgment or lien against the land of John Phillips, dec'd.

On the 3rd of April, 1819, this judgment was indorsed for the use of Amos Dixon's executors. Suits were instituted to the December Term, 1819, in the Court of Common Pleas, against sheriff Haughey and his sureties severally, on his official recognizance, for the use of Dixon's executors, which suits were founded on the default of the sheriff to apply so much of the proceeds of the sale as might be necessary for the payment of the Chandler judgment. These suits were severally referred to George Read, Jr., James R. Black and James Booth, Jr., who reported in favor of the plaintiffs, and judgments were entered

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thereon at the May Term, 1821, for $918.81 damages, the amount then unpaid on said principal judgment.

The said Francis Haughey and his sureties were at the time of said sale of the real estate insolvent, and have so continued, and nothing has been or can be recovered from them on the judgments. The consideration of the bond was a debt due from John Phillips to Thomas Chandler. It was for money lent by Chandler to John Phillips. Thomas Phillips was his surety.

Brinckle, in support of the motion.

By the death of John Phillips this judgment ceased to be a lien on his land at law. It survived against Thomas Phillips, and the creditor had no remedy against John's land. There could be no *scire facias*. It is the settled rule that under a joint judgment against two or more, if one dies, there is no remedy at law against the assets of the deceased debtor. 1 *Chitty's Pl.* 30-31. Where there is no remedy by execution process there can be no lien. The lien ceases whenever the remedy to enforce it is gone. 1 *Com. Dig.* 154, *Action, K.* 4. As in case of the suing out of a *ca. sa.* on a judgment, the judgment ceases to be a lien, because the plaintiff having elected to proceed against the body cannot sue out an execution against the land. *Freeman vs. Ruston*, 4 *Dallas R.* 214 : 2 *Binney's R.* 226 : 13 *Johns R.* 533. So, a judgment creditor having seized the goods of his debtor under a *fieri facias* cannot take execution against the land; and consequently the lien upon the land is gone. *Clerk vs. Withers*, 6 *Mod. R.* 299 : 1 *Salk R.* 322, *S. C.* These cases do not proceed upon the ground that the *ca. sa.* or the *fi. fa.* operates as a satisfaction in fact of the debt. If the judgment be against two jointly, although by the *ca. sa.* or *fi. fa.* the land of one debtor be discharged, the debt survives against the other. Execution, without a satisfaction, is no bar to the debt. *Cro. Car.* 75 : *Tidd's Prac.* 937.

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Argument.

It does not meet our claim to say that we have a remedy in equity against the estate of John Phillips. To this it is sufficient to answer that we have a remedy at law against Thomas Phillips under this judgment, and therefore we could not go into equity. But granting that there might be equitable relief, no man having the two remedies can be compelled to go into a court of equity. Dixon had at all times a right to rely on his remedy at law; and on the death of John Phillips our remedy survived against Thomas. He became the sole debtor to us, and in such case a court of chancery will not force us into equity against the estate of the deceased debtor, but will leave us to our remedy against the survivor. The creditor in such case has no right in equity until there be a decree in equity; and now the party can here demand of the sheriff his money, the land bound by his judgment having been sold by the sheriff; and as the money is brought here into Court, the plaintiff, Dixon, is entitled to the order of this Court for the payment of his judgment. The plaintiff, Dixon, had no right to recover against sheriff Haughey at law; for on the death of John Phillips his debt survived against Thomas, and the money going into the hands of Haughey on the sale of John's land under an execution of another creditor, we could not recover against the sheriff, because our debt survived against Thomas.

Wales, for a subsequent judgment creditor, against the motion.

The lands of John Phillips were sold by sheriff Haughey for a sum sufficient to pay the judgment now claimed, this judgment being the first lien against the lands. The money in the sheriff's hands was a satisfaction of the judgment, although the sheriff proved to be insolvent. Money raised under an execution is applicable to the judgments according to their priority. Payment to the sheriff is a

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satisfaction, and the judgment is discharged. 3 *Binney's R.* 358. Therefore, the sale of John Phillips' lands for money sufficient to pay Dixon's judgment was a satisfaction of the judgment, and his only remedy remained against the sheriff.

It is objected, that the death of John Phillips severed the judgment at law. But Dixon cannot be now admitted to impugn his own acts. He sued the sheriff and recovered a judgment against him for the very money which had been made on the sale of John Phillips' lands. It is too late now to say that no such action will lie, and that no recovery could be had at law against the sheriff. As the case stands, Dixon has in fact had his remedy at law; and, therefore, a court of chancery will not now interfere.

But again, this judgment was for money loaned to John Phillips for his own use. Thomas was his surety. In equity the debt ought to be paid out the estate of John Phillips, and on a bill by the creditor, or by Thomas Phillips, for such relief the Court would so decree. And yet the Court is now asked to make itself instrumental in violating this equity of Thomas Phillips, the surety, by ordering the debt to be paid out of his lands.

Brinckle, in reply.

We are not affected by the sale of the lands of John Phillips. It was not a sale in execution of Dixon's judgment, but of the judgment of John and George McCalmont, who were third persons. We were not privy to the proceeding and had no notice of it. Sheriff Haughey and his sureties were insolvent from the time the money went into his hands, and we could not recover it. There is no equity in such a case against us; and, where the equities are equal, the Court will remit the parties to their remedies at law. It is true, that the debt was originally the debt of John Phillips, but Thomas became bound with

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him in the bond as a principal. He has no equity against the creditor.

The case is simply that of a creditor having two remedies,—one at law, the other in equity. A party having several remedies may elect that which suits him best; as in the case of a creditor by both bond and mortgage; or of a landlord, having remedy by action or distress There is no equity to deprive us of our election.

RIDGELY, CHANCELLOR.—It has been contended by Mr. Brinckle, that by the death of John Phillips, this judgment survived and became the debt of Thomas Phillips alone; that it ceased to be a lien on the real estate of John Phillips, and that Dixon's executors had no remedy at law against the representatives of John Phillips, nor against sheriff Haughey: and further, that as Dixon's executors never recovered and could not recover the debt from the sheriff or his sureties, he has a better title in equity to receive it out of the proceeds of the real estate of Thomas Phillips, against whom the judgment survived, than any subsequent judgment creditor.

I doubt extremely the position that the lands of John Phillips became exonerated of this judgment by his death,—that the whole debt fell upon Thomas Phillips, and that he and his real estate became alone chargeable with it. By our Act of Assembly for taking lands in execution for the payment of debts, (1 Del. Laws, 109,) it is declared that all lands, tenements, or hereditaments, whatsoever within this government, where no sufficient personal estate can be found, shall be liable to be seised and sold upon judgment and execution obtained; and this provision is made, that no creditors may be defrauded of their just debts due to them from persons who have sufficient real estate to satisfy the same. This judgment, in the lifetime of John Phillips, was binding on his real estate, which, by the Act of Assembly, was liable to be

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seised and sold upon an execution issued thereon. The law does not require that the execution should issue in the lifetime of the debtor, but it must be issued upon the judgment which binds the land; and the judgment binds the land until it is satisfied, or until the land is sold upon that or some other judgment. All the lands of both debtors were bound by the judgment, and I cannot perceive how this express provision can be avoided by the death of John Phillips. If by his death this judgment were to survive against Thomas Phillips alone, it might so happen that the Act of Assembly would be entirely defeated; for suppose a prior judgment to have been recovered against Thomas Phillips, of an amount greater than the value of his whole personal and real estate, the creditor would lose his debt, although John Phillips' real estate was sufficient to satisfy it.

In England lands were not liable to execution in personal actions for debt or damages except in the case of the King, or where the chattels of the debtor were not sufficient to answer the debt, or in an action of debt against an heir upon an obligation made by the ancestor. In the latter case, the reason was that the goods and chattels of the debtor belonged to the executor or administrator, and if the lands were not liable in the hands of the heir, the creditor could have no fruit of his action. 3 *Coke Rep.* 11, *Herbert's case:* 2 *Bac. Abr.* 328–9, *Execution A: Plowd.* 440: *Hob.* 60. The statute of Acton Burnell (11 *Edw.* I) first made burgages devisable liable to be sold upon certain recognizances therein mentioned. Soon after, in 13 *Edw.* I, the statute of Merchants followed, which made it lawful for a debtor to sell his lands and tenements for the discharge of his debts (recognizances); and if this was not done in a reasonable time, the lands and goods of the debtor might be delivered to the merchant by a reasonable extent, to hold them until such time as the debt should be wholly levied. These statutes were made with a view to com-

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merce, and to enable the merchant to secure his debts by the recognizances or bonds of record, and afterward, on failure of payment, to subject the lands as well as chattels to execution. In the same year, the Statute of Westminster, 2nd, (13 *Edw.* 1) enacted, that "when a debt is recovered or "acknowledged in the King's courts, or damages awarded, "it shall be from henceforth in the election of him that "sueth for such debt or damages, to have a writ of *fieri* "*facias*, unto the sheriff, for to levy the debt of the lands "and goods; or that the sheriff shall deliver to him all the "chattels of the debtor (saving only his oxen and beasts of "his plough) and the one half of his land, until the debt be "levied upon a reasonable price or extent; and if he be "put out of that tenement he shall recover by a writ of "*novel disseisin*, and afterwards by a writ of *re-disseisin*, if "need be." This last is the first statute which subjected lands to execution on a judgment or recognizance at common law. The two former statutes were made to subject lands to execution to satisfy certain securities created by them; as statutes merchant, statutes staple, and recognizances in nature of statutes staple. 3 *Coke Rep.* 11. *Herbert's case:* 2 *Bac. Abr.* 328, *Execution A;* 2 *Saund. R.* 48-49, *part* 1, *Thretheroy vs. Achland*, *note*(3); 2 *Saund. R.* 67-68, *part* 1, *Underhill v. Devereaux*, and the notes by *Sergeant Williams*, to that case. And by the statute of Westminster, 2d, as all the lands are bound, a joint lien shall not survive; for in executions which concern the realty and charge the lands the sheriff cannot do execution on the land of one only. 3 *Coke Rep.* 14 *a.* In 5 *Com. Dig.* 775, *Pleader*, (3 *L.* 3) it is said, that "if the judgment be against two and "one dies; a *scire facias*, shall be against the survivor, *quare* "execution against his goods and a moiety of his lands, and "against the heir and *terre tenants* of the deceased, *quare* "execution against them for a moiety of his lands *habere non* "*debet.*" He cites *Carth. R.* 107. In *Smarte vs. Edson*, 1 *Lev. R.* 30, it was adjudged, that "if a judgment be against A

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and B, and one dies, a *scire facias* lies against the survivor, and the plaintiff may proceed against him as to the personalty, or he may proceed against the survivor and the heir and charge the lands of both; and if he will take execution on the lien real, the charge ought to be equally against both and the *scire facias* against both." And in *Pennoir vs. Brace*, 1 *Salk. R*, 320, *Holt, C. J.* held, that a *capias* or a *fieri facias*, being in the personalty might survive and might be sued against the survivors without a *scire facias*; otherwise of an *elegit*; for there the heir is to be contributory. From all the authorities it is clear that a personal execution will survive, but that a real one will not. See 8 *Coke Rep.* 14; 4 *Mod. Rep.* 315; 4 *Bac. Abr.* 417 *Scire Facias c.* 5, and the notes in *Saunders* before referred to.

The English statute which gives the *elegit*, is not more express in charging judgments on land, than is our Act of Assembly; and, indeed, the words used are not as comprehensive as those of the Act of Assembly.

Upon the authorities before referred to, and upon the reason and intention of the Act of Assembly, I am of opinion that this judgment did not survive against Thomas Phillips alone, but that all the lands originally bound, remained liable to it, until the sale was made by sheriff Haughey of the lands of John Phillips upon the judgment of John and George McCalmont; and then the money in Haughey's hands was applicable to this judgment, and was a satisfaction of it. At that time the lands of Thomas Phillips became discharged, and had the plaintiff after that sale attempted to recover the money of Thomas Phillips, a court of equity would have restrained him.

I can have no doubt that in equity the land of John Phillips alone ought to have been subjected to this debt; and that if a recovery had been had at law against Thomas, John would have been compelled by a court of equity to reimburse him. John borrowed and had to his own proper use the money for which this bond was given, and upon

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which this joint judgment was entered. Thomas was his surety only. In such case a court of equity will presume a mistake in point of fact, in every case where a joint obligation has been given, to set up the debt against a deceased obligor. See 8 *Wheaton*, 214. Upon this principle the executor of Dixon had a remedy in equity against the estate, or rather the representatives of John Phillips, and the sheriff was responsible to him, on the sale, for the amount of the debt.

The executor of Dixon can take nothing by his motion, and this money must be distributed among the other judgment creditors of Thomas Phillips.

JOSEPH WOLLASTON,

vs.

THOMAS PHILLIPS.

New Castle, Aug. T., 1823.

Practice upon applications for an order to sell the real estate of a defendant in satisfaction of a decree for the payment of money.

MOTION FOR SEQUESTRATION AND ORDER OF SALE.—A final decree had been made between the parties to this cause for the payment by the defendant to the complainant of $811.19, with costs, within two months, or that an attachment issue. On the 27th of June, 1823, the two months having expired without performance of the decree, an attachment was issued and returned *non est inventus*. Thereupon, *Rogers* and *Black*, for the complainant, moved, on

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the foundation of the sheriff's return to the attachment, for a commission of sequestration, to be directed to the sheriff, commanding him to sequester the goods, chattels, effects, moneys and personal estate of the defendant, Thomas Phillips, in New Castle county, and all moneys and debts due and owing to the said Phillips, from all and every person whatsoever, until the said Phillips should perform the decree and clear his contempt, &c. The motion was also for an order to sell the real estate of said Thomas Phillips.

McLane and *Read, Jr.*, for the defendant, objected.

The writ of attachment issued improvidently. The decree was conditional, that the money should be paid within two months, or that an attachment should issue. There is nothing to show that the money was not paid. An affidavit of the non-performance of the decree should have been made before the attachment was taken out. Such is the English practice. The affidavit should be filed in all cases, except when it appears by the record that the party has not done the act required, as in the case of an attachment, for want of an answer; so, where according to the rule of court an attachment is awarded unconditionally, it goes of course, agreeably to the order; for nothing is to be done, and consequently no affidavit is required of non-performance. But when the attachment is issued for the non-performance of the decree, it should appear by affidavit that the decree has not been performed; for then the non-payment of the money does not appear on the record. The affidavit is not merely a part of the proceeding, but is the ground of it; and it is therefore essential in all cases where an exception does not arise upon the record. The consequence of this defect of proceeding is, that the attachment and the return are void, and the defendant is not in contempt.

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Opinion.

Rogers and *Black*, for the complainant, contended that the practice had been different; that it had not been usual, where attachments had been taken out for the non-performance of decrees, to make an affidavit; that the rule of this Court did not require an affidavit, but had declared that in case of non-performance, according to the terms of a decree, an attachment might be taken out without any other previous proceeding.

McLane, in reply, said that the rule referred to did not mean to dispense with the affidavit, but with all other process. The affidavit is not process, but is the ground of the attachment; and it is not included in the expression "without any other previous proceeding."

THE CHANCELLOR was of opinion that the attachment was not improvidently issued under the practice of the Court; but he did not consider the issuing of the attachment and the return of *non est* as alone laying a sufficient ground for an order to sell the defendant's real estate in satisfaction of the decree. The order, therefore, was not granted on the present motion.*

On the next day an affidavit was filed by the complainant, and also one by the sheriff of New Castle county, David C. Wilson,—the two together shewing that the defendant was much involved in debt, that his personal estate was under execution to an amount greatly exceeding its value, that his real estate was largely encumbered by liens, that he had absconded from the State, that nothing had been paid toward satisfaction of this decree, and that by no other mode could the complainant obtain satisfaction but by a sale of the defendant's real estate. The

*This view of the Chancellor is gathered very clearly from the course of proceeding actually taken in this cause, as shewn by the record. His manuscript note of the case is, from some cause, left incomplete. The argument of counsel is given and the Chancellor's opinion is commenced, but left unfinished.

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Chancellor, upon a motion supported by these affidavits, made an order for the sale of the real estate of the defendant by the sheriff. The sale was made, and the same being returned and confirmed, the proceeds were brought into Court and applied, under the order of the Chancellor, to the liens, according to their priority.

GEORGE K. HALL,

vs.

DAVID GREENLY, ELISHA E. GREENLY, JOHN P. GREENLY, and ELISHA EVANS.

Sussex, July T. 1824.

A voluntary deed was made by a father conveying to his two sons, who were minors, certain land, which was afterwards sold by the sheriff in execution of judgments against the father, recovered subsequently to the deed but for debts contracted prior to it. Under the special circumstances of the case, the Court refused to set aside the deed for the relief of a purchaser of the land deriving title under the sheriff's sale.

In cases of this nature the Court, in granting relief, will only set aside the deed impeached. It will not decree a delivery of possession to the purchaser, nor an account of the rents and profits.

BILL TO SET ASIDE A CONVEYANCE FOR FRAUD ON CREDITORS.—This bill was filed under the following circumstances. David Greenly, by deed dated the 19th of January, 1819, conveyed certain real estate, of which he was seized, to his two sons, Elisha E. Greenly and John P. Greenly, their heirs and assigns, for the consideration, as expressed in the deed, "of the sum of $1000.00, good and "lawful money of the State of Delaware, to him in hand

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Statement of the case.

"paid by Elisha Evans for the said Elisha E. Greenly and "John P. Greenly, and the regard he had for them, and "many other good reasons known only to himself," the said David Greenly. By the terms of the deed there was reserved to the said David Greenly the use of the land conveyed, as long as he should occupy it himself; with this proviso, that he should raise and school his children without any charge or expense to them. The grantees in the deed were, at the date of it, infants under the age of twenty-one years. The grantor, David Greenly, continued after the conveyance to reside on the land as before, with his family, of whom the grantees, his sons, formed a part.

At the time of making the conveyance before mentioned, David Greenly was indebted to sundry persons. Among others, he was indebted to John Houston in nine single bills, dated the 15th of August, 1817, amounting in the whole to about $267. Judgments were recovered by Houston on these single bills before a Justice of the Peace, after which he assigned four of the judgments to James Huffington; and for the others Greenly gave to Houston a single bill, dated the 17th of October, 1820, for the sum of $174.90, with a warrant of attorney for the confession of judgment thereto annexed. A judgment on this single bill to John Houston was entered in the Court of Common Pleas. At the same time James Huffington took from Greenly, for the four judgments before the Justice which Houston had assigned to him, a single bill for the sum of $133.16, with a warrant of attorney for the confession of judgment; and a judgment on this single bill to James Huffington was also entered in the Court of Common Pleas. At the time of making the before mentioned conveyance, David Greenly was also indebted to Edward Huffington and William Huffington, in a promissory note for $200.00, dated the 23rd of December, 1818, on which note a judgment was recovered against David Greenly in the Court of Common Pleas, at the October

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Term, 1820, for $234.00. The latter judgment was for the use of Daniel Cannon. Writs of *fieri facias* were issued upon the judgment of James Huffington against Greenly, and upon the judgment of Edward and William Huffington for the use of Cannon. The land conveyed by the before mentioned deed was levied upon, and afterwards on the 4th of March, 1823, under further process of execution, was sold by the sheriff at public sale, and purchased by David Robinson for the sum of $510.00 The sale, being returned to the Court, at the April Term, 1823, was confirmed, and a deed was executed by the sheriff conveying to Robinson the interest of Greenly in the land. Afterwards David Robinson, by deed dated the 6th of June, 1823, conveyed the premises to the complainant.

The bill set forth the facts above stated and alleged that the deed from Greenly to his two sons, who were minors, was a voluntary conveyance, without any valuable consideration, and was fraudulent and void as against the creditors of Greenly, and as against David Robinson and the complainant, who were *bona fide* purchasers of the premises, under David Greenly, for a valuable consideration. The bill further alleged that the execution and existence of the deed were concealed from the creditors for the purpose of defrauding them; that the said John Houston and James Huffington had released the judgments recovered before the Justice of the Peace for the express purpose of obtaining such judgments as would be a lien upon the land of David Greenly; and that the said Greenly had continued to hold the land, after the conveyance of the same to his two sons, for his own use and benefit. The bill charged the defendant, Elisha Evans, who was Greenly's father-in-law and by whom the deed was drawn, to be a confederate in the fraud. The prayer of the bill was that the deed should be declared void and be decreed to be delivered up to the complainant to be cancelled; that the grantees therein, Elisha E. Greenly and John P.

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Greenly, might be compelled to execute and deliver to the complainant a conveyance of the land in controversy, and that possession thereof might be delivered to the complainant; that until such delivery should be made a receiver of the rents and profits might be appointed by the Court; that the defendant Greenly might be restrained from assigning a lease he had made of part of the premises to one James Walker; and that the defendants might be decreed to come to an account with the complainant for the rents and profits of said land and premises; and for further relief.

The answer of the defendants admitted the conveyance by David Greenly to his two minor sons, Elisha P. Greenly and John P. Greenly, of the lands and premises in controversy, at the time and in the manner alleged in the bill. It also admitted the recovery of the several judgments against David Greenly,(as set forth in the bill,) by John Houston, by James Huffington, and by Edward and William Huffington, for the use of Daniel Cannon; and that writs of *fieri facias* were issued upon the judgments of James Huffington and of Edward and William Huffington for the use of Daniel Cannon,—in execution of which writs the lands and premises conveyed by David Greenly to his two sons had been levied upon and sold, and afterwards conveyed by the sheriff to David Robinson; also, that the same lands and premises were sold and conveyed by Robinson to the complainant. The answer alleged, by way of defence, that David Greenly had been a weak-minded and illiterate man, addicted to habits of intemperance, easy to be imposed upon, and every way unfit for business; that he had contracted sundry debts, without any adequate compensation, to persons who had taken advantage of his weakness; that his affairs having become much involved, and he being unfit to manage them, the defendant, Elisha Evans, who was Greenly's father-in-law, had been obliged to devote much time and labor, and to

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expend considerable sums of money, on Greenly's account; that he had determined to make this a ground for requiring, on the part of Greenly, a fair provision for his children, so that they might not be reduced by his incompetence to beggary; that, in satisfaction of the said claim of Elisha Evans, the defendant Greenly, together with his wife, by a deed dated the 10th of November, 1817, conveyed to Elisha Evans and his wife, the lands and premises in controversy, to hold the same for their joint lives and the life of the survivor; that immediately after such conveyance Elisha Evans went into and continued in possession of the premises, lived upon them, and was assessed and paid the taxes for them: that the same were known and considered in the neighborhood as having been purchased by Evans; that some time after this, about the month of January, 1819, Evans, at the instance of Greenly's wife, who was then sick, proposed to Greenly that he, Evans, together with his wife, would release the interest which had previously been conveyed to them in the lands in controversy, *provided*, that he, Greenly, would thereupon settle the said land upon his children; that this proposition was assented to by Greenly, and as the deed previously made to Evans had not been recorded, it was determined to carry the arrangement into effect by a deed directly from Greenly to the children,—in pursuance of which agreement the deed from Greenly to his children, referred to in the bill, was executed. The answer further alleged, that although the deeds before mentioned were not recorded, their existence and objects were, immediately after their execution, known to the persons interested in the notes, bills, judgments and executions, the sale by the sheriff and the deed from him, mentioned and set forth in the bill; that the lands were sold by the sheriff at a very great sacrifice; that Robinson, the purchaser, expressed his willingness at the time of the purchase to hold them for the payment of his debt out of the rents and profits and afterwards to re-convey them to

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Greenly; that the complainant, to whom Robinson had conveyed his interest in the lands, purchased them subject to an agreement by Robinson to refund the purchase money to the complainant, should his title under Robinson's deed prove to be defective. The answer further alleged that the single bill of Edward and William Huffington, to satisfy the judgment upon which the sheriff's sale was in part made, was fraudulently obtained from Greenly, he having given it as the consideration for a tract of land sold to him by one Isaac Green, which was afterwards taken in execution and sold for the debts of Green, notwithstanding that the Huffingtons had assured Greenly at the time he purchased the said tract that there were no liens against it. The answer did not impeach the judgment of James Huffington, the other judgment in execution of which the lands had been sold by the sheriff; but it alleged that James Houston was informed by Elisha Evans of the arrangement for securing the land in controversy to Greenly's children, and that he expressed his approval of it and advised that it should be made. The answer submitted that under all the circumstances, considering the ignorance and incapacity of Greenly for business, the advantages which had been taken of his condition, and the great sacrifice made of the property by the sheriff's sale, the Court ought not to interfere to deprive the defendants, the sons of Greenly, of their legal right; or that if the Court should see fit to declare the deed from Greenly to his sons to be void, such decree ought to be only upon condition that the lands should be again exposed to sale, free from the embarrassments of the former sale and with a better opportunity to all concerned to protect their respective interests in the premises. And the answer utterly denied that the deed from Greenly to his sons was a voluntary deed, or that it was made with any fraudulent purpose whatever; but, on the contrary, alleged that its object was solely to protect Greenly from imposition and

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fraud practiced by others upon his ignorance and incapacity,—in which practices the answer charged that the complainant had been himself concerned.

Issues were joined and depositions taken by both parties. The cause came before the Chancellor, at the July Term, 1824, for a hearing upon the bill, answer, exhibits and depositions.

Robinson and *Cooper*, for the complainant.

This was a voluntary conveyance by David Greenly to his children, he being at the time in failing circumstances and indebted to sundry persons, among whom were the Huffingtons, the creditors under whose judgments the present complainant derives title. Such a conveyance is void upon settled principles. A voluntary conveyance, made by a party at the time indebted, is presumed to be fraudulent as against the previously existing creditors. Even subsequent creditors may impeach such a settlement on account of prior indebtedness. 3 *Johns. Ch. R.* 506 : 2 *Johns. Ch. R.* 48 : 1 *Atk.* 93 : 2 *Bro. Ch. R.* 90 : 2 *Ves. Sr.* 11 : 5 *Ves. Jr.* 387 : 3 *P. Wms.* 288 : 2 *Ves. Sr.* 519–520 : *Cowper*, 434.

The purchaser under a judgment is entitled to stand in the place of the judgment creditor against a fraudulent conveyance. The statute against fraudulent conveyancing protects the judgment creditor. and the purchaser is protected by the judgment. 2 *Johns. Ch. R.* 49. It matters not whether the complainant, or those under whom he claims, had notice. A voluntary conveyance is fraudulent and void against a purchaser, though he had notice of it. *Sugden on Vendors*, 464 : 2 *Bro. Ch. R.* 148 : 4 *B. & P.* 332 : 2 *Taunt.* 82 : 9 *East* 59, 63 : 1 *Johns. Ch. R.* 270. The case does not rest on presumptive fraud only. There are strong circumstances showing actual fraud, i. e. a deliberate purpose to defeat creditors. There is no proof that

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Evans paid any consideration. He was always embarrassed and not able to pay. The deed on its face bears evidence of its design. Besides the money consideration ($1,000.00) it purports to be made upon considerations best known to the grantor. It contains the unusual clause reserving to him a continued possession, provided he should raise his own children. The deed was followed by no change of possession. It was not recorded for two or three years, but was kept in Evans' pocket. All these circumstances show it to have been a contrivance by which Greenly should continue in possession, take the profits, and prevent his creditors from selling.

With respect to the alleged want of consideration for the note given to the Huffingtons and on which a judgment against Greenly was recovered, being one of the judgments under which the land was sold, it does not appear that Greenly ever complained of this debt. He filed no bill for relief against it, but permitted the land to be sold under the judgment. He cannot now, on that ground, impeach the title of a *bona fide* purchaser under the sale. With respect to the allegation that James Huffington, the other judgment creditor, advised this conveyance, there is no proof of it. His testimony is to the contrary.

Wells, for the defendants.

This case is addressed to the sound discretion of the Court, to be determined by considering all its circumstances. The general principle that governs it is, that a party seeking to set aside a voluntary conveyance must show an equity entitling him to call upon the Court for relief. Now this land was sold to satisfy two debts. One of these was the note to the Huffingtons, given by Greenly for the lot purchased from Jesse Green. This lot was afterwards sold under a prior judgment against Green, so that the consideration for the note failed. The transaction was a fraud, with which the Huffingtons were connected.

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They could have no equity to set aside the deed in controversy, and none can be derived under them. The other judgment creditor, for whose debt the land was sold, advised and consented to the settlement upon Greenly's children. So the answer of the defendants alleges and there is no testimony to controvert it. No equity then to avoid this deed can be set up under James Huffington. But again, even waiving our objection that Huffington advised this conveyance and conceding that he could have enforced his judgment against the land, still it does not appear that the land could have been condemned and sold under his judgment alone, excluding the fraudulent debt of the two Huffingtons. Now, whatever objections would lie against the equity of the judgment creditors to be relieved against this deed, they are good against the purchaser; for if the purchaser is to be protected under the rights of the creditors he must be liable to their disabilities and be affected by their want of equity.

So far, I have treated this deed as if it were a voluntary conveyance. But it was not such. There was a prior deed from Greenly to Evans and wife for a valuable consideration from Evans. That was a *bona fide* transaction. By that deed Evans and wife acquired a life estate in the land, which estate they surrendered in consideration of the settlement made upon the children of Greenly.

RIDGELY, CHANCELLOR.—If I intended to make a final decision as to the rights of the parties in this cause, I would minutely examine and discuss the exhibits, proofs and arguments of the counsel respectively, and deliver my opinion upon the various matters which have been given in evidence; but I shall not do so, because I do not mean to prejudice either party by any thing which I shall say, except so far as it may be necessary to explain the course which I am about to pursue.

This is a kind of ejectment cause. The complainant prays that the indenture made by David Greenly to

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Elisha E. Greenly and John P. Greenly, his sons, on the 19th of January, 1819, may be declared fraudulent and void, and may be cancelled and delivered up to the complainant; and that the grantees in that deed may be compelled to convey said land to the complainant; and that the said land may be delivered to complainant; and in the meantime that a receiver be appointed to receive the rents and profits; and that said Greenly may be restrained from assigning a lease made to James Walker; and that the defendants may be decreed to account for the rents and profits; and for general relief.

Now the utmost length that this Court would go in granting relief would be merely to act on the deed of the 19th of January, 1819. For as to the possession, and the rents and profits, that is, the mesne profits, the complainant has the same remedy which all persons have where land is withheld from the proper owner. Such owner may, at law, recover the possession; and in an action for the mesne profits he may recover the rents and profits.

And as to the deed,—if it is fraudulent, the complainant can recover at law, if he is entitled to recover; for fraud, in such a case as this, is as much within the jurisdiction of a court of law as within the jurisdiction of this Court. This is one of my reasons for not deciding the matter here.

Another objection to relief is, that the debts of the Huffingtons, and of Isaac Green, do not present a case so pure as to entitle them to favor in this Court. They essentially operated in the sale of the land.

I do not intend to justify the deed made by Greenly to his sons. But, under all the circumstances, the complainant must be left to his remedy at law. There, he may have a complete relief, according to the merits of his case. Here, it could be only partial; for neither the possession nor an account for the rents and profits could be decreed him.

The bill must be dismissed, without prejudice to either party at law, and each party must pay his own costs.

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ST. JAMES' CHURCH,

vs.

JAMES WALKER, administrator, *c. t. a.*, of SAMUEL WALKER, deceased.

New Castle, April T. 1825.

A nuncupative will, made according to the law of the testator's domicil at the time of his death, will pass personal estate situated in a foreign State or country, although not executed according to the formalities required by the laws of that State or country.

But, to give effect, in Delaware, to a foreign nuncupative will, a probate thereof must be made in the county where the personal property is situated,—the formalities of such probate to be according to the law of the domicil of the testator, and not such as are required by the statute of this State.

In the present case, a nuncupative will executed in the State of Pennsylvania, according to the laws of that State, but not proved in this State, *held* not sufficient to pass a legacy to a religious corporation within this State, to be paid out of assets situated in this State.

The paper signed by the witnesses and produced as a nuncupative will in this case, *held* not sufficient to be admitted to probate as such, because the words spoken by the decedent did not show an *animus testandi*,—also, because it did not appear that the persons signing the paper were desired by the testator to attest it as his will.

BILL FOR A LEGACY.—NUNCUPATIVE WILL.—The complainant was a religious society, duly incorporated under the laws of the State of Delaware, by the name of "St. James' Church," and had the legal capacity to take by gift, devise, bequest, &c. Samuel Walker, a member of the congregation, residing in Chester County in the State of Pennsylvania, on the 7th of November, 1821, made a nuncupative will, in the presence of three witnesses, and thereby bequeathed to the complainant a legacy of four hundred dollars. Walker died on the same day, in Chester

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County aforesaid, and on the 11th of November following, the witnesses to the nuncupative will reduced the same to writing.

The will was proved, in due form of law, on the 10th of December, 1821, before the Register of Wills for Chester County; and letters of administration *cum testamento annexo* were granted to James Walker, who thereupon took upon himself the execution of the will.

The testator, Samuel Walker, died possessed of a considerable personal estate, which, at the time of his decease, was in New Castle County, Delaware. The administrator, James Walker, also took letters of administration from the Register of Wills for New Castle County. No probate of the will was made in New Castle County; but administration was granted upon the filing of a copy of the probate made in Pennsylvania.

The bill set forth the above stated facts, alleging that the will contained a good and valid bequest of the said sum of four hundred dollars to the complainant, and that the testator died possessed of assets to pay his funeral expenses, debts, and the said legacy. It prayed for an account of the estate, and that the administrator should be decreed to pay the legacy, according to the bequest contained in the nuncupative will.

Annexed to the bill was a copy of the nuncupative will, certified on the 13th of May, 1824, under the hand and seal of office of D. Heister, Register of Wills for Chester County, as follows:

"We, the undersigned, are ready and willing to depose to the following facts. We, John McIntire, James Walker and Thomas Kay, being in the house of James Walker, and by the bed-side of Samuel Walker, now deceased, on the seventh day of this instant, (November, 1821,) the above named John McIntire, asked the above named Samuel Walker, (now deceased,)—'Samuel do you know

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this man?' to which he replied; 'not without it is Thomas Kay.' The now deceased then observed, 'I wish to leave a certain sum to that church.' The above named John McIntire then asked; 'to what church?' He replied, 'to St. James' Church, the church I belong to.' He was then asked, 'what sum?' he answered, 'three or four hundred dollars.' He was then asked, 'which of those sums?' He replied, 'four hundred dollars,—not to exceed four hundred dollars.' That these declarations were made by the above named Samuel Walker, while in his right mind, we are fully satisfied.

As witness our hands and seals, this eleventh day of November, in the year of our Lord, one thousand eight hundred and twenty-one."

(Signed,)

JOHN MCINTIRE,
THOMAS KAY,
JAMES WALKER, (Tanner.)

CHESTER COUNTY, ss.

Be it remembered, that on the tenth day of December, A. D. 1821, personally appeared John McIntire, Thomas Kay, and James Walker, (tanner,) before the subscriber, being Register for the probate of wills and granting letters of administration in and for the said county, in the commonwealth of Pennsylvania, who, being duly sworn according to law, do say, that they were personally present with Samuel Walker at the time of his last sickness, and that about six hours before his decease they did, each of them respectively, hear the said Samuel Walker pronounce and utter the words hereunto annexed, purporting to be the last will and testament (in the nature of a nuncupative will) of the said Samuel Walker, and the said words to have been spoken by him on the seventh day of November, A. D., 1821, at the house of James Walker, where the deceased had resided

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about eight or nine years, and the same words were committed to writing, within four days after they were uttered, and to which their names are respectively affixed; and that the words contained in the annexed paper were all the words made use of by the said Samuel Walker relative to the disposal of his estate and property, and that at the time he pronounced them he was of a sound, disposing mind and memory, and every way capable of making a will, as they verily believe.

(Signed,)

Sworn and subscribed this 10th day of December, 1821, before D. HEISTER, Reg'r.

JNO. MCINTIRE,
THOMAS KAY,
JAMES WALKER, (Tanner.)

Be it remembered, that on the tenth day of December, A. D., 1821, the last will and testament (nuncupative) of Samuel Walker was proved and approved, in due form of law, and letters of administration *cum testamento annexo*, were granted to James Walker, who was solemnly sworn to exhibit a true and perfect inventory of the deceased's estate into the Register's office, at West Chester, on or before the tenth day of January next, and to settle the account of his administration within one year from this time, or when thereunto legally required.

Given under my hand and the seal of said office.

D. HEISTER, Reg'r.

The answer of the defendant admitted that the complainant had been duly incorporated under the laws of the State of Delaware, as in the bill alleged. It also admitted the facts set forth in the bill touching the death of Samuel Walker in Chester county, Pennsylvania, and the making by him of a certain will, in the nature of a nuncupative will, the probate of the same, and the granting of letters of administration to the defendant, both in Chester county, Pennsylvania, and in New Castle county,

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Delaware. The answer further admitted that the testator died possessed of personal property in New Castle county, but alleged that the defendant was unable to set out the amount thereof, inasmuch as a large part consisted of outstanding debts,and other parts thereof were dependent, for their recovery, upon the result of a suit, now depending, which had been instituted by the defendant. And, for greater certainty as to the contents of said will, the defendant referred to the copy thereof annexed to the complainant's bill. But whether the said paper, purporting to be a will, was a good nuncupative will, under the law of this State, and whether the bequest therein contained was good and valid in law and available for the complainant, the defendant did not know, but craved the direction of the Court as to the same.

The cause was submitted to the Chancellor, at the April Term, 1825, upon the bill and answer, without the taking of proofs, and without argument.

Rogers, for the complainant.

Read, Jr., for the defendant.

RIDGELY, CHANCELLOR.—It appears that Samuel Walker, the testator, at the time when the said nuncupative will was made, resided in Pennsylvania, at the house of James Walker, where he had resided about eight or nine years. The words were spoken in his last sickness, about six hours before his death, and were committed to writing within four days after they were uttered. The will was proved in Chester county, in the State of Pennsylvania, according to the certificate of D. Hiester, Register for the probate of wills in that county.

The State of Pennsylvania being the domicil of the testator at the time of his death, and for several years before, if the will is good according to the laws of that

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State the personal property mentioned in it may pass according to the bequest, upon a proper probate being made, without regard to the law of this State, where such personal property may be, as to the formality of the will. The *lex loci* of the testator, and not the *lex loci rei sitae*, both in wills and successions *ab intestato*, must govern. Lord Loughborough, in delivering the opinion of the Court in *Sill vs. Warwick*, 1 *H. Blk.* 665, 690, says, "it is a clear "proposition, not only of the law of England, but of "every country in the world where law has the semblance "of science, that personal property has no locality. The "meaning of that is not that personal property has no "visible locality, but that it is subject to that law which "governs the person of the owner, with respect to the "disposition of it. With respect to the transmission of "it, either by succession or by the act of the party, it "follows the law of the person. The owner in any "country may dispose of his personal property. If he "dies it is not the law of the country in which the prop-"erty is, but the law of the country of which he was a "subject, that will regulate the succession." And so in *Bruce vs. Bruce*, 2 *Bos. & Pul.* 229, it was decided that the actual *situs* of the goods had no influence. And in *Pipon vs. Pipon*, *Ambler*, 25, a similar doctrine was held. And in *Desesbats vs. Berquier*, 1 *Binn. R.* 336, the Supreme Court of Pennsylvania held that a will of personal property must be executed according to the law of the testator's domicil at the time of his death. If it is void by that law it will not pass personal property in a foreign country, although it is executed with all the formality required by the laws of that country.

It therefore follows that a will of personal property made in Pennsylvania, although the property may be in this State, must operate according to the laws of that State; but then the question will occur, whether the probate made in Pennsylvania, of a nuncupative will, is sufficient to pass the personal property in this State.

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A probate, until it is annulled or reversed, is conclusive; and no evidence can be received against it. It cannot be set aside in any court of law or equity, on any collateral matter; but, if it is to be questioned, it must be upon an appeal. *Gilb. Law of Evid.* 74: 1 *Lev.* 235, *Noel vs. Wells*: 4 *Co. Rep.* 94, *Bunting's case*: 1 *Salk. R.* 290, *Blackman's case*: 1 *Atk.* 630: 2 *Atk.* 324, 378: 1 *P. Wms.* 388: 2 *P. Wms.* 287: 1 *Ves. Sr.* 119, 284: 2 *Vern.* 8: *Ambler*, 756: 4 *Ves. Jr.* 28: *Cowper*, 315. Even if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate; for the parties may resort to the Ecclesiastical Court, which is competent to determine upon the question of fraud. *Mitford's Pleadings*, 206.

But the probate of this nuncupative will in Pennsylvania is not sufficient to give it any effect in this State; and until probate is made here, the will cannot be considered to pass any property here. 4 *Burns' Ecc. Law*, 187.

In England a will of personal property, if there be *bona notabilia* both in the province of Canterbury and in the province of York, must be proved either before both metropolitans, if within each of their jurisdictions there be *bona notabilia* in divers dioceses,—or else, if there be not so in any of the places, then before the particular bishops in those several dioceses where the goods are. Or, if within the one jurisdiction metropolitan the testator had goods in divers dioceses, and in the other but in one diocese,—then, in the one place is the will to be proved before the archbishop, and in the other place before the particular bishop. 4 *Burns' Ecc. Law*, 183. It is evident from these cases that where the deceased had *bona notabilia*, or chattels to the value of a hundred shillings, in the provinces of Canterbury and York respectively, that the will must be proved in both; for, as the bishops were themselves originally the administrators to all intestates in their own dioceses, and as the present administrators are in effect no other than their substitutes, it was impossible for

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the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay in their own dioceses beyond which their episcopal authority extended not. And the probate of wills naturally follows the power of granting administration, in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects. 2 *Blk. Com.* 508–9–10: 2 *Lev.* 86. *Hard.* 216: 1 *Salk.* 39, *p.* 8: 2 *Bac. Abr. Executor*, 399, (*E.*)

In the year 1700, while our Government was united with that of Pennsylvania, all wills in writing, whereby real estate within the province or territory was devised, were, by an Act of Assembly (1 *Laws of Del., App.* 29) declared to be good and authentic in law, whether the said wills were made within or out of the province or territory, *provided* the same were legally proved within this province or territory within six months after the death of the testator; or within eighteen months, if the devisee should live out of this Government. And all nuncupative wills, made within this province or territory and attested according to that Act, were to be proved in the Register's office "in this province or territory." Afterward, in the year 1706, by another Act of Assembly, all wills in writing of real estate, whether made within or without this Government, "legally proved within this Government, or in the chancery in England," and nuncupative wills of goods and chattels attested according to that Act "and proved in the Register's office in this Government" within a limited time, were declared to be valid in law. See 1 *Laws of Del.. App.* 58. The last of these Acts was made after our separation from the Government of Pennsylvania.

These Acts of Assembly continued in force until the year 1753, when the present Act concerning written and nuncupative wills was passed. And they, I apprehend, gave rise to the practice and legalized the probate of a

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will, or the granting letters of administration, in a single county, so that such probate or letters of administration shall operate and be effectual all over the State, without a probate or obtaining letters of administration in each county where there may be *bona notabilia*; and in the Act for establishing an Orphans' Court (1 *Laws of Del.*, 87) the Register is spoken of as having "the power of probate of wills and granting letters of administration in this Government."

In England it is not sufficient that a will of personal property be proved abroad. It must be proved there, in order to give it validity, if there be personal estate there. In *Jauncey vs. Sealey*, 1 *Vern.* 397, the plaintiff, as administrator of J. S., who died at Naples, brought his bill to have a discovery of the intestate's personal estate. The defendant pleaded that the supposed intestate had made a nuncupative will and made the defendant executor; and that he, the defendant, had proved the will, according to the custom of the country where the testator died; and he denied that the testator had left any estate but what was at Naples. The court allowed the plea, and said that the testator having left no estate in England, it was not necessary the will should be proved there; no more than if a man had died and left an estate in Scotland. See *Mitfords' Pleadings*, 206, where the same case is referred to, according to which it is clearly implied that if the testator had left goods in England, the will must have been proved there. In *Hunter vs. Potts*, 4 *T. R.* 182, *Law*, one of the counsel, in arguing that personal property is regulated, not by the law of the country in which it is situated, but by that of the owner's domicil, says, "upon this principle a probate would be granted here upon the foot of a foreign probate in the case of a foreigner who died leaving property in this country." And in *Lee v. The Bank of England*, 8 *Ves. Jr.* 44, the master of the Rolls, in the case of a will made in America which the executor would not prove in Eng-

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land, but which had been proved in this country, considered the representatives in America not to be the legal representatives in England,—that the laws of England required probate to be made there and would take no notice of a foreign administration. In *Desesbats vs. Berquier*, 1 *Binn. R.* 336, a will made by Jean Thirl, an inhabitant of the Island of St. Domingo, was proved in Pennsylvania. That probate was annulled, because the will was not executed with the formality required by the law of St. Domingo, the testator's domicil, and was therefore not valid; but the will had been necessarily proved in Pennsylvania at first, on the supposition that it was good and effectual. And in *Worrell vs. Dickey*, 1 *Johns. Ch. Rep.* 153, Chancellor Kent says, "it is well settled "that we cannot take notice of letters testamentary or of administration granted abroad, and that they give no authority to sue here. This is not only the law of England but it has been generally adopted in this country."

As connected with this subject, it may be remarked that letters of administration granted in one State or Government are not sufficient to maintain an action in another, unless it is in virtue of some statute or positive law. In our own State the terms prescribed by "an Act directing the priority of payment of debts of persons dying within this Government" (1 *Laws of Del.* 81) must be complied with; otherwise, letters of administration obtained out of the State are not sufficient for maintaining an action by a foreign administrator. So, in Pennsylvania letters of administration granted under seal in a sister State are sufficient to maintain an action, under an Act of Assembly passed in the year 1705. 1 *Binn. R.* 63. But letters of administration granted in England were adjudged not sufficient in Pennsylvania, because the Statute of that State did not extend to such letters of administration. 1 *Dall. R.* 456. And the same doctrine is held in the District of Columbia. 1 *Cranch's R.* 259. So in Eng-

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land, if a man dies intestate and has goods in England and Ireland administration must be granted in both countries.

Our own statutes have prescribed the manner in which written wills, both as to land and personal property, and nuncupative wills as to personal property, shall be executed and proved; and they contain particular provisions in relation to written wills made by persons residing in certain countries out of this Government and there proved; but they are entirely silent as to nuncupative wills, and do not provide that copies and probates, made in any other State or Government, shall be received here as good and valid. This omission of nuncupative wills made and proved abroad clearly demonstrates that the Legislature intended to leave them on their former footing. And the provision in favor of certain written wills equally proves that, without this statute, probate of them must be made within this State before they can here avail. It is the clear law of the State that neither a will, nor a probate made abroad, is available in this State until the will be here proved; except in the cases provided for in an Act concerning wills made by persons residing out of this Government. 1 *Laws of Del.* 448.

Upon the principle that personal property must follow the domicil of the testator, if this will has been made according to the laws of the State in which the testator was domiciled at his decease, even though all the formality required by our Act of Assembly has not been observed, it is sufficient to pass personal estate; but in order to give it effect the probate must be made in New Castle county, where such personal property is situated,—not, indeed, according to the requisites of our statute, but according to the proof required by the law of the domicil of the testator. If the executor will not prove the will he may be cited by the Register, and if that cannot be effected it will be a *casus omissus*, and must be provided for by the Legislature of the State or by the Congress of the United States.

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Syllabus.

I am of opinion, therefore, that because this nuncupative will of Samuel Walker has not been proved in New Castle county in this State it conveys no interest whatever to St. James' Church in the supposed legacy of four hundred dollars.

But, even if this will had been brought for probate in New Castle county, I do not think that it could have been properly proved according to the law of Pennsylvania, or of this State, because Samuel Walker seemed not to have had, according to the words spoken, the *animus testandi*,—a disposing mind; but the words uttered were elicited from him by the witnesses, or some of them.

Another objection that might be made to a probate of this paper is, that the persons attesting it were not desired by Samuel Walker to witness that such was his will, nor did he use any words to that effect. Altogether, there is so little of design in the paper like making a will that it is probable it never could, if opposed, be proved as a nuncupative will.

Bill dismissed.

EZEKIEL WILLIAMS CLOWES, an infant, &c., by GREENBERRY BLADES and PREUDA his wife, late PREUDA CLOWES, guardian of said E. W. CLOWES,

vs.

THOMAS L. JUDGE.

Sussex, May, 1825. (*In Vacation.*)

Bill for an injunction and an account. Upon the petition of the complainant, an infant, &c., by his guardian, under the oath of the guardian and of her husband, (the guardian being a married woman), setting forth that the defendant "threatens and intends to leave the State of Delaware and to withdraw himself out of the jurisdiction of the Court," and that deponents believe that he is indebted to the complainant in the sum of $8000.00 and upwards,—a *ne exeat* ordered.

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Statement of the case.

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PETITION FOR A WRIT OF NE EXEAT.—In this case a bill in equity had been filed by the complainant, (an infant, by Greenberry Blades and Preuda his wife, guardian of the complainant) praying a writ of injunction to restrain the defendant from further digging and raising iron ore and mineral earth out of certain lands, of which the defendant then held possession, but the title to which the complainant claimed to be in himself. The bill also prayed that the defendant might be decreed to account for the value of the ore which he had already raised and taken away from the land. A preliminary injunction was ordered, according to the prayer of the bill, pending which a petition on behalf of the complainant was presented to the Chancellor, praying that a writ of *ne exeat* should issue against the defendant.

The petition set forth the substance of the bill, the order for an injunction and the service thereof, as well as the service of a subpœna to answer; and then proceeded to allege as follows, viz: "that the defendant, Judge, as "this petitioner has been informed and doth believe, hath "not, since the service on him of said writ of injunction, "taken away any ore from said land. But the said Thomas "L. Judge has lately made over, sold, and conveyed away "all his store goods, teams and other property, in Sussex "county; and the said Thomas L. Judge, in order to "defeat your petitioner of the sum due to him on account "of the ore before raised and taken away by the defendant "from your petitioner's land as aforesaid, for an account "of which your petitioner has prayed in his bill aforesaid, "and in order to defeat your petitioner in said suit in "Chancery, and of the costs therein, he the said Thomas "L. Judge, threatens and intends to quit and leave the "State of Delaware, and to withdraw himself out of the "jurisdiction of this Honorable Court. And your peti-"tioner and the aforesaid Greenberry Blades do believe "that the sum due from said Thomas L. Judge to your

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"petitioner, for and on account of the ore by him taken "away as aforesaid,doth amount to three thousand dollars "and upwards. Therefore he prays a writ of *ne exeat* "*republica*, &c."

The petition was signed, "Ezekiel W. Clowes,by Green- "berry Blades and Preuda his wife, late Preuda Clowes, "guardian." It was sworn to by Blades and wife.

Robinson, for the petitioner.

W. H. Wells and *H. Wells*, for the defendants.

THE CHANCELLOR considered that a writ of *ne exeat* should be granted. The affidavit of the threats by de- defendant to leave the State was made directly, and not upon information and belief only: and it was, therefore, within the rule of the decisions. *Roddam vs. Hetherington*, 5 *Ves. Jr.* 91: *Oldham vs. Oldham*, 7 *Ves. Jr.* 410: *Etches vs. Lance*, 7 *Ves. Jr.* 417: *Hannay vs. McEntire*, 11 *Ves. Jr.* 54: *Jones vs. Alephsin* 16 *Ves. Jr.* 470. With respect to the indebtedness, as the claim of the complainant rested in account, and was peculiarly within the defendant's own knowledge, the Chancellor considered it sufficient that the deponents had sworn to their belief that the defendant was indebted in a sum certain, viz: $3000. *Rico vs. Gaultier*, 3 *Atk.* 501: *Russell vs. Ashby*, 5 *Ves. Jr.* 96.

It was ordered, that a writ of *ne exeat* issue, and that the defendant be held to give security to the amount of $3,000.00.

See *Clayton, et al., vs. Mitchell*, ante, p. 32.

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Syllabus.

WILLIAM K. LOCKWOOD, adm'r., *c. t. a.*, of THOMAS CANDY, dec'd, DAVID STRADLEY, THOMAS CANDY STRADLEY, SALLY STRADLEY, WILLIAM CANDY COLLINS, THOMAS COLLINS, JR., SALLY COLLINS, BENJAMIN COLLINS, SOPHIA COLLINS, JR., MARY ANN COLLINS, ALEXANDER COLLINS, JOHN COLLINS, SUSAN WALKER, AMELIA WALKER, ELIZABETH WALKER, JAMES WALKER, WILLIAM WALKER and ROBINSON WALKER, JR., infants, &c., by the said WILLIAM K. LOCKWOOD, their next friend,

vs.

SUSANNA STRADLEY, THOMAS COLLINS, and SOPHIA, his wife, ROBINSON WALKER, and ANN, his wife, and SARAH C. BROWN, an infant.

Kent County, Aug. T. 1825.

T. C , by will, directed that his executors, thereinafter named, should sell and dispose of all his real and personal estate, wheresoever or whatsoever, at such time or times as they, or the survivor of them, could do it to the best advantage, and either at public or private sale, as they or he might think best in their or his discretion, &c. *Held*,

1. That under this provision no estate passed to the persons named as executors but that the real estate descended to the heirs at law of the testator.

2. That the persons named as executors having refused to take letters testamentary, an administrator, *c. t. a.*, has no authority, as such, to make the sale directed by the will. The direction to sell was a personal confidence in the executors named, and it cannot be executed by an administrator.

3. That this is such a trust as can be executed by the Court, the property given and the objects to be benefitted being certain.

4. That to make good a title, pursuant to a sale under a decree of the Court, the heirs at law of the testator are properly made parties and must be decreed to join in the conveyance of the estate.

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5. That one of the heirs at law being an infant, a day must be given to her, after arriving at twenty-one years of age, to shew cause against the decree; and this, notwithstanding that her answer, made by a guardian, may have admitted the case to be as alleged in the bill.

BILL FOR SALE OF REAL ESTATE IN EXECUTION OF A TRUST.—This bill was filed under the following circumstances. Thomas Candy, deceased, by his last will and testament, dated May 15th, 1821, devised as follows:—

"Item—it is my will that my executors hereinafter named, and the survivor of them, do sell and dispose of all my real and personal estate, wheresoever and whatsoever, at such time or times as they, or the survivor of them, can do it to the best advantage, and either at public or private sale, as they or he may think best, in their or his discretion:—all moneys arising from such sales, as also from all other my estate whatsoever, I direct to be placed out and kept at use, on good and sufficient landed security, for the benefit of the hereinafter described legatees; and, after the payment of my debts and the necessary expenses in settling my concerns and the specific legacy above mentioned, then I will that all the rest, residue and remainder, together with the interest which shall accumulate thereon, be divided into seventeen equal parts or shares, three of which parts or shares I give and bequeath to the children of my eldest sister, Susanna Stradley, which are now born and to those which shall hereafter be born to her, which shall attain to the age of twenty-one years, to be paid to them when and as they shall severally attain that age, in equal shares as tenants in common. Eight of the said parts or shares I give and bequeath to the children of my sister Sophia Collins which are now born, and to all such as she shall yet have, who shall attain the like age of twenty-one years, to be paid to them when and as they shall severally arrive at that age, in equal shares as tenants in common. The remaining six parts or shares I give and bequeath to the children of my sister Ann Walker,

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already born, and to those which shall yet be born to her, who shall live to the age of twenty-one years, to be paid to all such children of my said sister Ann when and they shall severally arrive at that age, share and share alike, in common tenancy."

"Item—Should it so happen that all the children of either one or more of my before named sisters depart this life without attaining to the age of twenty-one years, in such case I give and bequeath the parts or shares of my estate which I have herein before bequeathed to and designed for such children so dying, to all such children of my other sisters as shall attain to the said age of twenty-one, that is to say, to all such children of my said sisters or sister named in this will, as shall attain to the age of twenty-one, to be divided among them equally as tenants in common, and to the survivor of them so attaining, if one child only."

"Item—As I have directed the sale of all my real estate, I hereby authorize and empower my executors hereinafter named, and the survivor of them, to sell and convey the same in fee simple to the purchaser or purchasers thereof; for which purpose the deed or deeds of my said executors, or the survivor of them, shall be good and effectual."

Gideon Cullen and Thomas Tomlinson were appointed executors of the will.

The testator, Thomas Candy, died in April, 1824. His will being thereupon admitted to probate, Gideon Cullen and Thomas Tomlinson, named therein as executors, refused to take letters testamentary and to execute the trusts of the will; whereupon, letters of administration, *c. t. a.*, were granted to William K. Lockwood, one of the complainants.

The testator left some personal estate, which was sold by his administrator, *c. t a.* He also died seised in fee simple of a farm or tract of land, situated in Kent county,

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Delaware, containing about one hundred and fifty acres, and which comprised all of his real estate, the same being left by him subject to the provisions of his last will above set forth. He left to survive him three sisters and one neice, his heirs at law, viz : a sister, Susanna Stradley, widow of David Stradley, dec'd ; a sister, Sophia Collins, wife of Thomas Collins ; a sister, Ann Walker, wife of Robinson Walker, and a niece, Sarah C. Brown, the daughter of a certain John Brown by another sister of the testator, who had intermarried with Brown and died in the testator's lifetime.

The bill set forth the above stated facts, and further alleged that the complainants, David Stradley, Thomas Candy Stradley and Sally Stradley, are the children of the said Susanna Stradley, deceased, and are entitled under the said will to three seventeenth parts of the estate, real and personal, of the testator ; that the complainants, William Candy Collins, Thomas Collins, Sally Collins, Benjamin Collins, Sophia Collins, Jr., Mary Ann Collins, Alexander Collins and John Collins, are the children of the said Sophia Collins, and are entitled to eight seventeenth parts of the estate of the testator ; and that the complainants, Amelia Walker, Elizabeth Walker, James Walker, William Walker, Susan Walker and Robinson Walker, Jr., are the children of the said Ann Walker, and are entitled to six seventeenth parts of the estate of the testator.

The complainants, by their bill, insisted that it was the manifest intention of said testator that his real estate, subject to the provisions of his will, should be sold at all events, &c ; and that the proceeds thereof, with all the moneys arising from his personal estate, except so much as was necessary to pay debts, funeral expenses, expenses of executing the will, and for payment of a legacy of $200.00, to one Jerusha Start, should, with the accruing interest, be paid to the complainants, the children of the said sisters

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of the testator; that is, that three seventeenths, with the accruing interest, should be secured to the complainants, the children of the said Susanna Stradley, or such of them as might attain the age of twenty-one years, and to be paid as they severally arrive at that age; and so as to the other complainants. That in equity and good conscience the trusts of said will ought to be executed, and the complainants ought to have secured to them the benefits which said Thomas Candy intended they should severally and respectively take under said will. That the trusts of said will, so far as the same relate to the sale of said testator's real estate, cannot be executed without the intervention of a decree of this Court. That no provision is made in said will for the contingency of the executors, named in said will, refusing to take upon themselves the burden of the execution thereof, and that for want of such provision, inasmuch as said executors named in said will have renounced the execution thereof, there is now no person upon whom (independently of a decree of this Court,) the right to execute said trust in relation to the said testator's real estate devolves.

The bill prayed that the trusts of the said Thomas Candy's last will and testament might be executed by a decree of this Honorable Court, providing for and ordering the sale of the aforedescribed farm and tract of land, of which the said Thomas Candy was seized as aforesaid, at the time of making his will and at the time of his death, and securing to complainants, the children of the said Susanna Stradley, Sophia Collins and Ann Walker, the proceeds thereof, according to the true intent and meaning of the said will and testament; and for general relief.

A joint and several answer was filed on behalf of all the defendants, including Sarah C. Brown, an infant, whose answer was by John Brown, her guardian *ad litem*, appointed by the Court.

The answer admitted the execution and probate of the

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will of Thomas Candy, deceased, and the devises and bequests therein contained, the appointment of executors, and their renunciation, the appointment of the administrator, *c. t. a.*, and all the facts and matters set forth in the bill.

The cause was submitted to the Chancellor, at the August Term, 1825, upon the bill and answer, without argument.

M. W. Bates, for the complainants.

Frame, for the defendants.

RIDGELY, CHANCELLOR.—This case has been submitted to the Chancellor upon the bill and answer, without debate, and without any authorities being produced to him on either side, and it seems to be apparent that all the parties in this suit consider it to be a matter of course that a decree should be made for the sale of the real estate of the testator, to give effect to his will. One of the defendants, Sarah C. Brown, who is one of the heirs of the testator, is an infant; and that circumstance alone, according to the apparent disposition of the other defendants, who are also heirs and are of full age, has made it necessary to apply to this Court for the sale of the land; for had the whole estate descended to those alone, that is, to the heirs of full age, they might have conveyed the land without the aid of this Court. But the infancy of Sarah C. Brown would render the title of the purchaser under the other heirs incomplete. The object now is to sell the land, notwithstanding the renunciation of the executors and the infancy of one of the heirs, according to the intention of the testator as expressed in his will. But this cannot be effected finally, so as to conclude Sarah C. Brown, the infant; for the answer of the infant, by her guardian, will not conclusively bind her. In the case of *Wrotterly vs. Bendish*, 3 *P. Wms.* 235,

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note, e, it was ruled by Sir Joseph Jekyll, that where a defendant puts in an answer to a bill brought by an infant, who does not reply to it, the answer must be taken to be true, in regard that the defendant, for want of a replication, is deprived of an opportunity of examining witnesses to prove the answer, and he ought not to suffer from such omission in the plaintiff. But in *Legard vs. Sheffield*, 2 *Atk.* 377, Lord Hardwicke said that an infant can admit nothing, and therefore his not replying does not affect him; and he directed evidence to be read to make out a pedigree stated by a defendant in his answer,—the infant plaintiff not replying to the answer,—that he might judge whether it was clearly made out that the defendant was an heir at law. The hearing must have been upon bill and answer, and the answer was not taken as true against the infant. And in *Bunbury*, 338, *Strudwick vs. Pargiter, an infant*, it was ruled that no exceptions could be taken to an infant's answer put in by his guardian; by which he could not be concluded and might amend when he came of age. And so, in *Copeland vs. Wheeler*, 4 *Bro. Ch. Rep.* 256, it was admitted that exceptions will not lie to an infant's answer.

The course in such a case is for the cause to proceed, and, should there be a decree against the infant, to give him a day after he comes of age to show cause against the decree, provided he has such cause. By this will of Thomas Candy the real estate is not devised to any one, but has descended to the heirs at law, and consequently they are properly made parties; and, according to the authorities, a day must be given to the defendant, Sarah C. Brown, who is an infant. In *Cook vs. Parsons*, *Prec. in Chan.* 184: 2 *Vern.* 429, on a bill of review, an error was assigned that the lands were decreed to be sold pursuant to the will, without giving a day to the heir, an infant, to show cause after he came of age; but this was held to be no error, because the land was devised to trustees, so that nothing descended to the infant, and there was no decree against him

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to join, and the trustees might have sold without coming to the Court for direction ; yet it is there said, that if they do come it may be a question if the infant ought not to have a day to show cause ; but it was not needful there as nothing descended to him,nor was there any decree against him to convey. In this suit, there will be a decree against the infant Sarah C Brown, and she will be directed to join in the conveyance.

Scarth v. Cotton, Cas. temp. Lord Talbot, 198, is a remarkable instance of the parol demurring. An estate had been conveyed in trust to be sold to pay debts and incumbrances upon it, and then in trust for the grantor's own right heirs. The grantor died. A bill was filed by a bond creditor for the sale of the estate against the trustee and the heir, an infant. The infant by her answer insisted that being an infant, the parol ought to demur because, although it was a trust for paying off incumbrances which then affected the same, yet as to the residue it was only assets. The Lord Chancellor thought that although in this case it would be to the infant's prejudice to take advantage of the law, because the interest would outrun the rents and profits of the estate; yet, it being mentioned in the pleadings, he said he could not avoid ordering it, although the counsel would have waived the objection. And so an order was made to take an account of what was due to the plaintiff, but all proceedings to stay until the infant defendant came of age, and the plaintiff to pay all parties their costs except the infant and to have them again out of the estate. In *Blatch vs. Wilder*, 1 *Atk.* 420, 421, it was adjudged that where lands are devised to trustees to be sold for payment of his debts, and the heir is an infant, he has no day given him ; otherwise,when there is no devise expressly to any particular person, for in that case he has his day. There, the land was not expressly devised, and it was directed that the infant, the customary heir of copy-hold premises, should join in the sale thereof on attaining the

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age of twenty-one years, unless within six months after he shall attain such age, he show good cause to the contrary,—and the purchaser of the copy-hold, in the mean time, to hold and enjoy the same.

In *Uvedale vs. Uvedale*, 3 *Atk.* 117, I. W. by his will directs his real estate to be sold after his wife's death and the money arising therefrom to be equally divided between R. U. and five other persons The bill is brought by the widow, a creditor. R. U. is an infant, and as heir at law to the testator had the legal interest in the estate. Although the usual practice is for the parol to demur, yet it being for his (R. U's) interest that the estate should be sold, and as in this case there was a trust to be performed and the Court can see to the proper application of the money, Lord Hardwicke decreed a sale, but declared at the same time that he did not mean by this direction to break in upon the rule of parol demurring.

There was a decree of foreclosure against an infant on a mortgage, with a day to show cause, in *Goodier vs. Ashton*, 18 *Ves. Jr.* 83, but this has been altered in *Mondey vs. Mondey*, 1 *V & B.* 223, where an order was made directing, in case the mortgages consent to a sale, an inquiry whether it would be for the infant's benefit. See *Fountain vs. Caine & Jeffs.*, 1 *P. Wms.* 504.

It is evident from all the cases, and from principle too, that when the estate directed to be sold has not been devised away, but has descended to the heirs at law, they should be decreed to join in the sale, (an infant heir after attaining the age of twenty-one years),and that a day should be given to the infant, after arriving to the age of twenty-one years, to show cause. In the present case, the testator has not devised the estate to any one, and therefore it is the estate of the heirs; and the sale to be decreed will be of their legal estate, subject to the trust created by the will of the testator and for the purpose of having the trust executed.

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Opinion:—whether trust or power created.

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The principal question under this will is whether this is a trust to be executed by this Court, or whether it is a mere power which this Court cannot execute.

The testator devised thus,—"It is my will that my execu- "tors hereinafter named, and the survivor of them, do sell "and dispose of all my estate, real and personal, whereso- "ever and whatsoever, at such time or times as they, or "the survivor of them, can do it to the best advantage, and "either at public or private sale, as they or he may think "in their or his discretion. All moneys arising from such "sales, as also from all other my estate whatsoever, I "direct to be placed out and kept at use, on good and suffi- "cient landed security, for the benefit of the hereinafter "described legatees; and after the payment of my debts "and the necessary expenses in settling my concerns and "the specific legacy above mentioned, then I will that all "the rest, residue and remainder, together with the inter- "est which shall accumulate thereon, be divided into "seventeen equal parts or shares, three of which parts or "shares I give and bequeath to the children of my eldest "sister Susanna Stradley which are now born, and to those "which shall hereafter be born to her, who shall attain to "the age of twenty-one years, to be paid to them when "and as they shall severally attain that age in equal shares "as tenants in common." So, he gave eight parts of said money and interest to the children of his sister Sophia, born or to be born, and the remaining six parts to the children of his sister Ann Walker, born or to be born; and then he provided for the death of any of the children.

By the renunciation of the executors the trust has not been executed, and the administrator, William K. Lockwood, cannot execute it by any authority he now possesses. The authority to sell was given to the executors. It was a confidence placed in them by the testator. It was personal, and cannot be performed by the administrator. *Yates vs. Compton*, 2 *P. Wms.* 308, was a case very similar to this.

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There, the testator devised that his executors should sell land, and with the money arising from that sale and the surplus of his personal estate should purchase an annuity of £100 to J. S. for life, out of which she should maintain her children; and he gave £30 to each child, to be raised out of said annuity; and the personal estate he should die possessed of and the over plus he gave to J. S., and made B. and C. executors. The testator died, and the said J. S. died within three months after. The executors renounced. Administration with the will annexed was granted to Yates, the plaintiff, who was also the administrator of J. S. the intended annuitant. He, with the children of said J. S. brought the bill against the heir of the testator to compel him to join in a sale of the lands; and it was decreed that the land should be sold. Now if the administrator could have sold the land no bill would have been brought, nor any decree made, for that purpose. In Pennsylvania, *Moody's lessee vs. Van Dyke*, 4 *Binn. R.* 31, it was adjudged that administrators with the will annexed could not sell where the executors had renounced, and such is the law here.

As the executors have renounced, and as Lockwood, the administrator with the will annexed, has no authority to sell, this becomes a trust to be executed by this Court:—for this land and personal estate is clearly and explicitly given to the children of the testator's sisters. The Master of the Rolls, in *Pierson vs. Garnett*, 2 *Bro. Ch. Rep.* 38, says that Lord Thurlow in *Harland vs. Trigg*, 1 *Bro. Ch. Rep.* 142, and in *Wynne vs. Hawkins*, 1 *Bro. Ch. Rep.* 179, has laid down the true principle, that where the property to be given is certain and the objects to whom it is given are certain, there is a trust to be executed. See 2 *Bro. Ch. Rep.* 226.

In the cases of *The Duke of Marlborough vs. Godolphin*, 2 *Vesey, Sr.* 61: *Harding vs. Glynn*, 1 *Atk.* 469: *Brown vs. Higgs*, 4 *Ves. Jr.* 708; 5 *Ves. Jr.* 495: 8 *Ves. Jr.* 561, and

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in many other cases there cited, much controversy arose on the non-execution of a power and a trust, and on the difference between a power and a trust; but as, according to all those cases, this is a trust, there can be no doubt that the Court can cause it to be executed.

A decree was entered for the sale of the lands and premises described in the bill, to be made by William K. Lockwood, a trustee appointed for that purpose by the Chancellor; and that the proceeds of such sale, after the payment of all costs in the cause, should be applied by the said trustee according to the trusts of the last will and testament of Thomas Candy, deceased. The decree further directed that the heirs at law of the testator(who were parties to the cause,) should join with the trustee in a deed conveying the premises to the purchaser thereof. And with respect to the infant, Sarah C. Brown, who was one of the heirs at law, it was decreed as follows, viz;

"And it is ordered, adjudged and decreed by the Chan-
"cellor, that the said Sarah C. Brown, one of the defend-
"ants, do, when she, the said Sarah C. Brown, arrives at
"the age of twenty-one years, convey and assure to such
"purchaser, his heirs and assigns forever, by a good and
"sufficient deed, the said lands and premises, with the
"appurtenances, and that she acknowledge the same in
"due form of law. And it is ordered, adjudged and decreed
"by the Chancellor, that this decree is to be, and shall be,
"binding upon the said Sarah C. Brown, the infant, unless
"she, the said Sarah C. Brown, shall in six months after
"she shall attain the age of twenty-one years (being served
"with process for that purpose,) show unto this Court good
"cause to the contrary; and in the meantime that the
"said purchaser do hold and enjoy the said land and
"premises with the appurtenances"

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Statement of the case.

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JOHN NEWBOLD,

vs.

MICHAEL NEWBOLD, THOMAS NEWBOLD and WILLIAM BLACK, Jr., executors, &c., of THOMAS NEWBOLD, deceased, and the FARMERS' and MECHANICS' BANK in the City of PHILADELPHIA.

New Castle, Oct. 1825.—(*In Vacation.*)

A creditor by bond and mortgage cannot, without some special equity in favor of the debtor, be restrained from proceeding, at his election, upon either or both of his remedies, so that he does not take a double satisfaction.

PETITION FOR AN INJUNCTION.—This was a petition of John Newbold for an injunction, accompanied by an affidavit of the petitioner, setting forth, as the ground of the petition, the following facts, viz :

The petitioner, on the 27th of August, 1823, executed a mortgage of certain real estate, in Delaware County, Pennsylvania, to the Farmers' and Mechanics' Bank in the City of Philadelphia, one of the defendants, to secure the debt of $15,400, payable with interest, on or before the 27th day of August, 1825. Accompanying the mortgage was the petitioner's bond for the same debt, with a warrant of attorney for the confession of judgment. The bond and mortgage were afterwards assigned by the Bank to the other defendants, Michael Newbold, Thomas Newbold and William Black, Jr., executors of Thomas Newbold, deceased, by whom said securities are now held.

The petition stated that the tract of land in Delaware County, covered by the mortgage, was exceedingly valuable, consisting of one hundred and fifty acres of marsh meadow in a high state of cultivation; two hundred and

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eighty acres of upland in fine condition, and having upon it a valuable fishery; several very productive stone quarries; a very large and commodious stone house and other buildings; that the property cost the petitioner $65,000, and was worth, even at the then depressed price of real estate, not less than $60,000, and would now bring at a sale by the sheriff, $50,000; that the only liens upon the premises, prior to the mortgage, were three other mortgages thereon given by the petitioner to James C. Fisher and Joseph D. Brown, for securing the payment of $25,000; and that said tract of land was worth far more, and would sell at a sale by the sheriff for more, than would discharge the last mentioned three mortgages and also the first mentioned mortgage, by several thousand dollars; that the proceeds of such a sale would discharge all those mortgages and leave a balance of from seven to ten thousand dollars; that this allegation is not made unadvisedly, but on facts which had recently occurred and which will prove their truth; for said premises were, about the months of December or January next previously, under a judgment obtained subsequent to all the said liens, and by process issuing thereon out of the Court of Delaware County, sold by the sheriff of that county, for $48,100; that is, for $23,100, subject to the principal of the aforesaid three mortgages, amounting to $25,000; and the same was bought by the aforesaid Michael Newbold, Thomas Newbold and William Black, Jr., executors of said Thomas Newbold, deceased, the holders of the aforesaid bond and mortgage assigned by the said Bank; that such purchase money would have discharged the aforesaid four mortgages and left a balance of more than $7000.00; that upon the return of said process of sale, the petitioner knowing that said premises had been sold for much less than their real value, applied to the Court and had the sale set aside. The petitioner further stated that after the sale was so set aside the petitioner, being anxious to furnish to his creditors, who had

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a lien on said premises, the full income, rents and profits thereof, to be applied to their debts, conveyed the same to Alexander Helmslie, in trust for the mortgage creditors, and gave the possession of the premises to Michael Newbold, Thomas Newbold and William Black, Jr., in order that they might receive the rents and profits thereof; and they have accordingly ever since retained possession of the premises, and received the rents and profits thereof, amounting as the petitioner believed, to at least $3000 or $4000; that the petitioner was anxious for the sale of the mortgaged premises, in order that the debts secured by the mortgages may be discharged; that the executors were in the receipt of the rents and profits, and had the means in their own hands of effecting a sale of the premises whenever they should think proper. The petitioner further stated, that he was the owner of other large and valuable estates in Pennsylvania; that he owned a plantation in Bucks County, which he purchased at the price of $50,000, and on which he now resides; that he was also owner of fourteen houses situated in Philadelphia, of considerable value. The petitioner further stated that he was the owner of a tract of land, situated in New Castle county, in the State of Delaware, containing about three hundred and ninety-three acres; that this land was on the river Delaware, and that the Chesapeake and Delaware canal passed through it. That a town had been laid out at and near the mouth of said canal, which was on the land of petitioner, streets and alleys located and opened, and building lots laid out. The said land had thus been greatly increased in value, and the petitioner had already entered into contracts for the sale of lots in the town, to the amount of between $50,000 and $60,000, on many of which lots contracts had been made for erecting houses; that there was still a further demand for lots in the town which, the petitioner believed, would continue to increase; that the sale of lots, and the erection of buildings thereon, would necessarily

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enhance the value of the remaining lots and the residue of the land; that lots had been sold on credit for the purchase money, and on improving contracts which compel the purchaser, within a certain time, to erect buildings of a certain size and description; that such sales, though profitable, did not enable the owner of the soil to realize the purchase money at once; that the petitioner considered his prospect of realizing an independent fortune out of his land as certain, unless he should be interrupted in his plans by some proceeding that would prevent his giving clear titles to such lots as he should dispose of. Such an interruption he knew was possible, but it was not anticipated by him, as he knew he had given securities on his real estate in Pennsylvania to those creditors to whom he was indebted to any considerable amount, and he never imagined that a creditor, who had his debt fully secured in that State, would wantonly pursue a course that might be of irretrievable injury to the petitioner, by preventing his completing his sales of lots in the said town.

The petition then set forth that the defendants, Michael Newbold, Thomas Newbold and William Black, Jr., executors of Thomas Newbold, dec'd, had caused judgments to be entered upon the petitioner's aforesaid bond in the Supreme Court of the State of Delaware for New Castle county; that upon said judgment a writ of *fieri facias* had been issued and the same had been levied upon the before mentioned real estate of the petitioner situated in New Castle county, notwithstanding the said executors held for the same debt a mortgage on the tract of land in Delaware county, in the State of Pennsylvania, of a value far more than sufficient, at a sheriff's sale, to discharge the said debt after paying the prior liens upon it, which tract of land the said executors then had in their actual posession and were in receipt of its profits.

The petitioner charged, as a ground of equity, that by his contract with the Farmers' and Mechanics' Bank he

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had specifically pledged the tract of land in Delaware county for the payment of the debt mentioned in said mortgage, and for which debt the bond on which the judgment was entered was given; that this pledge was accepted by the Bank, and the mortgaged premises taken as its specific security. That they were now in the actual possession of said executors, who were in the receipt of the rents and profits; that the mortgaged premises were admitted by the executors to be more than sufficient to pay the debt due them, and all the prior liens, even if now exposed to a sale by the sheriff; that notwithstanding the ample sufficiency of the mortgaged fund to satisfy the debt which was due the executors and also all prior liens, they were now seeking to abandon that fund, and to come into the State of Delaware with the bond aforesaid, and upon this to coerce a sale of the lands of the petitioner in New Castle county, upon which the said town has been located. thus preventing the petitioner from complying with and completing the contracts for the sale of said town lots, and were proceeding to sacrifice the interest of the petitioner to an extent which would probably ruin him irretrievably.

Sundry exhibits were annexed to the petition shewing certified lists of the judgments and mortgage against the petitioner in the State of Pennsylvania; also the proceedings for the sale of the land in Delaware county, in the petition referred to, and the proceedings in execution of the judgment entered against the petitioner in New Castle county.

The prayer of the petition was that the defendants might be restrained by a writ of injunction from further proceeding under their said judgment and execution against the real estate of the petitioner in New Castle county.

The petition came before the Chancellor in vacation. Oct. 1826, upon a motion *ex parte* for an injunction.

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Black, for the petitioner.

The Chancellor refused to award the writ, and assigned the following as his reasons:

Upon the best consideration which I can give to the subject, I do not think that upon the case made in the petition the writ of injunction should be ordered.

It seems to me to be clearly and reasonably settled that a mortgagee may use all the remedies upon a bond and mortgage which the law affords, at the same time, and consequently any one of them which he prefers; but that he shall not take a double satisfaction for the debt. In *Booth vs. Booth*, 2 *Atk.* 343, Lord Hardwicke says, "though "the defendant is foreclosing the equity of redemption "here, yet he is not precluded from bringing an ejectment "at law at the same time, unless there is something very "particular to take it out of the common case." And Lord Redesdale, in 1 *Sch. & Lef.* 176, states the general rule to be, that "where a party is suing in this Court he "shall not be allowed to sue at law for the same debt. "But the case of a mortgage is an exception to this rule; "he has a right to proceed on his mortgage in equity, and "on his bond at law at the same time." In the case before Lord Redesdale there was something 'very particular,' (as Lord Hardwicke said), which formed an exception to the general principle, but not applicable to the present question. And in 3 *Johns. Ch. Rep.* 331, Chancellor Kent says it seems to be generally admitted in the books, that the mortgagee may proceed at law on his bond or covenant at the same time that he is prosecuting his mortgage in Chancery.

If the mortgagee may thus proceed, both at law and in equity, he certainly may have the fruit of both, or of either, so that he does not take a double satisfaction; and whether he proceeds at law on the bond and mortgage, or

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at law on the bond and in equity on the mortgage, the principle is the same. Here, the mortgagee is not proceeding on the mortgage. In 1 *Yeates R.* 9, where a suit was brought on a bond which accompanied a mortgage, the Court would not prevent the plaintiff from levying it on what land he pleased. The case of *Holditch vs. Mist*, 1 *P. Wms.* 695, is stronger than the present, and yet the Court would not compel the party to resort to a particular fund but left him to his common remedy. The case of *Folliott vs. Ogden*, 1 *H. Blk.* 124, and *Wright vs. Nutt*, 1 *H. Blk.* 136: 3 *Bro. Ch. Rep.* 326, are not applicable. In 3 *Bro. Ch. Rep.* 334–5, that case of Wright was argued on this principle, that Sir James Wright had all his property in Georgia confiscated, was himself a banished man, that the fund to which the creditors should resort was the confiscated property in the hands of the State of Georgia, and that the person who had access to a fund for the payment of his debt, to which the debtor had not access, should make it available before he comes upon the debtor personally. Here, the debtor has access to all the funds, and may avail himself of all of them; and there can be no reason for compelling the creditor to resort to one alone. His remedy upon the bond is as much his right as a remedy upon the mortgage, and there does not appear to be any equity in compelling him to resort to one or the other, especially as there is no oppression in the act, although there may be some inconvenience, and indeed an entire frustration of the petitioner's scheme in establishing a own at the mouth of the canal. In *Wright vs. Simpson* 6 *Ves. Jr.* 714, the former cases of Wright, although perhaps not over-ruled, are not assented to by Lord Eldon. *Hays vs. Ward*, 4 *Johns. Ch. Rep.* 123, has some allusion to this subject, but that case relates mainly to the rights of a surety.

According to the petitioner's affidavit he has had a large surplus of assets for the payment of his debts. They may be thus stated:

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ASSETS.

Estimated value of the mortgaged premises,	$50,000.00
Plantations in Bucks county, purchased for	50,000.00
Fourteen houses in Philadelphia, estimated at	14,000.00
Total,	$114,000.00

LIABILITIES.

The three prior mortgages,	$25,000.00	
The present bond and mortgage,	15,400.00	
The subsequent judgment,	34,668.02	
	75,068.02	
Add for interest, say,	20,000.00	95,068.02
Surplus of assets,		$18,931.98

With all these funds in the power of the petitioner, it may be asked why he does not pay off the bond and mortgage? I see no reason for taking this case out of the common course.

But it appears that the plaintiffs at law have met with real difficulties in getting this money in Pennsylvania. The mortgaged land did sell at a sale made by the sheriff, under another judgment, for a sum sufficient to discharge this and all the other mortgages, and to leave a balance of from $7,000 to $10,000; and yet, because the petitioner conceived that the property had been sold for much less than its real value, he applied to the Court and had the sale set aside. Now, this proceeding interposes a serious difficulty; for it may be inferred that the highest and best price bidden is not to be taken as the measure or standard of the value, but that a sale by the sheriff is to depend upon some imaginary value. It is not alleged that there was any irregularity in the sale, nor any unjust or unfair conduct in the sheriff, or in any other person; nor

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indeed was any security given that there should be a proper advance on a second sale. Under all these circumstances it seems to me that no ground is laid for the interposition of the Court of Chancery. The petition states that after the sale was set aside the petitioner conveyed the mortgaged premises to Alexander Helmslie, in trust for the mortgage creditors, and gave the possession of them to Michael Newbold, Thomas Newbold and William Black, Jr., to receive the rents and profits; and that they have accordingly ever since retained the possession thereof, and received the rents and profits, as petitioner believes, to at least the amount of three or four thousand dollars; and that the executors have the means of effecting a sale of the premises when they think proper. The date of this trust deed is not given, but it was after the 16th or 17th of January, 1826, and whether before or after the judgment was entered and execution issued in New Castle county does not appear. The terms of this contract are not stated, and I can form no opinion how far it ought to affect or restrain the plaintiffs at law from proceeding on their judgment and execution. The fee simple, I suppose, is vested in Helmslie, in trust; and that is all that can, with certainty, be inferred. It does not appear, to whose benefit the rents are first to be applied. These plaintiffs at law have not the first mortgage; and it is to be supposed that the oldest mortgages would be preferred. However, enough of this trust sale is not given to furnish any ground upon which I can satisfactorily award the injunction. Rents to the amount of three or four thousand dollars, since January last, seem to be a monstrous sum, unless there be something very uncommon in the production of the farm, fertile as it may be, and profitable as it may be from its local situation. The transaction seems to be an extraordinary one for executors to engage in, and should be more fully explained to make it the ground for granting the prayer of the petition.

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Amended petition—injunction.

Petition dismissed.

Afterwards, on the 26th of October, 1826, another petition and affidavit of the same petitioner was presented to the Chancellor praying the same relief as did the former. This latter petition and affidavit alleged as a further ground of equity that after the sale by the sheriff of the tract of land in Delaware county, Pennsylvania, and the setting aside of the same by the Court, the petitioner proposed to the defendants, the executors of Thomas Newbold deceased, to convey and assign the said mortgaged premises to a trustee for the creditors, with power to sell the same and to apply the proceeds in discharge of the liens thereon; that said proposal was acceded to by the executors, who nominated for such trustee one Alexander Helmslie; that thereupon, the petitioner executed such conveyance to said Helmslie, upon the trust aforesaid; and pursuant thereto the executors took possession of the premises; that said conveyance was made with the express understanding and agreement that the property so conveyed was to be first resorted to for the payment of the liens against it, according to their priority.

Upon this petition an injunction was awarded, as prayed for.

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Syllabus.

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MARTHA DICK, a lunatic, by her trustee, JAMES BRADFORD,

vs.

STEPHEN DOUGHTEN, WILLIAM DOUGHTEN, ISAAC DOUGHTEN, BENEDICT DOUGHTEN, JOHN S. DOUGHTEN, JOSEPH WOLLASTON and ELIZABETH his wife, and STEPHEN DOUGHTEN and WILLIAM DOUGHTEN, administrators, *c. t. a.*, of WILLIAM DOUGHTEN, dec'd.

New Castle, Feb. T. 1827.

The equitable defence of a purchase of land for valuable consideration, without notice, may be made by answer as well as by plea; but such defence, when made by answer, must be alleged with the same fullness and precision as is required in a plea

It is not sufficient that in the answer it be stated only by way of recital, in connection with the statement of title, that the defendant purchased for a valuable consideration and without notice. The matter should be alleged, separately and distinctly from the statement of title, and insisted upon as a bar to the equity of the bill.

It is not sufficient to allege generally that the defendant purchased for a valuable consideration; but it must be specifically alleged of what the consideration consisted.

In the present case the statement by the answer that the defendant gave "a full, fair and just price for said tract of land without any notice, knowledge or belief that there existed any defect in the title of the same, or that the said tract of land was liable to any claim or demand of dower by the said M. D. (the complainant) or of any other person," is not sufficient (if excepted to) as a plea of purchase for a valuable consideration, without notice. But such an answer or plea, if not excepted to, will be taken as sufficient.

Under the defence of a purchase for value and without notice, the *onus* of proof is on the defendant. The acknowledgment in the deed of the receipt of a consideration is not evidence to support such a defence.

A plea of purchase for value and without notice is a bar only against an equitable and not against a legal claim. It is no bar against a bill for the assignment of dower, that being a legal title.

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Statement of the case.

Upon a decree for the assignment of dower against a purchaser of land from the deceased husband and for an account of rents and profits, the purchaser is liable only for rents and profits which accrued subsequent to the date of his purchase. To support a claim by the widow for rents and profits from the death of the husband all the intermediate purchasers must be made parties to the bill.

The Act of Limitations will not be enforced in equity, unless it be insisted upon by plea or answer.

BILL IN EQUITY FOR THE ASSIGNMENT OF DOWER.—The case made by this bill was as follows:

James Dick, deceased, the husband of the complainant, was in his lifetime seised in fee simple of a certain tract of land, situate in New Castle county. About the 21st, of April 1803, he sold and conveyed the same to David L. Reece, the complainant being before and at the time of the sale and conveyance the lawful wife of the grantor, the said James Dick. The bill alleged that the complainant had not at any time released her dower in said land or barred herself thereof by any act or deed whatever. The title to the land was traced down by the bill, from David L. Reece to William Doughten, the present tenant and the defendant in this suit. James Dick, the husband, died on the 26th of December, 1803, leaving to survive him his widow, the complainant, and one daughter. William Doughten, the defendant, was in possession of the lands at the filing of this bill, and had been since the 21st of March, 1814. The prayer was that dower be assigned to the complainant out of the said tract of land, and that the defendants account with her for the rents and profits which may have accrued therefrom since the date of the death of the said James Dick.

The answer of the defendant admitted the seisin of James Dick, and that he had by deed, dated the 21st of April, 1803, sold and conveyed the premises to David L. Reece, in fee; and the several sales and conveyances of the same down to the conveyance made to the defendant on the 21st

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of March, 1814, were also admitted; but in no one of them, as the answer alleged, was there any money consideration mentioned, or any other consideration. The answer did not admit that Martha Dick was, at the time of the sale and conveyance to David L. Reece, the lawful wife of James Dick. It further alleged that the defendant, "gave a full, "fair and just price for the said tract of land, without any "notice, knowledge or belief that there existed any defect "in the title to the same, or that the said tract of land was "liable to any claim or demand of dower by the complain- "ant, or any other person." The answer did not set forth of what the "full, fair and just price," alleged to have been given for the land consisted, whether of money, or of any thing else. The answer insisted that the complainant was never entitled to dower in the said land, or that if she ever had any right of dower in the same the right had been released or extinguished.

Issues were joined and depositions were taken on the part of the complainant, the defendant not joining in the commission.

The cause came first before the Chancellor, at the August T. 1822, for a hearing upon the bill, answer, exhibits and depositions. After the reading of the depositions taken on behalf of the complainant the defendant, by his counsel, prayed that an issue might be directed by the Chancellor, to be tried by a jury at the bar of the Court of Common Pleas, to find whether or not the complainant, Martha Dick, was the lawful wife of James Dick, on the 21st day of April, 1803, and continued to be the lawful wife of the said James Dick, until the time of his death. An issue was, thereupon, directed by the Chancellor accordingly; and the same was tried by a jury at the bar of the Court of Common Pleas, and returned and filed in this Court on the 28th of June, 1823. By the verdict of the jury upon said issue, it was found that the complainant was the lawful wife of the said James Dick, on the 21st day of April,

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1803, the date of the conveyance of the land by James Dick to David L. Reece, and that she continued to be the lawful wife of the said James Dick, until the time of his death.

After the return of the verdict found upon the issue directed as aforesaid, the cause coming again before the Chancellor, on the 16th April, 1824, a decree was made that an account be taken of the rents and profits of the land. Before any further proceedings were had William Doughten, the original defendant, died; whereupon, on the 25th of July, 1825, a bill of revivor was filed against Stephen Doughten, William Doughten, Isaac Doughten, Benedict Doughten, John S. Doughten and Joseph Wollaston and Elizabeth his wife, the said Stephen, William, Isaac, Benedict, John and Elizabeth being the children and heirs at law of the said William Doughten, deceased, and against the said Stephen and William as administrators, *c. t. a.*, of the decedent. An answer to the bill of revivor was filed and the original suit decreed to be revived. On the 19th of July, 1826, a decree was made for the assignment of dower to the complainant, and commissioners to assign the same were appointed. On the 5th of March, 1827, the commission with the assignment of dower was returned, and at the same time an account of the rents and profits, taken under a previous decree, was filed.

At this stage of the proceedings the cause came before the Chancellor for a final decree. An objection to such decree was then for the first time taken by the counsel for the defendants, that William Doughten, the original defendant, was a purchaser of the premises for a valuable consideration and without notice. A question was also raised whether, if the complainant were entitled to dower, her claim to rents and profits should run from the date of the decease of her husband, James Dick, or only from the date at which William Doughten became the purchaser of the land.

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Argument.

Booth, for the complainant.

The only question reserved, and to be determined upon this final hearing, respects the complainant's claim for rents. We insist that she is entitled to one third of the annual rents and profits which have accrued since the decease of her husband, who died December 26th, 1803. The law gives to the widow dower for her maintenance from the death of her husband, and the party in possession must account to her from the time her title accrued. It matters not that his own title accrued subsequent to her's. He should have secured himself against his grantor. The widow may recover her share of the rents and profits accruing prior to the time of making demand. *Curtis vs. Curtis*, 2 *Bro. Ch. R.* 620, *cited* 2 *Ves. Jr.* 126. No limitation bars the claim for rents upon an assignment of dower. *Oliver vs. Richardson* 9 *Ves. Jr.* 222.

Rogers, for the defendants.

The original defendant, William Doughten, was a purchaser for a valuable consideration and without notice, and in that character is, upon settled principles, entitled to the protection of a court of equity. The allegation of the answer is full on this point, that "the defendant gave a full, fair and just price for the said tract of land without any notice, knowledge or belief that there existed any defect in the title to the same, or that the said tract of land was liable to any claim or demand of dower by the said Martha Dick, or by any other person." Such defence may be taken as well by answer as by plea. *Wyatt's Pr. Reg.* 22: *Guard vs. Saunders* 2 *Ves. Jr.* 454: *Williams vs. Lambe* 2 *Bro. Ch. R.* 264: *Mitford's Pl.* 246.

As to rents and profits—It is settled at law that damages, or rents and profits by way of damage, cannot be recovered before demand made. 3 *Levinz.* 409. In this

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rule equity will follow the law. The demand in this case was the filing of the bill, no other being proved. As the case stands, therefore, the widow is entitled only from the date of filing the bill. But, even had a demand been earlier made, it could not have carried the claim for rents as against the original defendant to a date prior to the accruing of his title by purchase. The cases cited for the complainant were of claims against the heir at law, whose title accrues at the death of the ancestor. Again, the claim to rents from the death of the husband is defective for want of parties. All the intermediate holders of the land should have been brought before the Court. 3 *Bro. Ch. R.* 264. *Non constat* but that the prior holders may have paid the widow's annual rents. They should be here to answer. *Further*, we insist upon the Act of Limitations. At law, the action for mesne profits is limited to six years. So, by analogy, is an account for rents upon an assignment of dower in equity. 5 *Ves. Jr.* 744: 4 *Bro. Ch. R.* 468: 1 *S. & L.* 428. The complainant, though a lunatic, has had a trustee since the year 1807. There has been gross negligence.

Wales, for the complainant, in reply.

It is to late to take the defence of a purchase for value, without notice. There is no allegation in the bill putting this matter in issue. What is stated is only by way of recital. It is not, as it should have been, insisted upon as a defence against the equity of the bill. Throughout a long course of proceedings, involving the trial of an issue at law, this question has not before been raised. It is now too late. The dower has been already decreed, and assigned in execution of the decree. Were the question open, a purchase without notice would be no bar against a lunatic. Upon the proofs it does not appear that Doughten was without notice, but the contrary.

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Opinion :—payment of purchase money, how to be averred.

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As to the widow's share of rents, she is entitled from the accruing of her title, and is not restricted to the time of demand made. She was a lunatic, incapable of making a demand, and her trustee had no knowledge of her title. The act of limitations does not apply, not being insisted upon in the answer.

RIDGELY, CHANCELLOR.—It is now for the first time objected in argument for the defendants, that William Doughten, was a purchaser without notice, for a valuable consideration. Had exceptions been taken to the answer it might have been doubted whether it was sufficient. After deducing the title from James Dick to Amasa Smith, it is then stated that "the said Amasa Smith, by a certain "deed of bargain and sale, duly executed by the said "Amasa Smith and Lucretia his wife, bearing date the "twenty first day of March, in the year of our Lord, one "thousand eight hundred and fourteen, sold and conveyed "the said tract to this defendant, his heirs and assigns; "that this defendant gave a full, fair, and just price, for "the said tract of land, without any notice, knowledge, or "belief that there existed any defect in the title of the "deceased, or that the said tract of land was liable to any "claim or demand of dower by the said Martha Dick, or "of any other person." A plea of purchase for valuable consideration, without notice, must aver the consideration and the actual payment of it. *Mitford, Pl.* 216; and Mitford cites, *Hardingham vs. Nicholls*, 3 *Atk.* 304, and *Maitland vs. Wilson*, 3 *Atk.* 814. In the latter case the defendant pleaded the purchase deed, the several sums which were the consideration, and among the rest, a sum of £4,958, money really paid. Lord Hardwicke says, "it "is pleaded in such a manner that it seems rather a recital "of the purchase deed; whereas, it ought to have been "pleaded distinctly and separately from the recital; and it "should have been averred by the plea, that the sum

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" mentioned as the consideration in the deed was really and " *bona fide* paid. This being a plea to the relief, and not " to the discovery, if it was directed to stand for an answer, " without the words, " with liberty to except," it would " be establishing it as a good answer; and therefore to " prevent this, it is necessary these words should be added." That case shows that in an answer the consideration money must be averred to be paid, distinctly from the deed. And from 1 *Harrison's, Ch. Pr.* 224, it appears necessary to set forth in the answer, that the purchase was made for a real and valuable consideration in money paid. In *Gilb. Eq.* 57–58; *Mitford's, Pl.* 215–216; *Sugd. on Vend.* 553, 558, this subject is treated pretty much at large in relation to pleas. And it is evident from the case of *Maitland vs. Wilson*, that the answer must be full and particular; and, indeed, where the defence is made by answer, without a plea, it is necessary that there should be the same precision, and that all the matters making the defence should be as clearly and as explicitly stated, as in a plea. In this answer the defendant alleges that he gave "a full, fair and just price" for the said tract of land; but whether he ever paid a valuable consideration, or whether this price was given in money, or by exchange of lands, or in any other article, does not appear. A settlement in consideration of marriage is equivalent to a purchase for a valuable consideration and may be pleaded in the same manner. *Mitf. Pl.* 218; *Rep. Temp. Finch.* 9. But then the plea must set forth the settlement and the lands comprised in it, with sufficient certainty. *Mitf. Pl.* 219; *Atk.* 52. Even in the deed of Amasa Smith, said to have been made to Doughten, no valuable consideration is mentioned; and in pleading a deed of bargain and sale, if money or a valuable consideration i snot shown, it will be bad on demurrer. 2 *Com. Dig.* 66, *Bargain and sale.*(*B.* 12.) And in pleading a release in Chancery, the defendant must set out the consideration upon which the release was made. *Mitf. Pl.* 209. In this case

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it is the essence of the defence, that a valuble consideration was paid by Doughten. This should not be shown only by recital of the deed; but according to *Maitland vs. Wilson*, 3 *Atk.* 304, it should have been distinctly averred separately from the recital of the deed. The phrase, "a full, "fair and just price for the land," may mean any adequate compensation, distinct from a valuable consideration.

However, this answer has not been excepted to, and it will be here taken as sufficient. It is now to be considered whether any proof has been made that William Doughten, gave a full, fair and just price for this land; for the replication puts the defendant upon proof of his answer. 1 *Harrison's Ch. Pr.* 407: *Cooper's Equity*, 328. And so as to a plea. 3 *P. Wm.* 94. And the purchase for a fair price should be proved distinctly from the deed of Amasa Smith. That might be good evidence for the payment of any consideration therein mentioned between Smith and Doughten; but it is not proof as between Doughten and Dick's widow, nor between Doughten and any third person.

On reading the depositions of the witnesses taken on behalf of the complainant, some of these speak of having heard that Doughten paid $3,000.00, for the lands; and one of them heard Doughten say so; but the declaration of Doughten, and the hearsay of others, is not evidence, and amounts to no proof of the payment by Doughten of a full, fair and just price for the land. Consequently, as there is no such proof, the defendant has failed in establishing that fact, and of course a final decree must be made for the complainant.

I might here close this part of the case; but two other points were made in the argument. *First*, on the part of the complainant, it was objected that the defendant could not make the defence, *by answer*, of his being a purchaser for a valuable consideration, without notice. The *second* point was, whether the defendant can avail himself, by

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Opinion:—defence of purchaser may be by answer.

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plea or answer, of his being a purchaser for a valuable consideration without notice, *as against a claim of dower* in the complainant.

First, I think a defendant may avail himself of this defence by answer as well as plea. The following authorities support this opinion:—1 *Harrison's Ch. Pr.* 244: *Harris vs. Ingledon*, 3 *P. Wms.* 91, 95; 2 *Ves. Sr.* 492. Lord Hardwicke says, in *Chapman vs. Turner*, 1 *Atk.* 54, "the defence "proper for a plea must be such as reduces the cause to a "particular point, and from thence creates a bar to the "suit, and is to save the parties the expense of an examination; and it is not every good defence in equity that "is good in a plea, for where the defence consists of a "variety of circumstances, there is no use of a plea; the "examination must still be at large, and the effect of allowing such a plea, will be, that the Court will give "their judgment on the circumstances of the case before "they are made out by the proof." In addition, Lord Redesdale's *Treatise on Pleadings*, 246, may be consulted on this subject. The defence in this case might, possibly, have been better made by a plea and by answer in support of the plea; but I will not enlarge on this subject.

The *second* might have been much the most important point; but from the failure of proof in the defendant, it is not of the first consideration in the cause. However, I shall not pass it by without notice. In *Williams vs. Lambe*, 3 *Bro. Ch. Rep.* 264, which was a bill for dower, and in which the defendant pleaded to the discovery and relief that he was a purchaser for a valuable consideration, without notice of the vendor being married, Lord Thurlow said, "the only question was, whether a plea of purchase "without notice would lie against a bill to set out dower; "that he thought where the party is pursuing a legal title, "as dower is, that plea does not apply, it being only a bar "to an equitable, not to a legal claim." He therefore overruled the plea. Mr. Park, in his *Treatise on Dower*, 328,

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says, the case of *Williams vs. Lambe* may be supported on its particular circumstances, on the ground that the plea covered too much, being to the relief as well as to the discovery. The dowress had a right to recover against the purchaser at law, and if it be established that a court of equity has a concurrent jurisdiction to assign dower, such a plea to the relief would appear to be inexplicable; although it might be good to the discovery, since the relief prayed is not the assistance of the Court to enable the dowress to make good her title at law, but merely to give her the effect of a recovery at law. It is, indeed, noticeable that the observations of Lord Thurlow seem distinctly addressed to the plea, as a plea to the relief, and his omitting to intimate that such a plea might be good as to the discovery, may possibly be accounted for by the consideration that in a case so circumstanced, a plea to the discovery would almost unavoidably be over-ruled by the answer. Now, in the case of *Williams vs. Lambe*, I do not perceive the ground for Mr. Park's distinction; for as the case is reported by Brown, although Lord Thurlow's remarks were addressed to the plea, yet they distinctly state that the plea did not apply as a bar to a legal claim; that dower was a legal claim, and therefore the plea was over-ruled. But suppose Mr. Park's distinction to be correct, this answer does not object to making the discovery; and it does state the several deeds of conveyance, and makes a full discovery as to the title; and then, as I clearly understand it, the fact that the purchase for a full, fair and just price, without any notice, knowledge or belief that there existed any defect in the title, or that the said tract of land was liable to any claim or demand of dower by the said Martha Dick is opposed as a defence to the relief. This is a legal, not an equitable title, and I should decree in favor of the complainant, had the defendants supported their answer by proof, unless the admission of the sufficiency of the answer by not excepting to it might have

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interposed a difficulty. As to the rents and profits, the decree will be confined to the 21st of March, 1814, the time of the purchase made by William Doughten. The other purchasers are not parties; and whether the arrears of rent, or anything, was paid to this complainant previous to Doughten's purchase does not appear. If the complainant wished to go back to the death of the husband, all the purchasers antecedent to Doughten should have been made parties. As that has not been done, the account for the arrears of rents and profits will be limited to the date of his purchase. The Act of Limitations has not been pleaded nor insisted on in the answer, and therefore it can have no effect.

ELIZABETH GILDER,

vs.

UNITY GILDER and REUBEN GILDER, administrators of JOHN GILDER, deceased, and DAVID MARVEL, administrator, *d. b. n.*, of HENRY GILDER, deceased, (which said JOHN and HENRY were executors of REUBEN GILDER, dec'd), and BATCHELDER CHANCE and ABSALOM GIBBS.

New Castle, July T. 1827.

A plea or answer, relying upon the equitable defence of a purchase for a valuable consideration, without notice, must set forth the consideration,—of what it consisted,—and must aver the actual, *bona fide*, payment of it, independently of the usual recital of payment in the deed. Also, the plea or answer must deny positively the fact of notice of the complainant's title or claim previous to the execution of the deed; and must deny every circumstance, charged in the bill, from which notice might be inferred. Notice must be denied, though not charged in the bill.

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Statement of the case.

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This defence may be taken either by plea or answer; but a denial of notice or fraud, charged in the bill, should be by answer also, in order that the complainant may be at liberty to except to its sufficiency.

A testator by will directed that his 'just debts and burying expenses be "paid" by his executors. He devised to his two sons his whole real estate, 'to them and their heirs, in equal moieties forever; *and also all his personal estate after paying the legacies in the will mentioned.*" *Held*, upon the construction of the will, that the legacies were not charged upon the real estate devised to the sons.

BILL IN EQUITY FOR A LEGACY.—This bill was filed to recover a legacy of £100 bequeathed to the complainant by the last will and testament of her father, Reuben Gilder, dated March 17th, 1775. The testator bequeathed sundry legacies, among which was a legacy to the complainant of £100, to be paid "on her arrival to lawful age or day of "marriage." The real estate of the testator was devised to his two sons, Henry Gilder and John Gilder, whom he appointed executors. After the death of the testator, in April, 1775, the will was proved and letters testamentary thereon granted to Henry Gilder and John Gilder. Henry Gilder, one of the executors, died intestate on the 1st of June, 1789, and administration of his estate was granted to Susannah Gilder and James Miles: afterwards, upon the death of both Susannah Gilder and James Miles, administration *de bonis non*, of the estate of Henry Gilder, deceased, was granted to David Marvel, one of the defendants. John Gilder, the other executor of the will of Reuben Gilder, deceased, died on the 1st of October, 1802, and administration of his estate was granted to the defendants, Unity Gilder and Reuben Gilder. After the death of the testator, Henry Gilder and John Gilder, the devisees of his real estate, entered into possession thereof; and afterwards John Gilder, by deed dated the 30th of May, 1776, conveyed his interest in the said real estate to Henry Gilder, who became sole seized thereof. After his death the real estate was sold, under two several orders of the Orphans' Court for New Castle County, for the payment of his debts.

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One of said orders was granted by the Court in the year 1789, to Susannah Gilder and James Miles, as administrators of Henry Gilder, deceased; pursuant to which order about seventy-five acres, part of said real estate, was sold to Absalom Gibbs, one of the defendants, and the sale being returned to and confirmed by the Court, the land so sold was conveyed to Absalom Gibbs, by a deed from the administrators dated the 26th of February, 1790. The other of said orders of sale was granted by the same Court, in the month of September, 1816, to David Marvel, as administrator, *d. b. n.* of Henry Gilder, deceased; pursuant to which order the residue of the real estate was sold to the defendant, Batchelder Chance; and the sale being returned to and confirmed by the Court, the land so sold was conveyed by the administrator, *d. b. n.* to Batchelder Chance, the purchaser.

The material parts of the will of Reuben Gilder, dec'd, out of which the controversy arose, were as follows:

"*First.* I do direct that my just debts and burying "expenses be paid by my executors hereafter named.

"*Item*—I give and bequeath unto my two sons, Henry "Gilder and John Gilder, the whole of my lands, that is "the plantation and land whereon I now live, as also my "right to lands in Cecil county, in the Province of "Maryland, to them and their heirs, in equal moieties for-"ever; and also my personal estate, after paying the leg-"acies hereinafter mentioned.

"*Item*—I give and bequeath unto my daughter, Elizabeth "Gilder, the sum of £100, to be paid unto her on her ar-"rival to lawful age or day of marriage; and my will also "is, that my son, John Gilder, shall at his own expense "raise and educate my said daughter, Elizabeth."

The bill, after setting forth the general facts above stated, alleged that Henry Gilder and John Gilder, as executors of the will of Reuben Gilder, dec'd, took pos-

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session of the personal estate of the testator, to an amount sufficient to pay all his debts and funeral expenses, and also the legacy of the complainant; that they wasted the personal estate, and never accounted therefor; that the legacy of the complainant was by the terms of the will charged upon the real estate devised to Henry Gilder; that said real estate consisted of a farm of about two hundred acres, situated in Kent county, which farm was of a value greater than the amount of the legacy. The bill further alleged that the complainant was born on the 1st of October, 1772, and is consequently above the age of twenty one years, and entitled to payment of the legacy. The bill prayed that the representatives of the estates of Henry Gilder and John Gilder,dec'd, who were the executors of the will of Reuben Gilder, dec'd, might come to an account of the said testator's personal estate and pay the said legacy, or that, in default of personal assets of the testator to pay the same, the said legacy should be decreed to be a charge upon the real estate devised to Henry Gilder and John Gilder, and be raised by the sale of the same, or of some part thereof.

The answers of David Marvel, adm'r., *d. b. n.*,of Henry Gilder, dec'd, and of Reuben Gilder, one of the administrators of John Gilder,dec'd, severally admitted that Henry Gilder and John Gilder were executors of Reuben Gilder, dec'd, and that as such they received the personal estate of the testator. These defendants stated that they had no knowledge of any account having been passed by the said executors, but they believed that the executors had faithfully performed their duties, and had not wasted or misapplied the assets received by them. These defendants admitted the allegations of the bill touching the death of the said Henry Gilder and John Gilder, respectively, and the administration raised upon their respective estates. Also, these defendants admitted the devise of the real estate to said Henry Gilder and John Gilder, the convey-

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ance by John Gilder of his interest therein to Henry Gilder, and the alleged sales and conveyances made of parts of the same, under orders of the Orphans' Court, to the defendants, Batchelder Chance and Absalom Gibbs, respectively. These defendants further alleged, by way of defence, that they believed the legacy of the complainant had been paid many years before, though they had no voucher of the fact of payment; that the estates of the said Henry Gilder and John Gilder had been administered, without any demand or notice on the part of the complainant of her said legacy; that these defendants had no knowledge whatever of any claim on the part of the complainant until the filing of this bill; that twenty-seven years had elapsed between the arrival of the complainant at age,—on which event the legacy became payable, and the filing of this bill; and these defendants insisted upon the lapse of time as a bar, in equity, to the complainant's demand.

Unity Gilder, who was co-administrator with Reuben Gilder of John Gilder, dec'd, being a non-resident of this State, and not having appeared in the cause after publication made under the rule of the Court, the answer of Reuben Gilder was, by consent of counsel, taken to stand as the answer of both administrators.

The answers of the defendants, Batchelder Chance and Absalom Gibbs, severally admitted the facts set forth in the bill touching the death of Reuben Gilder, the probate of his will, the bequests therein made to the complainant, and the devise of real estate to Henry Gilder and John Gilder; also they admitted the granting of letters testamentary upon said will to Henry Gilder and John Gilder, the conveyance by John to Henry of his interest in the real estate devised to them, the death of Henry and John respectively, and that administrations were raised upon their respective estates as in the bill was set forth. These defendants believed that the personal estate of the testator,

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Reuben Gilder, was sufficient to pay his debts and the legacies bequeathed by his will. They had no knowledge of any accounts having been passed by the executors, but they believed that the executors had performed their duty, and that the legacy of the complainant had been paid. The defendants severally admitted that the real estate devised to Henry Gilder and John Gilder, and of which, under the conveyance by John of his interest therein, Henry Gilder had become sole seised, was after the death of Henry Gilder, sold by his administrators under two several orders of the Orphans' Court, for the payment of his debts, and that said real estate was purchased by these defendants severally, that is to say, that a tract of seventy-five acres, part of the real estate, was purchased by the defendant, Absalom Gibbs, for the sum of £200, 15s. at the sale made by Susanna Gilder and James Miles, administrators of Henry Gilder, dec'd; also that another tract of two hundred acres, the residue of said real estate, was purchased by the defendant, Batchelder Chance, for the sum of $400.00, at the sale made by David Marvel, adm'r., *d. b. n.*, of Henry Gilder, dec'd; and that the lands so purchased were duly conveyed to the said defendants who still held the same. And these defendants alleged, by way of defence, that the complainant had never given to these defendants respectively any notice of her claim against the said lands, nor had she ever made any demand, other than by the bill filed in this cause, upon either of these defendants, for her said legacy. These defendants, however, did not by their answers allege that they had purchased *without any notice or knowledge whatever of the complainant's claim*, or of the legacy bequeathed to her by the will of Reuben Gilder, dec'd; nor did they distinctly aver that they had *in fact paid the consideration* mentioned in the respective deeds for the lands purchased by them. For a further defence, these defendants denied that the legacy bequeathed to the complainant was, by the

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terms and effect of the will of Reuben Gilder, deceased, charged upon the real estate devised to Henry Gilder and John Gilder. They also insisted upon the lapse of time since the legacy became payable to the complainant as an equitable bar to the relief prayed by this bill.

Issues were joined, and depositions taken by both parties. The cause came before the Chancellor, at the February Term, 1828, for a hearing upon the bill, answers and exhibits, without argument.

J. M. Clayton, *Brinckle* and *H. M. Ridgely*, for the complainant.

T. Clayton, *Hall*, *M. W. Bates* and *E. L. Wells*, for the defendants.

RIDGELY, CHANCELLOR.—There is no ground for a decree in this cause against the representatives of Henry and John Gilder. Their estates were administered without any notice of this demand, and the administrators cannot be liable on this bill,—certainly not after such a lapse of time.

The case then remains to be considered with respect to Batchelder Chance and Absalom Gibbs, the purchasers of the lands alleged by the bill to be charged with the legacy of the complainant under the will of Reuben Gilder.

One question, arising out of the answers of Chance and Gibbs is, whether they have sufficiently set up as a ground of equitable defence that they are purchasers for a valuable consideration, without notice. They indeed allege that the complainant never gave them notice of her claim, and that she never demanded of them this legacy except by the exhibition of her bill in this Court; but this is not a sufficient plea, nor answer, of the want of notice. In *Mitf. Pl.* 215, 216, it is laid down, that in a plea of purchase for a valuable consideration without notice, the plea

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must aver the consideration and the actual payment of it, and it must deny notice of the complainant's title or claim previous to the execution of the deed and payment of the consideration. The notice so denied must be notice of the existence of the complainant's title, and not merely notice of the existence of a person who could claim under that title. If particular instances of notice or circumstances of fraud are charged, these must be denied as specifically and particularly as they are charged in the bill. The special and particular denial of notice, or of fraud, must be by way of answer, in order that the complainant may be at liberty to except to its sufficiency.

In *Bodman vs. Vandenbendy*, 1 *Vern.* 179, which was a bill by a dowress to remove a trust term, the defendant pleaded that he was a purchaser, but he did not deny notice. He was ordered to answer. Notice must be denied, though not charged in the bill. It may be sufficient to deny it by plea or answer, but it is best to deny it by both plea and answer. 3 *P. Wms.* 244, 2 *Ves. Jr.* 458–9: 9 *Ves. Jr.* 32. Chancellor Kent, in 1 *Johns. Ch. Rep.* 575, says, "if a party means to defend himself on the ground that he was a *bona fide* purchaser for a valuable consideration, without notice of a trust, he must deny the fact of notice and every circumstance from which it can be inferred." In *Mitf. Pl.* 216, as before observed, it is stated that the consideration should be averred, and the actual payment of it. And in *Maitland vs. Wilson*, 3 *Atk.* 814, on a bill to defeat a purchase for fraud and imposition, Lord Hardwicke said, "it should have been averred by the plea that the sum mentioned as the consideration in the deed was really and *bona fide* paid, and it ought to have been pleaded distinctly and separately from the recital in the deed."

A plea of a purchase for a valuable consideration is a plea in bar. The want of notice creates an equitable bar; but where the want of notice is not pleaded no bar is presented. And so, in an answer. In *Casson vs. Round*, *Prec.*

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in Ch. 236, the defendant by his answer did not deny notice positively, but evasively; and the complainant could not prove sufficient notice; yet, because the defendant had not denied notice positively, a decree was made against the defendant. The defence made by the answer should be as particular in stating the want of notice and the payment of a valuable consideration as in a plea; for whether it be by plea or by answer, it should present an equitable bar or defence against the recovery.

In this case the defendants, Gibbs and Chance, allege that they purchased their several parcels of land by virtue of certain orders of the Orphans' Court. Suppose they did;—what claim have they to the protection of this Court? They have not denied notice of the legacy, nor have they alleged the payment of a valuable consideration; and, therefore, they have not made a case of conscience, to warrant the protecting interposition of this Court. It may be argued that it is to be inferred from their answers that they actually paid their respective purchase moneys. That may be so; but such a fact is not to be taken by inference. It must be positively averred, independently of the recital in the deed. 3 *Atk.* 813. Because, therefore, these two defendants, in their several answers, have not denied notice of this will, nor of the bequest of this legacy to the complainant, and have not alleged the actual payment of a valuable consideration, no sufficient defence is set up on the ground of their being purchasers for a valuable consideration, without notice; and therefore this case must depend upon the other questions raised, viz; *first*, upon the effect of the will in charging the lands devised to Henry Gilder and John Gilder; and *second*, upon the effect of lapse of time.

The most important question in the cause is whether the lands devised by the will to Henry Gilder and John Gilder, were charged with this legacy.

There are no words in the first clause of the will to

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charge the legacy on the real estate. The legacy is not there mentioned. The testator says:—*First*, "I do direct "that my just debts and burying expenses be paid by my "executors hereinafter named." These words, if debts were not chargeable by law on land, would charge them in this will, if the personal estate, which is the proper fund to pay debts and legacies, were insufficient. So far, no charge is made, nor intention expressed, as to the payment of the legacies. If the testator intended to charge the legacies upon the land it may be asked, why he did not include them, in this clause, with the debts and burying expenses? After devising his real estate to his sons, Henry and John, in fee, he adds these words,—"and also, "all my personal estate, after paying the legacies herein- "after mentioned." The charge upon the real estate, if there be any, must arise out of these words; and I apprehend, that the testator designed by them only to dispose of the personal estate and to charge the legacies upon it. Such an intention might well suit the personal estate of the testator; for, it is agreed by all parties that it was sufficient for the payment of the debts and legacies; and the omission to file an inventory and appraisement shows the views of the executors, and creates a strong presumption of such sufficiency. The two clauses distinctly apply, one to the real and the other to the personal estate. The personal estate only is the antecedent to the relatives, "after "paying the legacies;" for a provision had before been made for the debts, and by no necessity can the words "after paying the legacies," be enlarged to comprehend the real estate, unless that were expressly charged, or the intention of the testator were clear and unequivocal that it should be so. The omission to charge the legacies in the first clause shows that, at that moment or in that part of the will, the payment of the legacies had not been thought of, or that the testator postponed that matter until the personal estate should be disposed of in order that they might

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be charged upon it. I have examined the original will, and it seems to me that when it was first drawn, the words, "and also all my personal estate after paying the legacies hereinafter mentioned," were omitted; and I conclude that it afterwards occurred to the testator to dispose of the personal estate and to charge the legacies upon it. These words appear not to have been written at the same time with the rest of the will, although they are in the handwriting, I conceive, of the same person. The design seems to be so apparent, in view of all these circumstances, that I cannot bring my mind to consider the testator as intending to charge these legacies upon the real estate, or that he has done so. I should hold myself bound by the adjudged cases, if they applied to this will; but, under my view of it, they do not, inasmuch as the testator has expressly charged the legacies upon the personal estate and by no implication on the real estate. That had been fully devised before the payment of the legacies is mentioned; and when he does speak of their payment he connects it with the personal estate, and makes it a personal charge on Henry and John. He does not direct his executors to pay the legacies, nor in any way attach the payment to them other than as having the personal estate given to them.

In this decision I govern myself by the will and do not contradict a single case before cited.

I have not thought it necessary to enter into any consideration of the lapse of time insisted on as a defence, being quite satisfied to decide the case upon the construction of the will.

Let the bill be dismissed.

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Statement of the case.

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THOMAS I. HILFORD, adm'r. of LYDIA HILFORD, his late wife,

vs.

JOHN C. WAY, ELIZABETH DAVIS, THOMAS PETERSON, JOHN W. PETERSON and PETER MASON, adm'r. of MARTHA MASON, his late wife.

New Castle, July T. 1830.

A testator, after bequeathing certain pecuniary legacies, and among others a legacy of $866.66 to a daughter, and one of $1000.00 to another daughter, devised the residue of his estate, including some real estate, to the same daughters, as follows: "My further will is that the remainder of my estate, if any there be, shall be equally divided between my two daughters Martha and Lydia, whom I appoint my executors." Bill filed by the representative of one of the legatees, alleging a deficiency of personal estate and praying that the unpaid balance of the legacy be charged upon the residuary real estate. *Held*, that the legacy was a charge on the real estate.

BILL IN EQUITY FOR RAISING A LEGACY OUT OF REAL ESTATE. —John Way, by his last will and testament, dated August 15th, 1807, bequeathed sundry pecuniary legacies;—among others, a legacy of $866.66 to his daughter Martha, and a legacy of $1000.00 to his daughter Lydia. He then devised the residue of his estate as follows: "My further will is that the remainder of my estate, if any there be, shall be equally divided between my two daughters aforesaid, Martha and Lydia, whom I appoint my executors." The testator left both real and personal estate. After his death letters testamentary were granted to his two daughters, Martha and Lydia, and to Peter Mason, the husband of Martha. A testamentary account was passed in 1816 by Lydia Way, for herself and her sister Martha, which showed a balance of personal estate unappropriated

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Argument.

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of $331.97. Lydia afterwards intermarried with Thomas I. Hilford, who in 1827 passed a testamentary account showing a balance then unappropriated of $749.82. Peter Mason held possession of the testator's real estate from the death of the latter in 1813 until 1818. Lydia Way then came into possession of the real estate and held it, together with her husband, Thomas I. Hilford, after their intermarriage until her death. The rents were only partially accounted for in the testamentary accounts. The unappropriated balance of $749.82, upon the last account, being insufficient to pay the legacy to Lydia, with its interest, this bill was filed for a further account of the rents, and for their application towards payment of the legacy, and that any deficiency should be raised by a sale of the real estate. It appeared from the accounts that the legacy to Martha had been satisfied. The defendants demurred to the bill, and the question raised was upon the construction of the residuary clause of the will above set forth.

Grubb, for the complainant.

This is the case of an implied charge, under the general rule that where, after a bequest of legacies, the residue of all the testator's estate, including real estate, is devised, the residuary devisee takes, not as under a specific devise of real estate, but only what remains after the satisfaction of the debts and legacies. This principle was in England first applied to a direction by the testator for the payment of his debts followed by a general residuary devise. 1 *Vernon*, 411 : 3 *Ves. Jr.* 738. The same rule was extended to legacies, and is now fully settled upon authority. 3 *Ves. Jr.* 551 : 2 *Ves.* 325 : *Prec. in Ch.* 264 : 2 *Dall. R.* 131 : 2 *Binn. R.* 530 : 6 *Binn. R.* 395 : 3 *Yeates R.* 294 : *Powell on Exr's.*, 120.

Wales, for the defendants.

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Opinion.

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To support the prayer of the bill it must appear from the will that the testator *intended* to charge the real estate with this legacy. In the absence of express words to that effect there must at least be strong implication. No such intent appears. It is the case of an ordinary pecuniary legacy, to be paid in money, with no direction how it shall be paid, and with no words to shew an intent to charge the real estate. Nor is there ground to imply such intent, but the contrary. The testator devises the residue to the same two daughters who are the legatees, thereby showing that he thought his personal estate sufficient. He left, in fact, a considerable personal estate and but a small amount of debts. The terms of the will and the circumstances of the testator, so far from creating any necessary implication that he meant to charge his real estate, rather raise the presumption that he thought his personal estate sufficient and had no intention to charge any other fund.

JOHNS, SR., CHANCELLOR :—This is a general demurrer. If any part of the case made by the bill entitles the complainant to discovery, or to any relief, it is the general rule that the demurrer must be overruled and the defendant put to answer. 2 *Madd. Ch. Pr.* 283 : 1 *Swanst. R.* 304. The bill alleges that a balance of the legacy bequeathed to Lydia, late the wife of the complainant, remains unpaid, and that there is a deficiency of personal estate and of the rents of the real estate, exclusive of the rents not accounted for by Peter Mason, who for a time held the property and whose wife was Martha, the other legatee. Upon these facts it may be necessary to resort to a sale of the real estate, or of some part of it. The intent of the testator, to be collected from the whole will, connected with the circumstance that the personal estate was small, is clear, that the legacies were to be paid, if necessary, out of the real estate and so were a charge thereon. The words,

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"the remainder of my estate if any there be," manifestly import that the residuary devisees were only to take the *residue* of the estate after debts and legacies should be paid.

Let the demurrer be overruled, and a rule to answer be entered.

JAMES BOOTH, executor of JAMES BOOTH, dec'd, who was executor of the last will and testament of HENRY PETERSON, dec'd,

vs.

MARIA WARD, WILLIAM H. CRAWFORD and CATHARINE his wife, ANDREW P. READING, HESTER ANN CONNELL, ANNA M. BARROLL, MARY C. BARROLL and WILLIAM BARROLL, administrator of HESTER C. BARROLL, dec'd, also executor of HARRIET BARROLL, dec'd.

New Castle, July T. 1880.

A testator, having provided for the raising of a fund out of certain real estate, by a charge or sale thereof, bequeathed one moiety to his three nieces, the daughters of J. W., and the other moiety to his five nephews and nieces, the children of P. R., "or to such of them as shall be alive when the time of such division shall arrive." The fund was raised by a sale of the real estate, prior to which sale the three daughters of J. W., all died. *Held*, that the moiety bequeathed to the daughters of J. W. did not survive to the children of P. R.

This was an executor's bill filed for instructions touching the construction of the will.

The testator, Henry Peterson, a resident of England, devised certain lands situate in New Castle county, Dela-

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ware, to his nephew, Andrew Jacob Peterson, his heirs and assigns, charged with the payment to his executors of £500, with interest from January 1st, 1797,—to be paid at the expiration of two years after the testator's death should be known in America, and his will produced there. The £500 charged upon the land was bequeathed as follows: "And when the £500 shall be paid, one moiety I give equally to my three nieces, the daughters of Dr. James Wynkoop, Mary, Hester and Harriet Wynkoop; and the other moiety equally to my five nephews and nieces, the children of Philip Reading, to wit: Philip, Maria, Catharine, Andrew and Sarah Reading,—or to such of them as shall be alive when the time of such division shall arrive." The will further provided that upon default in payment of the £500 at the time directed, the devise to Andrew P. Reading should be revoked; and in that event the land was devised to the executors in fee simple, who were directed to sell the same and to divide the net proceeds, as was before provided touching the division of the £500 charged upon the land.

The testator died, February 5th, 1814. In the year 1824 the will was proved in America, and afterwards letters testamentary were granted to Nicholas Hammon and James Booth. The charge upon the land having remained unpaid more than two years after probate of the will, the executors, on July 14, 1827, sold the land for $500. Nicholas Hammon died; afterwards the surviving executor, James Booth, also died. James Booth, the present complainant, is executor of the deceased surviving executor.

The three daughters of Dr. James Wynkoop, nieces of the testator, to whom the first moiety of the proceeds of sale was bequeathed, were all deceased at the date of the sale,—the period of division under the will. Their representatives are among the defendants to the bill. Of the five children of Philip Reading, to whom the other moiety was bequeathed, two died before the sale of the land

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leaving three to survive, viz: the defendants, Maria, widow of Wm. M. Ward, Catharine, wife of William H. Crawford, and Andrew P. Reading.

The three surviving children of Philip Reading claimed to be entitled to the entire fund under the provision for survivorship. Thereupon the executor filed this bill, for instructions by the Chancellor. The answer of the defendants admitted all the facts set forth in the bill, submitting the claims of the parties to the opinion and decree of the Chancellor.

The cause came before the Chancellor, upon the bill and answer, at the July Term, 1830.

Rogers, for the representatives of the daughters of Dr. James Wynkoop.

The will, in effect, divides the fund into two moieties, giving one to the Wynkoop family, the other to the Reading family. There is a vested interest in each family to the moiety bequeathed to it, subject to a survivorship among the members of that family. The provision for survivorship does not extend to the entire fund but to the respective moieties as they are severally bequeathed.

Read, for the surviving children of Philip Reading.

The testator intended the whole fund for the two families, the Wynkoops and Readings, and for no one else. No other objects of his bounty are named or seem to have been contemplated. And as to these families his favor to the legatees named is personal;—it is to those then living and who might be living when the fund should be realized. There was no vested interest in the deceased legatees.

JOHNS, SR., CHANCELLOR.—The intent of the testator seems clear. A moiety of the £500 was intended for the

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daughters of James Wynkoop, and the other moiety for the five children of Philip Reading. There are no words to indicate an intent to give more than a moiety to either family. The reasonable construction of the words, "or "to such of them as shall be alive when the time of such "division shall arrive" is, that the survivors of the Wynkoops shall take a moiety and the survivors of the Readings the other moiety. The words, "such division," certainly intended the division into moieties, and if it meant to include also a sub-division (as it might do), it can only mean to sub-divide one moiety among the survivors of the Wynkoops, and one moiety among the survivors of the Readings; for the moieties were to be divided not equally but in the proportion of three and five. The words "such "of them, &c.," follow after the bequest to the Readings; which raises a doubt whether "them," means both families. But supposing such to be the construction, still as the extent of the testator's bounty seems to have been to give a moiety only to each family, and there are no words to carry the whole to the Readings, in the event of the death of all the Wynkoops, I am of opinion that the survivors of the Readings are entitled to one moiety only; and a decree will be so made. With respect to the moiety bequeathed to the Wynkoops I can make no decree. The period of division was at the sale of the land in 1827, at which time the three daughters of James Wynkoop were all dead. The legacies were not vested so as to pass to representatives of the daughters, and there are no parties to the cause in whose favor any decree for this moiety can be made.

Decree accordingly.

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Statement of the case.

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WILLIAM HUGHLETT,

vs.

MARY HARRIS, JOHN HARRIS AND JAMES HARRIS.

Kent, July T. 1830.

A judgment creditor, having obtained an injunction to restrain the commission of waste upon lands which were subject to the lien of his judgment, afterwards and pending the injunction purchased the premises at sheriff's sale in execution of the judgment. *Held*, that the party committing the waste was not liable in equity to account to the purchaser for the waste committed prior to the purchase.

A title to the land at the time of waste committed is necessary in order to sustain the right to an account for the waste.

The principle that where an injunction is granted to restrain a wrong, equity will give full relief in order to prevent a multiplicity of suits, is limited to cases in which there exists a right in equity to relief for the wrong already done, independently of the pendency of an injunction to prevent future wrong.

BILL FOR AN ACCOUNT OF WASTE.—William Hughlett, in the years 1807 and 1808, sold and conveyed to Richard S. Harris, two tracts of land, situated in Kent county, one for the sum of $1,600.00, and the other for $4,154.50, taking for the purchase money two judgment bonds payable in long instalments. Judgments were entered on both bonds. On the 4th of June, 1827, Richard S. Harris died, having previously conveyed the lands in question to his sons, John Harris and James Harris, two of the defendants. After the father's death the sons proceeded to make considerable alterations in the condition of the property, cutting off the timber, removing fences, &c. They also made some improvements. The purchase money secured to Hughlett by the two judgments remaining unpaid, he filed a bill in equity for an injunction to

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restrain the commission of further waste. The injunction was issued Aug. 25th, 1827. Afterwards, and pending the injunction the premises were sold at sheriff's sale, in execution of the judgments, and was purchased by Hughlett for $1,825.00. Hughlett took a deed from the sheriff dated October 21st, 1828. The bill upon which the injunction was ordered prayed additionally a decree that the defendants, John Harris and James Harris, should account and make satisfaction for the waste committed. Mary Harris was joined in the bill as the widow of Richard S. Harris.

Depositions on both sides touching the waste committed were read at the hearing. On the part of the defendants testimony was adduced to shew that on the whole the property was improved in value by the acts complained of.

The answer of the defendants relied chiefly upon an objection to the jurisdiction of the Court to relieve the complainant who, at the filing of his bill, was without title to the land. The answer alleged, as a further defence, that by the acts complained of in the bill the property had been benefited.

Issues were joined and depositions taken, proving the waste. On the part of the defendants there was testimony tending to shew that the property had been, on the whole, improved in value by the defendants, John and James Harris.

The cause came before the Chancellor, at the July Term, 1830, for a hearing upon the bill, answer and depositions.

M. W. Bates and *H. Stout*, for the complainant.

The question is whether the Court has jurisdiction to decree an account and satisfaction for the waste, the complainant not having title to the premises when the waste was committed. We rest the jurisdiction on three grounds:

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Argument.

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1. The Court has unquestionable jurisdiction to restrain waste by an injunction, in order to the protection of a lien on the premises. Having the case thus before it, the Court will decree full relief, to the extent of an account and satisfaction for the waste done. The jurisdiction proceeds upon the ground of preventing a multiplicity of suits. 1 *Madd. Ch. P.* 149 : 2 *Chanc. Cas.* 37 : *Francis' Maxims* 42 : 3 *Atk.* 381 : 1 *Ves. Jr.* 81 : 1 *Johns. Ch. Rep.* 145. In the latter case an issue was directed to ascertain damages ; for which the Court has power, if requisite.

2. The Court may relieve on the ground of *fraud.* Here is a large debt, on which not so much as interest has been paid in full, and the premises in question are the only security. The defendants, taking advantage of the creditor's indulgence, have reduced the value of the security with notice of the lien. They must be taken to have had notice of a lien of record.

3. The defendants are liable to account as executors *de son tort*, having cut and converted the timber, in the absence of any administration upon the estate of Richard S. Harris.

John M. Clayton, for the defendants.

1. This is not a case of waste. The complainant had no title to the land. Waste is an injury done to the inheritance of another. The inheritance was in the defendants at the time of the acts complained of. The timber was their own and they had a right to cut it. At all events, though an injunction may lie at the suit of a judgment creditor to restrain future waste, a court of equity has no jurisdiction to decree an account for the waste committed. None of the cases cited go to that extent. But, 2.—The suit is without equity under the circumstances. The complainant sold the premises to Richard S. Harris at a large price and has by the sheriff's sale got

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them back again. And the evidence shews that by the acts complained of the property was improved, and came to him worth more than when he sold it. There is no equity to support a decree for an account, even if the Court had jurisdiction for such relief.

JOHNS, SR., CHANCELLOR.—In this case there is now no question to be decided as to the right of having an injunction to prevent waste. It was obtained and has had its designed effect to prevent future wrong, or waste, as it is called. The injunction was permitted to continue, and since it was issued the complainant has obtained the title to the land and the possession.

The complainant, having restrained the commission of further waste, as it is called, now seeks to obtain an account of the waste done for the purpose of thereafter obtaining a decree for the amount of the damages. The question to be decided is whether the Court will decree an account to be taken in such a case as this.

The acts alleged to be done and complained of were done by the persons having at the time the fee simple title to the lands, and the person now claiming an account *then* had no title.

I can find no case in the books to warrant a decree for an account in such a case as this, and am of opinion that the complainant is not entitled to such a decree.

The principle laid down in 1 *Madd. Ch. Pr.* 149, that where an injunction is obtained to prevent a wrong, a court of equity will, in order to prevent a multiplicity of suits, proceed to give full relief, must be understood to apply to those cases where the party has not only a right to the injunction to prevent future wrong, but also to have relief in a court of equity for the wrong previously done. To extend the principles further would bring many cases into chancery, which properly belong to the courts of common law.

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Syllabus.

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The jurisdiction of the Court of Chancery in England has been much enlarged by modern decisions, and if those decisions are to be considered law in this State, they will prostrate the limits fixed by the Act of Assembly, (*Del. Dig.* 103,) to the powers of our Court of Chancery. When it becomes necessary, I shall not hesitate to express an opinion as to the limits of chancery jurisdiction in this State. But in this case that will be unnecessary, because I am of opinion that, even in England, the Court of Chancery would not decree an account and afford relief to this complainant, he having no title to the land at the time when the acts complained of were done by a person who then had the fee simple.

The second ground of defence,—the want of equity in the circumstances,—it is unnecessary to consider.

Bill dismissed with costs.

JOHN E. BURTON and ANN B. BURTON,

vs.

ROBERT L. HARRIS, EX'R. of ISAAC SHORT, dec'd.

Sussex, July T., 1830.

I. S. intermarried with a female guardian of two minors. Certain goods, in the purchase of which the funds of the minors had been invested, were sold by the husband, and a bond for the proceeds taken in his own name. Afterwards, he joined the wife in passing guardian accounts, in which they were charged jointly with the funds of the wards. *Held*, that the husband was liable in equity to account to the wards.

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In such case equity will follow the funds, and the guardian accounts are evidence that these have come to the husband's hands.

The liability of the husband is not discharged by his death, but his estate becomes bound.

BILL IN EQUITY.—The complainants were children of Cornelius Burton, dec'd, and as his legal representatives were entitled to certain real and personal estate. Their mother, Sarah Burton, became the administrator of the decedent and guardian of the children. There came to her hands, as guardian, certain funds of her wards, composed of rents of their real estate and their share of the deceased father's personal estate. These funds she invested in the purchase of merchandise, with which she set up a store in partnership with Elisha Burton. In this condition of the estate of the minors the mother, their guardian, on the 23rd of Feb., 1823, intermarried with Isaac Short. On the 4th of March, 1824, the partnership was dissolved, and by agreement between Short and Burton the goods were relinquished to the former. Short took possession of the stock and sold it to a purchaser, taking for the purchase money a bond in his own name. Afterwards, on the 11th March, 1825, Short and his wife passed guardian accounts, in which they were charged jointly with the funds received, to wit; an account of the guardianship of John C. Burton, shewing a balance due him of $2126.88; and also an account of the guardianship of Ann B. Burton, showing a balance due her of $559.54. Afterwards Isaac Short died, and subsequently to his death Sarah Short passed guardian accounts, in which she charged herself with the balances shown on the former accounts passed by herself and her deceased husband, Isaac Short, jointly. The accounts passed by Mrs. Short after her husband's death, were signed by her with a reservation, stating that she had not in fact received the former balances from Isaac Short's estate. Isaac Short died seized of considerable real and personal estate,

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sufficient to answer for the balances due upon the guardian accounts in which he joined. This bill is filed against his executor, Robert L. Harris, to recover those balances out of his estate. The facts in the cause were not in controversy, and the case turned upon the question of Short's responsibility in equity, arising out of his having received the stock in which the funds of the wards had been invested and his having joined in the guardian accounts.

The bill was filed Feb. 24, 1827, and on the 8th of Feb., 1828, the late Chancellor Ridgely made a decree for an interlocutory account, to be filed by the defendant, with leave to the complainants to except, and also for the examination of witnesses on both sides. An account being filed under this decree, exceptions were taken by the complainants for the omission to charge the defendant, as Short's executor, with the balances due upon the guardian accounts before referred to. The case then came before the present Chancellor for argument upon the exceptions. The Chancellor treated the interlocutory decree as not being conclusive of any right between the parties, and proceeded to hear the case upon the general question of the defendant's responsibility under the guardian accounts.

Robinson, for the complainant.

The guardian accounts, of themselves, fix the liability of Short's estate. By joining in them he bound himself and his estate after him for this debt, as the debt of the wife. But it is sufficient to rest Short's liability upon the fact that the money of the wards, which we seek to recover, came to his hands. Of this fact the guardian accounts are an acknowledgment, and are conclusive against him. These accounts, as they stand, bind us, and if so, Short as a party to them must be equally bound. 1 *Stark. Ev.* 309, 312. But, were we to go behind the accounts, it is proved that

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as a matter of fact, Short received the wards' funds. It is in evidence that their money was invested in the purchase of certain store goods, which Short sold, and took to himself the purchaser's bond for the price. This is like the case in 1. *Eq. Cas. Abr.* 60. Now, it is a principle of equity that no conversion of a trust fund shall defeat the recovery of it by the party entitled, so long as it can be traced. Whoever receives it shall answer for it. *Dig. of Chanc. Cas.* 200. This principle renders Short's estate liable.

J. M. Clayton and *E. D. Cullen*, for the defendants.

Our defence is two-fold. 1. We deny that there is any liability of Short's estate, upon either of the grounds relied on for the complainant. With respect to Short's responsibility, as a legal consequence of the marriage, for this debt of his wife, such responsibility was extinguished by his death, upon the happening of which the debt survived against her alone. Such is the settled rule of law. 3 *P. Wms.* 410: *Cas. Temp. Talbot*, 173: 1 *Sch. & Lef.* 263. Then, as to the effect of Short's joining in the guardian account. He joined only in his character as husband of the guardian, the person really responsible, and not as charging himself. Such is the general practice, and these accounts are in the common form. In accordance with this view it was that Mrs. Short, after her husband's death, passed further guardian accounts which charged her alone; nor is the legal effect of these last accounts at all varied by her statement in them that she had not in fact received the money of her wards. Further, we deny that Short became personally chargeable, as having in fact received the money of these complainants, upon the principle that equity will follow a trust fund. The goods for which the bond of the purchaser was given belonged to the children and not to Short. Therefore, the bond as to him was without consideration and void. Besides, we deny that the money, even if received by Short, could be followed.

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That would be to strain the equitable principle too far, and would carry it to the extent of following the goods themselves into the hands of an innocent purchaser.

2. Our second defence is that the complainants have an ample remedy at law by suit against Mrs Short and her sureties in the guardian bond; and there is no need of equitable interference. Mrs. Short is the party primarily liable, and this suit is in effect one for her benefit, though instituted in the name of her wards. At all events, she is interested in the suit and should have been made a party. For, she is liable over to the executor of Short, should there be a decree against him. The bill is defective in omitting to join her as a defendant. *Cooper's Eq. Pl.* 33. Even if Short did receive the money, Mrs. Short is the party properly liable to the wards, with a remedy over for her against Short's estate. 4 *Bro. Ch. Rep.* 336: *Coop. Eq.* 174: 1 *Harrison's Ch. P.* 77.

Robinson, in reply.

If Mrs. Short be deemed a necessary party she can be made so at any time, even at the hearing. The case of the husband being discharged by his death from liability for the wife's debts is where he has done no act in his lifetime to make them his own. This Short has done in the present case, by joining in the guardian accounts. They are his accounts, not the wife's. Her signing them is a nullity. Nor is his liability, once fixed by these accounts, discharged by her passing separate accounts after his death; especially as the latter shew, on their face, that she had not received the money. It is not true that we have an adequate remedy at law. The surety is not good, and the debt cannot be got out of Mrs. Short. At all events we have a right in equity to follow the fund, and with respect to that, Short's liability was to the minors, and the suit is properly in their name.

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Opinion.

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JOHNS, SR., CHANCELLOR.—I am of opinion that Isaac Short's estate is liable for the balances of the two guardian accounts passed by him and his wife, 11th March, 1825, and for the rents received by him during the cover ture and not accounted for, subject to such disbursements made by him, or by his executor, for the benefit of the wards as have not been allowed in the guardian accounts.

The act of passing the accounts by Short is of itself sufficient to charge him in the absence of other proof. It is true there is much other proof, but it does not negative the existence of a consideration for charging himself with the whole of the balances due the wards. On the contrary, it satisfactorily appears that after his marriage with Sarah, the guardian, sufficient property or funds, which equitably belonged to the minors and should be applied to pay them, came to the hands of Isaac Short. He was therefore, in equity and good conscience, bound to pay the minors the balances due to them. The signing of the guardian account by the wife was a nullity. It can have no legal effect as to her; but he was bound by his act in charging himself. Suppose they had joined in a bond or recognizance. It would have bound him and not her. The death of Isaac Short cannot operate to destroy the liability in equity. It is argued that the remedy should be by suit at law. But it is doubtful whether there could be a recovery at law against the executor of Short, who was not then guardian. It may even be doubted whether the complainants could, at law, sue the sureties for money which in fact came by the marriage to the hands of Isaac Short. It would at all events be inequitable that his death should exonerate his estate and make his widow, Sarah, the guardian, or her sureties, liable to pay the debt when the funds out of which it should be paid have been taken from her, and it is to be presumed now constitute a part of Isaac Short's estate.

It is certain that a court of equity will always allow a

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Syllabus.

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creditor to follow the fund, if it can be traced, and will make it liable. Isaac Short's estate should, on principles of equity, be responsible to the extent of the property which came to his hands and which ought to be applied to pay the minors. The passing of the guardian accounts is evidence presumptive that the funds came to his hands. There is, therefore, sufficient ground for a decree charging his estate to the extent of the funds received by him, subject to disbursements properly made for the benefit of the minors. Let the amount for which the decree shall be entered be ascertained by the counsel.

Decree accordingly.

LUKE LOFLAND,

vs.

JOSEPH MAULL.

Sussex, July T. 1880.

A purchaser of land, under a contract for a conveyance, claimed to set off against his bond for purchase money certain payments which he had made in satisfaction of debts due from the vendor to third persons. The contract did not, in terms, authorize the purchaser to make the payments for which credit was claimed, nor was there proof of any order or authority from the complainant specifically applying to the payments made. *Held*, that in this case there was proof, to the satisfaction of the Chancellor, of a general authority to the purchaser to apply purchase money to debts of the vendor. *But held further*, that such authority was not requisite to entitle the purchaser to the benefit of the payments,—that the complainant, upon the general principle that he who seeks equity must do equity, was bound in this court to allow just payments made for his benefit. *Held also*, that upon exceptions to a sworn account of the purchase money, filed by the purchaser in answer to the prayer of the bill, he was not under the *onus* of proving the existence of the debts paid by him and sought to be set off.

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Statement of the case.

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In this case the purchase money was payable by instalments *in futuro*. There was no stipulation in the contract of sale with respect to the time of delivering possession of the land; but after the sale and before the instalments had all become due, the purchaser, with the vendor's consent, entered into possession. *Held*, that he did not thereby become chargeable with interest on the unpaid purchase money from the date of such possession, in the absence of any stipulation to that effect in the contract of sale.

BILL FOR AN ACCOUNT AND A DECREE FOR PURCHASE MONEY. —The complainant, Luke Lofland, by written articles, dated July 1st, 1823, contracted to convey to the defendant, Joseph Maull, certain real estate for the consideration of $2500,00, to be paid in five annual instalments of $500,00 each, the first payment to be made January 1st, 1823. The articles contained no stipulation as to the time when a conveyance should be executed, or when possession should be delivered. Nor was there any stipulation with respect to the payment of interest. The possession was in fact delivered to Maull at the time of executing the articles, the complainant believing, as his bill alleged, that he would be entitled to interest on the purchase money from the delivery of possession; but no agreement to that effect was alleged in the bill, and any such agreement was denied by the answer. On the 7th July, 1824, Lofland executed a deed conveying the title to Maull.

The defendant afterwards paid sundry debts of the complainant, which payments he claimed as credits against the purchase money. He also claimed that he was chargeable with interest on the purchase money only from the time at which it was made payable by the articles. According to this mode of settlement the defendant owed the complainant nothing, but had in fact a little overpaid the purchase money. The complainant was willing to allow to the defendant, as credits, certain judgments and executions, which the defendant had paid, agreeably to a stipulation in the written contract, to the amount of $500,00; but he objected to the allowance of other debts, which the

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defendant had paid without authority. He also insisted upon charging the defendant with interest on the purchase money from the date of the articles, upon the ground that the defendant had from that date held possession of the premises, to which he had no claim, under the articles, until the conveyance of the title. Upon the complainant's basis of settlement a considerable balance was due to him. In this state of the controversy, the present bill was filed March 1st, 1823, praying that the defendant should file an account of the purchase money, and of his payments made in discharge of it, and should be decreed to satisfy to the complainant such balance as should be found to be due to him. After answer filed and issue joined, the late Chancellor Ridgely made an interlocutory decree for an account of all judgments and executions, due from the complainant and paid by the defendant, and also all other his disbursements, distinctly showing what were made upon written orders and what were made without orders, with the dates, amounts, &c. Leave was granted to except to such account when filed, and for the examination of witnesses. The defendant filed an account, in accordance with his claim as above stated, to which the complainant excepted, objecting to the allowance, as credits, of certain debts which had been paid without his order, and claiming to charge the defendant with interest on the purchase money from the date at which possession of the premises was delivered. Depositions were read, on behalf of the defendant, tending to show that the premises sold were of less value than the purchase money; that they were in bad condition; and that the defendant had incurred more expense to put them in order than the rental was worth. It was also proved that, at the time the articles were drawn and executed, nothing was said as to the payment of interest before the purchase money was to become due. Depositions were also read, proving written orders of the complainant in favor of some of his creditors, and tending to prove, by

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the complainant's declarations, a general authority, in the defendant for the payment of the debts.

The case came before the present Chancellor, at the July Term, 1830, upon the exceptions filed to the account of the defendant, and upon the proofs taken.

Robinson, for the complainant.

1. There is not sufficient proof of a general authority to the defendant to apply the purchase money to the complainant's debts; and in the absence of this he can be credited only with the debts paid under the complainant's special order, written or verbal. It would not be permissible to prove the existence or validity of the debts in order to support payments made without authority; for no such issue is triable in this cause. To admit it would be a surprise on the complainant. And were the existence of the debts in question, still the *onus* would be upon the defendant to prove them, and no such proof is in the cause. We cannot be held to prove the non-existence of debts. We object, then, to any credit for the payment of debts by the defendant without the complainant's order.

2. With respect to interest on the purchase money, our claim to it from the date of the articles rests not upon contract, but upon the equity arising out of the defendant's having had possession of the premises before he was entitled to a conveyance under the contract. No time for a conveyance and delivery of possession being stipulated, the defendant was not entitled until he should pay the purchase money. The allowance of interest is a subject lying within the discretion of the Court, depending upon the equities of the case; and such an equity, we insist, is sufficiently supported by the defendant's enjoyment of the property before he became entitled to it under the con-

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Argument for defendants.

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tract. *Sugd. on Vend.* 358: 3 *Dessaus. Rep.* 555: *Jeremy's Equity*, 447.

J. M. Clayton and *Layton*, for the defendant.

1. The proof establishes a general authority to apply the purchase money to the complainant's debts. Two witnesses testify to his own declaration that Maull was to pay his debts. But apart from this, Maull by paying the debts became a creditor in equity, and is entitled to set them off against the purchase money. Nor were we bound, in order to entitle us to the benefit of the debts, to prove their existence. The answer and account are under oath, and are sufficient if not contradicted by two witnesses or by one with circumstances; and there is no evidence against them.

2. We object to the claim for interest. The settled rule is that interest is chargeable, either under contract or for default in payment of the principal. 2 *Burr.* 1081: 1 *H. Blk.* 227: 13 *Vin. Abr. Title. Int.* 499: 1 *P. Wms.* 541: 1 *Madd. Ch. P.* 441: *Sugd. on Vend.* 353, 361. Even if interest may be allowed in a court of equity upon equitable grounds, in the absence of contract, still this case presents no such equity. The possession of the premises was no more than the defendant was entitled to. The contract was for a conveyance within reasonable time, which was in effect for an immediate conveyance. The vendor thus became a trustee for the vendee, and the latter was entitled both to a conveyance and to the possession. Further, whatever effect the delivery of possession might be supposed to have generally on the question of interest, in this case it is proved that there were in fact no rents and profits. The equity therefore is against rather than in favor of interest, on the ground of possession.

Robinson, in reply.

If the defendant is entitled to be allowed for debts paid

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without authority, he is at least bound to prove the existence of the debts. His answer on this point is not responsive to the bill. His allegation that he applied the purchase money to complainant's debts is new matter, and being put in issue by the replication must be proved.

JOHNS, SR., CHANCELLOR.—The bill is filed by a vendor of land against the purchaser for an account and for the recovery of a balance of the purchase money. An account was decreed and taken, from which it appears that the purchaser has paid, within the times mentioned in the written contract, the whole purchase money and $32.32 over. This result depends upon the allowance to the defendant, as credits in the account, of certain debts which he claims to have paid for the complainant, and also upon his not being charged interest on the purchase money before the instalments became due.

The complainant's counsel objects to the account upon two grounds.

First, That a part of the debts, if paid, were paid without authority; and that these being deducted will leave a balance due to the complainant. And he insists that, under the circumstances, a court of equity will give him relief by a decree for such balance.

This ground of objection raises several questions.

1. The first is a question of fact. Were these debts paid with the consent or approbation of the complainant? It is not positively proved that the complainant gave a written or verbal authority in every case; yet, there is sufficient proof to satisfy the Court that there was an understanding between the parties as to the payment of the debts; and, if the debts paid were just debts, it is the opinion of the Court that they ought to be allowed as credits in the account.

It is objected that there should be proof on the part of

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the defendant as to the existence of the debts prior to their payment,—that the complainant cannot prove their non-existence, and that the *onus probandi* is on the defendant. This objection is not sufficient. If difficulty of proof exists, it is from the complainant's own act in prosecuting his claim in a court of equity. It might indeed have been necessary for him to come into this Court for a discovery and to obtain an account to enable him to recover at law. But after an account he might have proceeded at law; and there the *onus probandi* as to the existence of the debts and payments would have been on the defendant. The complainant has chosen to proceed to a final decree in this Court, and the difficulty is one of his own creating. There can be no surprise upon the complainant in this case. The exceptions to the accounts put the matter in issue. It is not necessary to consider precisely how far the account is to be taken as evidence; but being made under oath, in answer to the prayer of the bill, it must have some effect as evidence with respect to matters about which there is no proof to the contrary.

2. But further,—with reference to the allowance of the debts there is another question. Is proof of the complainant's authority for their payment by the defendant necessary? Suppose it to be the case of purchase money ($2,000.00) payable in five instalments, without any stipulation as to how it should be paid. Then, the broad question would be, what is payment? Would it include only debts paid by order of the complainant, or would it not in equity extend to any debt actually due from the complainant and paid by the defendant?

It is sufficient to say that the complainant, having come into this Court for its aid, must do equity. And if debts due from him have been paid, he will be required, in seeking relief here, to allow such payments. This Court will deal with the case upon equitable principles. If the complainant insists upon his strict legal rights under the

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articles of agreement, his remedy is in a court of law. Under this view, his bill, on this part of the case, ought to be dismissed for a want of equity.

Second,—The next objection to the account has respect to the interest. The complainant seeks to charge the defendant with interest from the date of the articles.

This claim is not made on the ground of the written contract; for the terms of the contract do not warrant it. Nor does the complainant's counsel dispute the general rule of law, for which authorities were cited and which to my knowledge has been established law in Delaware for fifty years, that interest can be demanded only from the time mentioned in the agreement.

The interest is claimed to run from the date of the articles, on the ground that the parties so intended, but omitted to insert a provision to that effect in the contract. There is an entire failure of proof on this point. Even if there had been such proof, it would have been necessary to consider whether parol testimony would be admissible for such a purpose.

But the interest is claimed on the further distinct ground that after the sale and before the purchase money was paid, the vendor permitted the purchaser to take possession of the land,—which, it is insisted, implies an agreement on the part of the purchaser to pay interest.

I have examined and considered the authorities cited to this point, and am of opinion that they do not apply to such a case as this. I know of no rule or principle of law out of which such an obligation could arise. It would be against reason and common sense.

The reason assigned for such an obligation is, that the purchaser cannot compel a conveyance until he pays *all* the purchase money; and, therefore, if he gets possession it is a consideration for which he ought to pay interest. This position assumes what is not true in fact. The contract

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is that the complainant shall convey "at the reasonable request" of the defendant. This the law considers to be forthwith or immediately. The conduct of the parties, by the execution of a deed in 1824, before the purchase money had been all paid, is evidence that they understood such to be the nature of the contract.

Again, the ground taken rests upon what is not true as a principle of law, viz; that the obtaining possession is a consideration which creates an equitable obligation to pay interest. Consider the nature and effect of the contract. The defendant became the owner. He had the equitable title. The complainant, if he retained the title, would have been a trustee for the defendant and accountable to him for the profits. It is too absurd a principle to be admitted, and is contrary to equity, that if the defendant took possession of his own property, which it was lawful for him to do, that such an act should make him liable to pay a larger sum for the land than he had agreed to pay; that the legal effect of doing a lawful act—of exercising a right by possessing himself of his own property, should make the defendant liable to pay interest beyond and in contradiction to the express terms of the written contract. I am of opinion that the claim for interest cannot be sustained.

The exceptions to the account must be overruled and the bill dismissed with costs.

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Syllabus.

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JOSEPH BEESON AND THOMAS BEESON, administrators of THOMAS BEESON, deceased,

vs.

JOHN ELLIOTT, executor of REBECCA BEESON, deceased.

New Castle, Feb. T., 1831.

A testator devised as follows; "I give to my dear and loving wife, the "reasonable use of two suitable rooms in the house that we may "happen to dwell in at the time of my decease, whether in town or "country, with suitable provisions in the cellar, kitchen, garden, "necessary house, well or pump: To hold to my said wife for and "during her natural life, with full and free ingress or egress and "regress." After the death of the testator, his widow removed from the house in which he was living at his decease, and to which the rights and privileges devised to her had attached. The premises were for some years occupied and rented by her two sons, the devisees thereof in fee simple, but without any contract for compensation in respect of the widow's privileges. *Held*, that under the devise the widow took such an interest in the premises, that the law would imply a contract to pay a compensation therefor in the absence of an express contract; and that the allowance of such compensation by referees in an arbitration between the widow and one of the devisees, submitting all matters in controversy, was not a mistake in law.

The question of allowing interest upon arrears of an annuity is, in a court of equity, discretionary, – depending upon equitable considerations arising out of the circumstances of the particular case.

An annuity bequeathed to a widow in lieu of dower, for her maintenance, and charged on real estate, payable quarterly, the prompt payment of which was necessary to her comfortable support,—*held*, to be a proper subject for the allowance of interest; and that such allowance by referees, in an arbitration submitting all matters in controversy, was not a mistake in law. Courts of equity have a general jurisdiction to relieve against mistakes in law, committed by arbitrators in the making of awards; but, in the exercise of such jurisdiction, the Courts will relieve only against such mistakes as are *plain, palpable and gross.*

Long acquiescence in an award, without objection made in the court of law to which such award was returned, the arbitration being one

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entered into in a suit or amicable action at law,—*held*, a sufficient ground for a court of equity to refuse its interference, even supposing such a case to be within its jurisdiction.

In the case of an award made in a suit or amicable action at law, pursuant to the Statute of 18 Geo. II. (Digest Delaware Laws, 112), the remedy against irregularity or mistake in the award is in the court of law to which the award is returnable.

Awards under the Statute of this State, made pursuant to a rule of court, with judgment thereon, stand upon a different footing from awards under the English Statute of 9 and 10 William III; and the English decisions under the latter Statute are not in force here.

A party is not, by his having joined in a case stated in a court of equity submitting the question of the validity of the award, precluded from objecting to the want of jurisdiction. The consent of parties cannot give jurisdiction, if otherwise it does not exist.

Where two courts have concurrent jurisdiction of a subject matter, the one which first possesses the cause acquires thereby the right to exercise the jurisdiction exclusively.

Under the Statute of this State of 1726–36, limiting the powers of the courts of equity, our Court of Chancery has no jurisdiction of a case in which there is a "sufficient remedy at law." What *is* a "sufficient remedy at law," in the sense of the Statute is not clearly settled.

CASE STATED IN THE NATURE OF A BILL FOR AN INJUNCTION.—This was a case stated, entered under an agreement that it should stand as a substitute for a bill and answer. It set forth the following state of facts as agreed upon between the parties:

"Thomas Beeson, the elder, grandfather of complainant, being seised in fee simple of a certain farm or tract of land, situated in Brandywine Hundred, and also of a certain house and lot, situated in the Borough of Wilmington, on the 13th of February, 1787, made his last will and testament in writing, whereby he devised, among other things, certain portions of his real estate in Brandywine hundred, and also his house and lot in Wilmington, to two of his sons, viz; Jonathan Beeson, and Thomas Beeson, the father of the complainants. He also devised to his wife, Rebecca Beeson, an annuity of £40 per annum, during her

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Statement of the case.

natural life, payable quarterly, in bar of dower; and charged the said annuity upon the real and personal estate devised and bequeathed to his two sons, Jonathan and Thomas Beeson. He also devised to the widow, Rebecca Beeson, the reasonable use of two rooms in such house, whether in town or country, as they might be dwelling in at the time of his death, together with certain privileges, for and during her natural life. The testator died on the 22nd of March, 1790,—dwelling, at the time of his death, in the house in Wilmington. The annuity of £40, and the use of the two rooms in the house in Wilmington, as devised by the testator, were accepted by Rebecca Beeson in bar of her dower; and in the month of April, 1790, she removed from the house and resided with her two sons, then living together in the country;—with whom she continued to reside until the 4th of May, 1792, and then removed to the house of her son-in-law, John Elliott, the defendant. She resided with him until her death.

Upon the death of the testator, the house and lot in Wilmington came into the possession of Jonathan and Thomas Beeson, who held it without any agreement, arrangement or understanding, whatsoever, between them and the widow, Rebecca Beeson, until the 22nd March, 1799. At that date Jonathan and Thomas Beeson having contracted to sell the house and lot, each executed a judgment bond for $300.00, to the widow, to secure to her an annuity of $20.00, during her life, for her right in the house and lot.

In the beginning of the year 1814, the widow and Thomas Beeson having disagreed as to the sum due from him, for his proportion of the arrears of the said annuity of forty pounds, and also for the arrears of the annuity of twenty dollars secured by his bond,—an amicable action was entered in the Court of Common Pleas, referring all matters in controversy to three referees, by whom an award was made in favor of the widow, Rebecca Beeson, for the sum of $993.23; and the same being returned to the Court of

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Commqn Pleas, was confirmed, without objection, and judgment entered thereon.

Rebecca Beeson and Thomas Beeson afterwards both died, and proceedings at law were taken by the executor of Rebecca Beeson, deceased, to collect from the administrators of Thomas Beeson, deceased, the judgment recovered in the amicable action, as also the arrears of the annuity accrued since the date of the amicable action. Thereupon, this case stated was agreed upon and submitted to the Chancellor, for such decree as, under all the circumstances, should be agreeable to equity.

The referees in the amicable action allowed to the widow interest on the annuity of £40.00, and also allowed $20 per annum as a compensation for her privileges in the house from 1793, to 1799, during which period she had relinquished them to the devisees. The present controversy arose out of these allowances.

J. A. Bayard and *Rogers*, for the complainants.

The complainants seek to have this award set aside or corrected in equity, on the ground of mistake on the part of the referees. Several questions are involved.

1. Was there such mistake?

It was a clear mistake in law, on the part of the referees, to allow interest on the arrears of the annuity. The modern doctrine is that an annuity does not carry interest, in the absence of an express contract to pay it. The doctrine proceeds upon the ground that an annuity is of the nature of interest, and the law does not allow interest upon interest Interest upon an annuity is in the nature of compound interest. 3 *Bro. Ch. Rep.* 489, 494: 2 *Ves. Jr.* 153: 4 *Bro. Ch. Rep.* 320: 1 *Sch. & Lef.* 301. There have been no decisions in this State to control the question, and it must therefore be governed by the English authorities.

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Another mistake of the referees in point of law was the allowance of $20 per annum to the widow as rent or compensation for her right to the two rooms and the accompanying privileges, devised to her by the testator in the house where he should be living at his decease. Her interest in the rooms was a mere personal privilege,—a right of user,—such as she could not sell, and for which she was entitled to no compensation, in the absence of contract with Thomas Beeson.

2. Do these mistakes invalidate the award? and has this Court jurisdiction to set it aside? These are the next questions.

The rule as to the effect of mistake is, that for a mistake in law an award made under a general reference shall be set aside, though not where the reference is a special one, expressly submitting the question of law, or where the reference is made to a professional person. Such is the rule of the common law courts in the case of an arbitration submitted to in a suit pending. 3 *East*, 18; 13 *East*, 356. Courts of Equity exercise the like power over awards made in arbitrations at large, 1 *Ves. Jr.* 365: 2 *Ves. Jr.* 15, 451: 6 *Ves. Jr.* 282: 9 *Ves. Jr.* 364: 14 *Ves. Jr.* 265, 269.

But it will be argued that our remedy was in the Court of Common Pleas, the award being by the Statute made subject to the approval of that Court. *Del. Digest* 112. True, we might have applied to that Court, but the remedies are concurrent. The statutory remedy in the common law court does not oust the general jurisdiction of equity over awards. In the absence of negative words in a statute creating a new jurisdiction, the intention to oust an existing jurisdiction is not to be presumed. In cases of awards under the English Statute of 9 & 10 Will. III, the courts of equity continued to exercise jurisdiction, as previously they had done, over awards made at common

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law. 2 *Ves. Jr.* 451: 14 *Ves. Jr.* 265. There are important reasons for reserving the concurrent jurisdiction in equity. The remedy in a court of equity is more effectual than at law. It can afford discovery. An appeal lies from its decree; whereas the confirmation of the award, at law, is final and conclusive. There are no negative words in this Statute; and, for important reasons enforcing the general principle, the jurisdiction must be taken to continue. The delay of the complainants to seek relief in equity ought not to prejudice their just rights. For it is not a case of inexcusable laches, through which the widow can be supposed to have suffered any injury. It was a case between a mother and her sons, and the delay was to avoid family disputes.

Booth and *Hamilton*, for the defendants.

1. The referees committed no mistake affecting the validity of this award. With respect to interest on the annuity,—the allowance of interest is, in equity, discretionary, depending upon the circumstances of the case; and although, in some cases, such interest on annuities has been denied, yet not so, where the annuity is given for maintenance, and especially if it be charged on real estate. 2 *Atk.* 211: 3 *Atk.* 579: 1 *P. Wms.* 541: 2 *P. Wms.* 163. This is a case of that description. The annuity is given to a widow in lieu of dower, for her maintenance; and it is charged upon the testator's real, as well as his personal estate. It affords, at most, a bare support for the widow; and the delay of payment could not but be presumed to be detrimental to her. No laches, in not receiving it, can be imputed to her. The case is one of strong equitable circumstances in favor of the interest; such as courts of equity have never failed to regard. In *Mary Batson vs. Smith*, in our Court of Chancery in 1819, interest was allowed on an annuity bequeathed to a widow. Next, as

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to the allowance made for the widow's privileges in the house. It appears that the devisees, the testator's sons, rented the house and received the rents therefor. These rents were in part an equivalent for her interest in certain parts of the house. In equity, at least, the widow should be entitled to a just compensation for a right, the full benefit of which the devisees have received. At all events, a court of equity will not interfere to set aside an allowance, already made, of a compensation which rests upon so strong an equity as in this case.

2. This Court has no jurisdiction over the award. The general principle that equity will not interfere, where there is a complete remedy at law, is of itself a bar to relief. For the complainant could have had ample redress in the Court of Common Pleas, upon the return of the award. It was subject to the approval of that Court, which is invested with as large an equitable power over awards, made in suits there pending, as this Court will exercise over awards generally. But, further, the Statute, under which this award was made, expressly declares it to be final and conclusive, if approved by the Court to which it is returned, and directs that judgment shall be entered thereon, *Del. Digest*, 112. The Statute makes it as available as a verdict. It is well settled that this Court cannot interfere against a verdict at law to correct mistakes, though it may do so in order to relieve against fraud. Then, as by the Statute awards are put upon the same footing as verdicts, it follows that courts of equity can relieve against them to the like extent only. The provision of our Statute making awards in suits pending available as a verdict and conclusive, if approved by the Court to which they are returned, places them upon a different footing from awards under the English Statute of 9 and 10 William III.

3. But even if this Court has jurisdiction over awards made under the Statute, the present is not a proper case for its interference. The ground alleged by the bill is not

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sufficient. To impeach an award, whether at law or in equity, there must appear to have been fraud, misbehavior of the referees, or palpable and gross mistake,—such as this case does not show. Neither the courts of law nor of equity will interfere to re-examine, upon the merits, a case which has been investigated by referees, nor to correct mistakes of fact. 1 *Ves. Jr.* 365 : 2 *Ves. Jr.* 15. *In* 2 *Barn. & Ald.* 691, the Court refused to set aside an award impeached on the ground that the arbitrators had allowed interest, contrary to the general practice of the courts, holding such allowance to be within the discretion of arbitrators.

A further objection to equitable interference in this case, even conceding the jurisdiction, arises out of the acquiescence or laches of the complainants. The award was made in 1814, and then approved by the Court of Common Pleas, without objection. The complainants proceeded to make payments under the judgment, from time to time, up to 1820. And not until after the widow's executor sought to collect the balance due upon the judgment, as late as 1828, when this bill was filed, after a delay of fourteen years, did the complainants attempt to impeach the judgment. In this view the equity of the case is strongly against them.

JOHNS, SR., CHANCELLOR.—The questions which the argument and the nature of the case present are,

1.—Did the arbitrators commit any mistakes, which invalidate the award?

2.—Supposing this Court has jurisdiction, is this a case in which the power of the Court ought to be exercised to set aside the award and stay the proceedings at law?

3.—Has this Court jurisdiction?

1. The first question is, did the arbitrators commit any mistake?

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It is contended that two mistakes in law have been committed, and that against these the Court should grant relief.

With respect to one of these, it is said that the right or interest in two rooms in a house, together with certain privileges, which by the will of Thomas Beeson, the elder, were devised to Rebecca Beeson for life, passed only *a right to use and occupy the rooms herself*, which right was not transferable, and that she could not sell or rent it to another; that as she removed from the house in May, 1792, and Thomas Beeson, Jr., and his brother possessed it until March, 1799, without any agreement, arrangement or understanding whatever between them and Rebecca Beeson, she was not entitled to any compensation for the use or occupation thereof; and that the arbitrators, in charging the executors of Thomas Beeson, Jr., with a moiety of £40 per annum for the use of her part of the house during the term of seven years, were mistaken as to the law; and that, in this respect, the award is invalid.

This was a reference of "*all matters in variance between the parties.*" Whether Thomas Beeson, Jr., objected to paying any sum for the occupation of Rebecca Beeson's part of the house during the seven years, or to the amount to be paid, and whether this was a question decided by the arbitrators, does not appear. If the right to have any compensation for the use of the two rooms was not a matter in controversy, then the arbitrators would not, and the presumption is they did not, decide the question of law; nor does it appear that there was any controversy as to the amount. But, if the arbitrators did decide that Rebecca had a right to some compensation for permitting her sons to have the use of her part of the house for seven years, without any express contract, they did not mistake the law; for the law would imply a contract, if they occupied and used the house with her permission.

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Opinion:—as to interest on annuity.

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I am of opinion, that a larger interest in the house passed by the will than the complainants' counsel allow. The extent of that interest it is not material for me to decide. With respect, then, to the charge for rent of a part of the house and the privileges, no mistake appears to have been committed by the arbitrators.

The other alleged mistake in law is, that the arbitrators allowed Rebecca Beeson interest on the moiety of the annuity of £40, payable by Thomas Beeson, Jr., up to March 25th, 1814, to which by law she was not entitled.

It does not appear whether this was a matter in controversy submitted to the arbitrators. It may be the controversy included only the balance due on the account, the amount of payments and the sum to be allowed for the occupation of the rooms in the house. If so, then there was no mistake.

Again, what evidence was before the arbitrators as to interest does not appear. Suppose there had been an agreement, in consideration of forbearance, to pay interest, then it would be no mistake to allow it.

But further, conceding that the question of interest *was* a matter in controversy, and was decided by the arbitrators, and that there was no agreement for it, still was such decision against law?

This is a question not settled by Delaware decisions. The English authorities are not easy to be reconciled. It seems to be laid down in them, as a general rule, that the arrears of an annuity do not carry interest, unless there be a contract for the payment of it. The modern cases establish this principle, as a general rule. 2 *Ves. Jr.* 163: 4 *Bro. Ch. Rep.* 320: 3 *Bro. Ch. Rep.* 489, 492. But the cases cited show exceptions to the general rule, and that in particular instances the allowance of interest is discretionary. 2 *Atk.* 211: 1 *P. Wms.* 541. As, where the annuity is charged on real estate, and is for maintenance. 3 *Atk.*

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579 : 1 *P. Wms.* 541. So, where arrears have accumulated,—on the principle of wrongfully witholding the money interest has been allowed. 2 *P. Wms.* 163.

It is my opinion that the allowance of interest is discretionary; and that every case of an annuity, in which the question of interest arises, must be decided by its own circumstances, according to equity.

In this case the will shows that Thomas Beeson, the elder, was the owner of a considerable estate; that he left several children, to whom much of his estate was devised, besides the land devised to his sons, Jonathan and Thomas; that he charged those lands with the payment of £40 per year to his widow, payable quarterly, in lieu of dower; and that the testator made no other provision for the maintenance of his widow, except the use of two rooms in a house, together with certain privileges, and her choice of part of the personal estate, to the value of £50. This then is the case of an annuity for maintenance, charged on land, the profits of which the person bound to pay takes; and the quarterly payment of the annuity is necessary for the support of the annuitant. The non-payment quarterly is a wrongful withholding of the only means of her support; and the enjoyment of the profits of the land creates an obligation, both at law and in equity, for the allowance of interest.

I am, therefore, of opinion that if the arbitrators in this case did decide the question of interest and allow it, they did not commit a mistake nor decide against law.

Here I might stop and make the decree. But the importance of the other two questions raised in the case induces me to proceed, and to express my opinion upon them. Besides, some of the counsel may not be convinced of the correctness of my opinion on the question as to mistake, who would be satisfied that on other principles the suit ought to be dismissed.

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Opinion:—rule as to setting aside awards in equity.

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2. The next question is whether, assuming that the Court has jurisdiction, this is a proper case in which to set aside the award and stay proceedings at law?

The argument of the complainant's counsel assumes the broad ground that mistakes are sufficient to invalidate awards, with some special qualification. They cite 1 *Madd. Ch. Pr.* 78–9: 1 *Ves. Jr.* 364: 2 *Ves. Jr.* 450: 14 *Ves. Jr.* 264. They take a distinction between a general and a special reference, contending that in the former the Court will correct errors in law, though not in the latter. 3 *East*, 18: 13 *East*, 356: 6 *Ves. Jr.* 282: 9 *Ves. Jr.* 364. They also take a like distinction between references to non-professional and to professional men.

The defendant's counsel deny the broad ground assumed for the correction of awards generally, in equity. While they admit that courts of equity do exercise the power of correcting mistakes in law committed by arbitrators, they insist that its interference must be only for a *plain*, *palpable* or *gross* mistake, as is the rule at common law; that in this respect, equity follows the law; and that at law the merits of an award cannot be inquired into, but it can be impeached only for fraud, misbehavior, corruption, or for such mistakes in law as are called *plain*, *palpable* or *gross* mistakes. To show that equity will not, in England, exercise its power, in all cases, to set aside an award made against law or fact, there was cited 6 *Ves Jr.* 281: also, 1 *Ves. Jr.* 365.

The defendant's counsel further insisted upon several special grounds of objection against a decree for relief in this case. These are,

1. That, with respect to the allowance of interest on the annuity, it has been held that, on a question of interest, the courts do not interfere with the discretion of arbitrators. 2 *Barn. & Ald.* 691: 1 *Taunt* 151.

2. That our Statute makes awards under references in

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court available as verdicts; and that a verdict can be set aside only in the court where it is found. That in this State verdicts and awards stand on the same footing,though it is otherwise in England. *Dig. Del. Laws*, 112.

3. That the acquiescence of Thomas Beeson,Jr., by omitting to object at law to the award, was of the like effect as is neglect to move for a new trial after a verdict, in which case equity will not relieve. 1 *Sch. & Lef.* 201.

4. That equity will not interfere where, as here, there was a complete remedy at law. 1 *Sch. & Lef.* 201 : 1 *Madd. Ch. Pr.* 111 : 9 *Ves. Jr.* 67.

5. That objections to an award must be made in the court to which the award is returned. 1 *Bac. Abr.* 239. 1 *Mad. Ch. Pr.* 79.

Besides the cases cited by counsel many other English authorities have been examined by the Court. It is certain that the law of awards, in England, has undergone much change since the 4th of July, 1776. Many of the modern cases are contradictory, and introduce new principles. They cannot, however, be held applicable to the two species of awards created by our laws, and which were unknown in English jurisprudence. Our system of rules for regulating awards differs from the English, particularly in reference to awards made under the act of 18 Geo. II, (Dig. Del. Laws, 112,) and the other species of awards returned into court in amicable actions. The latter originated, either in a liberal construction of the statute of 18 Geo. II. or in usage, which may be considered as part of the common law of Delaware. I do not know that the statute of William III, creating a new species of awards in England, was extended here by practice. My impression is that the statute of 18 Geo. II, was designed as a substitute, so modified as to suit the convenience of our people.

It seems to me sufficient, in deciding upon this as the

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case of an award and judgment in an amicable action entered in one of our courts of common law, to refer to our own Statute relative to this species of awards, and to the construction which has been given to it by the decisions of our courts. This I have endeavored to do, having collected together from memory, and from notes of cases taken by myself for a long series of years, the decisions of our courts in controversies respecting the validity of awards.* The rule established by them, as to the correction of mistakes of law by arbitrators is, that for a *plain, palpable* and *gross* mistake there is a remedy, at law or in equity, according to the circumstances of the case and the nature of the reference. But what *is* a *plain, palpable* and *gross* mistake is not clearly defined. However, in applying the

* The Chancellor here cited from his notes the following as the course of decisions in Delaware, touching the powers of the Courts over awards.

CHANDLER *vs.* SPRINGER'S EXR'S :—*Common Pleas, Feb. T.* 1785.

Bayard, for plaintiff; *Bedford*, for defendant.

Action on the case. Reference, and award for £221, 14s. Objected to.

The Court decided that the merits of an award could be inquired into; and it did inquire generally into the merits of this award. The grounds taken were the words in the Act of 18 Geo. II, "approved by the Court," which were considered to import that the Court must inquire, in order to approve or disapprove;—also the words, "to be available as the verdict of a jury," which must be understood to import *not more* available than a verdict; and, therefore, that an award might be set aside on the same grounds as a verdict.

MIERS' EX'RS., *vs.* SPEER'S EX'RS :—*Common Pleas*, 1788.

Action of debt. Reference, and an award.

The rule was admitted by counsel as to an inquiry into the merits; and the Court did inquire, and examined an arbitrator as a witness.

PRICE *vs.* JEFFERIS :—*Common Pleas*, 1790.

Amicable action.

The rule was insisted on that awards could only be set aside on the grounds of misbehavior or corruption. The Court considered this to be an award within the Act of 18 Geo. II, and set it aside because one of the arbitrators was not sworn.

MCKINLEY *vs.* REYNOLDS :—*Supreme Court*, 1791; *Killen, C. J.*

Bayard and *Read*, for plaintiff; *Bedford* and *Levy*, for defendant.

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Opinion:—here, no plain mistake—effect of acquiescence.

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rule to the present case, there can be no difficulty. The mistakes here insisted upon are not plain, but are doubtful; and the principal one relied on relates to a question of interest, which, it is considered, rests much in discretion. Besides, here is long acquiescence,—four years from the time of the award to the death of Rebecca Beeson,—four years more to the death of Thomas Beeson, Jr.,—and three more before this suit was instituted between the representatives of the original parties,—an acquiescence, in all, of eleven years, with no attempt ever made to object at law to the award. In such a case, it is my opinion that a court of chancery ought not to interfere, even if it has jurisdiction.

3. The third question is, whether the Court has juris-

Reference in a suit pending.

The referees were examined, and the merits of the award inquired into generally. The principle decided in *Chandler vs. Springer's Ex'rs.* was admitted, and the award was impeached on the ground of its being against fact and law.

GILPIN *vs.* GILPIN:—*Supreme Court*, 1793; *Read, C. J.*

An amicable action held to be a reference under the Act of Assembly.

LEWDEN *vs.* SAWYER:—*Court of Errors and Appeals, Equity side*, 1799.

Van Dyke, for appellant; *Read*, for respondent.

Award in an amicable action entered in the Common Pleas.

The Court of Appeals inquired into the merits, and for mistakes as to law corrected the award and ordered a perpetual injunction. (*Johns, C. J.*, having been counsel for the appellants, did not sit.)

COPES AND WIFE *vs.* WILSON AND WIFE:—*Supreme Court*, 1802.

Van Dyke, for plaintiff; *Bayard*, for defendant.

Action of waste, and reference entered.

It was admitted by counsel that this was a species of reference at common law, and it was so considered by the Court.

CRAIN *vs.* LOWBER:—*Supreme Court*, 1804; *Read, C. J.*

Bayard and *Hall*, for plaintiff; *Van Dyke* and *Ridgely*, for defendant.

The Court refused to permit an arbitrator to be a witness to support or impeach the award, or to suffer his declaration to be proved.

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Opinion :—want of jurisdiction—question not precluded.

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diction. One of the counsel for the defendant considered that the defendant, having joined in a case stated and submitted the controversy to this Court, had admitted the jurisdiction and was thereby precluded from objecting to it. The Court is of a different opinion. It has been said to be the duty of a good judge to amplify his jurisdiction; but the Chancellor is of opinion that it is for the good of the people that the Court of Chancery should be confined within its legitimate limits. If the jurisdiction do not exist, consent cannot give it. In such case the proceedings are void and a nullity, as was decided in *Bishop vs. Bishop*, in 1795, by the Supreme Court, (*Read, C. J.*) respecting a a case in the Orphans' Court.

The complainants' counsel, in support of the jurisdic-

The Court also decided that it would not inquire generally into the merits. Other witnesses were examined, and the award was attempted to be impeached for mistakes of fact and law. The Court held that no mistakes were proved and confirmed the award.

ARMSTRONG AND WIFE, *vs.* WINDSOR'S EXR'S. :—*Supreme Court*, 1811.

A majority of the Court inquired into the merits, and set aside an award for a mistake in not allowing a discount. *Johns, C. J.*, dissenting.

PHILLIPS *vs.* REES :—*Court of Errors and Appeals;* 1811.

Appeal from a decree of the Court of Chancery dismissing a bill to set aside, on the ground of mistake, an award which had been made in an amicable action.

The decree was affirmed, because the Court of Appeals was of opinion that no mistake had been committed. It was considered un necessary to decide the question as to the power of the Court to afford relief.

In the argument it was admitted that for a *gross* mistake a court of equity would set aside an award; and the power to inquire as to mistakes under some limitations, seemed not to be questioned.

PRATT AND KINTZY *vs.* BRADUN AND REES :—*Court of Errors and Appeals*, 1811.

Bayard and *Rogers*, for appellants; *Van Dyke* and *Read*, for respondents.

This case came before the Court upon an appeal from an interlocutery order of the Chancellor for an account. There had been an

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tion, argued that a party must have the right to elect whether to object to the award at law or in equity, in order to preserve his right of review by an appeal to the High Court of Errors and Appeals. This argument assumes that a writ of error would not lie to the judgment at law on the award. That is a question not decided, arising under the Acts of 13 Geo. II, and the Act of 1811 (*Dig. Del. Laws*, 112), and under the Act of 1829 respecting bills of exception. It will depend on the meaning and import of the word "trial" in the latter Act. But suppose it true, that there can be no review of the judgment at law. This may be a defect in our constitution or laws, but it does not prove that the Court of Chancery has jurisdiction in such a case.†

† The Chancellor, in the margin of his manuscript opinion, has a note that a writ of error will lie to a judgment at law on an award, and cites Gilpin vs. Gilpin decided in 1793. But from his memorandum of that case, among others collected on the general subject of the powers of the courts over awards, it appears to have been in the Supreme Court. Perhaps he intended, in the marginal note, to refer to *Lewden vs. Sawyer*, in 1799, which was in the Court of Appeals, on error to the court of Common Pleas, and was the case of an award. See *ante*, p. 382. *Note.*

award in an amicable action and judgment thereon, which was relied on as a bar to the right to an account.

The Court considered that the award was not conclusive. The objection to it was misbehavior.

The Court also expressed an opinion that the arbitrators had committed a gross mistake; but observed that the Court was not to be understood as deciding the general principle, that, in every case of awards; a mistake of law will make it obligatory on a court of equity to interfere and set aside the award. The Court considered the exercise of this power to be discretionary. The question of jurisdiction was not considered. The interlocutory decree was affirmed.

CRAIN'S ADM'R. AND DOUGLASS *vs.* LOWBER'S ADM'R.:—*Court of Errors and Appeals*, 1813.

Rodney, for appellant; *Hall*, for respondent.

This was an appeal from a decree of the Court of Chancery setting aside an award which had been returned in an action referred in the Supreme Court. Exceptions to the award had been heard in the Supreme Court, the award confirmed and judgment entered upon it.

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Opinion :—question of jurisdiction.

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I am of opinion that this Court is without jurisdiction of the case before it, upon two grounds :

1st. On the principle decided by the Court of Appeals in the case of *Crain's adm'r., and Douglass vs. Lowber's adm'r.*, decided in the Court of Appeals in 1813, that where two courts have concurrent jurisdiction, the one which first possesses the cause has the exclusive right of exercising jurisdiction. This is the latest decision, and I believe the only one where the point was expressly adjudged on argument ; and it being a decision of the highest tribunal is considered by this Court a binding authority.‡ I have understood that the late Chancellor, after this decision, dismissed some bills filed for setting aside awards, and required, before he would entertain such bills, some special

‡ See this case, *ante*, p. 384. *Note.*

Rodney relied on the want of jurisdiction in the Court of Chancery, insisting on the principle that where two courts have concurrent jurisdiction, the Court first possessing the cause ousts or excludes the other. *Hall* answered, that the Court of Chancery had exercised the power.

The Court unanimously reversed the Chancellor's decree. *Johns, C. J.*, and *Hall, Cooper* and *Warner, Justices*, were of opinion that the Chancellor had no jurisdiction. *Booth, C. J.*, did not express an opinion on this point, but concurred in the reversal.

SPEAR *vs.* JARRELL : — *Court of Errors and Appeals*, 1814.

This was an appeal from a decree of the Chancellor staying proceedings on a judgment at law entered upon a bill obligatory which had been given for the payment of a sum of money, according to such award as might be made under a parol submission. The decree in effect set aside the award. It was reversed on the appeal, because the Court considered the award conclusive, inasmuch as it had not been impeached on any of the usual grounds of misbehavior, corruption or of plain and gross mistake.

SAUNDERS' EXR'S. *vs.* HAUGHEY : — *Supreme Court*, 1815.

An amicable action, referred to counsel and report returned. The Court set aside the award for a mistake of law. The point seems to have been submitted by consent of counsel.

CLAYTON *vs.* WILLIAMS : — *Supreme Court*, 1815.

There was a general judgment against an administrator on a

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ground, such as accident, or other reason for the omission of the party to avail himself of his remedy at law.

2d. The other ground is that Thomas Beeson, Jr., had a sufficient remedy at law. By the 20th Sec. of an Act of Assembly, passed between 1726 and 1736, limiting the powers of the courts of equity within this State, the jurisdiction of the present case, (there being a sufficient remedy at law) is ousted. What is the meaning of the word "sufficient" in the above Act is a question which has occasioned some uncertainty as to the dividing line between the common law and equity jurisdictions. In *Polk vs. The Farmers'* and *Mechanics' Bank*, in the Court of Appeals, June T., 1822, this point was made and much argued. There was no direct decision by the Court, but its opinion

report, and this was an action of debt on the judgment. Parol testimony was offered to prove a want of assets, and was rejected by a majority of the Court. *Johns, C. J.*, contra.

HUDSON, ET AL., *vs.* MCDONOUGH (A GUARDIAN), ET AL. :—*Supreme Court*, 1816.

McLean and *Read*, for plaintiff; *Van Dyke* for defendants.

An amicable action to settle the lines of certain land, and report returned.

The award was objected to. 1st, for a mistake. 2nd, that a guardian could not bind his ward by such an action. An arbitrator (not objected to) was offered as a witness.

The Chief Justice asked if the Court were to re-try the merits. The plaintiffs' counsel answered in the negative. The defendants' counsel said, the evidence was offered only to prove *the nature of the case*. *Read* objected to a general inquiry. This was an inquiry into the merits. The Court directed the counsel first to discuss the question, whether the minor would be bound by this reference on the part of his guardian. This question being argued, the Court decided it in the negative and set aside the award.

WILTBANK'S EXR'S *vs.* T. & P. MAULL :—*Supreme Court*, 1826.

Robinson, for plaintiffs; *Wells*, for defendants.

Reference in an action pending, and award returned.

By consent, witnesses were examined as to the merits. *Wells* contended that the referees had not sufficient evidence, and that awards were only as available as verdicts. *Robinson* replied that a verdict

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was that the Court of Chancery must be kept within the limits of its jurisdiction.

The present is a plain case, in which there can be no doubt as to the sufficiency of the remedy at law.

With such views of the questions arising in the case, the bill must be dismissed.

This decree was, on appeal, affirmed by the High Court of Errors and Appeals, at the June Term, 1831. See 1 *Harrington's Rep.* 394. *n.*

would not be set aside on such ground. The Court held that no plain mistake was proved and that the decision of the referees ought to bind the parties. Award confirmed.

SILVERS AND WIFE *vs.* FORD'S ADMR'S :—*Supreme Court*, 1827.

Johns. for plaintiffs ; *Read*, for defendants.

In an amicable action, on report returned, the Court decided that the principles on which the award was made could not be inquired into ; for this would be to re-try the merits.

SPRUANCE *vs.* POOVY :—*Supreme Court*, 1829.

Booth, for plaintiff; *Black*, for defendant.

Reference in an action pending, and award returned.

Booth offered a referee as a witness, and proposed to inquire into the merits. *Black* objected to the competency of the witness. *Booth* insisted that the witness was competent for some purposes. The Court decided that a referee was not a competent witness for the purpose of inquiring into the merits of the award or to impeach it for misbehavior or corruption. Award confirmed.

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Statement of the case.

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THOMAS ROBERTS, adm'r. of LAVINIA ROBERTS, dec'd, RACHEL B. LYON, WILLIAM LYON, GEORGE A. LYON, JOHN LYON and JACOB B. LYON, infant, by his next friend, WILLIAM LYON,

vs.

JAMES BROOM, JOHN LOWBER, assignee in trust, et al.

New Castle, July T. 1831.

An executor and trustee under a will, having in his hands funds bequeathed to legatees on certain trusts, purchased real estate. Subsequently to the purchase, sundry judgments were recovered against the trustee, which became liens upon the real estate so purchased. The trustee afterwards becoming insolvent, some of the legatees, whose legacies remained unpaid, filed a bill in equity, alleging that the real estate had been purchased with the trust funds, and claiming that a trust resulted to the unpaid legatees. *Held*, that the evidence was not sufficient to prove that the trust funds were applied to the purchase. But *held also*, that supposing the trust funds were so applied, and that a trust resulted therefrom, as between the legatees and the trustee and his assigns, yet that such trust could not avail against the legal rights of the judgment creditors.

BILL IN EQUITY TO ENFORCE A TRUST OF REAL ESTATE.—Jacob Broom, deceased, being in his lifetime seised of real and personal estate, by his will dated April 10th, 1810, directed that the residue of his real estate should be sold, and the proceeds thereof, together with the unappropriated balance of his personal estate, be disposed of as follows, viz: $10,000 to be kept invested during the lifetime of his widow, for her benefit, and the residue of the fund to be distributed equally to and among the testator's children and two grandchildren, viz: one seventh each to James M. Broom, Ann Littler, Hetty W. Lyon, Sarah Roberts, Lavinia Broom and Jacob P. Broom, and one seventh to the two grand children, John and Rachel

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Roberts. The shares of James M. Broom and Ann Littler were bequeathed to them absolutely, but the other shares were all to be invested, and held upon certain trusts for the benefit of the several legatees. The testator further provided that, at the decease of his widow, a dwelling house, which he had devised to her for her lifetime, should also be sold, and that the proceeds thereof, together with the capital of $10,000 before directed to be invested for her benefit, should be disposed of in like manner as before provided touching the residue of the fund first directed to be raised. James M. Broom was appointed the executor and trustee. After the death of the testator, April 26th, 1810, James M. Broom, the executor and trustee, took letters testamentary and possessed himself of the estate. He passed sundry testamentary accounts, the last of which was on the 7th of May, 1816, and showed a balance in his hands of $52,925.48, applicable to the trusts of the will. Broom, while executor and trustee, purchased a considerable body of real estate, taking the deeds in his own name, without mention of any trust. About the year 1826, Broom, becoming embarrassed in his circumstances and indebted in sundry judgments of large amount, which were liens upon the real estate, executed an assignment of the real estate, bearing date May 31st, 1826, to John Lowber, in trust to convert the same into money and apply the proceeds in payment of the unsatisfied legacies bequeathed by Jacob Broom, deceased, to his children and grand children, or, should there be a deficiency of proceeds to pay the whole, then to apply the same *pro rata*.

The bill was filed by Thomas Roberts as the administrator of Lavinia Roberts, deceased, who was one of the children of Jacob Broom and a legatee under the will, and by the other complainants as the surviving children of Hetty W. Lyon, another of the said children and legatees, who at her decease became entitled to her share under the

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trusts of the will. It was alleged that the other legacies had been paid, or nearly so; and, consequently, the persons who would have been entitled to the other legacies, supposing them to be unpaid, were made parties defendant, together with Broom, the executor and trustee,—also Lowber, the assignee in trust, and sundry judgment creditors of Broom, viz: The Bank of Delaware, the Bank of Wilmington and Brandywine, the administrators of John Bellah, deceased, the executors of Joseph Tatnall, deceased, and the executors of James Jefferis, deceased. The judgments of these defendants were recovered between the purchase of the real estate by Broom and his assignment of it.

The bill charged that the real estate purchased by James M. Broom, and which was part of the property assigned by him in trust, had been paid for by Broom out of the trust funds; that the assignment so admits, and expresses the assignor's intention that the real estate, so purchased and paid for out of the trust funds, should be held as a security for the legatees. The bill seeks to affect this real estate with a trust in favor of the legatees, and claims that such trust has priority against the judgments recovered against Broom before the execution of the assignment. The prayer was for a discovery, and that the real estate be charged with the unpaid legacies of the complainants in preference to the judgments.

A decree *pro confesso*, was taken against James M. Broom, for want of an answer The real defendants, i. e. the creditors of Broom, answered, admitting the general state of facts alleged in the bill, except the charge that Broom purchased the real estate with the funds of the testator,—as to which they put the complainants upon proof. They also insisted upon their legal rights, as judgment creditors whose debts were incurred without notice of the equity now set up.

Pending these proceedings, the real estate in controversy was sold; part, under an execution at law, and the residue,

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under an order of the Chancellor, by consent; and the proceeds, after paying the execution at law, were brought into this Court to abide the decree in the cause. The proceeds not being sufficient to satisfy both the legacies and the judgments, the question now raised was which should be first paid.

The cause was put at issue, and came before the Chancellor, at the July Term, 1831, for a hearing upon the bill, answer and exhibits, without depositions.

Black and *Rogers*, for the complainants.

This case presents two questions.

1st. Was there a resulting trust of the real estate to the legatees?

It is a settled principle in equity, that if a trust fund be applied by the trustee to the purchase of real estate, and the title be taken in his own name, the trusts of the fund attach to the real estate. A use results, by operation of law, to the *cestui que trust*. So rigorous is this rule that by no artifice can it be evaded, if the fund can in any way be traced. Into whatever it may be converted, whether into real or personal estate, the *cestui que trust* may, at his election, look beyond the personal responsibility of the trustee, and enforce the trust against the property purchased. The authorities to this point are numerous and conclusive. *Wilson's R.* 400–402; 1 *T. R.* 619–623; 1 *Salk.* 161; 5 *Ves. Jr.* 169; 10 *Johns. R.* 63; 3 *Johns. R.* 216; 1 *Johns. Cas.* 205; *Ambler*, 409; 3 *Binn. R.* 302. Such a trust need not be evidenced by writing. It results from the fact that the trust fund was used in the purchase, and that fact may be proved by any species of evidence,—by parol as well as written. *Ambler*, 409: 2 *Bro. Ch. Rep.* 290; 1 *Dall. R.* 193; 2 *Washington's Rep.* 441–445. The Court will, of course, exercise caution and require satisfactory

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proof, 3 *M. & S.* 574; but the proof of such a trust is held to be abundant, if either (1st.) the trustee admits in his answer that he used the trust fund in the purchase; or, (2d.) if otherwise it is admitted under the hand of the trustee. How is the use of the trust fund for the purchase of this real estate established in the present case? We say, first, by fair presumption. The trustee had in his possession at the time a large trust fund, some $15,000.00, of which he was entitled to only one seventh. No other means of purchase are shown. It is presumable that he purchased with this fund. But the case presents specific proof of the use of the trust funds; 1st, as to Broom, the trustee, the bill is taken *pro confesso*; and, so far, that is an admission of the fact on the record; and, 2d, the recital in the assignment by Broom is direct proof. It is a declaration that the lands were purchased with the trust fund and were intended to be a security for the legatees. 2 *Washington's R.* 445; *Ambler*, 413.

2nd. Is the equitable lien of the legatees preferred to the judgment against Brown?

Under the English decisions equitable liens avail against all claims but that of a purchaser for a valuable consideration and without notice. A well known example of such equitable liens is the case of a lien for unpaid purchase money. A trust resulting from the use of a trust fund in the payment of purchase money stands upon as strong a ground. Equitable liens, generally, are held good as against mere judicial liens, or rights arising by operation of law subsequently attaching. Hence, they have been preferred to the claims of assignees or creditors under assignments in bankruptcy. *Sugd. on Vend.* 364 : 1 *Madd. Ch. Pr.* 456. The same preference has been adjudged to equitable liens as against judgments. *Finch*, 63 : 1 *P. Wms.* 277 : 3 *Ves. Jr.* 576 : 1 *Paige's Ch. R.* 125. The principle is, that an assignment in bankruptcy, or a judgment, operates only upon the interest actually held by the

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debtor, and so must be taken subject to all equities which have attached to it. In Delaware the question is new; but, in the absence of judicial decisions, the English doctrine must be taken to apply.

The case of a judgment is distinguished from that of a mortgage. A mortgagee is treated as a purchaser, and acquires by his mortgage, and by the advance of the money secured by it, the superior equity of a purchaser for a valuable consideration. Not so a judgment creditor. The land is not a specific security for the judgment, on the faith of which the debt is presumed to have been contracted. The judgment is but a general lien, giving a right to enforce its collection against such interest as the debtor may have in land, but raising no equity in the creditor superior to equities existing in the land prior to the recovery of the judgment.

If a use resulted to the legatees at the time of the purchase, they have done nothing since to prejudice their claim. There have been no laches or acquiescence. The lands were purchased in 1814 and 1816. Broom continued to pay some of the legatees until his failure. There was no reason to complain. With respect to notice, if any notice were necessary, the creditors must be presumed to have had notice, from Broom's testamentary accounts, that he was, at the time of the purchase, a trustee with trust funds in his hands.

Wales and *Read, Jr.*, for the judgment creditors.

1. Was there any trust of these lands?

It is certain that there was no express trust created by the will or pursuant to its provisions. The direction is not for an investment in real estate to be held in trust, but that lands of the testator be converted into money; and the bequest is of a personal fund. The very evidence relied on, viz: the recital in the assignment, negatives a

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purchase in trust. It shows that Broom purchased the lands for himself, and afterwards, becoming embarrassed, sought by the assignment to subject it to the legacies.

But, it is contended that this is a trust resulting, by operation of law, from the fact that the lands were purchased with the trust fund. We deny that such was the fact. The evidence relied on to prove it, whatever might be its force against Broom, cannot affect these creditors. The taking of the bill *pro confesso* as to Broom raises no admission against the other defendants. So, the declaration of Broom, made in the recital of the assignment after he had become embarrassed, for the purpose of securing the legatees, is not admissible to the prejudice of honest creditors who had previously recovered judgments against the lands assigned. But, assuming the fact to be as is insisted upon, what does it amount to? only that Broom, having in his hands a mixed fund, his own money and that of the legatees, employs the whole in purchasing real estate for himself. Money has no ear mark. The fund was entire and cannot be separated. What part of it was held by Broom in trust cannot be traced, and hence no use can result from the application of it. The doctrine of resulting trusts does not apply here, but only to the case of a person who, having received money from another to purchase land for the owner of the fund, buys and takes the title in his own name. 1 *Atk.* 159 : *Prec. in Ch.* 163, 168, 184.

2. But supposing there was a resulting trust, as between the legatees and Broom, does it follow the lands against the creditors?

The distinction, in the English cases, between judgments and mortgages does not obtain in this country. In England, lands cannot be sold in execution of a judgment. Here, a judgment stands on higher ground. Under our law, it is as much a lien on lands as is a mortgage. The latter, though a conveyance in form, is in substance but a

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security for the debt, binding the land mortgaged. A judgment is also a security quite as effectual. The only substantial difference is, that one is a specific lien while the other is a general lien. Chief Justice Marshall, in 7 *Wheat. R.*, 46, denies the distinction here set up between judgments and mortgages. The doctrine which governs this case is that settled in the Supreme Court, in *Barclay vs. Greenly*, 7 *Wheat. R.* 56, that secret equities or trusts shall not avail to prejudice honest creditors without notice. In this country, the law does not favor such claims. They operate as a fraud on creditors, who have advanced their money on the faith of visible property in the debtor and without notice of claims against it. This general principle is sufficient to control the present case. But the hardship of this claim and its operation as a legal fraud on the creditors is aggravated by the special circumstances. The legatees lie by and permit Broom to hold the property for a number of years, resting upon the personal responsibility of the trustee until he becomes embarrassed, and then for the first time they seek to set up a trust in the real estate against creditors who, meanwhile, without any notice, have advanced their money and recovered judgments.

It is like the ordinary case of a person having an equity or lien upon property, who stands by silently and sees another purchase. He loses his equity. *Ambler*, 633. So here, as between these creditors and the legatees, the equity is in favor of the creditors, whatever use might be supposed to have resulted as against Broom.

JOHNS, SR., CHANCELLOR.—The two important questions arising are,

1st. Had the complainants an equitable lien on the real estate of James M. Broom?

2nd. If they had, is this equitable lien to be preferred to the legal liens of the creditors of James M. Broom?

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Opinion:—whether a resulting trust?

1. The first question depends on facts as well as law. As to the facts—It is contended that the lands of James M. Broom, though purchased in his own name, were purchased with money belonging to the legatees of Jacob Broom, in the hands of James M. Broom their trustee. The sufficiency of the proof is denied; and hence, the Court is called on to decide important questions of fact.

The case must be considered as twofold; 1st, as a controversy between the complainants and James M. Broom, their trustee, and his assigns; and 2nd, as a controversy between the complainants, as legatees, and the judgment creditors of James M. Broom. It is the same in effect as if the controversies were embraced in two suits. Proof which would be not only competent but satisfactory to establish a trust as against James M. Broom, and his assigns, may be incompetent, and if competent not to be credited or not satisfactory, when used to establish a trust estate in the lands of James M. Broom, so as to affect the rights of his judgment creditors.

Now,—without deciding whether the declarations of James M. Broom in the assignment, or the facts stated in the bill which are to be taken to be confessed by James M. Broom, are *competent* evidence against his judgment creditors,—it will be sufficient to say that, in the opinion of the Chancellor, the evidence is not satisfactory to prove the investment of the money of the legatees in the lands purchased by James M. Broom. There is no certainty as to the question what money or funds were so invested. The Chancellor must judge of the credibility of the evidence, as well as of its competency; but, admitting the latter, he is not convinced of the investment of the funds of the legatees. It is probable that the means which James M. Broom derived from his father's estate enabled him to raise money to make the purchase of the lands, but how or to what extent is not proved. With respect to the law

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of trust, as the facts are not proved, it is unnecessary for the Court to express any opinion.

2. But, suppose a trust to be established as between the legatees and Broom, the decisive question in this cause remains; that is, whether the equitable lien on the lands held in trust should be preferred to the legal liens of the creditors of James M. Broom? Must his judgment creditors be postponed, and the equitable lien of the legatees be first paid out of the proceeds of the sales of James M. Broom's lands?

The principal ground on which the counsel for the complainants rest, for the support of the affirmative of this question, is that there is a distinction between mortgages and judgments. It is admitted that, by the English authorities and under the laws of Delaware, a mortgage will be preferred to an equitable lien. But it is contended that judgments stand on a different ground; that one is a specific and the other a general lien; that a mortgagee is a purchaser, while a judgment creditor has no title to the land but only a right to sell it; that is, to sell such an interest in the land as the debtor has, which, it is argued, is an estate subject to the equitable lien. It is said that there are no decisions here, and that we must resort to English authorities, by which it appears such an equitable lien will be preferred to a judgment.

That there is some difference between a mortgage and a judgment is true; but, that there is a rule of law in Delaware that a judgment shall be postponed and an equitable lien on land be preferred, is not known to the Chancellor. For half a century he believes the law has been considered to be otherwise. The absence of decisions here to establish such a rule is strong negative evidence that no such rule of law has existed. It is not pretended that, at law, any such rule exists, but that this is a principle of equity. In England, where lands cannot be sold for the payment of debts, and the creditor has no

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legal means by a sale of the land to make his debt, such a principle of equity may be founded on reason and justice; but here, such a rule cannot be applied without violating one of the first principles of equity, to wit; that when two persons stand in equal equity, a Court of Chancery will not interfere.

It may be argued that the judgment creditor in Delaware has no legal remedy,—that he can only sell the land subject to the equitable lien. But such is not the law. In the case of *Vickory vs. The State*, in the Court of Appeals, at June Term, 1828, the law as to the legal effect of a sheriff's sale on a junior judgment was settled. It was there decided, that the sheriff's sale did discharge the land from all prior incumbrances excepting mortgages. In the earlier case of *Lewden vs. Sawyer*, the same principle had been recognized in the Court of Appeals and similar decisions had been made in the Supreme Court. By the Act of Assembly (*Digest Del. Laws*, 205) the sheriff's sale does pass the same title, that is to say, in the words of the Act, "such estate or estates" as the debtor had. The judgment creditor, therefore, has a legal remedy, and this Court will not interfere to destroy or defeat it.

There is another ground on which the Court ought not to interfere between the claimants and James M. Broom's judgment creditors. If any equitable lien existed it was a secret, invisible lien, unknown to the creditors who trusted James M. Broom on the credit of his visible property; and, therefore, it would be inequitable for this Court to aid in preventing the judgment creditors from recovering their debts.

I can perceive no substantial difference between the position of a *bona fide* purchaser from James M. Broom, without notice, or a mortgagee, and that of the judgment creditors. It is the policy of our laws to protect purchasers and creditors, without notice, against secret trusts. To support the secret equitable lien here set up (if one does exist)

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against judgment creditors would be to violate the policy of our law, and would open a wide field for defrauding creditors. I am of opinion that the judgment creditors are to be first paid out of the sales of the land, and that the surplus only should be distributed among the legatees.

Let a decree be entered accordingly.

SARAH H. MASSEY,

vs.

THE FARMERS' BANK of the STATE of DELAWARE, and NICHOLAS G. WILLIAMSON and VICTOR DU PONT, adm'rs of GEORGE R. MASSEY, dec'd, and FRANCIS HAUGHEY.

New Castle, Feb. T. 1831.

A debtor in an execution being entitled to a long term for years in land, the execution was, through ignorance of the sheriff, levied upon the land as real estate of the debtor. *Held*, to be no sufficient levy upon the term for years.

If a sheriff, having levied upon personal estate of a deceased debtor, permit the administrators to sell the same, the creditor in the execution cannot impeach the title of the purchaser, but must take his remedy against the sheriff.

BILL FOR AN INJUNCTION.—George R. Massey, deceased, was, in his lifetime, seised and possessed of certain real and personal estate, among which was a term for 999 years held by him in a house and seven acres of land. The Farmers' Bank, holding a judgment in the Supreme Court for New Castle county against Massey for $2,528.00,

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caused a writ of *fieri facias* to be issued and delivered to Francis Haughey, then sheriff, to be executed. The sheriff returned the execution as levied on goods in the hands of the administrators of Massey, amounting to $1,300.00, and also on lands, as per inquisition annexed. The inquisition included the house and seven acres, *which was described and levied on as real estate*; the sheriff, when making the levy, being ignorant of the leasehold nature of Massey's interest in this property. The goods, after the levy, remained in the hands of the administrators, who sold them, under an agreement with the sheriff, that the proceeds should be applied to the execution. Afterwards, Massey's personal estate being insufficient to pay his debts, the Orphans' Court made an order for the sale of his real estate, including the house and seven acres which had been levied on, and treating it as real estate. Under this order the house and lot was sold to the complainant, Sarah H. Massey, for $1,175.00. The sale was duly returned, and being confirmed by the Court, the house and lot was conveyed by the administrators to the complainant. After these proceedings, a *venditioni exponas* upon the judgment of the Farmers' Bank against Massey was issued, returnable to the Dec. T., 1819, under which the then sheriff Moody was proceeding to sell the leasehold interest of Massey, treating it as having been sufficiently levied on under the *fieri facias*. Thereupon, the complainant, as the purchaser of that interest at the sale by the administrators, filed her petition for an injunction, which was ordered.

This bill was afterwards filed, setting forth the facts as above stated, and alleging as grounds of equity that there had been no sufficient levy under the *fieri facias* upon the leasehold interest of Massey in the house and seven acres; and that even were such levy sufficient in law to bind the interest, yet that the sheriff had voluntarily permitted the administrators to sell the same, and had received part of

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the proceeds of sale to be applied to the execution; also that the attorney of the Bank and some of the directors had knowledge of the order of sale granted by the Orphans' Court and made no opposition to it. The bill, therefore, insisted that the complainant's title under the sale by the administrators could not be impeached under the execution.

Pending the suit, Francis Haughey, the sheriff, by whom the execution of the Bank was levied, died, and Abraham Eves, his administrator, was made a party defendant.

The answer of Nicholas G. Williamson, one of the administrators of Massey, admitted the allegations of the bill touching the proceedings in the Orphans' Court and the sale of the term for years under the order of that Court, the purchase of it by the complainant, the payment of the purchase money and the assignment of the term to her. It also stated that Haughey, the sheriff, had notice of the sale by the administrators and assented to it; and that the sheriff had also received from the administrators part of the proceeds of sale.

The answer of Abraham Eves, administrator of Haughey, the late sheriff, stated that he had no knowledge of the transactions set forth in the bill.

The Farmers' Bank, by its answer, admitted the general facts set forth in the bill touching the title of Massey, the proceedings in the Orphans' Court, and the sale, under its order, of the term for years to the complainant; and also touching the proceedings under its execution, so far as the proceedings concerned the levy. But the Bank denied that there was any agreement or permission by Haughey, the sheriff, that the administrators should sell the term, or that he received from them any part of the proceeds of such sale; it alleged that only the personal goods included in the inventory and appraisement had been sold with the sheriff's permission, and that the money received

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by him from the administrators was for the proceeds of these goods only. The answer of the Bank also denied that its officers had knowledge of the proceedings in the Orphans' Court, and alleged that they neither assented to nor opposed the order for sale.

The cause was put at issue and came before the Chancellor at the Feb. T., 1831, for a hearing upon the bill, answers, exhibits and depositions. The facts, so far as they are material, are referred to in the opinion of the Chancellor.

Wales, for the complainant.

There was no sufficient levy, under the *fieri facias* of the Bank, upon the term for years. The term is not embraced in the inventory and appraisement of the goods levied upon; and the return of a levy upon it as real estate is of no legal effect, the term being only a chattel interest. But, conceding that there *was* a legal levy upon the term for years, still the complainant took a good title under the sale by the administrators. The sheriff, Haughey, could not impeach it, because he had voluntarily permitted the administrators to sell; and he was upon general equitable principles estopped to deny the title of a purchaser under a sale made with his consent. Nor can the Bank follow the term with their execution, because if, as is contended, there was a levy upon it, the levy satisfied the execution against all except the sheriff, and the Bank's remedy was against him. The ignorance of the sheriff as to the nature of Massey's title to the house and lot, and his consequent mistake in making the levy, cannot prejudice the title of an innocent purchaser for value from the administrators, such as this complainant was. The claim of the Bank, under such circumstances, operates as a fraud on the purchaser. 2 *Bulst.* 717–750. 3 *Johns. R.* 182: 8 *Johns. R.* 446–452: 1 *Wilson's R.* 44: 4 *East R.* 523–585.

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Booth and *Rogers*, for the Farmers' Bank.

The execution bound all the personal estate of Massey; and the levy upon his interest in the house and lot, though in form treating it as real estate, must have effect according to the nature of the property, and be taken as a levy upon the term for years. Considering it a sufficient levy, then nothing has occurred to prejudice the rights of the Bank. The equity of the bill rests upon an alleged arrangement between the sheriff and the administrators, under which the latter were, it is said, permitted to sell the term for years. But this allegation of the bill is denied by the answer of the Bank and is not proved. The only agreement or arrangement admitted by the answer was one for the sale by the administrators of the personal chattels included in the inventory. There is no legal fraud in the claim of the Bank. It had no notice of the proceedings in the Orphans' Court, and was not bound to oppose them. The proceedings under the execution and in the Orphans' Court were taken under a mistake on the part of the sheriff and of the administrators, for which the Bank is not responsible. It has now no other resource but to sell the term. For there are judgments, younger than that of the Bank, which bind the other real estate of Massey; and the Bank cannot proceed against that real estate without crediting to its judgment the value of the term for years. It must either sell or credit the value of the term.

JOHNS, SR., CHANCELLOR.—This is a bill for a perpetual injunction to stay proceedings at law and to protect the title of a *bona fide* purchaser of a chattel real, to wit, a term for years, purchased at a public sale by the administrator of the deceased lessee. The protection is sought against the claim of a judgment and execution creditor, who contends that he has now the right, by virtue of his

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execution, to sell the same term for years, for the purpose of satisfying his judgment against the lessee. The ground taken by the judgment creditor is, that the levying of the execution gave him a lien upon the chattel real, with a right to sell it, which right has not been divested by the sale made by the administrators.

The judgment did not, of itself, create a lien. For this is a chattel real; and, as to such interests, a judgment is no lien, but an execution binds from its delivery to the sheriff, provided the execution is levied on the chattel before the return day of the *fieri facias*, and the sheriff does no act whereby the property is discharged from this liability.

1. The first question is, was this chattel real levied on by the sheriff? It does not appear to have been levied on as personal estate; for it is not mentioned nor appraised, as it ought to have been. The general return on the writ "levied on goods in the hands of the administrators amounting to $ ——" cannot be considered as a levy on the term for years, without more. But the sheriff's return is not only of a levy on goods, but there is also a levy on land, as per inquisition annexed. The inquisition embraces the house and seven acres, and levies upon it as real estate. Here was a clear mistake; and a question arises, what is the legal effect? The sheriff omits to levy on it as personal estate, and the property is levied on as land. This mistake of the sheriff, and the ignorance of the creditor in the execution as to the debtor's title in the house and lot, cannot make this a levy on the leasehold estate; for that would make the sheriff's act operate contrary to what he intended. The sheriff only levied on the house and lot as land; and he could not have considered himself responsible for it, as if he had levied on it as personal property, since he did not know that it was personal property.

2. But suppose there *was* a legal levy on this house and lot as a chattel, still there remains the question, whether

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the acts of the sheriff have divested his right to sell this property, that is, George R. Massey's interest therein ?

Supposing the sheriff to have levied on the term for years as a chattel, still he had power to permit the administrators to sell it. With respect to the goods embraced in the inventory and appraisement, it appears by the return that they were, when levied on, in the hands of the administrators ; and it also appears that after the levy the administrators were permitted to retain possession of them and to sell them, though on what terms they were allowed to do so is not proved satisfactorily. By this conduct the sheriff became liable to the execution creditors for the value of the goods. If the sheriff also permitted the administrators to sell the term for years, then, on the same principle, he became liable for its value to the execution creditor, supposing the sheriff to have made a legal levy upon it, unless he can be discharged on the ground of mistake caused by his ignorance of the nature of Massey's title to the house and lot.

Sarah Massey, the purchaser of the house and lot at a public sale made by the administrators, must have as good a title to this term for years as any purchaser of goods had to articles purchased at a sale by the administrators of other parts of the personal property. The abandonment of any claim by the sheriff, in the case of a public sale, is sufficient to protect innocent purchasers who buy fairly and pay the purchase money. The general power of administrators is to sell all personal property. If any person has a prior right or lien, and, having knowledge of a public sale of the property, does not give notice of his claim, the neglect is in the nature of a fraud on purchasers, and they ought to be protected against such a claim.

It is not a question whether the Bank ought to have given notice of their claim at the sale, in order to guard purchasers against imposition. The Bank had its remedy against the sheriff and his sureties, if, after a levy, the

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sheriff did not do his duty, but chose to permit the administrators to sell. The Bank, in such case, could not resort to the administrators, but the liability of the administrators was to the sheriff for the value of the property he permitted them to sell, and the Bank must resort to the sheriff. To the amount of the value of the personal property levied on, the Bank, *quoad* the debtor in the execution, is satisfied. The debtor is discharged, and the sheriff becomes the debtor.

I am, therefore, of opinion that the complainant's title ought to be protected. Let the injunction be made perpetual.

This decree was affirmed by the High Court of Errors and Appeals, at the June Term, 1833. See 1 *Harrington's Rep.* 186.

SUSANNA STILLEY,

vs.

AMOR GRUBB.

New Castle, Sept. T., 1833.

Under an Act of Assembly divorcing a wife from her husband, *a mensa et thoro*, and granting to the wife *all the rights, privileges and immunities of a feme sole*, the wife becomes competent to execute a release of land charged with an annuity bequeathed to her, under the will of a deceased husband, in lieu of dower.

By the release executed to the purchaser of the land charged with the annuity the complainant claimed the right to dower in the land, and released the same for a valuable consideration. *Held*, that she thereby precluded herself from claiming, against the purchaser, the annuity bequeathed to her in lieu of dower.

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Statement of the case—argument.

BILL IN EQUITY FOR ARREARS OF AN ANNUITY.—The complainant, the widow of Thomas Cartmell, deceased, became entitled under his will, in 1804, to an annuity of $40 bequeathed to her in lieu of dower, and charged (in part) upon certain real estate devised by the testator to Joseph Cartmell. The real estate was afterwards sold and conveyed to Parker Askew. The widow again intermarried with John Stilley, and was divorced from him, *a mensa et thoro*, by an Act of Assembly, passed Feb., 1812. While so divorced, on the 18th of March, 1816, the complainant executed a release of the annuity to Parker Askew, as the holder of the real estate charged with its payment. After the execution of such release the real estate was conveyed to Amor Grubb, the present defendant. This bill was filed to raise the arrears of the annuity out of the real estate. The answer relied upon the release as a defence.

The cause came before the Chancellor, at the Sept. T., 1833, for a hearing upon the bill, answer, exhibits and depositions. The sole question raised at the hearing was as to the validity and effect of the release. A copy of it is not found among the papers in the case.

R. H. Bayard, for the complainant.

The release is not a sufficient defence. In the *first* place, it applies only to the widow's dower, and not to the annuity given in lieu of dower. But, *second*, the complainant was at the time a *feme covert*, the wife of John Stilley, and was not competent to execute a release. The effect of a divorce is not to dissolve the bond of matrimony and to restore the wife to the capacities of a *feme sole*, but is only a separation from bed and board, and leaves her under the legal disabilities of marriage. 4 *Burns Ecc. Law*, 459: *Co. Litt.* 32, *a.* 33, *b.*: 235, *a.*: *Lewis vs. Lee*, 10 *Eng. Com. Law Rep.* 84: 3 *Barn & Cress*, 291: *Litton vs. Litton*, 1 *P. Wms.* 543: 3 *Atk.* 579.

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Wales and *Read, Jr.*, for the defendant.

The Act of Assembly divorcing the complainant from her husband expressly grants to her the rights of a *feme sole.* This settles the question of her legal capacity to execute the release. With respect to the construction of the paper there can be no doubt. The complainant had no right of dower to be released. She had made her election of the annuity by becoming administratrix *c. t. a.* The bill itself alleges her acceptance of the annuity and the present claim stands on that ground. The paper executed to Parker Askew, could, as a release of the land, legally apply to nothing but the annuity *Clancy on Mar. Wom.* 47, 48, 486. *Reeves on Dom. Rel.* 145. 1 *Bro. Ch. Rep.* 20.

JOHNS, JR., CHANCELLOR.—The Act of Assembly divorcing the complainant, Susanna Stilley, from her husband, John Stilley, *a mensa et thoro*, also confers upon her all the rights, privileges and immunities of a *feme sole.* This being her situation, I am of opinion that she had a right to execute all legal instruments necessary for the management of her property; and, as it appears from the release that she claimed her right of dower in the land held by the defendant, and for a valuable consideration, to wit, the sum of $100, released the same, by her so doing she has precluded herself from claiming, as against the purchaser, the annuity which was bequeathed to her in lieu of dower.

The bill is therefore dismissed, with costs.

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Statement of the case.

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FARMERS' BANK OF DELAWARE,

vs.

VINCENT GILPIN and JOHN F. GILPIN, assignees in trust, et al.

New Castle, Sept. T., 1833.

The indorser of a promissory note, though fixed in his liability by protest, is not entitled, as a *creditor*, to a share of the estate of the maker under an assignment for the benefit of creditors.

Such an indorser is entitled only to be reimbursed payments actually made by him.

The holder of the note can claim, under the equity of the indorser, out of the assigned estate, only to the amount of payments so made by the indorser.

BILL IN EQUITY AGAINST TRUSTEES UNDER AN ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—Joseph Robinson, being indebted to sundry persons and unable to pay his debts, executed an assignment, bearing date August 30th, 1822, to the defendants, conveying and assigning to them, their heirs and assigns, all his estate, real and personal, in trust to convert the same by sale into money, and the proceeds thereof to apply, in the first place, to the payment of a certain preferred debt of the assignor, specified in the assignment, and the residue of such proceeds to apply *pro rata*, towards the payment of all other debts of the assignor due to such creditors as should within sixty days thereafter execute a release in full of their respective claims against the assignor. Among the debts due and unpaid from Joseph Robinson, the assignor, at the date of the assignment, was a promissory note for $3000, made by Robinson, Aug. 28th, 1822, and payable to the order of Thomas Bradun, at sixty days after date. This note was indorsed for Robinson's

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accommodation, and was discounted by the complainant, the Farmers' Bank of Delaware. The note matured and was duly protested for non-payment. The assignees accepted the trust, and the creditors of Joseph Robinson, within the sixty days, executed releases. A release was executed, within the sixty days, by Washington Rice, as the attorney in fact of Thomas Bradun, the indorser, Bradun being then absent and responsible on the note of Robinson, the assignor. No release was executed by the Bank, so as to entitle it as a creditor under the assignment.

After the maturity and protest of the note, the Bank brought an action at law against Bradun, as indorser, and recovered a judgment for $3543.57. Upon this judgment a *fieri facias* was issued, and levied upon lands of Bradun, which lands were afterward sold under other executions, and nothing found applicable to the judgment of the Bank. A *fi. fa. attachment* was also issued, under which Robinson's assignees were summoned as garnishees. They appeared, pleaded *nulla bona*, issue was joined, and finally the Bank, the plaintiff in the attachment, was nonsuited. A suit was also brought by the Bank against Joseph Robinson, judgment recovered and execution issued. Under the execution, property of Robinson was sold to the amount of $1865.27.

The present bill is filed by the Bank, setting forth the above facts and claiming that Bradun, as the indorser and surety of Robinson on the note, had an interest in the trust fund entitling him to a dividend thereof, and that the Bank, as the holder of the note, was in equity entitled to stand in the place of Bradun, and to receive his dividend. The prayer was for an account and payment.

The defendants demurred to the bill, and the cause was first heard by the late Chancellor, (Johns, Sr.,) who overruled the demurrer and directed answers.

Thereupon, the assignees in trust, two of the defendants, answered, denying that Bradun was a creditor of Robin-

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son, otherwise than as indorser of the note, or that his release by Rice, as attorney, entitled him to any dividend out of Robinson's estate. They also alleged that Bradun had paid no part of the said note. Other defendants, creditors of Robinson, did not answer, and against them decrees were taken *pro confesso*.

The cause was put at issue and came before the present Chancellor, at the September T., 1833, for a final hearing upon the bill, answers and exhibits.

J. A. Bayard, for the complainant.

1. Bradun, as an indorser, was so far a creditor as to be entitled under the assignment to prove the debt, although it may be admitted that he must have paid the indorsed note before he could receive a dividend. This was such an equity as the Bank, standing in his place, might enforce; and being itself the creditor, payment of the debt was not a pre-requisite to its receiving a dividend. That the note had not matured before the assignment makes no difference. One holding a debt payable *in futuro*, or even a contingent debt, is none the less a creditor. This assignment in terms extends to all "claims and demands,"—words broad enough to include indorsers; and such was evidently Robinson's intention. Under our insolvent law (*Dig. Del. Laws*, 307,) indorsers are treated as creditors, and in practice they are admitted to prove under assignments. The present case is governed by the practice under our own insolvent laws, and not by decisions upon the bankrupt laws of England.

2. It is argued that we have an adequate remedy at law. Not so, for the object we seek, which is satisfaction out of this fund. It is a trust fund in a court of equity. By what common law process could we reach it? Our only remedy at law, which was by suit against Bradun, has

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Argument for defendants.

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proved ineffectual, and our equity is to proceed, as in his right, against the fund which is liable to him. To reach the fund we have no remedy at law, but in equity only.

There is no question of diligence on the part of the Bank against Robinson, in order to charge Bradun or to entitle the Bank, in equity, to his rights under the assignment. Bradun, as indorser, was on the note.

Wales, for the defendants.

Several objections arise against the equity of the complainant.

1. The complainant claims to stand in the place of Bradun, and to enforce his right to a dividend under the assignment. But Bradun is not a creditor. He is only an accommodation indorser of the assignor's paper, having paid nothing. Mere liability to pay the note does not entitle him to claim. To entitle himself, he must have paid the note. This is according to the settled rule under the English bankrupt law. *Chitty on Bills.* 459–60, 462–3. So also, it is held under the attachment laws of Pennsylvania. *Wallace's Cas.* 115. *Sergeant on Attachment*, 103. Before payment of the note, the Bank, and not Bradun, is the creditor. There cannot be two creditors for the same debt. To admit Bradun's right to a dividend under the assignment, while he stands only as an indorser having paid nothing, might result in leaving the assignor still liable to the Bank in a debt for which Bradun had received a dividend, contrary to equity and to the very purpose of the assignment, which was to obtain a full discharge from the assignor's debts. Bradun's release could not discharge Robinson from his liability to the Bank. It is then clear that Bradun could not himself claim under the assignment; and, therefore, the Bank, in now seeking to enforce his equity, must fail.

2. It is not alleged in the bill that Robinson was unable

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to pay, and that all means to recover it from him had been exhausted. Without this, the Bank could have no remedy in equity against an accommodation indorser, and if without remedy against him, it could have no equity under him.

3. The Bank had an adequate remedy at law, by action against Bradun, which they have already elected to pursue by a suit prosecuted to judgment and an attachment at law against these assignees. They elected this in preference to their remedy under the assignment, if such they had; and on this ground they have now no equity.

JOHNS, JR., CHANCELLOR.—The determination of this case must depend on the relation which Bradun as an indorser, liable absolutely to pay, sustained to Joseph Robinson, the maker. The term *creditor* has, by numerous decisions in cases of bankruptcy, acquired a legal meaning; and, in all cases of that description, its proper import is well understood. In ascertaining who are entitled as creditors to prove under the commission in bankruptcy the rights of an indorser, absolutely liable, have invariably been held to depend on the fact of payment, unless he has taken some legal evidence of debt, for which the liability of the surety is a good consideration. The fact of payment is declared to be essential, as well in a court of equity as at law. The difference in the practice of the respective courts is as to the time when it should be made,—the former requiring it to be prior to the act of bankruptcy, the latter considering the precedent liability accompanied by subsequent payment sufficient to entitle the indorser or surety to prove.

If the claim presented by the complainants in this suit comes within the principles settled by the decisions in cases of bankruptcy, there can be no ground on which it can be sustained; for even when the surety has taken from his principal some legal evidence of debt to secure himself, he shall not be permitted to receive a dividend on such

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proof, until he shall have discharged the debt which he is under obligation to pay; nor shall his dividend amount to more than his actual payment, though his counter security may entitle him to prove a much greater amount. *Ex parte Wildman*, 1 *Atk.* 110: 2 *Ves. Sr.* 113. *S. C.: Ex parte Marshall*, 1 *Atk.* 129; *Howis vs. Wiggins*, 4 *T. R.* 714.

But, independently of the decisions referred to in cases of bankruptcy, what are the liabilities and rights of an indorser, when the note discounted is for the accommodation of the maker, and the indorser simply lends his name, and thereby becomes conditionally responsible to the holder of the note? By the act of indorsement he enables the maker to obtain credit with the holder, who advances the money, and he incurs a qualified liability. It is not until the maker fails to make payment, and he receives notice under the protest, that his liability becomes absolute; nor even then, although fixed, can he sustain a claim against the maker, of such a nature as would authorize him to institute an action at law against him. Does the proceeding on the part of the holder of the note to enforce payment by pursuing his legal remedy vary the liability of the indorser? When judgment is obtained, it is but a security of a higher nature, and does not discharge the debt of the principal; and if there be execution against the property and nothing obtained under it, so long as the holder of the note fails to obtain payment out of the property or from the indorser, he retains the right of property in the note, and the indebtedness of the maker to the holder remains undiminished and absolute. The only right the indorser can have is purely conditional, as against the maker. If, as set forth in the bill, his being a security or absolutely liable render him a *creditor*, then clearly it must follow he has a legal claim upon the maker, and such claim cannot exist without a legal remedy; but until the indorser pays and takes up the note he cannot maintain *assumpsit* against the maker,—which is an equitable action,

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and is founded on the implied promise which the law raises in his favor.

This question may be considered in another view, as against the estate of a deceased person. Under the circumstances of this case, could the indorser claim and make probate of such a demand as a debt? It does appear to me impossible; for it cannot be contended that a mere liability to pay as surety entitles the party so liable to a credit for a debt. And, clearly, the relation of creditor presupposes that of debtor. The terms are cor-relative. My opinion in relation to this case is in accordance with that delivered by Washington, J., in the case of *Taylor vs. Gardiner, garnishee of Lees, Sergeant on Attachment*, 103. In that case there was a *scire facias* against the garnishee, upon an attachment and judgment against Lees. The question of law arose upon the following facts, viz: The attachment was laid on the 14th of September, 1807. In answer to the interrogatories put to the defendant, under the Act of Assembly, he stated that on the 19th of September, 1807, he received fifty crates of earthen ware belonging to Lees, which netted upwards of $900, but that Lees was under acceptances of certain bills indorsed by the defendant, which the defendant had been obliged to pay, the bills having been protested for non-payment. These bills were protested in August, and were taken up and paid by the defendant in October and November, 1807. Washington, J., in charging the jury, said,–" this is a hard case upon the defendant, who, " at the time this attachment was levied, was liable to pay " these bills as indorser, to a much greater amount than " the value of the funds of Lees in his hands: and if he had " then paid them, he would not have had in his hands any " effects of Lees. But until he paid them he was not a " creditor of Lees; and, of course, the attachment bound " the effects of Lees in his hands at the time it was laid,— " which could not be diminished by subsequent credits to " which he might be entitled. Now, until these bills were

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Syllabus.

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"paid by the defendant, he had *no claim* against Lees, and "on the 19th of September, he had goods of Lees in his "hands,—which must decide the issue in favor of the "plaintiff."

As the complainants have come into this Court to obtain relief by substitution, and have founded their claim to a dividend under the assignment, upon the right of Thomas Bradun, as a creditor of Joseph Robinson; and as I am of opinion that Bradun, as an indorser, fixed and absolutely liable, cannot, until payment, have any claim, or be considered as *a creditor* of Joseph Robinson,—therefore, in every view which I have been able to take of this case, the complainant must fail. As the bill has been taken *pro confesso* against some of the defendants, who are jointly interested in this trust fund, and those who have appeared and answered have disproved the complainant's case, the bill must be dismissed as to all the defendants, with costs. *Vide. Classon vs. Morris, on Appeal.* 10 *Johns' Rep.* 524.

This decree was affirmed by the Court of Errors and Appeals, at the June Term, 1835. See 1 *Harring. Rep.* 561.

ROBERT HOUSTON,

vs.

BARKLEY TOWNSEND.

Sussex, T. 1833.

Payment of the whole, or of a substantial part, of the purchase money is such a part performance of a contract for the sale of land as takes the case out of the Statute of Frauds. The authorities on this subject reviewed.

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Statement of the case.

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The payment must be clearly made and accepted in execution of the contract—being referrible to no other object.

Generally, the fact of part performance,—as when it consists of some unequivocal acts of the parties, referrible only to the contract, such as the taking possession of the land, &c.,—may be proved by parol. But the payment of money not being such an unequivocal act, the fact *that it was paid in execution of the contract* must either be admitted by the answer, or, if denied, must be proved by writing,—as by receipts or letters from the alleged vendor.

The fact of part performance being established, parol evidence is admissible to ascertain *the terms* of the contract. The terms should be clearly and distinctly proved; but the mere fact that they are controverted will not deter the Court from seeking to ascertain them. And if, from the nature of the testimony, it be difficult to ascertain them, the Court may direct an issue for that purpose.

The payment of $1,400.00 on account of purchase money amounting to $3,750.00, *held* to be a sufficient part performance, and that the fact and object of the payment was sufficiently proved by receipts of the vendor; and, the subject matter and terms of the contract being ascertainable from the evidence, a specific execution decreed.

BILL IN EQUITY FOR A SPECIFIC PERFORMANCE.—This was a bill for the specific performance of a parol contract for the sale of lands. The lands in controversy consisted of the residue of the real estate of Thomas Townsend, deceased, father of the defendant, Barkley Townsend, which in certain proceedings in the Orphans' Court for Sussex County for the assignment of dower and partition of the residue of the intestate real estate of Thomas Townsend, deceased, had been accepted by Barkley Townsend at the valuation thereof returned by the freeholders appointed to make the assignment and partition. The bill alleged that prior to the acceptance of the lands by Barkley Townsend, it was agreed between him and the complainant, that the complainant should join him in the acceptance of the real estate, and that, to make such arrangements effectual, the defendant would, after acquiring the title to the same, sell and convey to the complainant one half part thereof upon the terms following, viz: that the complainant

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should pay for the one half part of the real estate, the sum of $3,750.00 (which was one half the appraised value) as follows: that the complainant should sell and deliver one half of his interest in the schooner "Tanner" and one half of a scow, as payment of $625.00; that he should pay one half of a debt due from the estate of Thomas Townsend, deceased, to the Farmers' Bank of the State of Delaware, at Georgetown, the said debt amounting to $2,155.00, and the half part thereof, which the complainant was to pay to the Bank, amounting to $1,577.50; and the residue of the purchase money, to wit, $1,547.00, the complainant was to pay in cash upon the execution of a deed by the defendant. The bill further alleged a performance of the contract in part, and a tender of the residue;—that the complainant had paid in cash $1,400, and had sold and delivered to the defendant one half of his interest in the schooner "Tanner" and in the scow, worth together $625.00, and which were accepted by the defendant as a further payment to that amount, making in the whole the sum of $2,025.00, actually paid by the complainant in execution of the contract; that the residue of the purchase money of the half part of said real estate, to wit, $1,725.00, the complainant had tendered to the defendant, with a demand for the execution of a deed pursuant to the contract; but that the defendant had refused to accept the money tendered and to execute a deed; that the complainant was yet ready to pay the balance of $1,725.00, and fully to perform the contract on his part. The bill also alleged that the complainant held receipts for the cash payments amounting to $1,400.00,—one, a receipt for $800.00, dated March 15th, 1832, and the other, a receipt for $600.00, dated April 7th, 1832; that these receipts were signed and delivered to him by the defendant, as memoranda and notes in writing, acknowledging, as well the contract for the sale of one half part of the real estate, as the receipt of the sums of money

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paid on account of the purchase money. The bill also alleged that the defendant had admitted to sundry persons, that he had sold to the complainant the one half part of the property which he had accepted as the residue of the intestate real estate of Thomas Townsend, deceased. The prayer of the bill was for a discovery, and for a decree that the contract should be specifically performed by the defendant, the complainant tendering himself ready to perform the same on his part; also, for an account of rents and profits, &c.

The defendant pleaded "the act about contracts and assumptions," (*Digest Del. Laws*, 88); and also answered. The answer alleged that after the defendant had accepted the lands in controversy, the complainant applied to him for a purchase of one moiety thereof; that a treaty for such purchase was entered upon, and that pending such treaty the complainant advanced to him the said two sums of $800 and $600, which the defendant accepted in expectation that a bargain would be concluded, and that such advances would go toward the purchase money. Also, the defendant did agree to accept the complainant's interest in the schooner and scow, as part of the consideration, should a sale be effected. But the defendant alleged that the parties failed to agree upon the terms of the sale of said lands, and that no contract for sale was in fact ever made; that, consequently, the schooner and scow were not transferred to the defendant, and that he offered to repay the cash sums advanced by the complainant, but the latter refused to receive them. The answer admitted the indorsement by complainant of the note for $2,155.00 to the Farmers' Bank, but alleged that the note had been wholly paid by the defendant. The answer utterly denied the making of the alleged contract, and the signing of any paper or doing of any act intended to be in part performance of any contract whatever for the sale of the lands in controversy.

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The plea was set down for hearing, and after hearing was overruled by the Chancellor, but with an order that the plea should stand for an answer,—the benefit of the same be reserved to the defendant at the final hearing.

The case was put at issue, and depositions taken; and the cause came before the Chancellor, at the September Term, 1833, for a hearing on the bill, answer, exhibits and depositions.

Among the exhibits proved and read at the hearing, were the two receipts referred to in the bill and answer, and which were as follows:

(1.) "Received, March 10th, 1832, of Robert Houston, eight hundred dollars, which is in part pay of the half of the mill property, &c., in Middleford, which I promise to deed when called on.

(Signed.)
BARKLEY TOWNSEND.

(2.) "Received, April 17th, 1832, of Robert Houston, six hundred dollars, in part pay of the one half of the Middleford property, which I have sold to him. $600.

(Signed,)
BARKLEY TOWNSEND.

There were also, among the exhibits read, the following letters written by the defendant to the complainant, viz:

MARCH 3d, 1832.

(1.) MR. ROBERT HOUSTON.

SIR: Mr. Stuart informed me to-day that he would want his money in cash. You will please to meet me at Georgetown on Tuesday, and take enough money, if you have it, to pay him off, which will be about $800. Don't fail to go.

(Signed,)
BARKLEY TOWNSEND.

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MIDDLEFORD, MARCH 7th, 1832.

(2.) MR. R. HOUSTON.

SIR: I expected to see you to-day, but my horse is not at home, and this will answer the same. You will please to meet me at Georgetown to-morrow. I shall endeavor to have the business fixed. Don't fail. If Joshua Elligood has sent any papers to your store for me, please send them by the bearer.

(Signed,)
B. TOWNSEND.

MIDDLEFORD, APRIL 26th, 1832.

(3.) MR. R. HOUSTON.

DEAR SIR: I am compelled to relate a circumstance, which is very disagreeable to me, concerning the property. Our business, it appears is put to a stop by one circumstance which I do not like to mention here; but will relate to you when I see you. Some people have made themselves very busy, and they knew too well when to stop it. The amount you have advanced me I will return soon, if you wish it. I can't take the vessel under the present circumstances, but I will give you my freights, which is considerable per year. I will endeavor to see you to-morrow.

Very respectfully,

(Signed,)
B. TOWNSEND.

There was a considerable body of testimony taken under depositions, mainly intended to prove certain admissions on the part of the defendant, to sundry persons, of his having contracted to sell to the complainant one-half part of the property accepted by the defendant as the residue of the intestate real estate of Thomas Townsend, deceased. As the material parts of this testimony are stated in the opinion of the Chancellor, it need not be here set forth.

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C. S. Layton, for the complainant.

E. D. Cullen, for the defendant.

JOHNS. JR., CHANCELLOR.—The decision of this case appears to me to depend on two questions. *First*, Whether there has been a part performance. *Second*, If there has, then whether the terms of the parol contract as set forth in the bill are clearly proved.

1. As to the first question,—It is now settled, that equity does decide upon equitable grounds, in contradiction to the positive enactment of the Statute of Frauds; and, in cases of part performance, will admit parol testimony to prove the terms of a parol contract relative to land. *Hovenden, Tit. Spec. Perf.* 1, 2. The ground of equitable interposition is the prevention of fraud. *Vide Foxcraft vs. Lister, Colles Parl. Cas.* 108: *Jeremy's Eq.* 437: 2 *Atk.* 100: 1 *Br. Ch. Rep.* 417: 1 *Swanst.* 181: 7 *Ves. Jr.* 341: 3 *Ves. Jr.* 39–40 *and note*: *Parkhurst vs. Van Courtland*, 14 *Johns Rep. on Appeal*, 15. Whether payment of part of the purchase money is such a part performance as takes the case out of the Statute appears to be an unsettled point, and the decisions are contradictory. 1 *Madd. C. P.* 379: *Sugd. Ven.* 81 *to* 85. The early decisions upon the subject are, *Lord Pengal vs. Ross*, 2 *Eq. Ca. Ab.* 46: *Seagood vs. Meale*, *Prec. in Ch.* 560: *Luke vs. Morris*, 2 *Ch. Ca.* 135. These are generally cited as authorities to the point that it will not; but I would remark with respect to them, that they are adverted to in subsequent decisions as cases in which only a small sum was paid as earnest; and in 2 *Atk.* 1: 3 *Ves. Jr.* 37: 4 *Ves. Jr.* 720, it is held that part payment of the purchase money does take the case out of the Statute, upon the principle of part performance. These decisions have been objected to as extra judicial by Sugden, and as being nothing more than *dicta*. He refers to one made by Lord Redesdale as conclusive. 1 *Sch. and Lef.* 41.

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Upon looking into this case it appears to me, the contract was in writing; "the sum paid was in the agreement stated to be a deposit, and interest to be paid, if possession not delivered;" and the plaintiff seeking a specific performance of this written contract, which was under seal, attempted to supply by parol proof one of the terms alleged to have been omitted. It is true, in this case Lord Redesdale does take up the question whether part payment is part performance; and, reasoning upon the case before him and its circumstances, concludes therefrom, and also from the peculiar phraseology of the English Statute of Frauds, that part payment of purchase money does not take the case out of the Statute of Frauds; for he says, the great reason, as I think, why part payment does not take such agreements out of the Statute is, that the Statute has said that in another case, viz.: with respect to goods, it shall operate as part performance. And the Courts have, therefore, considered this as excluding agreements for lands; because it is to be inferred, that when the legislature said it should bind in the case of goods and were silent as to the case of lands, they meant that it should not bind in the case of lands. As this distinction does not exist in our Act of Assembly about contracts and assumptions, which is the Act relied on by the defendant in this case, it may be questioned whether Lord Redesdale's opinion can have any influence, especially as his reason does not apply.

So far as I have been able to trace the question in the American decisions upon the point of part payment, they accord with the decisions and *dicta* of Lord Hardwicke and Lord Rosslyn. In the case of *Wetmore vs. White*, 2 *Caine's Cases in Error*, (*New York*), Thompson, J. in delivering the opinion of the Court, (p. 109) says expressly, that payment of the consideration money had always been held as a part performance. Judge Reeves, under the title, "Powers of Chancery," in his Treatise on Domestic Rela-

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tions, has, after stating the conflicting decisions on this point, remarked in his peculiar manner, "that if it be *no fraud* to receive another's money on the footing of a parol agreement, and then to refuse the fulfilment of the agreement, then the cases in *Prec. in Ch.*, *Eq. Ca. Ab.* & *Sch.* & *Lefroy*, are correct, supposing the governing principle of the interference of chancery was to prevent fraud; but if it be fraud so to do, then they are incorrect, and the cases in *Vern.* 3 *Atk.* & 4 *Ves. Jr.* are correct, which proceed on the ground that the prevention of fraud was the reason why they were supposed not to be within the Statute. Washington, J., in the case of *Thompson vs. Tod.* 1 *Peters. Cir. Ct. Rep.* 388, says, "although it should be admitted that, under all the circumstances of this case, payment of a part of the purchase money will amount to a part performance, still it should appear beyond all reasonable doubt, that the payment was understood by the parties to have been so made and intended."

This opinion of Washington, J., accords with the principles laid down in *Powel on Cont.*: and 1 *Bac. Abr.* 74, *tit. Agreement.* I will refer to what is said by Bacon upon the subject of part performance, as it recognises essential principles and states the rule of evidence with respect to the payment of purchase money. Under the title of Agreement, (1 Vol. 73), Bacon says—"There are several cases in which it has been held, that a parol agreement, in part executed, shall be performed in the whole; but as those cases are not exactly stated or well reported, it will be sufficient to mention what seems to be the sense of them, and what, with any justness, can be collected from them, that if an agreement be made concerning lands, though not in writing, and the party by whom it was made receives all or part of the money, equity will compel a specific performance of the whole agreement; because this is out of the Statute, which designed to defeat such agreements only, no part whereof were carried into execution,

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and set up merely by parol; for that was the occasion of frauds and perjuries, that persons used to impose verbal agreements upon others, and by such false oaths charge the parties in equity to perform such agreements though they had never been made; and, therefore, the mere parol proof of such agreements concerning lands cannot be admitted in a court of equity; but where the price is paid, there it doth not stand upon the parol proof of the agreement only, but upon the execution of part of the agreement, which is evidence that the agreement was really made; and, therefore, there is the same reason that the plaintiff in equity should have the land for his money, as it is that he should deliver the goods where he has received the money; but the doubt in these cases is, what shall be a proof of the receipt of the money. Thus far it seems certain, that if the defendant in his answer confesseth the receipt of the money for that purpose in the bill, or if he denies the money, and it be proved upon him by writing, as by letter under his hand, or other written evidence, he shall be obliged specifically to perform the whole agreement, because he hath carried part into execution; but if the defendant confesses the receipt of the money, but says that he borrowed it from the plaintiff, and that he had it not in execution of that agreement, there he turns the proof of the agreement upon the plaintiff, and then the plaintiff must prove the receipt of the money by the defendant for the purpose in the bill, by some written agreement;"—for parol evidence as to the receipt of the money seems to be as much excluded by the Statute as parol evidence relating to the agreement.

From the investigation of the several decisions, I come to the conclusion, that there may be cases, in which payment of the whole, or part of the purchase money, will amount to performance of a parol contract concerning lands; and whenever the non-performance on the part of the vendor after receiving the purchase money, or a part

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thereof, would put the party into a situation that is a fraud upon him, unless the agreement is performed, the Court upon the principle of preventing fraud should decree a specific performance; provided, the terms of the agree ment can be satisfactorily ascertained, that is, the agreement as set forth in the bill. The act relied on as part performance should be such as would not have been done independent of some contract or agreement relative to land; because, as you are from the act performed to infer a contract, it must therefore be an act of that description which will not admit any other inference. I would further remark, that the act must to a certain extent be a joint act, or such as clearly indicates mutual assent. Thus, entering into the possession of land as owner, and with the consent of the vendor, has uniformly been considered and admitted to be part performance; and being evidence *per se* of an agreement for and concerning the land, the party seeking specific performance is permitted, by parol, to prove the terms. This act of the vendee, in entering upon the land and taking possession thereof as owner, with the assent of the vendor, is considered as in execution of an agreement, and therefore a part performance; but acts which are only preparatory, such as giving directions for conveyances, taking a view of the estate or putting a deed into the hands of a solicitor to prepare a conveyance, are not considered part performance. *Clerk vs. Wright*, 1 *Atk* 12: 6 *Bro. Par. Ca.* 45: 3 *Bro. Ch. R.* 400: 1 *Mad. C. P.* 381. So likewise, where there was a parol agreement for a compromise and a division of the estate by arbitration, acts done by the arbitrators towards the execution of their duty, such as surveying, &c., were not considered as acts of part performance, 6 *Ves. Jr.* 41. And where there was a parol agreement for the purchase of a lease, and that upon the plaintiff procuring a release of right from a stranger, the defendant would convey, and the plaintiff procured the release for a valuable consider-

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ation, this was held not to be a part performance entitling the party to a specific performance. 2 *Cox. R.* 271. These cases, and particularly the last, clearly evince the principle, which is essential to constitute an act a part performance; the thing done must be, as before stated, in execution of the contract, and not as preparatory or as inducement. See *Gevins vs. Salder*, 2 *Dessaus.* 190. Hence has arisen the difficulty with respect to the payment of money, not being such an act as of itself is conclusive; for it may have been made for a purpose different from that alleged; and if the party paying can by parol prove the fact of payment and the object, then it is apparent the door is open to perjury and fraud; and the Statute would be rendered useless and its provisions defeated. This has no doubt given rise to the opinion that payment of money, either in part by way of earnest or in full for the purchase, is not a part performance. If the fact is to be established by parol, then I should consider the opinion to be well founded; but if the fact of payment is connected with the concurrent act of the vendor receiving and appropriating the money paid as purchase money; and this appears, either by the defendant in his answer confessing the receipt of the money for that purpose, as charged in the bill; or if denied, it be proved upon him by writing, as by letter under his hand or other written evidence; or, if the defendant confesses the receipt of the money, but says he borrowed it from plaintiff, and had it not in execution of the agreement, then if the plaintiff prove the receipt of the money by the defendant, for the purpose alleged, by some written agreement; in all such cases, and upon every principle, it seems to me that such a fact, thus appearing, would be conclusive evidence of an existing agreement of which it was part performance, and which the defendant having carried part into execution should be compelled specifically to perform the whole.

In the case now under consideration, the complainant

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Opinion:—part payment, in this case, proved by writing.

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in his bill has charged the payments as made on account of the purchase money and in execution of the agreement set forth. The defendant, in his answer, admits the receipt of the money, as an advance pending the treaty for sale; but denies that said advances were a part performance of an agreement to sell and convey the said real estate, or any part thereof, to complainant; and also admits the two receipts. As the answer here admits the receipt of the money and denies that it was in part performance, we must recur to the receipts of March 10th, 1832, and April 17th, 1832, which are admitted by the defendant and proved by the witnesses to be signed by him. These receipts unequivocally establish the fact of part payment, to the amount of $1400, nearly one-half the purchase money as set forth by the complainant in his bill. The defendant has also admitted the proceedings in the Orphans' Court relative to the acceptance; and has not denied the matter stated by the complainant as to the inducement for his entering as surety in the recognizance. The equity of the complainant, as thus presented, is strong; and a case could not occur more in accordance with the rule as laid down by Bacon than that which appears from the two receipts. The defendant by the first receipt, dated March 10th, 1832, has not only acknowledged the receipt of $800, but also says "which is in part pay of the half of the mill property in Middleford, which I promise to deed when called on." The proceedings in the Orphans' Court of the same date show the property and the acceptance by the defendant, and fix the quantity. Thus the subject matter of the parol contract, and to which the receipts refer by name as the mill property in Middleford, is ascertained; a moiety of which, the defendant by said receipt declared he had sold to complainant; and by the acceptance it is proved to be two thirds of the residue of the Middleford property, which defendant accepted at the valuation, a moiety or half part of which he sold to the

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Opinion:—*terms* of parol contract to be clearly proved.

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complainant. This is a question which, as it relates to the terms of the contract, will be hereafter considered and properly belongs to the second question to which I will now advert; and, under the circumstances of the case, being of opinion that the payments on account of the purchase money, made and proved as aforesaid, are such acts as amount to part performance, I will now take up the second question, viz.: whether from the testimony in the case, the terms of the agreement set forth in the bill are clearly proved.

'2. It being the settled rule of the Court of Chancery that where a contract relating to an interest in lands has been executed by one party, or carried partly into execution, it may be proved by parol evidence, and specific performance decreed, in order that one side may not take advantage of the Statute, to be guilty of fraud (1 *Ves. Sr.* 221, 297: 2 *Johns. Rep.* 221, 573, 587: 1 *Serg. & Rawl.* 80: 5 *Day*, 16: *Parkhurst vs. Van Courtland*, 14 *Johns. Rep. on Appeal* 15;) and as I was of opinion that the part payment of the purchase money is a part performance of the contract set forth in the bill, the next consideration is whether that contract is made out by clear and satisfactory proof. Upon this subject *Sugden*, in his *Treatise on Vendors*, 86, remarks, "It may happen that although an agreement be in part performed, yet the Court may not be able to ascertain the terms, and then it seems the case will not be taken out of the Statute. If, however, the terms be made out satisfactorily to the Court, contrariety of evidence is not material (1 *Ves. Sr.* 221) and the Court will use its utmost endeavors to get at the terms of the agreement. 2 *Ves. Jr.* 243: 2 *Sch. & Lef.* 1: 5 *Vin. Abr.* 523, *pl.* 40: *Ib.* 522, *pl.* 38: 6 *Ves. Jr.* 470: 3 *Br. Ch. R.* 139: 1 *Sch. & Lef.* 22. In *Boardman vs. Mostyn*, 6 *Ves. Jr.* 470, Ld. Eldon says; "perhaps if it was *res integra*, the soundest rule would be that if the party leaves it so uncertain, the agreement is not taken out of the Statute sufficiently to be enforced; but in all the cases

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in equity, the Court has at least endeavored to collect, if it could, what were the terms the parties have referred to." *Sugden on Vendors*, 89, after stating a case lately decided by Lord Manners, and remarking that great reluctance had been manifested in carrying parol agreements into execution on the ground of part performance, where the terms do not distinctly appear, observes that, notwithstanding the case decided by Lord Manners, there appears to be abundant authority to prove that the mere circumstance of the terms not appearing, or being controverted by the parties, will not of itself, deter the Court from taking the best measures to ascertain the real terms. And Sugden further remarks, that it can rarely happen that an agreement cannot be distinctly proved where the estate is absolutely sold. Most of the cases on this head have arisen on leases, where the covenants, &c., are left open to future consideration. If, from the testimony, it is difficult to ascertain the terms of the agreement, the Court, to remove all doubts, may direct an issue. Hence, in the case now before the Court, if I am correct in the opinion I have expressed on the first point as to part performance, then it would be incumbent on the Court to ascertain the terms of the contract; or, if this could not be done, to direct an issue as to such facts as may not be clearly proved or established. The only fact about which there can be a doubt in the present case, is the price. The subject matter of the contract, and the quantity thereof sold and for which the defendant promised to give a deed on demand, I consider settled beyond all controversy, by the receipts signed by defendant and bearing date March 10th, 1832, and April 17th, 1832; and their operation and extent are fully and unequivocally ascertained, when taken in connection with the proceedings relative to the acceptance of said real property by defendant in the Orphans' Court of Sussex county, and with the testimony of Boyce and Elligood,—the defendant having by the acceptance acquired a title to two

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thirds of the real estate of his father, Thomas Townsend, deceased, described as the mill property in Middleford. Also, by the receipts dated March 10th and April 17th, 1832, defendant acknowledges to have received the sums mentioned,—in the first receipt in part pay of the half of the mill property in Middleford, which he promised to deed when called on;—by the second receipt he says, "in part pay of the one-half of the Middleford property which I have sold him." Thus much appearing to the Court by these receipts, which are proved in the cause, and not even denied, except evasively, as to their import, in the answer, I shall proceed to the inquiry whether the testimony satisfactorily establishes what was the consideration agreed upon.

The complainant in his bill sets forth the consideration, and alleges the same to be $3750; and then proceeds to state the manner in which, it was agreed, he was to pay the same to defendant. The defendant, in his answer, denies that any sum ever had been in fact agreed upon. The answer thus positively denying the fact, unless the same is established, either by the testimony of two witnesses or of one corroborated by circumstances, the denial in the answer must be conclusive. As this is one of the essential terms of an agreement, and necessary to be ascertained, I will advert to the testimony.

The first witness on the part of the complainant (the defendant not having taken any testimony) is Capt. Boyce, who in his deposition states, "that the defendant in the month of April or May, 1832, informed him he had sold half of the Middleford mills and property to complainant, and purchased the schooner Tanner and scow from him for $625; price of real property not stated; that he could have got more for said property than he had agreed to let Robert Houston (complainant) have it for." Now, it does appear that although no price was stated by the witness, yet his testimony proves two facts, viz: that

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the defendant had sold half of said property to the complainant and for a consideration agreed upon between the plaintiff and defendant; because, the defendant in stating to the witness that he had sold, had he said nothing more, would have afforded strong ground of presumption; but when he goes on to state, that he could have got more for said property than he had agreed to let Robert Houston have it for, he thereby unequivocally refers to a fixed price, settled and agreed upon, between the parties; otherwise, how could he with any propriety say, he could have got more for said property? The admission of the defendant, as proved by this witness, is therefore at variance with that part of his answer which denies that any price, or sum, or terms were agreed upon or fixed between complainant and defendant for the purchase of the said real estate by the complainant; hence, unless the testimony of Capt. Boyce is either sustained by another witness, or corroborating circumstances, it cannot prevail against the positive denial of the defendant, which is made under oath. But it does further appear, from the deposition of J. A. Elligood, that some time in the spring of 1833, at the time when complainant tendered the alleged balance of the purchase money, the defendant in presence of Elligood, in replying to what complainant stated to be the contract or agreement, admitted, "that he had heretofore agreed to convey said property to him, for the amount mentioned, but that it would be unjust that he should convey for that sum, being one-half of the valuation money." From the testimony of these two witnesses, both unimpeached and not controverted, except by the denial in the answer, it does appear that the parties had agreed upon the price or sum constituting the consideration; and from Elligood's testimony the sum is ascertained to be half of the valuation, and is thus rendered certain, because *id certum est quod certum reddi protest*; and by referring to the record of the Orphans' Court, which is in evidence in this cause,

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the one-half of the valuation appears to be the sum of $3750, as alleged in complainant's bill.

In considering the testimony in relation to this point, as to the sum or price having been fixed or agreed upon by the parties, the deposition of Noonan in connection with the answer, at first view, appeared to present some uncertainty whether the sum fixed or agreed upon was the half of the valuation, or half what the property cost defendant; and whether, under the term half what the property cost could be included the half of other expenses relative to the procuring the Act of Assembly, &c., they being properly a charge against the fund generally. But the deposition of this witness has relation to declarations of Townsend as to what he *intended to do*, and not, like the others, of what he *had done*. The subsequent information of Townsend, that there was a misunderstanding between him and Houston, does not disclose the cause, only that it was about the purchase of the Middleford property. From the declarations of Houston to Noonan it does appear that it related to the extra expenses, which it appears were never adjusted, although he seems to have been willing to pay his fair proportion. From the declarations, and the occasion when they were made, both before Noonan and Elligood, I am induced to believe this difficulty about extra expenses originated after the defendant had refused to perform the agreement. I am led to this opinion by the import of defendant's letter addressed to complainant, dated April 26th, 1832. In this letter the defendant attributes the interruption of the business to some unpleasant circumstance, which he was to communicate to the complainant when he should see him; and evidently attributes the non-compliance on his part to the interposition of some people, "who he says made themselves very busy, and who knew well when to stop it, &c." If the real difficulty had been a misunderstanding about the extra expense, would it not have been disclosed in this

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letter of the 26th of April? Why intimate that he was compelled to relate a circumstance that was very disagreeable to him? Surely, if the other had been the difficulty, it could have been stated with propriety, without occasioning any unpleasant feeling, such as the letter implies; nor could such a matter be in any way referred to the interposition of other people. This letter of the 26th April, written a few days after Houston had paid the defendant $600, evidently discloses that the writer was by no means satisfied with the course he was then adopting. He had, by the money and credit of the complainant, after discharging the debts against his deceased father's estate, been enabled to accept the two-thirds thereof at the valuation reduced more than one-half by the amount of incumbrances and debts paid off; and, in the course of the proceeding, as appears from the records of the Orphans' Court, had the benefit of the complainant's credit, as one of his sureties in the recognizance—a liability yet subsisting.

From all these circumstances, appearing in the cause, it is evident the defendant availed himself of the full benefit of the agreement, so far as the same had been performed by Houston, and did not make known his determination not to comply with the same on his part until he had obtained all the advantage he expected to derive from it. Upon the ground, therefore, that under the circumstances of this case it would be a fraud upon the complainant, if a specific performance were refused, I am of opinion the complainant is entitled to relief; but, before the same can be granted, it is necessary to direct an account of the rents and profits of the one-half of the two-thirds of the real estate for which the defendant, by the receipt dated March 10th, 1832, promised to give to complainant a deed on demand. And as equity considers as done that which is agreed to be done, I regard the right of the complainant to the one-half of the two-thirds of the said real estate as

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a perfect and subsisting title in equity from the date of the aforesaid receipt;—that it carried with it the right to the rents and profits, and entitled the defendant from that time to the balance of the purchase money, with interest, subject to deductions for such payments as might be clearly proved to have been made; all which, when the rents and profits shall be accounted for under an interlocutory order, will be adjusted, and the balance due on account of the purchase money being thus ascertained, then the Court will be able to make a final decree in the cause. Interlocutory decree for an account.

This decree was affirmed by the Court of Errors and Appeals, at the June Term, 1835. See 1 *Harrington's Rep.* 532.

SAMUEL LOCKWOOD,

vs.

MARTIN W. BATES, assignee in trust, and EZEKIEL MITCHELL and PETER ROBINSON, administrators of JOHN MITCHELL, deceased.

Sussex, Sept. T. 1833.

An order, granting a re-hearing of a decree in equity, does not *per se* vacate the decree; but only opens it for reversal, alteration or correction.

If an order for a re-hearing is dismissed, or discharged by agreement of the parties, without a re-hearing had, the original decree stands precisely as if such order had not been granted.

An agreement to exonerate sureties in a recognizance entered into by a defendant in a writ of *ne exeat*, upon their paying part of the decree recovered against the defendant, does not discharge the liability of the defendant under the decree.

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Statement of the case.

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It seems, that the defence of compromise or release is available by plea only, and not by answer.

One of several partners, to whom, in a suit for the final settlement of the partnership accounts, a share of the balance struck is payable under the decree in such suit, may set it off in equity against a judgment at law held against him by the defendant in the decree.

Such right of equitable set off is not affected by the fact that, under the same decree, shares of the partnership balance are made payable to other partners also; provided, the partners are entitled under the decree *severally*, and not *jointly*.

The equitable assignee of a judgment, even for a valuable consideration, and without notice of any existing equity against the judgment, takes it subject to all equities of the defendant in the judgment, accruing before he has notice of the assignment; and, consequently, subject to his right to set off a debt due him from the judgment creditor under a decree in equity made prior to his receiving notice of the assignment. A decree made after the notice, but entered *nunc pro tunc* as of a date prior to the notice, is of the same effect, in this respect, as if it had been *in fact* made at such date.

Under an assignment made to secure a pre-existing debt, the creditor has not the equity of a purchaser for valuable consideration.

A *lis pendens*, is constructive notice, not only to affect purchasers of the subject matter of the litigation, but also to protect all rights and equities arising out of it. In the present case, the pendency of a suit in equity resulting in a decree for the payment of a partnership balance by the defendant to his co-partner, which the latter sought to set off against a judgment due from him to the defendant, *Held* to be *constructive* notice of the co-partner's equity to an assignee of the judgment who took pending the litigation. *Held also*, that the assignee of the judgment, having been one of the solicitors in the suit in equity, must be taken to have had *actual* notice of the co-partner's equity of set off.

Mutual credits between two parties, though they cannot be set off at law, are ground for a set off in equity.

BILL TO OBTAIN THE BENEFIT OF A SET OFF.—This bill was filed under the circumstances following:

A bill in equity had been filed in the Court of Chancery for Kent county, at the suit of James Clayton, Samuel Lockwood and Armwell Long, three members of the firm of Mitchell, Lockwood & Co., against John Mitchell, the

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remaining member of the firm, the object of which bill, was to obtain a settlement of the affairs of the partnership by Mitchell, who had been the active partner. The cause was proceeded in to a hearing at the August Term, 1823, and the opinion of the then Chancellor, Ridgely, was announced at the February Term, 1826; but the defendant, Mitchell, having died since the hearing, the Chancellor, upon the petition of the parties interested, at the February Term, 1826, ordered a final decree to be entered *nunc pro tunc*, as of the 8th day of August, 1825.

By the decree the rights of the several partners were adjudged, and the defendant, Mitchell, was ordered to pay to them their several shares of the net partnership assets. As part of the decree the said defendant was ordered to pay to Samuel Lockwood, one of the partners,—the complainant in the present bill,—the sum of $1818.95. Pending the suit for the settlement of the partnership, Samuel Lockwood was indebted to John Mitchell, in a judgment bond for the real debt of $3000, dated the 3d of December, 1817, on which bond judgment was entered in the Court of Common Pleas, on the 9th of January, 1819. There was a credit to the judgment of $1000, as of Feb. 11th, 1818, leaving, however, with the interest in arrear, a balance due to Mitchell, larger than the sum which was payable to Lockwood, under the decree in the partnership suit. On the 8th of December, 1824, and while the partnership suit was pending, Mitchell executed a written assignment of the judgment he held against Lockwood to Martin W. Bates, in trust, for the payment of certain creditors of Mitchell. Notice of this assignment was given to Lockwood, on the 5th of November, 1825, and on the 22d of June, 1830, the judgment was marked on the record "for the use of Martin W. Bates, as per assignment to him "dated the 8th December, 1824." Martin W. Bates, to whom the judgment was assigned in trust, was, at the time of receiving such assignment, one of the solicitors in the then pending partnership suit.

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The present bill, setting forth the above facts, prayed that Lockwood might have the benefit of the decree made in 1825, in the partnership suit, by way of set off against the judgment due from him to Mitchell, now standing for the use of Martin W. Bates, in trust. The answer, admitting the facts set forth in the bill, relied upon three grounds of defence, viz:

1. That the assignment of the judgment against Lockwood, in trust for creditors, having been made on the 8th December, 1824, prior to the decree in the partnership suit in 1825, the rights of Lockwood's creditors under the assignment could not be affected by the subsequent decree against Mitchell, the original judgment creditor.

2. The answer set forth that, pending the partnership suit, a writ of *ne exeat* was granted against Mitchell, the defendant therein, under which he entered into a recognizance, with sureties, to secure payment of such amount as should be decreed against him in that suit. Afterwards, the complainants agreed with the sureties in writing, that upon the condition of their paying $1000 the complainants would not hold them responsible under the recognizance. That sum was afterwards paid by the sureties; and the answer of the defendants in the present suit insisted that by such agreement, and the payment made under it, the recognizance was discharged, and with it the liability of Mitchell under the decree in the partnership suit.

3d. The answer also set forth that after the decree in the partnership suit, to wit, on the 11th of April, 1826, a petition for a re-hearing was filed; and that the same, after argument on the 22d of Feb'y, 1827, was granted. Subsequently, on the 9th of July, 1827, an agreement was filed, whereby it was in terms "agreed between the parties "that the order for a re-hearing should be discharged, "and that the decree rendered by the Chancellor on the "24th of February, 1826, as of the 8th of August, 1825, "should remain firm and stable forever; and that the

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" said order for rehearing is accordingly discharged, and " the said decree is hereby made firm and stable forever." The answer insisted that the order for re-hearing *ipso facto* vacated the decree of 1825, leaving the cause as if no decree therein had been rendered; and that the subsequent agreement to discharge the order for rehearing could not have the effect intended by the parties, so as to re-establish the original decree. It was contended also, that the assignee of the judgment ought not to be prejudiced by the agreement, inasmuch as he was not a party to the partnership suit and had no notice of the proceedings relative to the re-hearing.

The cause was put at issue, and came before the Chancellor for a hearing upon the bill, answer and exhibits. There were no depositions,—an agreement of counsel being filed, in lieu of proof, as to the date at which Samuel Lockwood received notice of the assignment of Mitchell's judgment against him, to wit, the 5th of November, 1825.

Frame, for the complainant.

E. D. Cullen and *M. W. Bates*, for the defendants.

JOHNS, JR., CHANCELLOR.—In considering this case I have reversed the order in which the several grounds of defence are presented, and shall examine the last two before adverting to the question of set off.

1. The effect of the order granting a re-hearing does not *per se* vacate the original decree. It only opens it either for reversal, alteration or correction; and if the re-hearing does not take place, and the order should be dismissed, the original decree stands precisely as if no such order had been granted. The parties, having, by their agreement entered on the chancery docket, discharged the order for re-hearing, it must be presumed to have been done under the sanction and approbation of the Chancellor. The re-

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hearing not having taken place, no action of the Chancellor was or could be necessary to give validity to the to the original and final decree,—which, upon the discharge of the order for re-hearing, became firm and stable, independent of any agreement of the parties to that effect. The additional objection, viz: that the assignee, not being a party, should not be prejudiced, as he had no notice, will hereafter be considered, when I shall advert to the decisions in relation to purchasers *pendente lite.*

2. The next ground of defence is that of compromise,—under which it is insisted that the recognizance was satisfied and the order for re-hearing discharged. This, it has been contended, satisfied the decree; and, therefore, the complainant has no further interest or claim under it. In considering this ground,—which has been much relied on by the defendants,—even supposing it to be true, it appears doubtful whether a defendant can take advantage of it in his answer and whether it is not matter which must be relied on by plea. In 2 *Chitty's Eq. Dig.* 816, it is said, "a defence " of compromise or release is not proper for answer; it is " available by way of plea only. *Leonard vs. Leonard* 1 *Ball & B.* 323." But, considering it as properly embraced within the answer, the whole question is covered by the written agreement. No proof has been offered of any compromise, and the agreement must speak for itself. If we advert to it, it will appear, by an express provision contained in the agreement, that the parties were not to be thereby precluded from any remedy they might have against Mitchell. They bound themselves not to proceed on the recognizance, against the sureties, on condition of their paying $1000. This sum being afterwards paid, the receipt thereupon given must be considered in accordance therewith, and cannot be understood so as to contradict the written agreement of the parties. The recognizance taken under the writ of *ne exeat*, was no more than a security for the performance of the decree; and it was com-

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petent for the parties in whose favor it was taken to discharge the same, so far as the sureties were liable, without prejudice to their claims against their principal debtor under the decree. It amounted to no more than an abandonment of the security they had obtained under the writ of *ne exeat*, and left them to their usual remedies under the decree itself.

The argument founded upon the agreement discharging the order for a re-hearing, by which, as it has been contended, a compromise must have taken place, when extended beyond the sureties is inconsistent with the record entry. For, if it had been the intention of the parties to discharge the principal debtor, why did they declare that the original decree should remain firm and stable forever?

3. The remaining question in this case,—the one which appears to be the most material and important,—relates to the matter of set off. Before considering this, it will be necessary to state accurately the dates of the final hearing of the cause, the decree, the assignment and notice thereof. It appears, the final hearing of the cause in chancery was in August, 1823, previous to which the accounts had been filed and excepted to; and, at the August Term, 1823, the same was fully heard, and the Chancellor held the same under consideration, for the purpose of making his final decree. The assignment of the judgment was made in December, 1824; and, as appears from the agreement filed in this cause, notice of the assignment was not given to the debtor until November, 1825. In February, 1826, on petition, the Chancellor made his final decree, which be ordered to he entered as of the last term, viz: the August Term, 1825. The decree is in the following words:

"This cause having come on to be heard, on the 11th day "of August, A. D. 1823, and the bill, answer, accounts "filed, and the exceptions thereto, and the proofs and alle-

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" gations of the parties, being read and heard, and the " same debated by counsel learned in the law on both sides; " and the Chancellor having taken time to consider the " same; and the said Samuel Lockwood, Armwell Long " and Walter Douglass, administrator of James Clayton, " deceased, having at this term presented their petition to " the Chancellor, stating that the said John Mitchell " heretofore moved into the State of Maryland, and hath " died there since the last term, and praying that the " decree of the Chancellor may be made and signed *nunc* " *pro tunc*; and it being ordered by the Chancellor, this 22d " day of February, A. D. 1826, that the final decree in this " cause should be enrolled and signed as of the last term " of this Court, to wit, as having been made and rendered " the 8th day of August, A. D. 1825.—The Chancellor " doth now, this 24th day of February, A. D. 1826, order, " adjudge and decree, as of the said last term of this Court, " to wit, as of the said 8th day of August, 1825, that the " said John Mitchell, the defendant in this cause, shall pay " to Armwell Long, one of the complainants in this cause, " the sum of $1,468.23; that he shall likewise pay to " Samuel Lockwood, another of the complainants in this " cause, the sum of $1818.95¼; and that he shall further " pay to the said Walter Douglass, administrator of the " said James Clayton, deceased, the sum of $1706.61; " and that the said complainants recover their respective " costs in this suit from the said John Mitchell."

As this question of set off is to be considered with reference to the rights of the assignee, it may be well first to examine what would have been the condition of the obligee, had no assignment taken place. This will present the general question, whether Lockwood under this decree could have availed himself of the sum decreed to be due and payable to him, as a set off against the judgment held by Mitchell against him for a separate debt. At law, partners cannot maintain an action against each other, unless

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it be an action of account, until they have settled their accounts, or until a final balance is struck. In *Fromont vs. Coupland*, 9 *Eng. Com. Law, Rep.* 366, *Best, C. J.* says;—"If, after a partnership has been dissolved, the parties adjust "a balance, and one of them makes a promise to pay, "there arises on that a moral consideration which may be "the subject of an action. The case in Holt goes, perhaps, "somewhat further than this. However, it is enough to "say, that the opinion of Buller, Justice, in *Smith vs. Bar-* "*row*, is decisive of the present case. He there says, one "partner cannot recover a sum of money received by the "other, unless, on a balance struck, that sum be found due "to him alone. So that, before there can be an action or a "set off, in respect of a claim arising out of a partnership "account, there must be a final balance struck. The same "doctrine is laid down in *Foster vs. Allanson*, 2 *T. R.* 479. "It has been contended that a balance was struck in the "present case. But I think not. A balance during the "continuance of the concern will not do. It must be a "final balance of all the partnership accounts. There has "been nothing like that here; and we might be doing great "injustice if we were to allow the set off. The balance "in question was only upon a weekly account; and upon "an annual or final account the result might have been "different. Upon the balance thus struck no action could "have been maintained; and, unless an action could have "been maintained, the set off cannot be allowed" *Park and Burrough, J.'s* concurred.

This decision agrees with all other cases in principle, and determines the right of set off between partners at law by the right of action. The right of set off is dependent on the final settlement; and this result can only be obtained, either by the act of the partners, by a bill in chancery, or by the action of account. If, then, on dissolution of a partnership, the accounts between the partners are, on bill filed, finally settled and adjusted, and the bal-

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ances respectively due ascertained and liquidated, and a sum certain, severally due and payable, decreed,—it does appear that if the parties entitled should elect to proceed at law, each would, under the decree, have a distinct and separate right of action ; and this, upon the same principle on which they would have a right of action, in case the settlement had been made by the partners themselves. Hence, I conclude that, under this decree, Lockwood, for the amount due and payable to him from Mitchell, if he had elected to pursue a legal remedy, might have maintained his action of assumpsit; and if so, he being separately and in his own right entitled under the decree to receive a sum certain as due and payable to him from Mitchell, it is evident he would have a right to set off the same against a judgment due from him to Mitchell.

It has been contended that the decree, being made in a cause where several are complainants, is similar to a joint judgment and, therefore, cannot be set off against a judgment against one only of the complainants. On this point, it does appear that the character of the decree is misapprehended. The bill filed by the several partners against Mitchell, the acting partner, is not a suit instituted by the firm to recover a partnership debt. Its object was not to ascertain a sum due jointly; but, the partnership being dissolved, it is the mode adopted by the different members interested in the joint concern to adjust and settle their individual interests, and to ascertain and recover what is due to each separately from Mitchell. If it had been a suit on behalf of the firm, to recover a debt due the firm, then it would have been competent for either complainant under the decree to have received the whole, and to have given a discharge for the same. And, on the death of any one of the complainants, the survivors would have been entitled to the whole sum. It is the necessary result of a joint judgment, or of a joint interest under a decree, that the survivor is entitled. But how can the right of survivor-

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ship apply to the decree of 1825? By the express language of the decree, $1818.95 is due and payable from Mitchell to Lockwood; and he could not pay the same, or any part thereof, to either of the other complainants; nor could they give a discharge for it, or become entitled to it by survivorship. On Lockwood's death the right to receive it would have passed to his personal representatives as fully and absolutely as any other separate debt. The suit being a proceeding between partners, after dissolution of the firm, distinguishes it from the cases cited in the argument, which were decisions relative to the right of set off as between third persons, having separate demands against members of the firm and also indebted to the partnership. In all such cases, it would be inconsistent with the doctrine of set off to permit the separate debt to be deducted from the claim of the partnership; because, like the case of a joint judgment, it would be charging the joint interest with an individual debt.

Supposing therefore no assignment had been made as between Lockwood and Mitchell, the right to set off the amount due Lockwood under the decree, according to the principles of the decided cases would clearly have existed. The sum was a debt due from Mitchell to Lockwood, and it was liquidated and certain.

The next subject for consideration is the effect and operation of the assignment. It is admitted that the assignee takes subject to all the equity existing in the obligor; but the counsel for the defendant has insisted that the rule is limited to the equity existing at the time of the assignment. For the purpose of understanding this part of the case it will be necessary to advert to the assignment, and ascertain whether either the assignment, or the subject matter thereof, is within any statutory provision of this State. We have an Act of Assembly authorizing the assignment of bills and specialties. (*Dig. Del. Laws*, 42.) We have also statutory provisions for the assignment of

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judgments to sureties and to special bail, by whom the judgments have been paid. But the present case is not embraced within the provisions of any of these statutes; and I know of none other under which this assignee can derive the legal title. The peculiar character of this assignment requires to be particularly adverted to. It appears, from the proof in the cause, that judgment was entered on the bond executed by Lockwood to Mitchell, under and by virtue of the warrant of attorney, and that afterwards the same was indorsed for the use of Levi Dukes;—that in December, 1824, an extract from the record was obtained and an assignment made of the judgment to Martin W. Bates, Esq., for the purpose of paying a debt due from Mitchell to William Schlayter, of Philadelphia, and so much as might remain, after paying the Schlayter debt, to be applied to a debt due from Mitchell, together with Jacob Biddle, to Longstreth & Bailey of Philadelphia. It appears that the indorsement under this assignment was not made on the record until 23d June, 1830, when it was marked for the use of M. W. Bates, as per assignment to him, dated the 8th of December, 1824, on an extract. By agreement of counsel, filed in the cause, it is admitted that Samuel Lockwood, on the 5th of November, 1825, had notice of the assignment of the judgment by Mitchell to Martin W. Bates. How far the rights of the debtor are involved or affected under the transfer, independently of legislative enactment on the subject, must depend upon the general rule relative to notice. This would fix the 5th of November, 1825, the date of the notice, as the time when the liability of the debtor to the assignee commenced.

The next inquiry relates to the effect and operation of the decree which, under the petition in February, 1826, was ordered by the Chancellor to be entered and enrolled as of the 8th of August, 1825. And this presents for consideration the question, whether the assignee of the

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judgment, having notice of the suit pending in chancery, having acted as solicitor in the cause, and being fully acquainted with the whole proceeding, including the final hearing in August, 1823, does not come within the rule of equity as stated by Sir William Grant, Master of the Rolls, in the case of *The Bishsop of Winchester vs. Paine*, 11 *Ves. Jr.* 194; that "he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title." That a *lis pendens* is, of itself, notice to the purchaser is a rule well established. See 1 *Johns' Ch. Rep.* 577–578. One of the Ordinances of Lord Bacon, laid down for the better and more regular administration of justice in the Court of Chancery, was that "no decree bindeth any that cometh in *bona fide* by conveyance from the defendants before the bill exhibited, and is made no party, neither by bill nor order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the land, there regularly the decree bindeth." *Lord Bacon's Works, Vol.* 4, *p.* 511. In the case of *Martin vs. Stiles*, cited in 11 *Ves. Jr.* 200, the bill was filed in 1640, and was abated by death in 1648; and a bill of revivor was filed in 1662; and the purchase was made in 1651; —and yet, as the purchase was, by relation of the bill of revivor, made *pendente lite*, the purchaser was held bound, and by no less a judge than Lord Clarendon. When this case was afterwards, in a new shape, brought before Lord Keeper Bridgman, 1 *Cas. in Ch.* 150, he observed that it was not the form but the substance of a decree, that all are bound who come in *pendente lite*. The case of *Culpeper vs. Austin*, 2 *Ch. Ca.* 115, 221, is a strong determination on the same point In that case, the testator had conveyed his lands to his executors in fee, to pay his debts; and after his death the defendant purchased the lands of the executors *for a valuable consideration*. The heir brought his bill to have the land, on the ground that the lands were not

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wanted to pay debts; and the Lord Chancellor held, that the suit pending between the heir and the trustee, to have an account, was sufficient notice in law, without actual notice of the suit; and that the party purchased at his peril; so that if, in the event of the suit, it appeared that the sale was unnecessary and improper, the heir would recover against the purchaser. It turned out afterwards that the defendant lost his purchase, though he had no actual notice of the suit, and though he had purchased and paid the same day the bill was exhibited. In 1 *Ch. Ca.* 301: *Finch Rep.* 321, there we repurchases made by the defendant for a valuable consideration, *pendente lite*; and for that reason the purchasers were decreed to reconvey, and deliver up the writings. Chancellor Kent, after viewing the preceding cases, declares the same general principle, that as to all persons who come in as purchasers, *pendente lite*, though they are no parties to the suit, they and their interests shall be bound and avoided by the decree; and this is laid down as the known law in several cases to be found in Vernon. *Preston vs. Tubbin*, 1 *Vern.* 286. 1 *Vern.* 318, 459. 2 *Vern.* 216. See also, 2 *P. Wms.* 482. This doctrine came frequently under the review of Lord Hardwicke, and he always held that a purchaser, *pendente lite*, was bound by the decree in the suit. 2 *Atk.* 174; 3 *Atk.* 392. Lord Camden enforced the same rule. *Amb.* 676.

But, it may be said, that admitting the rule as settled by the preceding decisions, yet the assignee in the present case was not a purchaser of the subject matter in litigation, but of a judgment rendered for a separate debt of one of the partners. This objection renders it necessary to consider the question as to what was the equity of the obligor in the bond and debtor under the judgment; for the rule is well established that the assignee takes subject to all the equitable claims of the debtor; and in the present case, it being an assignment of a judgment, the assignee must take subject to all the equities of the debtor up to

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the time when the debtor had notice of the assignment. In the case of *Murray vs. Ballou*, 1 *Johns Ch. Rep.* 581, it was admitted that the assignee of the bond and mortgage took them subject to all the equitable claims of the obligor and mortgagor, but not to a latent equity of a third person. Yet, even with respect to the latent equity of a third person, in *Renfiew vs. Ferris, et al.*, 1 *Dow's Parl. Rep.* 50, it was held, on an appeal in a Scotch case, "that a latent "equity in a third person shall not defeat a *bona fide* assignee "of a right, without notice;" from which it appears that *with* notice it would. In the present case, it is not necessary to consider the rights of third persons, since the inquiry is confined to the equity of the obligor, who is the debtor under the judgment which has been assigned, and is within the rule that the assignee takes subject to all his equitable claims.

In *Norton vs. Rose, Washington's Rep.* 233, this question as to the equities of the obligor, and how far they prevail against an assignee, was fully considered and decided. A bill was exhibited in the Court of Chancery, in Virginia, by the appellant, to be relieved against a judgment at law recovered against him by the appellee upon an assigned obligation for the payment of money. The equity stated was, that the plaintiff had bound himself to pay to George Anderson £450, being the balance supposed to be due upon a settlement of accounts; that he had insisted upon certain credits for money paid by Charles Harris to George Anderson, to a part of which, he, the plaintiff was entitled, but that the plaintiff, relying upon Anderson's assurances that no payment had been made to him by Harris, and that he was insolvent, gave his obligation to Anderson for the £450. The bill prayed an injunction against a judgment obtained upon the obligation by the defendant, Rose, as assignee thereof; also to be allowed all discounts which he could make appear against Anderson; and for general relief. An injunction till further order was awarded. The defend-

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Opinion :—assignment, subject to equities of debtor.

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ant, Rose, by his answer, denied any notice of the plaintiff's equity at the time of the assignment made to him, and insisted that he was a *bona fide* purchaser of the debt in question, for a valuable consideration paid to Anderson.

The decree, or so much of it as relates to the subject of our present inquiry, determined that the plaintiff could not set off against the said debt, as held by Rose, any equitable demand which he might have against George Anderson ; and the bill was dismissed as to the defendant, Rose. From this decree Norton appealed. The case was fully argued in the Court of Appeals, and the judges delivered their opinions, *seriatim*. The principles applicable to the present case are so clearly and forcibly stated in these opinions that I cannot better express my own views than to adopt the opinions at large.

Roane, J. said "There are some points in this cause which "are not controverted by either side. It is admitted that, "upon the principles of the common law, a *chose in action* "is not assignable ; that is, the assignment does not give "to the assignee a right to maintain an action in his own "name. It is also conceded that, in England, the "assignee of a bond takes it charged with every species "of equity which was attached to it in the hands of the "obligee. If a different principle prevail in this country "it must grow out of the Acts of Assembly which author- "ized the assignment of bonds. The intention of these "was to alter the common law, so far as it prevented "bonds from being assigned, and to give to the assignee "a right to sue in his own name, in the same manner as "the obligee might have done. It was not intended to "abridge the rights of the obligor or to enlarge those "of the assignee beyond that of suing in his own name ; "and since it is clear, that prior to this law an original "equity attached to the bond, following it into the hands "of the assignee, this law does not expressly nor by im- "plication destroy that principle. With respect to the

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"proviso in the Act of Assembly, it contemplates *legal dis-* "*counts* only. The words 'the plaintiff shall allow all "discounts which the defendant can prove' were meant "to extend those discounts beyond the credits which "might be indorsed on the bond; and the latter words "'before notice of such assignment was given to the defend- "ant' were meant to restrain the discounts to such as "existed prior to notice of the assignment. This enlarg- "ing and restraining proviso was necessary, in order to "express clearly the meaning of the Legislature: but "neither the proviso, nor any other part of this Act, was "intended to extend to or abridge *equitable discounts*, which "were not in the contemplation of the Legislature when "making this law. The assignee, it is admitted, takes the "bond at his peril, so far at least as the possible claim of "the obligor to discounts may extend. If he chose not "to encounter this risk, nor to repose entire confidence "in the obligee, he should inquire of the obligor, and "from him obtain information respecting, at least, this part "of the subject. With the same convenience may the "inquiry extend to any equitable objections attached to "the bond. The two cases are precisely within the same "reason, and I can discover no principle of policy or jus- "tice which should so widely distinguish them. I am "clear in the opinion that an equity existing against the "bond is not lost or extinguished by an assignment for "valuable consideration and without notice. It is true "Norton's interest in the goods sold by Harris is not "established in the proof; but the ground of the Chan- "cellor's decree being wrong, it must be reversed, and "the cause remanded for further proceedings so as to let "in Mr. Norton to the proof of his equity."

Carrington, J.,—in the concluding part of his opinion, remarked;—"The case now under consideration comes fully "within those principles which seem to me to be correct. "Norton and Anderson were concerned together in trade,

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Opinion:—assignment, subject to equities of debtor.

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"and upon a settlement of accounts, Norton claimed a "credit for the proceeds of a quantity of goods in the "hands of Harris. But, Anderson assuring him that he had "received no part of those proceeds, Norton, unsuspicious "of the truth, gave his bond for the balance as it stood. "Rose, it is admitted, was a fair, *bona fide* purchaser of the "land. He is chargeable only with neglect. He might and "ought to have satisfied himself that the debt was justly "due before he received it. If, upon an inquiry, Norton "had assented to the payment, or acknowledged he had "no objections to it, this would have deprived him of his "equity against Rose. It was easy for any person, wish-"ing to take an assignment of the bond, to make the "inquiry. He would know at once where to make the "application. On the other hand, Norton could not give "a special notice to the person who was about to obtain it; "and the public papers would afford a very uncertain "channel of information. Upon the whole, I am clear that "the decree is erroneous and ought to be reversed."

Lyon, J.,—said, "If Norton had given this bond before "assignments were sanctioned by legislative authority, it "is admitted, on all hands, that his equity would have fol-"lowed the bond into the hands of an assignee. If so, is it "possible that the legislature could have meditated so much "injustice as to exclude him from setting up an objection to "the debt which, but for the law, he might have made? "Whatever would then have been the construction of the "law must be the construction of it at this day. I mention "this to shew that the legislature, by making bonds assigna-"ble, did not mean to deprive the obligors of any equitable "objections which they might have against them. Upon "the whole, I concur in opinion with the other judges." See also the case of *Pickett vs. Morris*, 2 *Washington's Rep.* 255.

The two preceding cases, which were decided in the Court of Appeals of Virginia, clearly establish the prin-

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ciple, that the assignee takes subject not only to the legal but also to the equitable claims of the obligor; and, in the case of *Norton vs. Rose*, it was a claim arising out of partnership transactions. The equitable claim to a further credit was founded on the right of one of the partners to his proportion of funds received by the other, to whom on settlement he had executed a bond without being allowed the credit. The Court held the assignee liable, notwithstanding he had no notice of the equitable claim and was a purchaser for valuable consideration.

In all the cases I have referred to, the assignee was a purchaser for valuable consideration. But how stands the present case in this respect? Was Martin W. Bates, or were the creditors for whose use he took the assignment of the judgment from Mitchell, purchasers for a valuable consideration? It appears that after the final hearing of the suit in Chancery, which was had at the August Term, 1823, in which suit Lockwood, as one of the partners, was claiming a balance due him from Mitchell, and the object of that suit was to establish and recover his claim from Mitchell, the whole matter in controversy being confined to the question of indebtedness, and the accounts filed under the interlocutory decree, and the exceptions heard and considered,—that while matters were thus pending, and when the Chancellor had the same under advisement for the purpose of making up his decree, Mitchell, the defendant, being indebted to other persons and insolvent or embarrassed, assigned this judgment, which he had against Lockwood, to Martin W. Bates, in trust for certain other creditors, they having judgments against him. It is not alleged that any valuable consideration was actually paid by the assignee, or that satisfaction was entered on the judgments for the payment of which the assignment was made. From all that appears it was nothing more than an assignment of a collateral security. This presents a case very different from that of a purchaser for valuable

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consideration, who has actually paid money; and more especially so, when the assignee was the solicitor on behalf of the defendant, Mitchell, and consequently, after the final hearing, in 1823, fully acquainted with the whole subject. In the case of *Turton vs. Benson*, 1 *P. Wms.* 497, Benson's administratrix assigned Turton's bond in trust for the benefit of Benson's creditors. Lord Chancellor, Parker, declared that "as to Benson's pretended assignment of the "bond, it was upon no consideration; but if it were, yet "in truth it was not an assignment, but an agreement "only that the assignee should have all the fair and equit- "able advantage and benefit of the bond that the assignor "himself was entitled to, and if nothing was due, nothing "could be assigned over." The Lord Chancellor further said, "as to what had been urged, that the creditors of "Benson were numerous and in danger of losing their "debts through a deficiency of assets, that would be of no "weight; for still the creditors of Benson must be paid "out of Benson's estate, and not out of the estate of "another man." This case in Peere Williams I have adverted to as fully answering the suggestion made by defendant's counsel, that the assignment in the present case was for a valuable consideration, and that if it be not sustained, the creditors for whose use it was made, will lose their debts. The remark made by the Lord Chancellor is founded upon the clearest principles of equity and justice.

It is admitted that, at law, there cannot be a set off under our Act of Assembly, except in cases of mutual debts; but where there are, upon accounts, mutual credits between two parties, though they cannot be set off at law, yet it is the common ground of a bill in equity. This was the opinion of Lord Chancellor Loughborough, in the case of *James vs. Kynnier*, 5 *Ves. Jr.* 108, supposing no bankruptcy had taken place. In the case of *French, assignee, vs. Fenn*, 3 *Doug. R.* 257, being a case of bankruptcy, the

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Opinion:—mutual credits may be set off in equity.

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set off was allowed, upon the ground of mutual credit. It was an action of assumpsit, brought against the defendant for money had and received to the use of the plaintiffs, as assignees of Cox. The defendant pleaded the general issue, *non-assumpsit*, and gave notice of set off. A verdict was found for the plaintiff, subject to the opinion of the Court on the following case, viz:

That on the 24th of January, 1778, Cox, Holford and Fenn, agreed to purchase a row of pearls for an adventure in trade, and that Fenn should advance the money. The agreement was as follows: "London, 24th January, "1778, J. Cox, J. Holford and J. Fenn, purchased a row "of pearls of James L. Jenne, for £2050, including the "commission. The said sum was advanced by J. Fenn, "upon an agreement that profit and loss thereon should "be equally divided between them, in thirds; in conse- "quence of which, we, the undersigned, do hereby agree to "pay two-thirds of the interest thereon, from the said 24th "of January, 1778, till the said row of pearls is sold."

In November, 1778, Cox became a bankrupt, after which the defendant sent the row of pearls to China, where it was sold for £6000, and the net proceeds being £5000, was remitted to the defendant. Cox, at the time of his bankruptcy, was indebted to the defendant in a much larger sum than a third of the profits of this adventure. The question for the consideration of the Court, therefore, was whether he was entitled to set off the sums owing to him from the bankrupt in bar of the action brought by the bankrupt's assignees for a third of the profits arising from the sale of the pearls. Lord Mansfield, said, "The Act "of Parliament is accurately drawn to avoid the injustice "that would be done, if the words were only mutual debts; "and it, therefore, provides for mutual credit. In this case, "credit is given to the defendant for a row of pearls which "is to belong in thirds to three persons. As Fenn ad- "vanced the whole money, the other two were to pay

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Opinion—conclusion.

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" him interest for their shares until the pearls were sold. " There is no doubt but there was a mutual credit. Cox had " trusted him with the pearls, and he had trusted Cox with " other goods, which in all probability he would not have " otherwise done. This is the real justice of the case, if " there had been no bankruptcy; and the bankruptcy " ought not to alter the real justice of the case."

Upon a full consideration of all the cases, I am of opinion that the complainant is entitled to relief and to have the amounts due him, under the decree, set off against the sum due upon the judgment.

Let a decree be entered accordingly.

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APPENDIX.

The two following cases, found among the late Chancellor Ridgely's notes, are deemed of sufficient importance to be published in an appendix to the Chancery Reports. Suggestions in favor of their publication have come,—as to the first case from the bar, and as to the other from some of the Judges. It will be, doubtless, acceptable to the profession to have such memorials as yet remain of the deceased Chancellors preserved; for which purpose they also are added to the appendix.

ELIZABETH FARROW,

vs.

NATHAN FARROW, JAMES FARROW, SARAH FARROW, ELIZABETH FARROW AND FRANCIS A. FARROW.

Orphans' Court, Kent County, Feb. T. 1822.

Dower may be assigned by the Orphans' Court in all cases, except where, under special circumstances, the aid of a court of chancery is necessary.

The Orphans' Court is a court of equity, as to all matters within its jurisdiction; and it may take cognizance of any bar to dower, equitable as well as legal.

An *ante*-nuptial contract for a collateral satisfaction in lieu of dower, fairly made, is a good bar in equity, and may be enforced against a claim of dower in the Orphans' Court. But a concealment by the husband of any fact which, at the time of entering into the contract, ought to have been communicated to the wife, is a fraud, and avoids the contract.

Petition for Dower.—Joseph Farrow, by his will, dated Sept. 20, 1821, devised all his real estate to his children, the respondents

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above named. He devised no portion of his estate, real or personal, to his widow. The personal estate proved to be greatly insufficient to pay the testator's debts. This petition was filed by the widow for the assignment of her dower out of the real estate of Joseph Farrow, dec'd. A summons in dower to the respondents, as heirs at law of Joseph Farrow, dec'd, was awarded and served. The respondents appeared, and pleaded in defence, that "before the "marriage had and solemnized between the said Joseph Farrow, "dec'd, and the petitioner, to wit, on the 8th of September, 1818, "by a certain instrument of writing, sealed with the seals of the said "Joseph Farrow, dec'd, and the petitioner, it was agreed by and "between the parties respectively, that the petitioner, if she should "be the longest liver, should, on the death of the said Joseph "Farrow, have and receive one-third part of the personal estate of "the said Joseph, in lieu and in full satisfaction of her third or "portion of the said Joseph's real estate."

The article of agreement, upon which the defence rested, was as follows, viz :

"Article of Agreement, made and concluded on this 8th Sep- "tember, 1818, by and between Joseph Farrow, of Little Creek "Hundred, in the County of Kent, and State of Delaware, of the "one part, and Elizabeth Birkelow, of the same Hundred, County "and State aforesaid, of the other, witnesseth,—That, whereas, "a marriage is shortly intended to be had and solemnized between "the said Joseph Farrow and the said Elizabeth Birkelow, it is "expressly agreed and understood by the said Joseph Farrow and "the said Elizabeth Birkelow, that if the said intended marriage "should take place, then and in such case, and provided also that "the said Elizabeth Birkelow, should be the longest liver, that she "shall, after the death of the said Joseph Farrow, have and receive "one-third of the said Joseph Farrow's personal estate, and in lieu "and full satisfaction of her third or portion of the said Joseph "Farrow's real or personal estate.

"In witness whereof, &c."

(Signed.)

In the presence of us,
PATRICK CONNOLLY,
HENRY LOWMAN.

JOSEPH FARROW, {L.S.}
ELIZABETH BIRKELOW. {L.S.}

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At the hearing of the petition the Article of Agreement was admitted ;—also, the marriage of the petitioner. that she was then twenty-one years of age, and the seisin of Joseph Farrow, deceased; also, that there remained no personal estate of the deceased, the whole having been sold under executions since his death. Witnesses were examined on behalf of the respondents, to prove the general notoriety of Joseph Farrow's indebtedness; but it did not appear to have been brought to the knowledge of the petitioner.

H. M. Ridgely, for the petitioner.

Hall and *J. M. Clayton*, for the respondents

Ridgely, Chancellor, and ex officio Judge of the Orphans' Court.— By the marriage article the petitioner agreed to take, in case she should survive her husband, Joseph Farrow, one-third of his personal estate, " in lieu in and full satisfaction of her third or " portion of his real or personal estate." Before and at the time of the marriage, Joseph Farrow was greatly in debt,—far beyond the value of his personal estate. He died about the 12th of December, 1821. On the 1st and 2d of January, 1822, his whole personal estate was sold by the sheriff, under execution process, originally issued the 8th of September, 1818, the day of the marriage ; and no part of it has been or can be applied according to this contract. The wife was twenty-one years old at her marriage.

On the part of the respondents, two grounds were taken. viz ;

1. That the Act of Assembly did not give to this Court jurisdiction in every case of dower ; that in many of them very important questions of law may arise which, if entertained by this Court, may be settled without going into and being heard and finally determined by the High Court of Errors and Appeals. And it was suggested that, on the allegation of fraud made by the petitioner's counsel, the Court should send that question to be tried by a jury.

2. It was contended that the wife, before marriage, might bind herself by such an agreement, however precarious it may be, so as to bar her claim of dower.

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First. As to the jurisdiction of this Court, there can be no question. The Act respecting devises of lands, joint estates and dower (5 *Del. Laws*, 174,) * has enacted that, "in all cases where a widow may "be entitled to dower, the same may be assigned and laid off to her "by the Orphans' Court of the county where the land lies, upon "her petition to the said Court, by the like proceedings, and in the "same manner, as is by law provided in the case of intestate estates; "and the costs and charges thereof shall be ordered by the Court "to be paid by the parties respectively concerned, according to "their interests in the said lands whereof dower shall be so assigned "or laid off." There can be nothing clearer than the meaning of the Legislature, as expressed in this Act. Authority is given, *in all cases* where a widow is entitled, to assign her dower. By law, in intestacies, no case can arise in which dower may not be assigned by this Court, unless the aid of a Court of Chancery may be required. Such has been the construction and practice under the acts concerning intestates' estates, and the Legislature intended by the late Act to subject all cases of dower, *where the demand could be sustained at law*, to the same jurisdiction, and to the same course of proceeding, whether the widow's right accrued on an intestacy or in any other manner. The act is remedial, and was intended to facilitate the assignment of dower, to lessen the charges, and equitably to divide the expenses among the parties interested. Yet, as there are no negative words in the Act and none implied, the widow may, according to the nature of the case, resort to any other tribunal which had jurisdiction before the Act was passed. In some cases it may be necessary to apply to chancery for its assistance; as where she has no title deeds, (*Cases Temp. Talbot*, 126,) or for the discovery of such facts as may enable her to proceed at law or in this Court; and on an allegation of an impediment thrown in her way in her proceedings at law, a Court of Chancery has a right to assume a jurisdiction to the extent of giving her relief for her dower, and, if the alleged facts are not positively denied, to give her the full assistance of that Court, she being, in conscience as well as at law, entitled to her dower. *Curtis vs. Curtis*, *2 Bro. Ch. Rep.* 620, 630. *Pultney vs. Warren*, 6 *Ves. Jr.* 89. But dower is a large demand, and the widow's remedy is *prima facie* at law; and wherever she had, or still

* See *Dig. Del. Laws*, (of 1829), 167.

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has, a remedy at law, she may apply to this Court by petition and recover her dower.

It has, however, been suggested that, on the allegation by the petitioner of fraud in the marriage contract, this case should be sent to one of the courts of law, in order that the question may be tried by a jury. For what purpose should it be sent to a jury? That another judge may sum up the testimony, and tell the jury what are the conclusions of law, upon the facts proved? Or, is it because a jury is more competent to try the credit of a witness? This Court, it is presumed, can as competently make the proper conclusions upon the facts as the judge of another court; and, as the advantage of a *viva voce* examination can be had here, the credit of witnesses may be as completely and satisfactorily tried here as by a jury. Suppose it were sent to a jury; their finding would not conclude this Court, and more especially the Court having appellate jurisdiction. They must hear and decide for themselves. The Act of Assembly warrants no such proceeding. The intestate acts countenance no such course; and no instance ever has occured of an issue being made up and sent to a jury by this Court. The petitioner has a right to insist on a decision of this Court; and it is the more important, as the petitioner's interest cannot extend beyond her life, that no unnecessary delay should be interposed. With her life her claim ceases; and she ought not to be delayed by a new and extraordinary mode of proceeding; particularly as the Act of Assembly limits the Court to the like proceedings as in the cases of intestacy.

The principal difficulty has arisen on the plea of the respondents. By that an agreement made before marriage, for a collateral satisfaction, is set up to bar the petitioner. At common law, a jointure was no bar of dower; because no collateral satisfaction could bar a right or title of inheritance or freehold. *Vernon's case*, 4 *Co. Rep.* 1: *Co. Lit.* 363: 2 *Bac. Abr.* 140, *Dower, F.* But now, by the Statute 27 H, 8. c 10. a jointure, made according to the Statute, is a bar. Though a collateral satisfaction is not pleadable at law, yet it may be a good bar in equity. *Lawrence vs. Lawrence*, 2 *Vern.* 365: *Co. Lit.* 36, *c*, *note* (1): *Eq. Ca. Ab.* 218 *pl.* 2: *Mundy vs. Mundy*, 2 *Ves. Jr.* 122, 129. And the cases in equity generally arise from some legal bar, or from some peculiar difficulty in prosecuting the claim at law. *Curtis vs. Curtis*, 2 *Bro. Ch. Rep.* 620, 630:

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Pulteney vs. Warren 6 *Ves. Jr.* 89 : *Mitford's Pleadings*, 110, 111 : *1 Madd. Ch. Pr.* 242.

No objection has been made to the plea upon this ground ; and this being the first case of the kind, the question is whether the plea of an equitable bar should be received by this Court, supposing it to be available in equity. The question must depend upon the character of this Court and its mode of proceeding. In the Constitution, *Article* 6, *Sec.* 15, 1 *Del. Laws.* 42 : 3 *Del. Laws* 256, the equity jurisdiction of this Court is spoken of as the only jurisdiction of the Court ; and in the Act for establishing an Orphans' Court, (1 *Del. Laws,* 87,) an appeal is given to the Governor for the time being, in equity. All the acts to be performed by this Court are of an equitable nature ; and the proceedings are by petition, summons, citation, attachment, imprisonment and sequestration —forms peculiar to a court of equity. The subject matter of the jurisdiction of this Court is such as properly belongs to a court of equity ; and no portion of it is such as belongs to a court of common law, unless it be the partition of the real estate of intestates among their heirs,as tenants in common, and the assignment of dower. The division of the real estate of intestates among their heirs, as tenants in common, is a peculiar case, and is not known at common law, unless among parceners. This authority was given to the Orphans' Court very early, and has been so continued. The assignment of dower in this case is to be made upon the petition of the widow, and in the same manner as is by law provided in the case of intestates' estates ; and the costs are to be paid by the parties according to their interest in the land. This Court, then, is a court of equity, as to all matters within its jurisdiction ; and whatever is a bar, either at law or in equity, may be pleaded. The Act declares, that in all cases where the widow may be entitled to dower, the same may be assigned and laid off by this Court. If she is not entitled at law, or if there is any equitable bar, the Court cannot assign it. The Act seems to mean that the whole inquiry should be made by this Court, to ascertain that she has title before the dower can be assigned

Second. This, then, brings us to the question of the widow's right, which depends upon the effect to be given to the marriage contract.

The contract, if fairly made, would certainly be binding on the petitioner. In *Lawrence vs Lawrence,* 2 *Vern.* 365, Lord Somers

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decreed that a collateral satisfaction was a good bar in equity. This decree was reversed,—not because of any doubt that dower might be barred in equity, but because the devise to the wife was not expressed to be in satisfaction of dower. See *Mr. Hargrave's note (1) to Co. Lit.* 36, *a.* In *Davila vs. Davila,* 2 *Vern.* 724, marriage articles were held to bar all demands out of the personal estate under the Statute of Distributions. *Caruthers vs. Caruthers,* 4 *Bro. Ch. Rep.* 506, in the note, where *Davila vs. Davila* is cited as law. In *Glover vs. Bates,* 1 *Atk.* 439, a marriage contract, made before marriage with an infant and which she agreed to after the death of her husband and after she arrived to the age of twenty-one years, was held to bar her of her share of the personal estate under the Statute of Distributions,—the husband having died intestate; such effect being given to a provision that certain terms for years therein mentioned should go to the wife, in full satisfaction and recompense of all right and claim of dower, or any claim or right by common law, custom of the city, or any other usage, law, or custom notwithstanding. In *Caruthers vs. Caruthers,* 4 *Bro. Ch. Rep.* 500, where the question was whether a female infant should be bound by a settlement made on her marriage, it was decided that she should not be bound, because of the uncertainty of the provision made for the wife. But the Master of the Rolls said, that if she had been an adult she might have taken a provision out of the personal estate, or she might have taken a chance in satisfaction of her dower, *acting with her eyes open*; but an infant is not bound by a precarious interest. In 1 *Madd. Ch. Pr.* 355, the law is thus summed up, that "any provision, however inadequate or precarious it may be, which an adult "before marriage agrees to accept, in lieu of dower, will amount to "a good equitable jointure." Like all other contracts, if she is fully apprised of all the circumstances, if she acts with her eyes open, and has an equal knowledge with the husband of all the facts, so that she may judge of them and of the probable result of the contract, she certainly ought to be bound. But if there is any concealment, or the suppression of any fact or thing which ought to be communicated, it amounts to fraud, and will vitiate the contract. This doctrine is applicable to all contracts. *Jervois vs. Duke,* 1 *Vernon* 19: *Broderick vs. Broderick,* 1 *P. Wms.* 239: *Cann vs. Cann. ib.* 727. And in the very case of dower, if it be fraudulently or partially assigned by the sheriff, a court of equity will give

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relief. *Hoby vs. Hoby*, 1 *Vern.* 218: *Sneyd vs. Sneyd*, 1 *Atk.* 442. In *Harvey vs. Ashley*, 3 *Atk.* 607, Lord Hardwicke declared that the husband, who had entered into a marriage contract with his wife, an infant, was guilty of a fraud in secreting judgments and other debts that were charged upon the estate, and that this was a good ground for relief,—not indeed to set aside the whole settlement, but to apply the unsettled estate of the husband to exonerate the estate settled of the incumbrances which had not been disclosed And the case cited by the petitioner's counsel from 2 *Com. Dig.* 469, *Chancery*, (3 *E.* 2) shows, that where a personal estate was vested in trustees upon trust to pay £100, per annum, to a widow in lieu of dower, which proved deficient, though she accepted it for many years, it was supplied out of the real estate. This case shows that where something is expected and considered to be given in lieu of dower, and the consideration fails, the woman shall be otherwise satisfied. And this does not interfere with what was before said, that a woman, an adult, might take any chance or provision, however precarious it may be, acting with her eyes open, in satisfaction of her dower; for the unreasonableness of a contract is no ground to set it aside, if she is of age, perfectly acquainted with her rights, fully aware of what is done, and of all the circumstances which may affect her, and is free from deception.

The contract now under consideration is not such as a Court of Chancery would execute. The husband secreted the debts which both his real and personal estate were bound to satisfy. On the 8th September, 1818, the date of the contract and marriage, two writs of execution were issued at the suit of the President, Directors and Company of the Commercial Bank of Delaware, under which his goods and personal estate were all subsequently sold, without raising a sufficiency to pay his debts.

According to the evidence, there is no proof that Mrs. Farrow had any notice of the debts. Mr. Farrow had a good deal of conversation with other persons about them; but none of the witnesses bring a knowledge of them home to the wife. Nothing was said about them when the contract was executed nor at the time of the marriage, all which happened the same day. There is a total want of any evidence that she had been informed of his situation. It is evident that she must have expected something as an equivalent for

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what she abandoned; and, therefore, to make the contract valid, justice required that his real situation should have been fully disclosed to her. He knew well his embarrassments, and that there could be no reasonable expectation that she would ever receive any thing in lieu of her dower. All this should have been explained to her.

An order for the assignment of dower must be made.

WALTER DOUGLASS, Ad'mr. of WM. S. DOUGLASS,

vs.

ROBERT STEPHENS.

High Court of Errors and Appeals, June T. 1821.

History, objects and construction of the 2d Sec. 4th Art. of the Constitution of the United States, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

William S. Douglass, the intestate, a citizen of the State of Delaware, became bound by his bill obligatory, dated the 6th of March, 1813, in the sum of $320, to be paid to Robert Stephens, a citizen of the State of Maryland. William S. Douglass was also indebted at the time of his death, to Walter Douglass, his administrator, a citizen of this State, the plaintiff in this Court, in a large sum of money, on a book account. Stephens brought a suit in the Court of Common Pleas on this bill, against Douglass, the administrator. To this action the defendant below pleaded debts of prior and superior dignity, and insisted that the Act of Assembly directing the the priority of payment of debts within this government (1 *Vol. Del. Laws*, 81) entitled him to retain his debt, in preference to Stephens, a creditor residing out of this State.

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The Act of Assembly upon which he relied provides as follows, viz.: "that where any debts are due, by any person whatsoever, to "any of the inhabitants of this Government, in all courts within the "same, priority of judgment and execution for debts due from any "person whatsoever shall be allowed to the inhabitants of this "Government, and that no foreign debt shall be paid by any executor "or administrator, till the debts due to the inhabitants of this "Government be first secured and paid, on penalty to pay the credi-"tors of this Government, as far as the assets in such executors' or "administrators' hands would reach, before such foreign debts were "paid; *Provided*, that the demand be made within six months after "the death of such debtor; any law, act, custom or usage to the "contrary hereof, in anywise notwithstanding."

The plaintiff below, Stephens, on the other hand, relied upon the provision in the second section of the same Act of Assembly, and on the second section, of Article IV, of the Constitution of the United States, as entitling him to a recovery of his debt, in preference to the inhabitants of this State whose debts are of an inferior order The Act prescribes the payment of debts of a deceased person by an executor or administrator as follows: (1.) Funeral expenses. (2.) Debts due the crown and to the proprietary; now to the State. (3.) Debts due by judgment obtained in the lifetime of the party deceased. (4.) Debts due by recognizance and for rent. (5.) Debts due by obligation. (6.) Debts due by bill. (7.) Servants' and workmens' wages. (8.) Accounts of merchants and others. The Section of the Constitution, referred to, ordains that "the citi-"zens of each State shall be entitled to all privileges and immuni-"ties of citizens in the several States." The sixth Article of the Constitution declares, that the Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

The Court of Common Pleas rendered a judgment in favor of Stephens. To reverse that judgment was the object of this writ of error.

W. Hall, for the plaintiff in error.

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H. M. Ridgely, for the defendant in error.

RIDGELY, CHANCELLOR.—I shall consider this case on the broad question, whether the Constitution of the United States places a citizen of the State of Maryland on an equal footing with a citizen of this State, in the recovery of debts. If it does, the judgment of the Court of Common Pleas must be affirmed; for the Constitution of the United States is the supreme law of the land, and abrogates the laws of every State in the Union inconsistent with it. But if, on the other hand, the term "citizen" is only used in contradistinction to "alien;" and if the Constitution designed to secure to the citizens of other States the mere right of citizenship, that is, that they shall not be deemed aliens, and to confer no other privileges, then the judgment is erroneous, and should be reversed.

Before the Declaration of Independence the colonist of Great Britain in America, and before and since, the subject of the King of England, in every part of the world, could and can acquire, inherit, and hold land in any of his dominions, as fully as an Englishman can in England. This doctrine was carried so far in *Calvin's case*, that after the union of the crowns of England and Scotland in the person of James I., of England, a Scotchman, born after the Union, was adjudged to be a natural born subject of England, and entitled to the same remedies in the courts of England as an Englishman; and after the conquest of Ireland by Henry II., and the extension of the British laws to that country, those who were born in Ireland were not aliens to the realm of England. Even those who were born in Calais, from the reign of Edward III. until it was lost in Queen Mary's reign, were capable and inheritable to land in England. See *Calvin's case*, 7 *Coke's Rep.* 1.

Impressed with these established principles, the people of the United States associated in the year 1774 to resist the oppressive and unconstitutional pretensions of the British King and Parliament. They united and acted in concert, as one people. Far from being aliens to each other, they knew that they were practically, as well as legally, fellow-citizens,—holding lands by purchase and inheritance in the respective governments, and enjoying every right and privilege indiscriminately with the inhabitants, only as the same were curtailed in this State by the Statute under consideration. In-

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deed; so far was this sentiment of community of interest carried that the people of this State were often represented, in their own Legislature and in Congress, by persons who resided in Pennsylvania. After the Declaration of Independence and the adoption of our State Constitution of 1776, Mr. McKean, though resident in Philadelphia, was a member of our General Assembly; and General Dickinson, of New Jersey, and Mr. ———— of Philadelphia were, at another time, Representatives of this State in the Congress of the United States. Mr. McKean actually signed the Articles of Confederation, on behalf of this State, when he presided in the Supreme Court of Pennsylvania. 2 *Del. Laws*, 645: 1 *Dall. Rep.* 32. After the Declaration of Independence, and before the signing of the Articles of Confederation, each State, possibly, had the power to declare the citizens of other States aliens; but such an exercise of power would have been viewed with a most suspicious, unfriendly eye; and would have violated the great principles of our union. The Articles of Confederation, however, sufficiently restrained any such attempt. In the fourth Article it was agreed, the better to secure and perpetuate mutual friendship and intercourse among the people of the several States in this Union, that "the free inhabitants of each of these States,—paupers, vagabonds "and fugitives from justice excepted,—shall be entitled to all privi- "leges and immunities of free citizens in the several States; and "the people of each State shall have free ingress and regress to and "from any other State; and shall enjoy therein all the privileges of "trade and commerce, subject to the same duties, impositions, and "restrictions as the inhabitants thereof, respectively; *provided*, that "such restrictions shall not extend so far as to prevent the removal "of property imported into any State to any other State, of which "the owner is an inhabitant; *Provided also*, that no imposition of "duties or restrictions shall be laid by any State on the property of "the United States, or either of them." This Article operated in favor of persons not included within the expression or meaning of the present Constitution, if the words "free inhabitants" were intended, as I presume they were, to include all the inhabitants of a State, except slaves. They comprehended aliens, free negroes, and every possible description of persons, not slaves, with the exception of paupers, vagabonds, and fugitives from justice; and they enlarged the privileges and immunities of such free inhabitants,

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making them equal to the privileges and immunities of the citizens of a State. Nay, the inhabitants of a State might have been entitled to greater privileges in another State than they could enjoy in their own, and to greater than the mere inhabitants themselves were entitled to in such other State. A State might have qualified the citizenship of its own people, but not the citizenship of the inhabitants of a neighboring State, who chose to visit or reside in such State; and thus no State could have protected itself against any class of persons, however worthless or pernicious they might have been to society, if they were tolerated in a neighboring State. A single State might have poured into other States all its miscreants, merely because they were inhabitants. And, in fine, the population of the United States, in relation to foreigners and all kinds of free persons, would have been subject to the control of any particular State favorable to the reception of such persons. The present Constitution has wisely corrected this evil, by vesting the right of naturalization exclusively in the United States, and by using the word "citizens" instead of "free inhabitants." There was another objection to this fourth Article of the Confederation. After employing the most comprehensive words, "privileges and immunities," it descended into a detail of some of those privileges and immunities, and weakened the force of those terms by not including in the detail all the privileges and immunities they were designed to protect. Ingress and regress from one State to another, the privileges of trade and commerce, and the removal of property are the only privileges and immunities enumerated, although the words "privileges and immunities" comprehend all the rights, and all the methods of protecting those rights, which belong to a person in a state of civil society,—subject, to be sure, to some restrictions, but to such only as the welfare of society and the general good require.

It is most evident, from a consideration of this Article, that the idea never was entertained that the people of one State could be taken to be aliens in another. The Article was made, the better to secure and perpetuate what then existed. It conferred no new right, but legalized and preserved such as were then fully enjoyed. It is true, that the Legislatures of the several States might have restricted the privileges previously possessed by the citizens of the other States, and they might have violently made the people aliens to each other; but, from the date of the ratification of the confed-

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eration, their power in this respect was completely limited; and, without a dissolution of the Confederacy, inhabitancy alone in one State entitled the inhabitants to all privileges and immunities of free citizens in the several States.

Thus stood our Union before the adoption of the present Constitution of the United States. The second section of the fourth Article was designed, if we judge from the words of it and from the whole scope of the Constitution, to restrain to a more definite class of persons the privileges and immunities secured to them, and to extend to the citizens of the several States, in each State, all privileges and immunities of citizens, without implication or construction. The only apparent difficulty in this section arises from the want of a constitutional definition of the word "citizens:" but, by contemplating our manners, the laws enacted before and since the Revolution, the Constitution of the United States and the Statutes of Congress, the meaning of the word "citizen" is as clearly ascertained as any other term or expression which comprehends several attributes or properties.

The word "citizen" imports the same as the word "freeman" in our old Acts of Assembly; and means every white man, who, by birth or naturalization, is or may be qualified to exercise and enjoy, under like circumstances, all the rights which any native born, white inhabitant of the State does or can enjoy. And every white man, born or naturalized in any other State, is such a citizen of such other State as to be entitled, in this State, to all the civil rights of citizenship, and by residence and other qualifications to all the political rights.

When men entered into a State they yielded a part of their absolute rights, or natural liberty, for political or civil liberty, which is no other than natural liberty restrained by human laws, so far as is necessary and expedient for the general advantage of the public. The rights of enjoying and defending life and liberty, of acquiring and protecting reputation and property,—and, in general, of attaining objects suitable to their condition, without injury to another, are the rights of a citizen; and all men by nature have them. See at large *1 Blk. Com. Book I. ch. 1.* But, unless some method had been provided to secure their actual enjoyment, they would be in vain declared, claimed, or asserted There are, therefore, establish-

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ed certain other subordinate rights of the citizen, which serve principally as barriers to protect and maintain inviolate those great and primary rights. The preservation of these original rights includes the preservation of the subordinate rights,—the privileges and immunities which it was intended by the Constitution of this State to preserve to its citizens,and by the Constitution of the United States to preserve, in each State, to the citizens of the other States, for the protection of the primary rights before mentioned.

The right of enjoying and defending life consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and in resisting, even to the commission of homicide, where such resistance is necessary to save one's own life. The right of enjoying and defending life, without the privilege of protecting it by all the means which the law as well as nature, in extreme cases, furnishes, would be illusory to the last degree. Therefore, this privilege belongs to us, and, by the Constitution of the United States, to every other citizen of the United States in common with us.

And so, as to the enjoyment and defence of liberty. To exercise this right every individual entitled to it must have the privilege of locomotion, of changing situation, or removing his person to whatsoever place his inclination may direct, without imprisonment or restraint, unless by due course of law. To secure this right more effectually our constitution (Art. I, Sec. 13,) has declared, that the privilege of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. But, as our Constitution was established for the government of the people of this State, it might be contended that the Legislature may limit its operation to its own citizens, and that the privilege may be withheld from citizens of another State. And, certainly, the argument would be as sound as it is to assert that the Legislature may suspend the privilege of recovering a debt, except on terms of inequality which amount to a prohibition in some instances.

The right of acquiring and protecting reputation and property includes all the privileges incident to such right. Property cannot be acquired and protected without the privilege of applying to courts of justice. No man can be his own arbiter. Our Consti-

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tution has declared that all courts shall be open, and every man for an injury done him in his reputation, person, movable or immovable possessions, shall have remedy by due course of law, without sale, denial, or unreasonable delay or expense. This is the assertion of a general right,—the right of all men; and it would be ineffectually declared were not the redress of wrong and the means of enforcing contracts, by which property is acquired, secured and protected. The acquisition of property is effected by contract. A right to property, or the acquisition of property, may be derived either from the act of another or by virtue of some positive institution. When it is derived from another it is generally effected by contract; and it becomes the privilege of every citizen to apply to courts of justice to enforce contracts, or to obtain redress for their violation. It is a privilege which grows out of the right of acquiring property, and is as necessary to its preservation as the air we breathe is to life. Suppose an horse is lent and the borrower refuses to restore him,or suppose an horse to be wrongfully taken,the owner can have remedy by law only. By redressing the injury or wrong the property is protected. So, if an horse is sold, and instead of receiving the price the seller leaves the money in the hands of the purchaser and takes a bond for its payment at a future day, the recovery of this money by a suit at law eventually protects the property. Contract may be traced back to the establishment of exclusive property by civil law; and as contract had its origin in property, so property, or at least property derived from another, now depends on contract. An obligation is a contract, and it is one of the various methods by which property may be acquired; and, therefore, a citizen of another State may claim from the courts of this State the enforcement of his contracts or satisfaction for their breach, precisely as the citizens of this State can; because it is the privilege of a citizen, and is secured to him by the Constitution of the United States. This debt must take its place according to the order of payment prescribed to executors and administrators; otherwise, the creditor will not enjoy in this State all privileges and immunities of citizens; for a common right must be enjoyed by all alike. If his obligation is postponed to a book account, and the obligation of a citizen of the State is preferred to such account,it is certain that he does not,—cannot enjoy all privileges of citizens, where those of this State are entitled to an equality, according to the dignity of their debts. To

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what purpose are all privileges and immunities reserved to the citizens of each State, if a State can discriminate between its own citizens and the citizens of another State in the privileges of a citizen, and unless the same method to protect their property is allowed to them. If we may cut and carve and limit and restrain other citizens in the exercise of our privileges as citizens, it is evident that they are not entitled to all privileges and immunities of citizens in this State. To recover a debt is a privilege; but unless he can recover it equally, or as fully, as a citizen of this State, something is withheld, and he has not the privilege of a citizen in this State,—unless, indeed, more than the privilege of a citizen is bestowed on our own citizens. On the great question of the suability of States, Chief Justice Jay, in his clear and luminous opinion, in *Chisholm vs. Georgia*, 2 *Dall. S. C. Repts.* 472, said "the citizens of America are equal as fellow citizens, and as joint tenants in the sovereignty."

The clause in the Constitution is as general as words can make it; and the exception contended for would contradict and do violence not only to this section, but to the leading principles of a free and national Government, one great object of which is to insure justice equally to all. It establishes the faith and credit to be given to the public acts, records and judicial proceedings of each State. It provides for the apprehension of fugitives from justice from one State to another; and it secures to those entitled to the service or labor of another such service or labor, even against the laws or regulations of a State into which such laborer or servant may fly; and, by this section, the rights of every citizen in the United States are protected in each State, by securing to him in the several States all privileges and immunities of citizenship. Thus, the system is completed; and most extraordinary would it be if a difference were made in the recovery of debts. If this 2d section of the 4th Article is to be understood with an exception, it is strange that it was not mentioned. The difficulty is to discover in what instance any privilege or immunity of a citizen of one State may be abridged in another. He may purchase and hold land by any of the several modes by which real estate may be acquired. He may take by descent, where the title is vested in him by the operation of law. He may obtain goods and chattels, in all the forms and varieties peculiar to personal property. He may be an executor, administrator, or witness He may prosecute every species of

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suit, both at law and in equity; and, in short, as to every civil right, I know no difference between him and a citizen of the State, unless this Act of Assembly makes one. If this be an exception to the clause of the constitution, and the intention was only to prevent citizens of other States being declared aliens, the Legislature might abolish all the rights, privileges and immunities of the citizens of other States They might forbid the recovery of debts upon any terms; the privilege of *habeas corpus* might be disallowed them, and they might be subjected to perpetual imprisonment; the descent of land to them might be regulated differently from the descent of land generally; immunity from arrest, in suitors and witnesses during their attendance on courts of justice, might be withdrawn; extraordinary and excessive taxes might be imposed upon the lands of non-residents; and all the ties by which we are united as one people, so far as they depend upon our own internal State government, might be dissolved. Why should the citizens of another State be made aliens as to the recovery of debts, and not to all other purposes? Thus, indirectly, might be done what it cannot be pretended the State could directly do. The only reasonable construction to be given to this clause is that of placing all citizens of the United States on the same footing, and extending to them a perfect equality in their rights, privileges and immunities. If one citizen has a privilege to which others are not entitled, then they are not entitled to all privileges and immunities of citizens in the several States; which is directly contrary to this provision. The Legislature may certainly prescribe different grades for the payment of debts by executors and administrators; and in so doing, no violation will be done to the Constitution of the United States, because all persons having debts of the same grade will rank equally. But a distinction between persons, because one resides in Delaware and the other in Maryland, directly diminishes the privileges of the citizens of Maryland.

Upon the most deliberate consideration of this question, I am of opinion that the citizens of another State—the white citizens I mean—may claim the civil rights, privileges and immunities of citizenship, in the same manner and upon the same terms, that citizens of this State are entitled to them, under similar circumstances. In the payment of debts by an executor or administrator there can be no other distinction than according to the dignity of the

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debt. A citizen of Maryland may recover a debt due by obligation or bill, in preference to a debt due to a citizen of this State on account, because the Constitution of the United States gives him the same privilege which is given to a citizen of this State.

As to political rights, the citizens of this and of other States have equal privileges, under like circumstances. If a citizen of Maryland, a white man, of the age of twenty-one years, shall have resided in this State two years next before a general election, and shall have paid a State or county tax, which shall have been assessed at least six months before the election, he is as fully an elector in his proper county as any citizen of the State. And so, with the same qualifications of age, freehold property, residence, inhabitance, he may be elected Representative, Senator or Governor. A citizen of Maryland can, as such, be appointed to no office within a county; but let him become an inhabitant one year, and qualify himself to vote for Rep resentatives, and he will be eligible in the same manner as a citizen of this State. In short, with the same qualifications, and under the like circumstances, every white man who is a citizen of another State is entitled to all the rights, civil and political, and to all privileges and immunities, of citizens of this State

There is another view that may be taken of the first section of this Act of Assembly. The preference given is not confined to citizens only, but it comprehends the inhabitants generally,—citizens and aliens. It places an alien, if he should be an inhabitant of this State, upon higher ground than any citizen of the United States who does not reside in this State. An alien, who never intends to become a citizen, has a preference given him by this Act. This law was enacted in 1721. In the year 1682, and in 1700, Acts of naturalization were passed; and, according to the provision of those Acts, an alien could not become a freeman—one entitled to the rights, privileges and immunities of natural born subjects—without naturalization. The exclusive right of naturalization is now vested in the Congress of the United States; and no State can give an alien a right or privilege greater than the rights or privileges of citizens of the United States. If this could be done in one instance, it could in all; and in this way the exclusive right of naturalization by Congress would be indirectly impaired. The Act of Assembly under consideration has this effect. It gives privileges to aliens, who are inhabitants of the

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State, greater than to citizens of other States; and, in this respect, it is repugnant to the Constitution.

Upon the whole, I am of opinion that this first section of the Act of the General Assembly, entitled 'An Act directing the priority of payment of debts of persons dying within this government," is in conflict with the Constitution of the United States; and, therefore, is void. The judgment of the Court of Common Pleas should be affirmed.

I confine this opinion entirely to the first section of that Act. It, possibly, may be supposed to have some bearing on the first clause of the second section, which authorizes administrators, appointed out of the State, to recover, upon certain terms, debts due to their intestates; but it is not my intention to express an opinion upon that part of the Act. The clause directing the order of payment of debts by executors and administrators is not in any manner affected by the Constitution of the United States, and stands in full force. This clause is necessarily connected with the present case, and gives to Stephens, the plaintiff below, and to all other citizens of this and of other States, a priority in the recovery of debts due by obligation or bill, over or before accounts of merchants and others. Should any question of this kind arise between a citizen, or an inhabitant, of this State, and an inhabitant, not being a citizen, of another State, it would stand uninfluenced by any opinion I have expressed in this case. I have considered the case between citizens of this State and citizens of another State, and none other.

JOHNS, CHIEF JUSTICE.—The question in this case is, whether the Act of Assembly giving a preference to creditors within the State (1 *Vol. Del. Laws*, 81), contravenes the Constitution of the United States and is incompatible with it.

By the second section of the fourth Article of the Constitution of the United States "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The words "privileges and immunities" are nearly synonymous. "Privilege" signifies a peculiar advantage, exemption, immunity. "Immunity" signifies exemption, privilege.

The privileges and immunities to be secured to all citizens of

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the United States are such only as belong to the citizens of the several States; which includes the whole United States, and must be understood to mean, such privileges as should be common, or the same in every State; and this seems to limit the operation of the clause in the Constitution to federal rules; and to be designed to restrict the powers of Congress as to legislation, so that no privilege or immunity should be granted by it to one citizen of the United States, but such as might be common to all. The language is not that the citizens in any State shall be entitled to all the privileges of citizens in each State. If it was, there would be more plausible ground to say that a citizen of Maryland should have the same privileges and rights in Delaware as a citizen of Delaware is entitled to. But, even supposing the design of this clause of the Constitution to have been to restrict the powers of legislation by the State Legislatures, it cannot be extended so far as that no peculiar advantage can be given by any State to its own citizens, but such as must be extended to all citizens in every State in the Union; because, the privileges secured are not such as are given to citizens in one or more States by the State laws, but must be such as the citizens in the several States, that is, in *all* the States, are entitled to.

The great object to be attained was to prevent a citizen in one State from being considered an alien in another State—to secure the right to acquire and hold real property. Our situation, antecedent to the formation of the first General Government, in 1778, rendered such a provision necessary; and, accordingly, a similar clause was inserted in the Articles of Confederation then adopted; from which the second Section of the fourth Article of the Constitution of the United States was, probably, taken.

The privileges and immunities, &c., are not enumerated or described; but they are all privileges common in the Union,—which certainly excludes those privileges which belong only to citizens of one or more States, and not to those in every other State. It is more easy to ascertain whether the municipal law of this State giving a preference to State creditors is a law incompatible with the privileges secured by the second section of the fourth Article of the Constitution of the United States, than it is to define all the privileges and immunities which the section was intended to secure to the people of the United States; and this will be sufficient for the purpose of deciding the present case.

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By the Constitution of the United States all power, jurisdiction, and rights of sovereignty, not granted by that instrument, or relinquished, are retained by the several States.

Uniformity of laws in the States is contemplated only on two subjects, viz.: bankruptcy and naturalization.

The legislative powers of Congress, defined in the eighth section of the first Article, do not interfere with or abridge the power of the States to make local regulations which are to operate within the State.

The restrictive clauses in the tenth section of the first Article of the Constitution of the United States, limiting the powers of the States, are confined to certain enumerated cases; none of which comprehend the subject of the distribution of the assets of a deceased person's estate among his creditors The local regulations in the States are variant. In Maryland, I believe, there is no priority given to bond creditors over simple contract creditors. In this State, the former must be paid before the latter. It will not be contended that the second section of the fourth Article of the Constitution of the United States repeals that part of our Act of Assembly which gives a preference to bond creditors. And the effect would be inequitable, to give it such an operation as to repeal another part of the same Act which gives a preference to State creditors; for, then, a Maryland bond creditor might take the whole assets, and exclude simple contract creditors residing in Delaware.

But, it is to be ascertained whether the Act of Assembly is incompatible with the second section of the fourth Article of the Constitution of the United States; and this must depend on the question, whether the right to recover debts out of assets in the hands of an executor or administrator is a privilege intended to be secured by this section.

I am of opinion that the privileges designed to be secured cannot be construed to be any right which a creditor has to recover a debt from the administrator of a deceased person. This must depend on the laws of each State. It is neither a right nor a privilege which, according to the words of the section, the citizens of each State are entitled to in the several States.

There is no rule as to the distribution of assets, which is the same

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in all the States; nor is this a subject for Congress to legislate on. The rules governing it can only be made by the State Legislatures. If the Maryland creditor has the privilege of commencing and prosecut ng a suit for the recovery of his debt, to be regulated by the municipal laws of this State, he enjoys a privilege which this Article intended to secure to him. The *lex loci* must govern as to the distribution of the fund for payment of debts. To recognize the principle on which the incompatibility is attempted to be supported, will abridge the powers of the States to legislate on many subjects not contemplated by the Constitution. The extent of the operation of the principle, in repealing State laws, it will be difficult to ascertain; and it would leave us without a rule in many cases. Laws of a similar nature in some of the States,—such as the laws in Maryland and Massachusetts for payment of debts by tendering property at an appraised value,—have been considered to be still in operation; and this has been sanctioned by Acts of Congress as to debts due to the United States. The attachment laws of Maryland, under which the property of a citizen of a sister State may be seized and sold, have been determined by the Court of Appeals in Maryland to be in force; and it has not been doubted but that our attachment law is yet in force. Our insolvent law, excluding non-residents, is considered to be in operation; and special acts are sometimes passed, to extend it to non-residents. I may refer also to our law of *extent*, and to the Virginia law preventing the sale of land for the payment of debts.

It would be mischievous, and produce much inconvenience, to sanction this new rule as to the settlement of the estates of decedents. Executors and administrators would be involved in difficulties. The practice has been to pay debts within the State in preference to debts due to non-residents, according to the Act of Assembly; and I cannot see that the Act is in conflict with the Constitution of the United States. The policy and liberality of its continuance must rest with the Legislature. We can only say, *Ita lex scripta est.*

I am, therefore, of opinion that the judgment of the Court below is erroneous, and ought to be reversed.

Davis and *Batson*, *Justices of the Supreme Court*, concurred with Chief Justice Johns.

The judgment was reversed.

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SKETCHES

OF THE

DECEASED CHANCELLORS

OF THE

STATE OF DELAWARE.*

1. CHANCELLOR KILLEN.

William Killen, first Chancellor of the State of Delaware, was born in one of the northern counties of Ireland, in the year 1722. He was of good family; his parents were Scotch Presbyterians, who had settled in the north of Ireland. He himself was a thorough Presbyterian throughout life; so thorough that his faith seemed to be a second nature.

Mr. Killen came to this country, while quite a boy, about the year 1737. He landed at Philadelphia, and thence went to Kent county on the Delaware, where he became an inmate of the family of Mr. Dickinson, father of the late John Dickinson, on his fine estate, near the Delaware Bay, which still bears the family name. The circumstances of young Killen's emigration, what led him into Mr. Dickinson's family, how long his residence in it, or what his employment, are all now unknown. John Dickinson, the son, became an accomplished scholar, remarkable for eloquence, occupying the highest

*An acknowledgment may be here made of the sources from which these sketches have been received. That of Chancellor Killen was made from the recollections of the late Judge Hall, who was the Chancellor's son in law. The sketch of Chancellor Ridgely is re-published from the Delaware Register, a periodical edited by William Huffington, Esq., in the year 1838. Those of the Chancellors Johns, were kindly prepared for the reporter by Hon. George B. Rodney, and that of Chancellor Harrington, by Hon. N. B. Smithers.

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posts in this State and in Pennsylvania. His father must have been very careful of his education; he was a few years Mr. Killen's junior; and it is probable that Mr. Killen's residence in the family had some relation to the education of the son. For, Mr. Killen, as we should conclude from his parentage, as well as from subsequent circumstances of his life, must have been well educated, for the time. The Scotch, who colonized the north of Ireland, carried with them their kirk, and their schools, and their domestic economy.

After a few years, he became deputy surveyor of Kent County, under the proprietary government,—a responsible office, requiring a man of more than common education An entry in his family Bible, in his hand writing, states that on the tenth of April, 1753, William Killen, "surveyor of lands," and Rebecca Allee were married She died September 23d, 1773, in her thirty-seventh year.

Mr Killen was admitted to the bar in Kent county, and was many years in practice. He was a man of sound legal mind and well instructed His law library was judiciously chosen, indicating a man of reading and reflection. Under the State Constitution of 1776, he was appointed Chief Justice of the Supreme Court, which office he held until he became Chancellor under the Constitution of 1792.

Throughout the Revolutionary period Mr. Killen was a staunch Whig. He was then a member of the committee of Public Safety for Kent. Afterward, under the division of parties in the State, he became a democrat; and was as fixed and thorough in his political sentiments as in his religious creed,—earnestly and actively supporting his party.

Under the new constitution of 1792 it became necessary to reorganize the courts. The offices of Chief Justice of the Supreme Court and of the Court of Common Pleas became very important, from an accumulation of business after the war. It was of much public concern how, properly, to fill them. Richard Bassett, of Kent County, was settled upon as the most suitable person for Chief Justice of the Common Pleas; while such was the high estimation in which George Read, of New Castle, was held for ability and integrity, that his appointment as Chief Justice of the Supreme Court was deemed indispensable to the character and influence of the new judiciary. But Mr. Killen had previously been Chief Justice of the Supreme Court, and to take the office would, in appearance be superseding

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him. To this Mr. Read would not consent. But the Chancellor was to be the official head of the new judiciary. To appoint Mr. Killen to that office would be a promotion; and in that case, Mr. Read was willing to accept the office of Chief Justice of the Supreme Court. The party in power was strongly opposed to the party of which Mr. Killen had always been an uncompromising member. There were members of the party in power seeking the appointment of Chancellor; but Mr. Read was resolute, and Mr. Killen was appointed. The motive which influenced Mr. Read to this course was once stated by him, in a conversation with the late Judge Hall, from whom these recollections were obtained. Mr. Read said, that Mr. Killen had accepted the office of Chief Justice, and had discharged its duties with firmness, in dangerous times; if the mother country had succeeded in suppressing the rebellion, his life might have been the forfeit; his administration of the office had given general satisfaction; and he ought not to be cast off. This incident is certainly worth preserving; it is honorable alike to both the parties concerned.

The Court of Chancery was then a novelty in our judicial system. The bar had no experience or training for it. There was, therefore, very little business in it for years. The transfer of the Orphans' Court jurisdiction was not made from the Common Pleas to the Chancellor until the year 1802, when it was effected by an amendment of the Constitution of 1792, through the influence of Chancellor Ridgely.

Judge Hall, in some memoranda respecting this period, writes thus: "When I came to this State, all knowledge of the decisions of the Courts prior to the Constitution of 1792, seemed almost to have passed away. There were some written reports by members of the Bar, made by them on private account; and of these only the decisions by Judge Read, or of the High Court of Errors and Appeals, passed as authority; all these being after the Constitution of 1792, which to the Bar as I found it, seemed the birth place of the judiciary. Edward Tilghman, Thomas McKean and Moses Levy, all distinguished in other States, had practiced at our Bar. George Read, James A. Bayard and Nicholas Van Dyke, leaders of our Bar in 1803, were all young men when the Constitution of 1792 was formed."

Of Mr. Killen, as a chancellor, little is now known. The system was new: few cases arose for his adjudication; and no notes of

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his opinions remain. He resigned the office in December 1801, understanding that Nicholas Ridgely, then Attorney General of the State, would be appointed to succeed him. Governor Hall had been elected by the democratic party, and was to come into office in the January following Mr. Killen was censured for not deferring his resignation, so that Governor Hall might appoint his successor. His answer was, that he restored the office to the party from which he had received it; that he considered it his duty to do so, although himself a democrat. Probably, his knowledge that the appointment of Mr. Ridgely was the best that could be made, and the importance of making a good appointment, had a proper influence.

The last years of Mr. Killen's life were passed much in seclusion. He occupied himself, chiefly, in mathematical studies, retaining for them the fondness of his early life. He retained, in an extraordinary degree, the recollection of his general reading in former years Judge Hall mentions that he, in conversation with the Chancellor, in his old age, referred to the account of Palmyra, given in Gibbon's History, which he had just been reading. The chancellor, who had read the account many years before, related it with more minuteness, as the Judge says, than he himself could do.

Chancellor Killen died October 5th, 1803, and was buried in the Presbyterian church yard, in Dover.

2. CHANCELLOR RIDGELY.*

NICHOLAS RIDGELY was born at Dover, September 30th, 1762. He was the eldest son of Charles G. Ridgely, an eminent physician and highly respectable gentleman of the same place. After acquiring a liberal education, Mr. Ridgely adopted the law as his profession, and completed his studies under the direction of Robert Goldsborough, Esq., of Cambridge, in the state of Maryland. At that time, it required more labor and research to become acquainted with the science of the law than it does at this day. The student had not the advantages now to be derived from the many excellent digests and elementary treatises, which have since been

* From the Delaware Register. (1838). Vol. 1, p. 58.

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published, on every branch of the law; wherein the true system has been separated from many erroneous decisions and principles, that have from time to time been overruled, in the course of the progress of the science towards perfection. The unwearied industry and well regulated mind of Mr. Ridgely soon overcame all difficulties in obtaining a knowledge of his profession; for we find him, while yet in the first flush of manhood, assuming a distinguished standing at the bar, as an able and sound lawyer; at a time, too, when the profession in Delaware was graced by the exhibition of the splendid talents of such men as James A. Bayard, Caesar A. Rodney and Nicholas Vandyke, whose well earned fame as lawyers, orators and statesmen, has become alike the property and the care of the State and the nation.

In the year 1791, Mr. Ridgely received the appointment of Attorney General of the State, the duties of which office, during the term of ten years. he discharged with credit to himself and satisfaction to the public. He was also elected, in 1791, a delegate from Kent County, in the convention which formed the Constitution of 1792. During the whole period occupied by the two sessions of that body, he was found constantly at his post, and ever active in the discharge of his duties. Our country had just come successfully through its memorable struggle for independence, and was engaged in perfecting its forms of government, upon the liberal and enlightened principles for which it had been so long contending. According to the plan agreed upon by the Confederation of the States, each State was to establish a separate constitution and government, not inconsistent with that recently ordained and established by the several States of the Union. The men of that day had been reared and educated under the aristocratical Government of England; and it required more than ordinary talents and patriotism to fix upon a new and permanent basis their institutions, so as to subserve the great interests involved, in the protection of life, liberty and property, under the new system of government then adopted. The occasion called for more than ordinary ability, and an entire regard for liberty and equality, which the Declaration of Independence had pronounced the birth-right of man. The Convention of 1792 proved itself worthy the sacred trust reposed in it, and equal to the arduous and important duties with which it was charged. The Constitution then established remained in force during the

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period of forty years; and was considered, at least, equal to that of any other State. Its principal features still remain in force; although, it has since been thought expedient to alter and modify some of its provisions with respect to the judiciary system, and a few other points, of minor importance. Mr. Ridgely, although, perhaps, the youngest man in the Convention, took at once a decidedly high standing in the deliberations of that body, and was among its most efficient members.

In 1792 he was elected under the new Constitution a Representative from the County of Kent, in the General Assembly of the State. The system of law, then in force, required to be newly modelled, to fit it to the principles established and brought about by the events of the Revolution,—a task requiring in the Legislature an intimate knowledge of the law as it existed, and of the changes necessary to be made, in order to effectuate the purpose above mentioned. And it will be found on examination of the proceedings of the Legislature of 1793, that the legal talents and enlightened understanding of Mr. Ridgely were mainly relied upon to perfect the system of Delaware law, in accordance with the genius of the new Government. Most of the laws, of a general and public nature, passed during that session, were framed and drawn by Mr. Ridgely, and were generally adopted without amendment He was repeatedly afterward a member of the General Assembly, and invariably performed his duties with fidelity and ability.

In the year 1801 the Honorable William Killen, then Chancellor of the State, resigned his office; and Mr. Ridgely was appointed to succeed him. At that time the Chancellor, by virtue of that office, was also sole Judge of the Orphans' Court. An immense power was thus placed in the hands of one man, over the liberty and property of a great portion of the citizens of the State,—which, if the judge had been either corrupt or incompetent might have resulted in much evil to the community. This power, however, was exercised by Mr. Ridgely always for the ends of justice, and for the protection of the oppressed and the innocent.

The situation of a judge is not one in which men expect to gain popularity. The selfishness of mankind often blinds them to the true merits of their cause, and when the decision is against them, they will make use of the privilege of complaining; yet, although

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the correctness of the opinions of Chancellor Ridgely was sometimes questioned, no one ever ventured to impugn his motives or doubt the honesty of his intentions. He always pursued, without fear, favor or affection, that line of conduct which the law and equity of the case pointed out, according to the best of his judgment and ability. At the time Mr. Ridgely entered upon the discharge of his duties as Chancellor, there had been very little business in the Court of Chancery; and there were no precedents for his guidance. The whole system of chancery practice was to be formed, and precedents to be established, in accordance with the existing laws of the State. The rules of court, forms of practice and general principles adopted by him, still continue in use, and are considered well worthy of preservation.

Chancellor Ridgely was looked upon with the highest respect by every member of the bar, who practiced in his Courts. He was strictly impartial between them, and never suspected of the slightest bias, even in favor of his only brother, who had the care of many cases confided to him as solicitor, and which had to be determined by Mr. Ridgely in his character of judge. He heard, with patient attention, the arguments of counsel; and the youngest member of the bar approached him with confidence; for he well knew that his most imperfect efforts would not be wholly disregarded, but would be viewed with all the favor which could be reasonably expected. Being himself well versed in a knowledge of his profession, Mr. Ridgely was always unwilling to proceed to the final determination of a cause, until the counsel on both sides had exhausted every argument, and produced every allowed precedent which could be brought to bear upon the case; and, when not satisfied that this had been done, he would set down the case for re-argument. When he gave his opinion, he never failed to notice all the points made in the cause by the contending solicitors, and their applicability, or the want of it, to the case under consideration; and he often produced well authenticated principles and cases, bearing upon the subject, which had been neglected or overlooked by the counsel in the argument,—in support of his decision. It was ever his anxious wish to convince all parties that his opinions and decrees were formed, with reference only to the principles of justice and equity. He was a just judge and an upright man; kind and complacent to all who had a right, and asked his interposition as a judge for redress of

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injury, or protection of property or personal liberty; but stern and inflexible to all appeals having a tendency toward injustice or oppression.

Several years before Chancellor Ridgely's death, he suffered considerably from ill health; but for the last two years of his life, his health seemed to have greatly improved; so much so, that his friends had hopes of his living many years longer. He, however, was under the impression. from his own feelings, that he had long labored under an affection of the heart, probably aneurism, which he well knew often proved suddenly fatal. And this impression seems to have been well grounded, when we consider the manner of his death, which took place at Georgetown, in Sussex County, while he was there in the discharge of his official duties as Judge of the Orphans' Court, on the first day of April,1830, under the following circumstances. He had been, all that day, and until some time in the night, laboriously and attentively engaged in hearing a case of appeal in the Orphans' Court,—in which, in pursuance of his usual course, he had taken full notes of the evidence and arguments of counsel. The Court was adjourned at about eight o'clock in the evening; he went to his inn, ate his supper, and after talking pleasantly some time with the family, retired to his chamber. A servant woman attended him with water, which he had ordered to his room; and as she departed, he informed her that he felt very unwell, and would be pleased to see Mr. Short, the landlord. The Rev. Mr. Higbee, a boarder in the house, whose room was next the Chancellor's, overhearing his complaint, immediately waited on him, offering his assistance; as also did Mr. Short. Every attention was bestowed upon him, but no relief could be afforded. The final summons had come; and he ceased to exist in less than half an hour from the time of first complaining—apparently suffering but little pain. His remains were brought to Dover, for interment; and he was buried in the Protestant Episcopal burying ground, near the remains of many of his family. A plain marble slab, upon which is simply inscribed his name, age, and the fact of his death while in the discharge of his official duties, points out the spot where his ashes are deposited. His body was followed to the grave by the largest concourse of friends and acquaintances ever known to attend, on a like occasion, in the County of Kent, thus evincing to the world, the high estimation in which his memory was held

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by the community among whom he had passed his long and useful life.

During the whole period Mr. Ridgely was Chancellor of the State, he carefully took and preserved notes of all the cases argued and determined before him; which, together with his opinions in all causes of importance, were written out at length. From these it was his intention to make selections, with a view to the publication of several volumes of Chancery Reports. Had he lived only a few years longer, it is probable the Bar would have been in the possession of a very valuable book for reference and authority, the want of which is now often felt and regretted. His notes are still in existence; and may we not hope that they will hereafter be given to the public in a form which may be useful to the profession and the community?

In person Mr. Ridgely was about the common size; his voice was strong, sonorous and clear, and his countenance so uncommon and remarkable that it is in vain to attempt its description; yet, it can never be forgotten by such as knew him well. During the whole of his long and active public life, although constantly thrown among gay and fashionable society, he adhered strictly to the manners and customs and fashions of his youth. In speaking, he used the old mode of pronunciation, without regard to Walker's Dictionary; and in writing, employed the same number of capital letters as were used in the days of Addison and Pope The cut of his coat was the same for fifty years; and he constantly wore short breeches with knee buckles and long fair top boots to correspond.

Mr. Ridgely was not only well versed in the knowledge of the law, but possessed of a large share of information on most other subjects. His memory was very tenacious, and scarcely any event of great public or private importance, which came under his observation, was ever forgotten by him. He was well acquainted with history, and his knowledge of the history of England, the most important of all to a jurist, was perhaps superior to that of any other man of his day in this State. His conversation was ever pleasing and instructive, and his company courted by all capable of being satisfied with rational society. He was alike a suitable companion for the old and the young, the grave and the gay, so long as they kept within the pale of propriety. Any deviation from the line of moral

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rectitude he would by no means tolerate Indeed, all who approached him were commonly careful to escape the rebuke of his penetrating eye, by suiting their expressions to his well known notions of what was alike due to good manners and morality. Although never warm in his professions of regard, he was invariably kind, and often affectionate in his deportment, toward those he thought worthy his countenance. Ever just and correct in his own conduct, he was not disposed to be very liberal to the systematically vicious; but, even to these, when he believed amendment of life followed repentance, he would again extend his good offices. His ears were ever open to the cries of the wretched, and his hand never closed to objects worthy of charity. He never indulged in excess of any kind; but was always consistently temperate. His conversation was pure and chaste; and never at any time sullied with profane language, or such as was unbecoming the dignity of his high station. In fine, he passed through life and descended to the grave, without a blot or stain upon his fair fame and estimable character.

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3. CHANCELLOR JOHNS, SR.

KENSEY JOHNS, SR., was born on West River in the State of Maryland, in the year 1759, and commenced the study of the law with Samuel Chase, afterward a Judge of the Supreme Court of the United States; but, before his admission to the bar, he removed to this State and completed his legal education at New Castle, in the office of George Read, a distinguished lawyer and one of the signers, for Delaware, of the Declaration of Independence. Mr. Johns married the daughter of Governor Van Dyke: and very soon by his talents and position he obtained a lucrative practice, and in a few years accumulated a handsome estate. Among the earlier proofs of the popular confidence in him was his election, as a delegate from New Castle County, to the convention called to form a new constitution for the State. In this capacity he became the associate of Richard Bassett and Nicholas Ridgely, both of them distinguished in the judicial annals of Delaware; and, by his learning and experience as a lawyer, he essentially contributed in framing the Constitution of 1792, which still forms the basis of that system under which we have

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so long prospered as a State. As another mark of the distinction to which Mr. Johns had early attained, it may be mentioned that in March, 1794, he was appointed by the Governor (Dr. Clayton) to fill a vacancy in the Senate of the United States, occasioned by the resignation of George Read. It being the first instance when the question arose as to the power of the Executive to fill such a vacancy, it was determined that,a session of the Legislature having intervened after the vacancy occurred, the appointment was invalid. Mr. Johns, therefore, did not take the seat to which he was appointed Notwithstanding Mr. Johns had attained to great success at the bar, he was induced to forego it and become an associate with Chief Justice Read, who had been appointed to that office in the Supreme Court under the new Constitution. There is reason to suppose that he did this at the suggestion of Mr. Read, for whom Mr. Johns entertained not only, in common with all others, the highest respect on account of his great learning and integrity, but also a warm regard, as the preceptor of his professional studies. It was also expected that he would succeed to the office of Chief Justice, which in fact he did upon the death of Mr Read in 1798. Mr. Johns thus became elevated to a position for which he was well fitted both by his learning and experience; and he continued to discharge its important duties with satisfaction to the people for more than thirty years,—a length of service seldom reached by a Judge. Constituted as this Court was, the labor of every legal investigation devolved upon the Chief Justice; and he became responsible for a correct decision of the cause. This circumstance promoted a more careful and thorough consideration of the case before the Court, and the Judge became thereby better qualified for the proper discharge of the duties of his office. Chief Justice Johns possessed a discriminating mind; and being thoroughly educated in the principles of his profession, he was generally able to lay hold of and accurately decide the important questions arising in a cause His judgment was cautious, and his convictions, resulting always from a most careful examination, were so fixed as to be seldom shaken. He came upon the bench at a period when many questions were unsettled, arising from the change of our institutions and government, and when the statutes of the State, having just before been collected, revised and published by Judge Read in 1794, required new constructions. Mr. Johns, from his intimacy with his predecessor, Judge Read, possessed great advan-

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tages in becoming acquainted with the judicial history of the State, and the unwritten decisions upon the questions of law which arose before and after our Constitution of 1776, in the framing of which Mr. Read was a prominent member. He was thus enabled to establish and engraft upon our system the principles of construction which had received the approbation of the grave and venerable men who sat in our courts from the period of the revolution down to his own time. During the whole period of his service as Chief Justice he presided also in the criminal Court, in all cases involving the life of the prisoner; and, while always upholding the majesty of the law and vindicating its justice against offenders, when called to pronounce the sentence of death upon a fellow creature, the sternness of the judge was in him often relaxed by the solemnity and painfulness of the duty he was called to perform

Upon the death of Chancellor Ridgely, in April, 1830, Chief Justice Johns was appointed, by Governor Hazzard, his successor. By his education and learning as a lawyer, by his gravity and dignity as a judge, and, above all, by his long experience as President of the Court of Errors and Appeals in all Chancery causes, he possessed great advantages for this higher office; and he entered upon its duties with the approval of the profession, and discharged them to the satisfaction of all. He was now, however, becoming advanced in years; and upon the adoption of the amended constitution of the State, in 1832, he voluntarily withdrew from the excitements and labors of his long official career to enjoy the quiet of private life. Retaining, however, considerable activity of mind and body, he renewed for a few years, to some extent, his old relations to the Bar, by acting as a counsellor at law. Chancellor Johns was a polished gentlemen, of the old school, being distinguished for his politeness, suavity and good breeding. His intercourse with the Bar was marked by kindness and indulgence toward young men, and by courtesy and patient attention to the older members. He was an upright judge, and in all relations a good man; and, having long and faithfully served the public in the most important stations of honor and trust, he quietly passed down the vale of years. He died in the full possession of his mental faculties, in his ninetieth year.

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4. CHANCELLOR JOHNS, JR.

KENSEY JOHNS, JR., was born in New Castle, in the year 1791, and graduated at Princeton College, in the year 1810. He studied law with Nicholas Van Dyke, Esq, his maternal uncle, then one of the most distinguished members of the Bar of this State; and, after completing his studies in the law school at Litchfield, Conn., was admitted to practice in the year 1813. He began his professional career under favorable auspices, and soon acquired a good standing at the bar. He was reputed a sound and able lawyer while yet a young man. This advantage he derived from early training, joined to a mind of strong perception and habits of application. The mental discipline he received at Litchfield he often adverted to, as of great benefit in forming his mind for legal analysis and leading him to refer every question to its true legal principle. The possession of this faculty enabled him in after life, to lay hold of the true point of a cause, and settle it satisfactorily, without becoming a diffuse reader or mere searcher after adjudicated cases. It was his own observation, that the common law commended itself to our admiration for its adaptation to the wants of men, by bringing almost every question to the touch stone of some fixed principle. Mr. Johns, after pursuing with increased reputation the practice of the law for several years, relaxed somewhat his attention to it, and engaged in public life. He was selected, on account of his high professional and moral character, as a candidate for Congress, to fill the vacancy occasioned by the election of the Hon. Louis McLane to the Senate of the United States. He was elected, and afterward re-elected, to represent the State in Congress. In this position he upheld the dignity and honor of the State, and bore himself in such a manner as to enjoy the respect and good opinion of his most distinguished associates. After retiring from Congress he began anew his professional life, but was not long so engaged before a change in the Constitution of the State led to a re-organization of the judiciary. Then it was that his venerable father, who had filled the office of chancellor since the death of Chancellor Ridgely, proposed to retire; and the Executive, acting in accordance with the wishes of the Bar and of the people, conferred that high office upon the son, Kensey Johns, Jr. This position seemed well suited to the personal and professional

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character of Mr. Johns. He was grave, dignified and courteous in demeanor, of great equanimity and self control, of a thoughtful and deliberative habit of mind, well versed in the learning of his profession, clear and firm in his convictions, and of such unbending integrity, that, however men might differ with him, it never was impugned. From a proper anxiety to decide every question upon its true merits, it has happened that a chancellor will become tedious in investigation and slow in decision; but Mr. Johns, although never hasty in determining a cause after argument, would seldom allow the term following an argument to pass before making a decree: and he was so prompt in bringing all causes to a speedy hearing, that the docket was never burthened with undecided cases. His written opinions, in cases of such doubt or importance as to require the investigation of legal principles, evince extensive and painstaking research, carefulness to weigh and distinguish between conflicting authorities, and a conscientious effort to reach the true principle which should govern the case. He sought not only to adjudge correctly the cause before him, but also to establish clear and well-defined rules and principles of equity for the future guidance of the Court and Bar. In his long term of judicial service, not a few questions of general importance came before him; and the results of his investigations, now about to be published, together with the decisions of other chancellors, will afford the profession of this State a valuable addition to its present range of judicial authority. That Mr. Johns sometimes erred in his judgments may not be denied. Like most judges of strong perception, he was sometimes liable to form his opinions upon the bearing of some single principle involved in a case, which a fuller consideration and examination of authority would show to have been modified or essentially changed. But, however that may be, his judgments were generally correct; and the great majority of his decrees appealed from, were affirmed by the Court of Errors and Appeals,—a fact, which, in addition to the learning and research which marked his written opinions, attests his ability as an equity judge.

Chancellor Johns continued to perform his duties as an equity judge, and also as presiding judge of the Orphans' Court and of the Court of Errors and Appeals, for over twenty-five years, never failing to meet the engagements of every term by reason of voluntary absence, and very rarely from sickness. Like his predecessor,

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Chancellor Ridgely, he may be said to have died almost in the performance of official duty. He had been holding the term in Sussex, in March, 1857, from which he returned at the close of the week, and on the same day, March, 1857, under circumstances somewhat similar with those which attended the death of Chancellor Ridgely, and by a transition as sudden, he was called from the very midst of active life. It may be added that the Chancellor was not only a strictly moral and upright man, but he was also a conscientious and consistent christian, from his youth, and passed quite a long life of usefulness as a member of the Presbyterian church, in New Castle. His sudden death was the cause of profound sorrow to his family and friends, and the community in which he had spent his long and useful life. He died on the 28th of March, 1857, and was buried in the Presbyterian church yard, at New Castle.

The life of a judge is ordinarily an uneventful one. His judicial duties, to be well performed, must form him to habits of study and of much seclusion. The general sentiment forbids,—and rightly so,—his taking an active part in political questions and measures, such as in our country open the wider and more conspicuous spheres of public life. Perhaps, the best testimonial which could be borne to the memory of a deceased judge is, that by a strict devotion to the duties of his office, and the yielding of what leisure these duties may leave him to the discharge of domestic and social obligations, his career is left without much of stirring incident for an extended memoir. Such was the life of Chancellor Johns. He was a good judge,—a useful citizen,—a devout christian,—a dignified, courteous gentleman, charitable and humane,—exemplary in all relations. But, although the incidents of such a career may be thus briefly summed up, not so, its fruits. The influence of a pure and upright character, exerted through a period of over half a century, silently leavening and purifying society, will remain long after he from whom it proceeded has ceased to be seen, or even to be remembered.

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5. CHANCELLOR HARRINGTON.

The uneventful life of a lawyer ordinarily furnishes slight mate-

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rials for the biographer. The record of his labors is a meagre abstract. His rounded argument is reduced to a skeleton-sketch. The most exhaustive discussion of principles is condensed into a brief synopsis. Only the curious inquirer cares to follow his investigations, and discover the key that unlocks the reasons of the judgment.

Those who are taken from the ranks of the profession, and elevated to judicial stations, rear more enduring monuments. Reported decisions constitute authoritative precedents. They are the witnesses of the law, bearing testimony to the laborious research, the nice discrimination and the varied learning requisite for the administration of a system which regulates and governs the complex relations of society in a world of error and fraud.

These recorded judgments form the surest testimonials of the ability of their authors; but it may not be unacceptable to offer a brief memorial of one whose whole professional life was spent in the performance of judicial functions.

Samuel Maxwell Harrington was born in Dover, Delaware, February 5th, A. D., 1803. On his father's side he was of English descent,—on his mother's, of German extraction. His academic studies were completed at Washington College, Maryland, of which Dr. Francis Waters was President. He was graduated in 1823, with the first honors of his class. During his minority, the death of his father imposed upon him the charge of his mother and two sisters. His first public employment was in the office of the Clerk of the Supreme Court, of Kent county. By the invitation of Henry M. Ridgely, he entered into his office as a student; and, subsequently, finished his legal studies with Martin W. Bates. He was admitted an attorney of the Supreme Court at the October Term, 1826. In 1828, upon the retirement of John M. Clayton, as Secretary of State, he was appointed his successor by Gov. Polk, and was subsequently re-appointed by Gov. Hazzard. A vacancy having occurred in the office of Chief Justice of the Supreme Court, Mr. Harrington was selected, in 1830, to fill that position; and, upon the abolition of the Supreme Court and the Court of Common Pleas, by the Constitution of 1831, he was appointed one of the Associate Judges of the Superior Court. Then, as now, the peculiarity of the judicial system of Delaware, rendered the posi-

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tion of an Associate Judge exceptionally important, the administration of every branch of jurisprudence falling directly within his functions. In this situation he continued until April 3d, 1855, when he was made Chief Justice, in place of James Booth, and occupied that station until May 4th, 1857, when he was appointed Chancellor, which place he held until his death, on Tuesday, November 28th, 1865, at the Washington House in the city of Philadelphia. From 1832 to 1855, he was the official Reporter of the judicial decisions of the State. In 1849 he was appointed by the Legislature, in connection with Joseph P. Comegys and Daniel M. Bates, to revise the public Statutes then in force, with general discretion to omit such provisions as they should consider unnecessary, and to vary whatsoever they might deem proper to render the general system consistent, or more perspicuous, or better adapted to circumstances. This delicate and responsible duty was faithfully performed by the Commissioners; and the Revised Code was passed by the unanimous vote of both Houses of the Legislature, February 27th, 1852. In 1853 the honorary degree of L L. D. was conferred upon him by Delaware College.

Without any extraordinary advantages of social or political influence, a career so remarkable could have been accomplished only by the manifestation of unusual merit. At a time when the Bar was filled with lawyers of the highest eminence, that a practitioner of three years' standing should have been elevated to the dignity of Chief Justice of the Supreme Court, might reasonably have appeared a wanton experiment upon public forbearance; but that he should have maintained his position with credit, discharging its duties with admitted capacity, gaining public confidence and professional esteem, and steadily advancing to the attainment of the highest judicial station, amply vindicated the wisdom of his selection.

A recapitulation of his professional labors would be a summary of the judicial history of the State for more than one-third of its existence. The written law was largely compiled by his hand, and the unwritten is evidenced by his Reports.

Other men may have obtained a wider reputation and achieved more brilliant success, but there are few to whom it has been given to confer more substantial benefits upon a whole community.

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Chancellor Harrington.

For the position of a judge he was, by nature, admirably adapted. With a mind reflective rather than suggestive, he was not prone to indulge in legal speculations, but was content to found his judgment upon the law as it had been established. The maxim, "*stare decisis*," which he adopted as the motto of his Reports, constituted the index to his judicial character.

Patient of toil, his diligence was unremitting. Desirous to be informed, he was willing to hear both sides. Possessed of a kindly disposition, he was uniformly courteous in his deportment. Scrupulous in his integrity, to use his own words in the case of *Rice vs. Foster*, he would "much rather be right than be consistent."

To him the imposition of a duty carried with it the obligation to perform it with fidelity; and he brought to the administration of the minutest details of the business of the Orphans' Court the same unwearied attention and careful investigation that he bestowed upon the most important cause in the Court of Errors and Appeals.

His whole life was a system of labor, and in this respect each day was but a repetition of the former. Stricken with paralysis, he was for two years almost prostrated; but so unconquerable was his determination to do something, that disease could not overcome it; and with him to cease to work, was to cease to live.

In the midst of his judicial labors he was not forgetful of the material interests of the people. He found time to advance a system of internal improvement; and, intense in whatsoever he undertook, to him, perhaps, more than to any other, we are indebted for the completion of that line of travel and transportation which has done so much to enhance the value of our lands and develop the resources of the State. Had he effected nothing else, the Delaware Railroad ought to endear his memory to this people, and endure as a monument of his wisdom and perseverance in securing this instrument of their prosperity.

Though a judge, he was not unmindful of his duty as a citizen; and his views of the relation subsisting between the States and the National Government induced him to take a decided stand with reference to the conflict that threatened the disruption of the Union. The measures of the administration for the suppression of the rebellion found in him a warm supporter. He regarded secession as rank treason, and he had neither toleration for the act nor sympathy with the actors.

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Thus faithful to his Government, he did not neglect the higher obligations which he owed to his God. A member of the Methodist Episcopal Church, he was unobtrusive in his devotions and unostentatious in his piety. Acknowledging his dependence upon a Higher Power, he manifested, in his life, that his actions were governed by the principles of a religion which he was not ashamed to confess.

A useful citizen, a true patriot, an upright judge, and a sincere christian, those among whom he was born, with whom he dwelt and for whom he wrought, are not insensible of his merits, nor will they be forgetful of his labors.

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1. Where the transactions material to ascertain the sum for which a party is liable are complicated, involved in confusion and difficulty, and require minute investigation, such as a jury cannot give, they are a proper subject of relief in a court of equity, by a decree for an account. *Farmers' and Mechanics' Bank* v. *Polk et al.*, 167.

2. A court of equity will entertain a bill for an account against a guardian, notwithstanding the guardian may have given security by bond, and may be liable to an action at law. *Davis, Adm'r,* v. *Davis*, 256.

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1. A denial, by answer, of the equity of the bill is not evidence, under the rule requiring two witnesses, &c., to controvert it, unless it be made by a party cognizant of the transactions out of which the complainant's equity arises. *Robinson* v. *Jefferson, Adm'r. et al.*, 244.

2. An answer setting up, as a defence, new matter is not evidence, but must be proved. *Ib.*

3. The equitable defence of a purchase of land for valuable consideration, without notice, may be made by answer as well as by plea; but such defence, when made by answer, must be alleged with the same fullness and precision as is required in a plea. *Dick* v. *Doughten et al.*, 320.

4. It is not sufficient that in the answer it be stated only by way of recital, in connection with the statement of title, that the defendant purchased for a valuable consideration and without notice. The matter should be alleged, separately and distinctly from the statement of title, and insisted upon as a bar to the equity of the bill. *Ib.*

5. It is not sufficient to allege generally that the defendant purchased for a valuable consideration; but it must be specifically alleged of what the consideration consisted. *Ib.*

6. The statement by the answer that the defendant gave "a full, fair and just price for said tract of land without any notice, knowledge or belief that there existed any defect in the title of the same, or that the said tract of land was liable to any claim or demand of dower by the said M. D. (the complainant) or of any other person," is not sufficient (if excepted to) as a plea of purchase for a valuable consideration, without notice. But such an answer or plea, if not excepted to, will be taken as sufficient. *Ib.*

7. A plea or answer, relying upon the equitable defence of a purchase for a valuable consideration, without notice, must set forth the consideration,—of what it consisted,—and must aver the actual, *bona fide* payment of it, independently of the usual recital of payment in the deed. Also, the plea or answer must deny positively the fact of notice of the complainant's title or claim previous to the execution of the deed; and must deny every circumstance, charged in the bill, from which notice might be inferred. Notice

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ANSWER—*Continued.*

must be denied, though not charged in the bill. *Gilder* v. *Gilder et al.*, 331.

8. This defence may be taken either by plea or answer; but a denial of notice or fraud, charged in the bill, should be by answer also, in order that the complainant may be at liberty to except to its sufficiency. *Ib.*

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1. A written submission to arbitration directed that the award should be made in writing, indented, under the hands and seals of the arbitrators. The award was made in writing, but was not indented nor under seal. *Held*, to be void in equity as well as at

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law—that a Court of Equity will not decree performance of an award which is void at law, except upon a subsequent agreement between the parties to abide by it. *Raisin* v. *Wood*, 57.

2. A provision for arbitration, in articles of partnership, does not bar a suit in equity as to matters not comprehended within the scope of the arbitration provided for. *de Pusey* v. *du Pont et al.*, 82.

3. Principles upon which a court of equity deals with provisions for arbitration in partnership articles. *Ib.*

4. A testator devised as follows: "I give to my dear and loving "wife, the reasonable use of two suitable rooms in the house that "we may happen to dwell in at the time of my decease, whether "in town or country, with suitable provisions in the cellar, kitchen, "garden, necessary house, well or pump; To hold to my said wife "for and during her natural life, with full and free ingress or egress "and regress." After the death of the testator, his widow removed from the house in which he was living at his decease, and to which the rights and privileges devised to her had attached. The premises were for some years occupied and rented by her two sons, the devisees thereof in fee simple, but without any contract for compensation in respect of the widow's privileges. *Held*, that under the devise the widow took such an interest in the premises, that the law would imply a contract to pay a compensation therefor in the absence of an express contract; and that the allowance of such compensation by referees in an arbitration, between the widow and one of the devisees, submitting all matters in controversy, was not a mistake in law. *Beeson et al., Admr's.* v. *Elliott, Ex'r.*, 368.

5. An annuity bequeathed to a widow in lieu of dower, for her maintenance, and charged on real estate, payable quarterly, the prompt payment of which was necessary to her comfortable support,—*held*, to be a proper subject for the allowance of interest; and that such allowance by referees, in an arbitration submitting all matters in controversy, was not a mistake in law. Courts of equity have a general jurisdiction to relieve against mistakes in law, committed by arbitrators in the making of awards; but, in the exercise of such jurisdiction, the Courts will relieve only against such mistakes as are *plain, palpable and gross.* *Ib.*

6. Long acquiescence in an award, without objection made in the court of law to which such award was returned, the arbitration being one entered into in a suit or amicable action at law,—*held*, a sufficient ground for a court of equity to refuse its interference, even supposing such a case to be within its jurisdiction. *Ib.*

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ARBITRATION AND AWARD—*Continued.*

7. In the case of an award made in a suit or amicable action at law, pursuant to the Statute, 18 Geo. II, (Digest Delaware Laws, 112), the remedy against irregularity or mistake in the award is in the court of law to which the award is returnable. *Ib.*

8. Awards under the Statute of this State, made pursuant to a rule of court, with judgment thereon, stand upon a different footing from awards under the English Statute of 9 and 10 William III; and the English decisions under the latter Statute are not in force here. *Ib.*

9. A party is not, by his having joined in a case stated in a court of equity submitting the question of the validity of the award, precluded from objecting to the want of jurisdiction. The consent of parties cannot give jurisdiction, if otherwise it does not exist. *Ib.*

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1. The assignee of two single bills given in consideration of an assignment, to be thereafter made, of an interest under a patent, the obligees having, after obtaining the bills, refused to make the stipulated assignment, takes them subject to the equities affecting them in the hands of the obligees. Such, *it seems*, is the effect of an assignment, even when made under the Statute of Delaware for assigning specialties. *Robinson* v. *Jefferson, Adm'r., et al*, 244.

2. Bill in equity by the assignee of a single bill against two prior holders and assignors, the debtor having become insolvent. *Held*, that the first assignor, who was the payee in the bill, was discharged by the neglect of his assignee to proceed against the debtor, who, at the time of the first assignment, was in good credit. *Held also*, that the second assignor was liable to the complainant, because he had neglected to collect the bill while he held it, the debtor being then solvent, and had assigned it to the complainant about the time of the debtor's insolvency. *Robinson* v. *Ross, et al*, 253.

3. The indorser of a promissory note, though fixed in his liability by protest, is not entitled, as a *creditor*, to a share of the estate of the maker under an assignment for the benefit of creditors. *Farmers' Bank* v. *Gilpin et al.*, 409.

4. Such an indorser is entitled only to be reimbursed payments actually made by him. *Ib.*

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ASSIGNMENT.—*Continued.*

5. The holder of the note can claim, under the equity of the indorser, out of the assigned estate, only to the amount of payments so made by the indorser. *Ib.*

6. The equitable assignee of a judgment, even for a valuable consideration, and without notice of any existing equity against the judgment, takes it subject to all equities of the defendant in the judgment, accruing before he has notice of the assignment; and, consequently, subject to his right to set off a debt due him from the judgment creditor under a decree in equity made prior to his receiving notice of the assignment. A decree made after the notice, but entered *nunc pro tunc* as of a date prior to the notice, is of the same effect, in this respect, as if it had been *in fact* made at such date.—*Lockwood* v. *Bates et al.*, 435.

7. Under an assignment made to secure a pre-existing debt, the creditor has not the equity of a purchaser for valuable consideration. *Ib.*

ATTACHMENT.

1. An attachment for contempt in the breach of an injunction should not be granted unless the affidavit, on which the motion is grounded, allege service of the writ; nor, without such allegation in the affidavit, can the service be proved upon interrogatories administered to the defendant taken under the attachment.—*State* v. *Gilpin et al.*, 25.

2. A discharge from an attachment for contempt, for the want of a sufficient affidavit of service of the injunction, is no bar to a second attachment for the same cause. *Ib.*

3. A party having been arrested under an attachment for contempt and having on his examination, under interrogatories, denied the contempt, *quere*, whether a commission can be taken out to prove the contempt?—*Rice* v. *Small*, 68.

4. Interrogatories filed under an attachment for contempt should be entitled in the name of the State as the prosecutor, and not of the party on whose application the attachment issued. *Ib.*

5. After a final decree in the cause and pending an attachment for its non-performance, leave was granted to the defendant to file a bill of review. After some delay, without any bill of review filed, the defendant being still held under the attachment, and the complainant proceeding to enforce the same,—upon motion, the Chancellor discharged the defendant, but with leave to the complainants to take out another attachment, unless the defendant should, before a certain day appointed in the order, file a bill of

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ATTACHMENT—*Continued.*

review, and should also make affidavit of his inability to pay the money decreed and give bond, with surety, for the payment of the same, or of so much thereof as should not be otherwise ordered and decreed under the bill of review,—such security, if given, to have the effect of suspending the original decree until the event of the bill of review.—*Dushane* v. *Ryland*, 230.

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BANK NOTE.

A person indebted by bond paid a balance due upon it in notes of an insolvent bank, which was not known, at the time, to have stopped payment. *Held*, not to be a discharge in equity of the debt, but that the creditor might recover the balance due before such payment.—*Jefferson et al.*, v. *Holland*, 116.

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BILL—*Continued.*

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same, or of so much thereof as should not be otherwise ordered and decreed under the bill of review,—such security, if given, to have the effect of suspending the original decree until the event of the bill of review. *Dushane* v. *Ryland*, 230.

IV. *Bills to perpetuate testimony.*

1. A bill to perpetuate testimony need not be verified by the complainant's affidavit, nor is it essential, in order to support such a bill, that the witnesses to be examined shall be aged, infirm, non-residents of the State or likely to remove therefrom. Distinction, in these respects, between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*. *Hickman* v. *Hickman*, 133.

2. Distinction at large between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*, and the practice under the two proceedings respectively. *Ib.*

3. If the bill has not made a sufficient case to entitle the complainant to an examination of witnesses, whether it be to perpetuate the testimony or to take the testimony *de bene esse*, the defendant should demur. It is too late, after the commission has been ordered, to object that the complainant has failed in any matter necessary to give him the benefit of this course of proceeding. *Ib.*

4. In the examination of witnesses under a bill to perpetuate testimony, the complainant is confined to the matters for proof alleged in his bill, and to the interrogatories annexed to the bill as the interrogatories to be propounded to the witnesses; but the objection to an examination beyond this limit is waived by the defendant's joining in the commission and filing cross interrogatories. *Ib.*

See COSTS.

V. *Bills for examination of witnesses de bene esse.*

Distinction at large between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*, and the practice under the two proceedings respectively. *Hickman* v. *Hickman*, 133.

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See PURCHASER, FOR VALUE WITHOUT NOTICE.

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BOND.

The charter of the Farmers' and Mechanics' Bank of Delaware required that a bond should be taken from the cashier, with surety, &c., and "with condition of good behavior." The condition of the bond taken in this case was that the cashier should "well and truly, and with fidelity, perform and discharge the duties enjoined on him as cashier of the Farmers' and Mechanics' Bank of Delaware, agreeably to the laws and regulations therein made and provided, &c." *Held*, that the condition of the bond was a sufficient compliance with the direction of the charter, and that it was valid. *Farmers' & Mechanics' Bank* v. *Polk et al.*, 167.

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BOND AND MORTGAGE.

A creditor by bond and mortgage cannot, without some special equity in favor of the debtor, be restrained from proceeding, at his election, upon either or both of his remedies, so that he does not take a double satisfaction. *Newbold* v. *Newbold et al.*, 310.

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A party is not, by his having joined in a case stated in a court of equity submitting the question of the validity of the award, precluded from objecting to the want of jurisdiction. The consent of parties cannot give jurisdiction, if otherwise it does not exist. *Beeson, Admr.*, v. *Elliott, Exr.*, 368.

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See TRUST AND TRUSTEE, II.

CHARGE.

1. A testator by will directed that his "just debts and burying expenses be "paid" by his executors. He devised to his two sons his whole real estate, " to them and their heirs, in equal moieties forever ; *and also all his personal estate after paying the legacies in the will mentioned.*" *Held*, upon the construction of the will, that the legacies were not charged upon the real estate devised to the sons. *Gilder* v. *Gilder et al.*, 331.

2. A testator, after bequeathing certain pecuniary legacies, and among others a legacy of $866.66 to a daughter, and one of $1000.00 to another daughter, devised the residue of his estate, including some real estate, to the same daughters, as follows :

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CHARGE—*Continued.*

"My further will is that the remainder of my estate, if any there be, shall be equally divided between my two daughters Martha and Lydia, whom I appoint my executors." Bill filed by the representative of one of the legatees, alleging a deficiency of personal estate and praying that the unpaid balance of the legacy be charged upon the residuary real estate. *Held*, that the legacy was a charge on the real estate. *Hilford, Admr.*, v. *Way et al.*, 342.

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1. Written contract for the sale of "a tract of land situated in Appoquinimink Hundred, *containing by deed* 200 *acres, be the same more or less.*" Upon a subsequent survey made according to the description in the deed referred to, the tract was found to contain 317 acres. *Held*, that parol evidence was not admissible to show that the parties intended the sale of a less quantity than the entire tract covered by the description in the deed. *Dale* v. *Smith et al.*, 1.

2. A married woman cannot, after she becomes sole, be compelled to make good or execute a contract which was void in its origin, or which she was legally incompetent to enter into. *Ross* v. *Singleton*, 149.

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CONTRACT—*Continued.*

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3. A court of equity cannot, in the absence of fraud, accident or mistake, give validity to a contract which is void in law. *Ib.*

4. A contract in writing for the sale of lands cannot be discharged by a parol agreement, except that equity will relieve where the parol agreement has been acted upon and the condition of the parties thereby changed. *Wilkins v. Evans*, 156.

5. *It seems*, that under the Delaware Statute about contracts and assumptions a written contract for the sale of lands cannot be waived except in writing. *Ib.*

6. A purchaser of land, under a contract for a conveyance, claimed to set off against his bond for purchase money certain payments which he had made in satisfaction of debts due from the vendor to third persons. The contract did not, in terms, authorize the purchaser to make the payments for which credit was claimed, nor was there proof of any order or authority from the complainant specifically applying to the payments made. *Held*, that in this case there was proof, to the satisfaction of the Chancellor, of a general authority to the purchaser to apply purchase money to debts of the vendor. *But held further*, that such authority was not requisite to entitle the purchaser to the benefit of the payments,—that the complainant, upon the general principle that he who seeks equity must do equity, was bound in this court to allow just payments made for his benefit. *Held also*, that upon exceptions to a sworn account of the purchase money, filed by the purchaser in answer to the prayer of the bill, he was not under the *onus* of proving the existence of the debts paid by him and sought to be set off. *Lofland* v. *Maull*, 359.

7. In a contract for the sale and conveyance of land, the purchase money was payable by instalments *in futuro*. There was no stipulation in the contract of sale with respect to the time of delivering possession of the land; but after the sale and before the instalments had all become due, the purchaser, with the vendor's consent, entered into possession. *Held*, that he did not thereby become chargeable with interest on the unpaid purchase money from the date of such possession, in the absence of any stipulation to that effect in the contract of sale. *Ib.*

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COSTS.

The defendant is generally entitled to costs under a bill to perpetuate testimony. *Hickman* v. *Hickman*, 133.

CREDITOR.

The indorser of a promissory note, though fixed in his liability by protest, is not entitled, as a *creditor*, to a share of the estate of the maker under an assignment for the benefit of creditors. *Farmers' Bank* v. *Gilpin, et al.*, 409.

See TRUST AND TRUSTEE, IV. 3.

DECREE.

1. Under the statute, enabling the Court of Chancery to make orders for the sale of real estate, when necessary in order to give effect to its decrees, the Chancellor has power to order the sale of real estate of a defendant against whom a decree for the payment of money has been made after a return of *non est* to an attachment against him for the non-performance of the decree, and upon its appearing that his personal property has been exhausted by executions at law. *Woolaston* v. *Mendenhall*, 23.

2. The affirmance of a decree of the Chancellor by the High Court of Errors and Appeals, upon an equal division of that court, is of the same effect as a judgment of affirmance under ordinary circumstances. *Clark et al. Admr's. d. b. n.*, v. *Kean et al. Admr's.*, 114.

3. Practice upon applications for an order to sell the real estate of a defendant in satisfaction of a decree for the payment of money. *Woolaston v. Phillips*, 271.

4. The court in relieving a purchaser against a fraudulent deed, will only set aside the deed impeached. It will not decree a delivery of possession to the purchaser, nor an account of the rents and profits. *Hall* v. *Greenly et al.*, 274.

5. An order, granting a re-hearing of a decree in equity, does not *per se* vacate the decree; but only opens it for reversal, alteration or correction. *Lockwood* v. *Bates et al.*, 435.

6. If an order for a re-hearing is dismissed, or discharged by agreement of the parties, without a re-hearing had, the original decree stands precisely as if such order had not been granted. *Ib.*

7. To make good a title, pursuant to a sale under a decree of the Court, the heirs at law of the testator are properly made parties and must be decreed to join in the conveyance of the estate. *Lockwood, Adm'r. c. t. a. et al.* v. *Stradley et al.*, 298.

See PAROL DEMURRER.

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DEED.

1. Where the description in a deed calls for certain natural boundaries, these are controlling, and effect will be given to them in applying the description to the premises, although thereby a larger quantity of land may be included than the deed specifies. *Dale* v. *Smith et al.*, 1.

2. A voluntary deed was made by a father conveying to his two sons, who were minors, certain land, which was afterward sold by the sheriff in execution of judgments against the father, recovered subsequently to the deed but for debts contracted prior to it. Under the special circumstances of the case, the Court refused to set aside the deed for the relief of a purchaser of the land deriving title under the sheriff's sale. *Hall* v. *Greenly et al.*, 274.

3. Where a deed is impeached for fraud, the Court, if it grant relief at all, will only set aside the deed impeached. It will not decree a delivery of possession to the purchaser, nor an account of the rents and profits. *Ib.*

4. Where land was by will directed to be sold, by the executors, and, the executors having renounced, a sale was decreed to be made by a trustee appointed by the Court; *Held*, that to make a legal title, pursuant to such sale, the heirs at law of the testator are properly made parties and must be decreed to join in the conveyance of the estate. *Lockwood Adm'r. c. t. a. et al.* v. *Stradley et al.*, 298.

See CONTRACT, 1.

DEMURRER.

If the bill has not made a sufficient case to entitle the complainant to an examination of witnesses whether it be to perpetuate the testimony or to take the testimony *de bene esse*, the defendant should demur. It is too late, after the commission has been ordered, to object that the complainant has failed in any matter necessary to give him the benefit of this course of proceeding *Hickman* v. *Hickman*, 133.

DEPOSITIONS.

1. Depositions in a cause having been taken, returned, and published, upon affidavit of the discovery of new testimony and motion for leave to examine additional witnesses, it must appear from the affidavit, that neither the party, nor his solicitor, have read the depositions taken, nor made copies or abstracts thereof. *Carlisle* v. *Rust et al.*, 72.

2. The answers of a witness taken under the interrogatories in chief and under the cross interrogatories form but one deposition,

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DEPOSITIONS—*Continued.*

and the signature of the witness and certificate of the commissioner, though made only at the end of the whole, is sufficient. *Westcott* v. *Allston et al.*, 74.

3. Depositions taken *in perpetuam memoriam rei* are not to be published except by special order of the Court. *Hickman* v. *Hickman*, 133.

DESCRIPTION.

See DEED, 1.

DEVISE.

See WILL.

DILIGENCE.

See EXECUTORS AND ADMINISTRATORS, 1.

LACHES—LAPSE OF TIME.

NEGLIGENCE.

DIVORCE.

Under an Act of Assembly divorcing a wife from her husband, *a mensa et thoro* and granting to the wife all the *rights, privileges and immunities of a feme sole*, the wife becomes competent to execute a release of land charged with an annuity bequeathed to her under the will of a deceased husband in lieu of dower. *Stilley* v. *Grubb*, 406.

DOWER.

1. The widow of a deceased tenant in common, who is entitled to dower in his undivided share of the lands held in common, cannot join in a petition for partition of the lands until after her dower has been assigned to her in the Orphans' Court, without metes and bonds. *Ex parte Burgess*, 233.

2. The proceeding for partition lies between tenants of the freehold. A widow, prior to the assignment of her dower, is not such a tenant, and therefore she cannot joinin a petition for partition. *Ib.*

3. After dower, without metes and bonds, has been assigned and the widow enters, she is a tenant, and holds her undivided dower; and then, by the equity of the Statute, 32 Hen. VIII., c. 32, and of the Statute of this State, partition may be made between her and the tenants in common. *Ib.*

4. A plea of purchase for value and without notice is a bar only against an equitable and not against a legal claim. It is no

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DOWER—*Continued.*

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bar against a bill for the assignment of dower, that being a legal title. *Dick* v. *Doughten et al.*, 320.

5. Upon a decree for the assignment of dower against a purchaser of land from the deceased husband and for an account of rents and profits, the purchaser is liable only for rents and profits which accrued subsequent to the date of his purchase. To support a claim by the widow for rents and profits from the death of the husband, all the intermediate purchasers must be made parties to the bill. *Ib.*

6. Under an Act of Assembly divorcing a wife from her husband, *a mensa et thoro*, and granting to the wife *all the rights, privileges and immunities of a feme sole*, the wife becomes competent to execute a release of land charged with an annuity bequeathed to her, under the will of a deceased husband, in lieu of dower. *Stilley* v. *Grubb*, 406.

7. By the release executed to the purchaser of the land charged with the annuity the complainant claimed the right to dower in the land, and released the same for a valuable consideration. *Held*, that she thereby precluded herself from claiming, against the purchaser, the annuity bequeathed to her in lieu of dower. *Ib.*

8. Dower may be assigned by the Orphans' Court in all cases, except where, under special circumstances, the aid of a court of chancery is necessary. *Farrow* v. *Farrow et al.*, (Appendix) 457.

9. An *ante-nuptial* contract for a collateral satisfaction in lieu of dower, fairly made, is a good bar in equity, and may be enforced against a claim of dower in the Orphans' Court. But a concealment by the husband of any fact which, at the time of entering into the contract, ought to have been communicated to the wife, is a fraud, and avoids the contract. *Ib.*

See INTEREST, 4.

ELECTION OF REMEDIES.

1. A bill to recover legacies was filed by two residuary legatees under a will against the administrator of the executor, the executor having been also, in his life-time, guardian of the legatees. One of the legatees, before the filing of the bill, had brought a suit at law on the guardian bond. *Held*, that the legatees must elect whether to proceed at law on the guardian bond, or to prosecute the pending suit in equity. *West et al.*, v. *Evans, Adm'x* 122.

2. A creditor by bond and mortgage cannot, without some special equity in favor of the debtor, be restrained from proceeding

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ELECTION OF REMEDIES—*Continued.*

at his election, upon either or both of his remedies so that he does not take a double satisfaction. *Newbold* v. *Newbold et al.*, 310.

ELEGIT.

Injunction granted to restrain a tenant, holding a farm under a writ of *elegit*, from tilling it contrary to the established rotation of crops on the farm, and to the usage of the country in which it is situate. Such improper tillage, when tending to depreciate the value of the inheritance, is waste. *Wilds* v. *Layton et al.*, 226.

EQUITABLE DEFENCE.

See PURAHASER FOR VALUE, WITHOUT NOTICE.

ESTATE.

See WILL. III, IV.

EVIDENCE.

I. *Admissibility.*

1. Parol evidence of intention, in the absence of fraud, surprise or mistake, is inadmissible to vary the description of land in a written contract of sale. *Dale* v. *Smith et al.*, 1.

2. Written contract for the sale of "a tract of land situated in Appoquinimink Hnndred, *containing by deed 200 acres, be the same more or less.*" Upon a subsequent survey, made according to the description in the deed referred to, the tract was found to contain 317 acres. *Held*, that parol evidence was not admissible to show that the parties intended the sale of a less quantity than the entire tract covered by the description in the deed. *Ib.*

3. Payments made by a surviving partner, on account of a partnership debt, are admissible in a suit against the representatives of the deceased partner, to take the debt out of the Act of Limitations. *Warner et al.*, *Ass'ees*, v. *Allee et al.*, *Adm'rs*, 49.

4. Parol evidence of the indorsement of a promissory note, without the production of the note, held inadmissible, though not offered in order to charge the indorser. *de Pusey* v. *du Pont et al.*, 77.

5. In the examination of witnesses under a bill to perpetuate testimony, the complainant is confined to the matters for proof alleged in his bill, and to the interrogatories annexed to the bill as the interrogatories to be propounded to the witnesses; but the objection to an examination beyond this limit is waived by the defendant's joining in the commission and filing cross interrogatories. *Hickman* v. *Hickman*, 133.

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EVIDENCE—*Continued.*

6. Two single bills having been given in consideration of an assignment, to be made, of an interest in a patent, which, after obtaining the bills, the obligees refused to make, parol evidence was held admissible to prove the consideration for which the bills were made, although the consideration did not appear upon their face. *Robinson* v. *Jefferson, Adm'r et al.*, 244.

7. Generally, the fact of part performance,—as when it consists of some unequivocal acts of the parties, referrible only to the contract, such as the taking possession of the land, &c., may be proved by parol. But the payment of money not being such an unequivocal act, the fact *that it was paid in execution of the contract* must either be admitted by the answer, or, if denied, must be proved by writing, as by receipts or letters from the alleged vendor. *Houston* v. *Townsend*, 416.

8. The fact of part performance being established, parol evidence is admissible to ascertain *the terms* of the contract. The terms should be clearly and distinctly proved; but the mere fact that they are controverted will not deter the Court from seeking to ascertain them. And if, from the nature of the testimony, it be difficult to ascertain them, the Court may direct an issue for that purpose. *Ib.*

II. *Answer as evidence.*

1. A denial, by answer, of the equity of the bill is not evidence, under the rule requiring two witnesses, &c., to controvert it, unless it be made by a party cognizant of the transactions out of which the complainant's equity arises. *Robinson* v. *Jefferson, Adm'r et al.*, 244.

2. An answer setting up, as a defence, new matter is not evidence, but must be proved. *Ib.*

III. *Competency of Witness.*

1 Objections to the competency of a witness must be made by articles filed, according to the rule of court, and cannot be taken at the hearing. *Webster* v. *Hopkins et al.*, 70.

2. The rule of court, which requires that objections to the competency of a witness be filed within the first three days of the term to which the commission is returned, does not supersede the necessity of filing articles. *Westcott* v. *Allston et al.*, 74.

3. The defendant having, under the interrogatories, examined a witness for the complainant as to his interest, *held* that it was irregular to file objections after the return of the commission. *Ib.*

4. The attorney in fact, by whom a bill in equity is filed, is not

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EVIDENCE—*Continued.*

a competent witness for the complainant. *de Pusey* v. *du Pont et al.*, 77.

IV. *Depositions.*

1. The answers of a witness taken under the interrogatories in chief and under the cross interrogatories form but one deposition, and the signature of the witness and certificate of the commissioner, though made only at the end of the whole, is sufficient.—*Westcott* v. *Allston et al.*, 74.

2. Depositions taken *in perpetuam memoriam rei* are not to be published, except by special order of the Court. *Hickman* v. *Hickman*, 133.

V. *Newly discovered evidence.*

1. A petition for the re-hearing of a cause, upon the ground of newly discovered evidence, not granted—the Chancellor considering that the evidence, if before him, could not vary the decree to be made in the cause, as it originally stood. *Dale* v. *Smith et al.*, 11.

2. Depositions in a cause having been taken, returned, and published, upon affidavit of the discovery of new testimony and motion for leave to examine additional witnesses, it must appear from the affidavit, that neither the party, nor his solicitor, have read the depositions taken, nor made copies or abstracts thereof. *Carlisle* v. *Rust et al.*, 72.

3. A re-hearing after decree made, will not be granted for the purpose of examining witnesses, or of admitting newly discovered evidence, as to matters which were in issue in the cause as originally heard. *Fennimore Adm'r. d. b. n.* v. *Rahow, Ex'r.*, 88.

VI. *Onus Probandi.*

1. Under the defence of a purchase for value and without notice, the *onus* of proof is on the defendant. The acknowledgment, in the deed, of the receipt of a consideration is not evidence to support such a defence. *Dick* v. *Doughten et al.*, 320.

2. A purchaser of land, under a contract for a conveyance, claimed to set off against his bond for purchase money certain payments which he had made in satisfaction of debts due from the vendor to third persons. The contract did not, in terms, authorize the purchaser to make the payments for which credit was claimed, nor was there proof of any order or authority from the complainant specifically applying to the payments made. *Held*, that in this case there was proof, to the satisfaction of the Chancellor, of a general authority to the purchaser to apply purchase

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EVIDENCE—*Continued.*

money to debts of the vendor. *Held also*, that upon exceptions to a sworn account of the purchase money, filed by the purchaser in answer to the prayer of the bill, he was not under the *onus* of proving the existence of the debts paid by him and sought to be set off. *Lofland* v. *Maull*, 359.

EXCEPTIONS.

1. Heirs at law of a deceased lunatic were admitted to except to the accounts of the trustee of the lunatic,—the attorney in fact of the trustee, who had acted for him and passed the accounts, being the administrator of the lunatic. *Vinson et al.*, v. *Vinson, Trustee*, 120.

2. Under exceptions, the accounts of a trustee, although they have been passed by the Chancellor, are open to re-examination. *Ib.*

EXECUTION.

1. A debtor in an execution being entitled to a long term for years in land, the execution was, through ignorance of the sheriff, levied upon the land as real estate of the debtor. *Held*, to be no sufficient levy upon the term for years. *Massey* v. *Farmers' Bank et al.*, 399.

2. If a sheriff, having levied upon personal estate of a deceased debtor, permit the administrators to sell the same, the creditor in the execution cannot impeach the title of the purchaser, but must take his remedy against the sheriff. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. The executors and administrators of a deceased partner are held to diligence in pursuing their remedy against the surviving partner, in a case of threatened mismanagement or insolvency; and their laches in this duty will preclude any equity they might otherwise have, growing out of laches on the part of a creditor of the partnership. *Warner et al. Ass'ees.* v. *Allee et al. Adm'rs.*, 49.

2. A legatee may file a bill for his legacy against the personal representative of the deceased executor of the testator (the executor having received assets to pay the legacy) without making the administrator *c. t. a.*, *d. b. n.* of the testator a party. *Kirkwood* v. *Mitchell, Adm'r. d. b. n.*, 130.

3. The deceased executor having left a will and appointed an executrix thereof, who, after taking letters testamentary, died: *Held*, that her personal representative was a necessary party to a

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EXECUTORS AND ADMINISTRATORS—*Continued.*

bill filed for the legacy against the administrator *c. t. a., d. b. n.* of the deceased executor of the testator under whose will the legacy was claimed. *Ib.*

4. The Statute which provides that no suit at law for a legacy shall be instituted against an executor until security to refund, in case of a deficiency of assets, be given or tendered, does not control the Court of Chancery. *Killen et al.*, v. *Adams, Ex'r.*, 184.

5. This Court has, by virtue of its general jurisdiction, the power to require of any complainant, in a proper case, security or indemnity. To adopt the Statute would narrow the power already held, and which is more ample for purposes of complete justice than is the authority given by the Statute to courts of law. *Ib.*

6. D. H. died intestate in 1784. Administration of his estate was granted to his widow and two sons. The widow entered into possession of the real and personal estate and died in 1796. One of the two sons died in 1796, and the other in 1817. No inventory and appraisement of the estate had ever been filed by the administrators, nor had any administration account been passed. In 1818, a surviving son of the intestate filed a bill for an account against the representatives of the two deceased sons of the intestate who had joined with the widow in the administration. *Held*, that this was a stale demand, for which a court of equity will not relieve. *Hall Adm'r. d. b. n.* v. *Walker Adm'r. et al.*, 241.

7. T.C., by will, directed that his executors, thereinafter named, should sell and dispose of all his real and personal estate, wheresoever or whatsoever, at such time or times as they, or the survivor of them, could do it to the best advantage, and either at public or private sale, as they or he might think best in their or his discretion, &c. *Held*,

1. That under this provision no estate passed to the persons named as executors, but that the real estate descended to the heirs at law of the testator.

2. That the persons named as executors having refused to take letters testamentary, an administrator, *c. t. a.*, has no authority, as such, to make the sale directed by the will. The direction to sell was a personal confidence in the executors named, and it cannot be executed by an administrator. *Lockwood, Adm'r. c. t. a.*, v. *Stradley et al.*, 298.

See PARTNERSHIP, 1.

ORPHANS' COURT.

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EXHIBITS.

The rule of court for the filing of a list of exhibits, applies as well to records and documents which prove themselves, as to papers proved by witnesses. *O'Daniel* v. *Vandegrift*, 128.

FEME COVERT.

See HUSBAND AND WIFE.

FRAUD.

1. The pretended burning by the wife of a marriage contract in order to pacify the dissatisfaction of her husband's mother, who had no interest in it, is not evidence of fraud, to affect her rights under it as against other persons. *Cochran* v. *McBeath et al.*, 187.

2. The joint possession by the husband and wife of the goods and furniture stipulated in a marriage contract to be for her separate use is not evidence of fraud nor a bar to the wife's claim,—such joint possession, after marriage, being consistent with the wife's title under the contract. *Ib.*

FRAUDS, STATUTE OF.

1. Parol evidence of intention in the absence of fraud, surprise or mistake, is inadmissible to vary the description of land in a written contract of sale. *Dale* v. *Smith et al.*, 1.

2. Written contract for the sale of "a tract of land situated in Appoquinimink Hundred, *containing by deed* 200 *acres, be the same more or less.*" Upon a subsequent survey made according to the description in the deed referred to, the tract was found to contain 317 acres. *Held*, that parol evidence was not admissible to show that the parties intended the sale of a less quantity than the entire tract covered by the description in the deed. *Ib.*

3. A contract in writing for the sale of lands cannot be discharged by a parol agreement, except that equity will relieve where the parol agreement has been acted upon and the condition of the parties thereby changed. *Wilkins* v. *Evans*, 156.

4. *It seems*, that under the Delaware Statute about contracts and assumptions, a written contract for the sale of lands cannot be waived except in writing. *Ib.*

5. Payment of the whole, or of a substantial part, of the purchase money is such a part performance of a contract for the sale of land as takes the case out of the Statute of Frauds. The authorities on this subject reviewed. *Houston* v. *Townsend*, 416.

6. The payment must be clearly made and accepted in execution of the contract—being referrible to no other object. *Ib.*

7. Generally, the fact of part performance,—as when it consists

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FRAUDS, STATUTE OF—*Continued.*

of some unequivocal acts of the parties, referrible only to the contract, such as the taking possession of the land, &c.,—may be proved by parol. But the payment of money not being such an unequivocal act, the fact *that it was paid in execution of the contract* must either be admitted by the answer, or, if denied, must be proved by writing,—as by receipts or letters from the alleged vendor. *Ib.*

8. The fact of part performance being established, parol evidence is admissible to ascertain *the terms* of the contract. The terms should be clearly and distinctly proved; but the mere fact that they are controverted will not deter the Court from seeking to ascertain them. And if, from the nature of the testimony, it be difficult to ascertain them, the Court may direct an issue for that purpose. *Ib.*

9. The payment of $1,400.00 on account of purchase money amounting to $3,750.00, *held* to be a sufficient part performance, and that the fact and object of the payment was sufficiently proved by receipts of the vendor; and, the subject matter and terms of the contract being ascertainable from the evidence, a specific execution decreed. *Ib.*

See TRUST AND TRUSTEE.

FRAUDULENT CONVEYANCE.

1. A voluntary deed was made by a father conveying to his two sons, who were minors, certain land, which was afterward sold by the sheriff in execution of judgments against the father, recovered subsequently to the deed but for debts contracted prior to it. Under the special circumstances of the case, the Court refused to set aside the deed for the relief of a purchaser of the land deriving title under the sheriff's sale. *Hall* v. *Greenly et al.*, 274.

2. In cases of this nature, the Court, in granting relief, will only set aside the deed impeached. It will not decree a delivery of possession to the purchaser, nor an account of the rents and profits. *Ib.*

GUARDIAN AND WARD.

1. A bill to recover legacies was filed by two residuary legatees under a will against the administrator of the executor, the executor having been also, in his life-time, guardian of the legatees. One of the legatees, before the filing of the bill, had brought a suit at law on the guardian bond. *Held*, that the legatees must elect, whether to proceed at law on the guardian bond, or to prosecute the pending suit in equity. *West et al.*, v. *Evans, Adm'x* 122.

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GUARDIAN AND WARD—*Continued.*

2. A court of equity will entertain a bill for an account against a guardian, notwithstanding the guardian may have given security by bond, and may be liable to an action at law. *Davis* v. *Davis*, 256.

3. The Act of Assembly requiring a guardian to give bond, with surety, was intended to provide an additional security for the ward, and not to take away the jurisdiction of this Court. The remedy at law on the bond is not, for all purposes, so complete as a bill in equity. *Ib.*

4. Rents of real estate of the ward received by the guardian after the guardianship ceased are, unquestionably, the subject of an account in equity. *Ib.*

5. I. S. intermarried with a female guardian of two minors. Certain goods, in the purchase of which the funds of the minors had been invested, were sold by the husband, and a bond for the proceeds taken in his own name. Afterward, he joined the wife in passing guardian accounts, in which they were charged jointly with the funds of the wards. *Held*, that the husband was liable in equity to account to the wards. *Burton et al.*, v. *Harris*, 353.

6. In such case equity will follow the funds, and the guardian accounts are evidence that these have come to the husband's hands. *Ib.*

7. The liability of the husband is not discharged by his death, but his estate becomes bound. *Ib.*

HUSBAND AND WIFE.

1. A married woman, whose husband was reported and believed to have been killed in battle, but who was in fact living, contracted to sell and afterward conveyed her maiden property. An ejectment for the premises was brought by the wife after the husband's death and judgment recovered against the purchaser *Held*, that, there being no fraud, he could not be relieved in equity. *Ross* v. *Singleton*, 149.

2. A married woman cannot, after she becomes sole, be compelled to make good or execute a contract which was void in its origin, or which she was legally incompetent to enter into. *Ib.*

3. By articles, executed before marriage, it was agreed that the intended wife should, after the marriage, hold to her sole and separate use, and subject to her disposal, certain real and personal estate to which she was previously entitled. No trustee for the wife was created in the contract. *Held*, nevertheless, that a court of equity will protect the wife against creditors of the husband,

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who were proceeding, under judgments against him at law, to take in execution the property so settled upon her. *Cochran* v. *McBeath et al.*, 187.

4. Under a marriage contract a separate estate may be created in the wife, without the intervention of trustees. And this is true both as to real and personal estate, and whether the claim of the wife in the particular case be against the husband, or against his creditors. With respect to *personal* estate, the appointment of a trustee for the separate use of the wife has never been deemed necessary; and, upon the weight of authority, a trustee is not necessary to a separate use of *real* estate. The decisions on this point fully reviewed. *Ib.*

5. Marriage is a valuable consideration to support a contract between husband and wife. In equity the form of the contract, so that it be in writing, is not material. Equity, on account of the consideration, will compel the execution of the contract; and, for that purpose, will hold the husband to be a trustee for the separate use of the wife during her life-time, of the rents and profits of her real estate, and of her goods and chattels, as also it will hold her heir at law to be a trustee to carry into effect any disposal of her real estate made by way of appointment under the marriage contract. *Ib.*

6. There is no difference, with respect to the principles before stated, between devises to the separate use of the wife without trustees, and marriage articles without trustees,—except that the reason for protecting the rights of the wife under marriage articles is stronger than under a devise, because under the former her rights rest upon a valuable consideration, whereas a devise is voluntary. *Ib.*

7. It is not necessary to the validity of a marriage contract that it should be recorded, nor that any publicity or notoriety should be given to it. Secrecy or concealment, in such case, is therefore not evidence of fraud. Nor is it necessary that any schedule or inventory of the goods and chattels secured to the separate use of the wife should be annexed to the contract. Nor is it necessary, in order to bind creditors, that the contract shall expressly secure the wife's property against liability for the husband's debts. Creditors stand on the same footing with the husband, and whatever binds him binds them. *Ib.*

8. The signature of the wife to the marriage contract is not essential to give it validity. It operates as a grant by the husband, in consideration of the marriage, and takes effect against him upon her acceptance of it and intermarriage with him. *Ib.*

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HUSBAND AND WIFE—*Continued.*

9. The pretended burning by the complainant of the marriage contract, in order to pacify the dissatisfaction of her husband's mother, who had no interest in it, is not evidence of fraud, to affect the complainant's rights under it as against other persons. *Ib.*

10. The joint possession by the husband and wife of the goods and furniture stipulated to be for her separate use is not evidence of fraud nor a bar to the wife's claim,—such joint possession, after marriage, being consistent with the wife's title under the contract. *Ib.*

11. The mere acquiescence of the wife in her husband's receipt of the rents, profits and income of her separate estates though it may make his acts already done under such acquiescence valid, and may discharge him from any subsequent account for sums received by him, is not an abandonment of her separate estate; and her inattention or laches in this respect cannot prejudice her. *Ib.*

12. I. S. intermarried with a female guardian of two minors. Certain goods in the purchase of which the funds of the minors had been invested, were sold by the husband, and a bond for the proceeds taken in his own name. Afterward, he joined the wife in passing guardian accounts, in which they were charged jointly with the funds of the wards. *Held*, that the husband was liable in equity to account to the wards. *Burton et al.*, v. *Harris, Ex'r.*, 353.

13. In such case equity will follow the funds, and the guardian accounts are evidence that these have come to the husband's hands. *Ib.*

14. The liability of the husband is not discharged by his death, but his estate becomes bound. *Ib.*

See DIVORCE.

IDIOT.

See LUNATIC.

INDORSEMENT.

1. Parol evidence of the indorsement of a promissory note, without the production of the note, held inadmissible, though not offered in order to charge the indorser. *de Pusey* v. *du Pont et al.*, 77.

2. The indorser of a promissory note, though fixed in his liability by protest, is not entitled, as a *creditor*, to a share of the estate of the maker under an assignment for the benefit of creditors. *Farmer's Bank* v. *Gilpin et al.*, 409.

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INDORSEMENT—*Continued.*

3 Such an indorser is entitled only to be reimbursed payments actually made by him. *Ib.*

4. The holder of the note can claim, under the equity of the indorser, out of the assigned estate, only to the amount of payments so made by the indorser. *Ib.*

INJUNCTION.

1. Practice as to the admission of *ex parte* affidavits in support of the bill, upon motion for a preliminary injunction. *Tatem et al.*, v. *Gilpin et al.*, 13.

2. An order for an injunction *pendente lite* cannot be appealed from, if it be such an order for an injunction as a court of equity, according to its established rules, can issue. *Ib.*

3. An injunction must be suspensive only, and must not operate so as to alter or affect the pre-existing situation of the parties. An order for an injunction having the latter effect may be appealed from. *Ib.*

4. An attachment for contempt in the breach of an injunction should not be granted unless the affidavit, on which the motion is grounded, allege service of the writ; nor, without such allegation in the affidavit, can the service be proved upon interrogatories administered to the defendant taken under the attachment. *State* v. *Gilpin et al.*, 25.

5. A purchaser of land at Sheriff's sale, the sale being not returned nor a legal title acquired, has nevertheless a remedy by injunction to stay waste of the premises purchased. *Thompson* v. *Lynam*, 64.

6. Injunction granted to restrain a tenant, holding a farm under a writ of *elegit*, from tilling it contrary to the established rotation of crops on the farm, and to the usage of the country in which it is situate. Such improper tillage, when tending to depreciate the value of the inheritance, is waste. *Wilds* v. *Layton et al.*, 226.

7. Injunction granted to restrain the collection of two single bills, given in consideration of an assignment, to be thereafter made, of an interest under a patent,—the obligees having, after obtaining the bills, refused to make the stipulated assignment. *Robinson* v. *Jefferson, Adm'r, et al.*, 244.

8. A creditor by bond and mortgage cannot, without some special equity in favor of the debtor, be restrained from proceeding, at his election, upon either or both of his remedies, so that he does not take a double satisfaction. *Newbold* v. *Newbold et al.*, 310.

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INJUNCTION—*Continued.*

9. The principle that where an injnnction is granted to restrain a wrong, equity will give full relief in order to prevent a multiplicity of suits, is limited to cases in which there exists a right in equity to relief for the wrong already done, independently of the pendency of an injunction to prevent future wrong. *Hughlett* v. *Harris et al.*, 349.

INSOLVENCY.

1. Upon the insolvency of the surviving partner, a creditor is entitled to have his debt satisfied out of the estate of the deceased partner, unless his equity to relief has been lost by laches. Ordinary forbearance is not such laches. *Warner et al.*, v. *Allee et al.*, 49.

2. The executors and administrators of a deceased partner are held to diligence in pursuing their remedy against the surviving partner, in a case of threatened mismanagement or insolvency; and their laches in this duty will preclude any equity they might otherwise have, growing out of laches on the part of a creditor of the partnership. *Ib.*

3. Bill in equity by the assignee of a single bill against two prior holders and assignors, the debtor having become insolvent. *Held*, that the first assignor, who was the payee in the bill, was discharged by the neglect of his assignee to proceed against the debtor, who, at the time of the first assignment, was in good credit. *Held also*, that the second assignor was liable to the complainant, because he had neglected to collect the bill while he held it, the debtor being then solvent, and had assigned it to the complainant about the time of the debtor's insolvency. *Robinson* v. *Ross et al.*, 253.

INTEREST.

1. Bequest to the testator's daughter, "during her natural life," of "*the yearly interest*" on one-half the proceeds of certain land directed by the will to be sold. The premises were sold on the 25th March, 1808. Interest on one-half the purchase money was paid to the legatee regularly up to 25th March, 1817. She died, 23d December, 1817. *Held*, that her administrator was entitled to interest up to the day of her death. *Matson, Adm'r.*, v. *Walters et al. Ex'rs.*, 146.

2. Under a contract for the sale of land the purchase money was payable by instalments *in futuro*. There was no stipulation in the contract of sale with respect to the time of delivering possession of the land; but after the sale and before the instalments

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INTEREST—*Continued.*

had all become due, the purchaser, with the vendor's consent, entered into possession. *Held*, that he did not thereby become chargeable with interest on the unpaid purchase money from the date of such possession, in the absence of any stipulation to that effect in the contract of sale. *Lofland* v. *Maull*, 359.

3. The question of allowing interest upon arrears of an annuity is, in a court of equity, discretionary,—depending upon equitable considerations arising out of the circumstances of the particular case. *Beeson, Adm'r.*, v. *Elliott, Ex'r.*, 368.

4. An annuity bequeathed to a widow in lieu of dower, for her maintenance, and charged on real estate, payable quarterly, the prompt payment of which was necessary to her comfortable support,—*held*, to be a proper subject for the allowance of interest; and that such allowance by referees, in an arbitration submitting all matters in controversy, was not a mistake in law. *Ib.*

INTERROGATORIES.

1. Interrogatories filed under an attachment for contempt should be entitled in the name of the State as the prosecutor, and not of the party on whose application the attachment issued. *Rice* v. *Small*, 68.

2. The defendant having, under the interrogatories, examined a witness for the complainant as to his interest, held that it was irregular to file objections after the return of the commission. *Westcott* v. *Allston et al.*, 74.

3 In the examination of witnesses under a bill to perpetuate testimony, the complainant is confined to the matters for proof alleged in his bill, and to the interrogatories annexed to the bill as the interrogatories to be propounded to the witnesses; but the objection to an examination beyond this limit is waived by the defendant's joining in the commission and filing cross interrogatories. *Hickman* v. *Hickman*, 133.

See ATTACHMENT, 1.

DEPOSITIONS, 2.

IRREPARABLE INJURY.

Affidavits are admissible to support the bill, though it be denied by the answer, in cases where the injunction may be necessary to prevent irreparable mischief. *Tatem et al.*, v. *Gilpin et al.*, 13.

JUDGMENT.

1. Satisfaction of a judgment having been entered of record, upon the representation of the debtor that a specified balance was

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due and upon his promise to pay it, a bill was filed by the creditor, alleging a larger balance to be in fact due, and praying relief. *Held*, that a court of equity has jurisdiction in such case to decree an account and the payment of the true balance. *McFarlan* v. *Frazier, Adm'r.*, 124.

2. The defendant in a *scire facias* at law on a judgment which had been entered under a warrant of attorney for the confession of judgment upon a bond, claimed to be allowed certain credits against the bond, which were disputed. By an entry on the docket of the *scire facias*, it was agreed between the parties that judgment should be confessed, with stay of execution for three months, the confession not to preclude any equitable relief the defendant might be entitled to in chancery. The present bill was filed by the defendant in the *scire facias* in order to obtain the benefit of the credits claimed by him against the judgment at law, the credits being for certain payments which he had made for the obligee in the bond in the course of settling the affairs of a former partnership between them. *Held*, That the defence against the bond being one which could have been effectually made at law, a court of equity will not interfere. *Conner* v. *Pennington et al.*, 177.

3. Notwithstanding the judgment at law was entered under a warrant of attorney, relief could have been had at law against the judgment for payments and matters of discount. For, as to payments made upon the bond *prior* to the entry of judgment, the court of law was competent, to that extent, to vacate the judgment, on motion; while payments and matters of discount accruing *after* judgment entered might have been pleaded in the *scire facias*. *Ib.*

4. The Statute of 4 *Anne, Ch.* 16, *Sec.* 12, enabling a defendant in an action of debt or *scire facias* on a judgment to plead payment, in bar of such action, is in force in this State; and such has been the practice. *Ib.*

5. One of two defendants in a joint judgment at law died. After his death his lands were sold in execution of another judgment which had been recovered against him alone. The proceeds of the sale went into the sheriff's hands and were sufficient to pay the joint judgment. Subsequently the lands of the surviving defendant were sold in execution of a decree in chancery and the proceeds of such sale brought into the Court for distribution. There being a surplus after satisfying the decree, a motion was made on behalf of the creditor in the joint judgment at law for the payment of that judgment out of the fund in equity raised by sale of the lands of

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JUDGMENT—*Continued*.

the surviving defendant. *Held*, that the judgment had been satisfied by the sale of the lands of the deceased defendant and the receipt by the sheriff of the proceeds of sale, such proceeds being legally applicable to the judgment. *Ex parte Dixon*, 261.

6. The death of one of two joint debtors in a judgment at law does not exonerate from the debt the lands of the deceased debtor, but they continue subject to the lien of the judgment. *Ib.*

7. In the above case the deceased defendant in the joint judgment having been the principal debtor, his lands on that ground alone would be subjected in equity to the debt, and the sheriff would have been held responsible for its amount to the judgment creditor, so as to bar a claim by the latter in this Court to receive satisfaction out of the lands of the surety. *Ib.*

8. A trust of real estate, resulting from its having been purchased with trust funds, will not avail against the legal rights of judgment creditors of the purchaser of the real estate. *Roberts, Adm'r., et al.* v. *Broom et al.*, 388.

9. The equitable assignee of a judgment, even for a valuable consideration, and without notice of any existing equity against the judgment, takes it subject to all equities of the defendant in the judgment, accruing before he has notice of the assignment; and, consequently, subject to his right to set off a debt due him from the judgment creditor under a decree in equity made prior to his receiving notice of the assignment. A decree made after the notice, but entered *nunc pro tunc* as of a date prior to the notice, is of the same effect in this respect, as if it had been *in fact* made at such date. *Lockwood* v. *Bates et al.*, 435.

JURISDICTION.

1. The Orphans' Court is a court of public and general jurisdiction, and its proceedings cannot be impeached collaterally. *Van Dyke et al.* v. *Johns*, 93.

2. Satisfaction of a judgment having been entered of record, upon the representation of the debtor that a specified balance was due and upon his promise to pay it, a bill was filed by the creditor, alleging a larger balance to be in fact due, and praying relief; *Held*, that a court of equity has jurisdiction in such case to decree an account and the payment of the true balance. *McFarlan* v. *Frazier, Adm'r*, 124.

3. The Statute which provides that no suit at law for a legacy shall be instituted against an executor until security to refund, in case of a deficiency of assets, be given or tendered, does not con-

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JURISDICTION—*Continued.*

trol the Court of Chancery. *Killen et al.*, v. *Adams, Ex'r.*, 184.

4. A Court of equity has, by virtue of its general jurisdiction, the power to require of any complainant, in a proper case, security or indemnity. *Ib.*

5. The defendant in a *scire facias* at law on a judgment, which had been entered under a warrant of attorney for the confession of judgment upon a bond, claimed to be allowed certain credits against the bond, which were disputed. By an entry on the docket of the *scire facias*, it was agreed between the parties that judgment should be confessed, with stay of execution for three months, the confession not to preclude any equitable relief the defendant might be entitled to in chancery. The present bill was filed by the defendant in the *scire facias* in order to obtain the benefit of the credits claimed by him against the judgment at law, the credits being for certain payments which he had made for the obligee in the bond in the course of settling the affairs of a former partnership between them. *Held*, That the defence against the bond being one which could have been effectually made at law, a court of equity will not interfere. *Conner* v. *Pennington et al.*, 177.

6. In the above stated case, in addition to the complainant's right to discount or set off against the bond his alleged payments for the defendant, the complainant had his action for money paid, and in that view there was an adequate remedy without the aid of a court of equity. *Ib.*

7. A court of equity will entertain a bill for an account against a guardian, notwithstanding the guardian may have given security by bond, and may be liable to an action at law. *Davis, Adm'r*, v. *Davis*, 256.

8. The Act of Assembly requiring a guardian to give bond, with surety, was intended to provide an additional security for the ward, and not to take away the jurisdiction of this Court. The remedy at law on the bond is not, for all purposes, so complete as a bill in equity. *Ib.*

9. A party is not, by his having joined in a case stated in a court of equity submitting the question of the validity of the award, precluded from objecting to the want of jurisdiction. The consent of parties cannot give jurisdiction, if otherwise it does not exist. *Beeson et al., Adm'rs*, v. *Elliott, Ex'r*, 368.

10. Where two courts have concurrent jurisdiction of a subject matter, the one which first possesses the cause acquires thereby the right to exercise the jurisdiction exclusively. *Ib.*

11. Under the Statute of this State of 1726–36, limiting the

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JURISDICTION—*Continued.*

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powers of the courts of equity, our Court of Chancery has no jurisdiction of a case in which there is a "sufficient remedy at law." What *is* a "sufficient remedy at law," in the sense of the Statute is not clearly settled. *Ib.*

12. Courts of equity have a general jurisdiction to relieve against mistakes in law, committed by arbitrators in the making of awards; but, in the exercise of such jurisdiction, the Courts will relieve only against such mistakes as are *plain, palpable and gross. Ib.*

See JUDGMENT, 2, 3.

LACHES.

1. Upon the insolvency of the surviving partner, a creditor is entitled to have his debt satisfied out of the estate of the deceased partner, unless his equity to relief has been lost by laches. Ordinary forbearance is not such laches. *Warner et al., Ass'ees,* v. *Allee et al., Adm'rs,* 49.

2. The executors and administrators of a deceased partner are held to diligence in pursuing their remedy against the surviving partner, in a case of threatened mismanagement or insolvency; and their laches in this duty will preclude any equity they might otherwise have, growing out of laches on the part of a creditor of the partnership. *Ib.*

3. Long delay and acquiescence in the defendant's title, held a good equitable defence, the bill having been filed nearly thirty years after the lands were conveyed to the defendant, and twelve years after the youngest of the heirs at law had attained twenty-one years of age. *Van Dyke et al.,* v. *Johns,* 93.

4. A court of equity will not relieve a complainant against the consequences of his negligence, or of a risk voluntarily assumed by him. *Ross* v. *Singleton,* 149.

5. The mere acquiescence of the wife in her husband's receipt of the rents, profits and income of her separate estate, though it may make his acts already done under such acquiescence valid, and may discharge him from any subsequent account for sums received by him, is not an abandonment of her separate estate; and her inattention or laches in this respect cannot prejudice her. *Cochran* v. *McBeath, Adm'x, et al.,* 187.

6. D. H. died intestate in 1784. Administration of his estate was granted to his widow and two sons. The widow entered into possession of the real and personal estate and died in 1796. One of the two sons died in 1796, and the other in 1817. No inventory and appraisement of the estate had ever been filed by the admin-

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LACHES—*Continued.*

istrators, nor had any administration account been passed. In 1818, a surviving son of the intestate filed a bill for an account against the representatives of the two deceased sons of the intestate who had joined with the widow in the administration. *Held*, that this was a stale demand, for which a court of equity will not relieve. *Hall, Adm'r, d. b. n.*, v. *Walker, Adm'r, et al.*, 241.

7. Bill in equity by the assignee of a single bill against two prior holders and assignors, the debtor having become insolvent. *Held*, that the first assignor, who was the payee in the bill, was discharged by the neglect of his assignee to proceed against the debtor, who, at the time of the first assignment, was in good credit. *Held also*, that the second assignor was liable to the complainant, because he had neglected to collect the bill while he held it, the debtor being then solvent, and had assigned it to the complainant about the time of the debtor's insolvency. *Robinson* v. *Ross et al.*, 253.

8. Long acquiescence in an award, without objection made in the court of law to which such award was returned, the arbitration being one entered into in a suit or amicable action at law,—*held* a sufficient ground for a court of equity to refuse its interference, even supposing such a case to be within its jurisdiction. *Beeson et al., Adm'rs*, v. *Elliott, Ex'r*, 368.

LANDLORD AND TENANT.

See ELEGIT.

LAPSE OF TIME.

See LACHES.

LEASE.

See TIME.

LAGACY AND LEGATEE.

1. A bill to recover legacies was filed by two residuary legatees under a will against the administrator of the executor, the executor having been also, in his life-time, guardian of the legatees. One of the legatees, before the filing of the bill, had brought a suit at law on the guardian bond. *Held*, that the legatees must elect, whether to proceed at law on the guardian bond, or to prosecute the pending suit in equity. *West et al.*, v. *Evans, Adm'x*, 122.

2. Two or more residuary legatees under a will must be parties to a suit in equity for the recovery of the residuary legacy. If

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one will not join as a party complainant, he must be made a party defendant. *Ib.*

3. A legatee may file a bill for his legacy against the personal representative of the deceased executor of the testator (the executor having received assets to pay the legacy) without making the administrator *c. t. a., d. b. n.* of the testator a party. *Kirkwood* v. *Mitchell, Adm'r*, 130.

4. The deceased executor having left a will and appointed an executrix thereof, who, after taking letters testamentary, died: *Held*, that her personal representative was a necessary party to a bill filed for the legacy against the administrator *c. t. a., d. b. n.* of the deceased executor of the testator under whose will the legacy was claimed. *Ib.*

5. Bequest to the testator's daughter, "during her natural life," of "*the yearly interest*" on one-half the proceeds of certain land directed by the will to be sold. The premises were sold on the 25 March, 1808. Interest on one-half the purchase money was paid to the legatee regularly up to 25th March, 1817. She died, 23d December, 1817. *Held*, that her administrator was entitled to interest up to the day of her death. *Matson, Adm'r*, v. *Walters et al., Ex'rs*, 146.

6. The statute which provides that no suit at law for a legacy shall be instituted against an executor until security to refund, in case of a deficiency of assets, be given or tendered, does not control the Court of Chancery. *Killen et al.*, v. *Adams, Ex'r*, 184.

7. A nuncupative will executed in the State of Pennsylvania, according to the laws of that State, but not proved in this State, *held* not sufficient to pass a legacy to a religious corporation within this State, to be paid out of assets situated in this State. *St. James' Church* v. *Walker, Adm'r, c. t. a.*, 284.

8. A testator by will directed that his "just debts and burying expenses be paid" by his executors. He devised to his two sons his whole real estate, "to them and their heirs, in equal moieties, forever; *and also all his personal estate after paying the legacies in the will mentioned.*" *Held*, upon the construction of the will, that the legacies were not charged upon the real estate devised to the sons. *Gilder* v. *Gilder et al.*, 331.

9. A testator, after bequeathing certain pecuniary legacies, and among others a legacy of $866.66 to a daughter, and one of $1000.00 to another daughter, devised the residue of his estate, including some real estate, to the same daughters as follows: "My further will is that the remainder of my estate, if any there be,

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LEGACY AND LEGATEE—*Continued.*

shall be equally divided between my two daughters Martha and Lydia, whom I appoint my executors." Bill filed by the representative of one of the legatees, alleging a deficiency of personal estate and praying that the unpaid balance of the legacy be charged upon the residuary real estate. *Held*, that the legacy was a charge on the real estate. *Hilford, Adm'r*, v. *Way et al.*, 342.

10. A testator, having provided for the raising of a fund out of certain real estate, by a charge or sale thereof, bequeathed one moiety to his three nieces, the daughters of J. W., and the other moiety to his five nephews and nieces, the children of P. R., "or to such of them as shall be alive when the time of such division shall arrive." The fund was raised by a sale of the real estate, prior to which sale the three daughters of J. W., all died. *Held*, that the moiety bequeathed to the daughters of J. W., did not survive to the children of P. R. *Booth, Ex'r*, v. *Ward et al.*, 345.

11. Though a trust may result to legatees in real estate purchased by an executor and trustee with assets applicable to the legacies, it will not avail against the legal rights of judgment creditors of the executor and trustee. *Roberts, Adm'r, et al.*, v. *Broom et al.*, 388.

LIEN.

The death of one of two joint debtors in a judgment at law does not exonerate from the debt the lands of the deceased debtor, but they continue subject to the lien of the jugdment. *Ex parte Dixon*, 261.

LIMITATIONS, STATUTE OF.

1. Payments made by a surviving partner, on account of a partnership debt, are admissible in a suit against the representatives of the deceased partner, to take the debt out of the Act of Limitations. *Warner et al., Ass'ees*, v. *Allee et al., Adm'rs*, 49.

2. The Act of Limitations will not be enforced in equity, unless it be insisted upon by plea or answer. *Dick v. Doughten et al.*, 321.

LIS PENDENS.

A *lis pendens*, is constructive notice, not only to affect purchasers of the subject matter of the litigation, but also to protect all rights and equities arising out of it. The pendency of a suit in equity resulting in a decree for the payment of a partnership balance by the defendant to his co-partner, which the latter sought to set off against a judgment due from him to the defendant, *held* to be *constructive* notice of the co-partner's equity to an assignee

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LIS PENDENS—*Continued.*

of the judgment who took pending the litigation. *Held also*, that the assignee of the judgment, having been one of the solicitors in the suit in equity, must be taken to have had *actual* notice of the co-partner's equity of set off. *Lockwood* v. *Bates, Ass'ees, et al.*, 435.

LUNATIC.

Heirs at law of a deceased lunatic were admitted to except to the accounts of the trustee of the lunatic,—the attorney in fact of the trustee, who had acted for him and passed the accounts, being the administrator of the lunatic. *Vinson et al.*, v. *Vinson, Trustee*, 120.

MARRIAGE.

See HUSBAND AND WIFE.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, 3, 4, 5, 6, 7, 8, 9. 10, 11.

MISTAKE.

1. Courts of equity have a general jurisdiction to relieve against mistakes in law, committed by arbitrators in the making of awards; but, in the exercise of such jurisdiction, the Courts will relieve only against such mistakes as are *plain, palpable and gross. Beeson et al., Adm'rs*, v. *Elliott, Ex'r*, 368.

2. An annuity bequeathed to a widow in lieu of dower, for her maintenance, and charged on real estate, payable quarterly, the prompt payment of which was necessary to her comfortable support,—*held* to be a proper subject for the allowance of interest; and that such allowance by referees, in an arbitration submitting all matters in controversy, was not a mistake in law. *Ib.*

3. A testator devised as follows: "I give to my dear and loving "wife, the reasonable use of two suitable rooms in the house that "we may happen to dwell in at the time of my decease, whether "in town or country, with suitable provisions in the cellar, kitchen, "garden, necessary house, well or pump: To hold to my said "wife for and during her natural life, with full and free ingress or "egress and regress." After the death of the testator, his widow removed from the house in which he was living at his decease, and to which the rights and privileges devised to her had attached. The premises were for some years occupied and rented by her two sons, the devisees thereof in fee simple, but without any contract for compensation in respect of the widow's privileges. *Held*, that under the devise the widow took such an interest in the premises,

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MISTAKE—*Continued.*

that the law would imply a contract to pay a compensation therefor in the absence of an express contract; and that the allowance of such compensation by referees in an arbitration between the widow and one of the devisees, submitting all matters in controversy, was not a mistake in law. *Ib.*

MORTGAGE.

See ELECTION OF REMEDIES, 2.

MUTUAL CREDITS.

Mutual credits between two parties, though they cannot be set off at law, are ground for a set off in equity. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

NE EXEAT REPUBLICA.

1. It is sufficient, in an affidavit to found a motion for a writ of *ne exeat*, to refer to the facts charged in the bill as shewing the ground of the complainant's demand or complaint, without restating them in the affidavit: *Provided*, the facts so charged are such as entitle the complainant to the writ. *Clayton et al.*, v. *Mitchell*, 32.

2. In the case of a bill for an account, where the balance between the parties is yet to be ascertained by an account and settlement, it is sufficient, in an affidavit for a *ne exeat*, for the complainant to swear *to his belief* that a sum certain is due to him. *Ib.*

3. Bill for an injunction and an account. Upon the petition of the complainant, an infant, &c., by his guardian, under the oath of the guardian and of her husband, (the guardian being a married woman), setting forth that the defendant "threatens and intends to leave the State of Delaware and to withdraw himself out of the jurisdiction of the Court," and that deponents believe that he is indebted to the complainant in the sum of $3,000.00 and upwards,—a *ne exeat* ordered. *Clowes et al.*, v. *Judge*, 295.

4. An agreement to exonerate sureties in a recognizance entered into by a defendant in a writ of *ne exeat*, upon their paying part of the decree recovered against the defendant, does not discharge the liability of the defendant under the decree. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

NEGLIGENCE.

Bill in equity by the assignee of a single bill against two prior holders and assignors, the debtor having become insolvent. *Held*, that the first assignor, who was the payee in the bill, was discharged by the neglect of his assignee to proceed against the

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NEGLIGENCE—*Continued.*

debtor, who, at the time of the first assignment, was in good credit. *Held also*, that the second assignor was liable to the complainant, because he had neglected to collect the bill while he held it, the debtor being then solvent, and had assigned it to the complainant about the time of the debtor's insolvency. ***Robinson*** v. *Ross et al.*, 253.

See LACHES, LAPSE OF TIME.

NEWLY DISCOVERED EVIDENCE.

See EVIDENCE, V.

REHEARING, 1, 2.

NOTICE.

See PURCHASER FOR VALUE, WITHOUT NOTICE.

LIS PENDENS.

SOLICITOR.

NUNCUPATIVE WILL.

See WILL, V.

OFFICIAL BOND.

See BOND.

ONUS PROBANDI.

See EVIDENCE, VI.

ORPHANS' COURT.

1. The confirmation of a sale under an order of the Orphans' Court, on the return thereof, is conclusive of title under the same except upon appeal.—*Van Dyke et al.*, v. *Johns*, 93.

2. The Orphans' Court is a court of public and general jurisdiction, and its proceedings cannot be impeached collaterally. *Ib.*

3. Dower may be assigned by the Orphans' Court in all cases, except where, under special circumstances, the aid of a court of chancery is necessary.—*Farrow* v. *Farrow et al.*, (appendix) 457.

4. The Orphans' Court is a court of equity, as to all matters within its jurisdiction; and it may take cognizance of any bar to dower, equitable as well as legal. *Ib.*

5. An *ante*-nuptial contract for a collateral satisfaction in lieu of dower, fairly made, is a good bar in equity, and may be enforced against a claim of dower in the Orphans' Court. But a concealment by the husband of any fact which, at the time of entering into the contract, ought to have been communicated to the wife, is a fraud, and avoids the contract. *Ib.*

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PARENT AND CHILD.

See FRAUDULENT CONVEYANCE, 1.

PAROL DEMURRER.

Where, in a bill for the sale of real estate, an heir-at-law is a defendant, a day must be given to such defendant, after arriving at twenty-one years of age, to shew cause against the decree; and this, notwithstanding that the answer, made by a guardian, may have admitted the case to be as alleged in the bill. *Lockwood, Adm'r, c. t. a., et al.*, v. *Stradley et al.*, 298.

PAROL EVIDENCE.

See EVIDENCE, 1.

PARTIES.

1. Interrogatories filed under an attachment for contempt should be entitled in the name of the State as the prosecutor, and not of the party on whose application the attachment issued.—*Rice* v. *Small*, 68.

2. A decree for partition will not be made unless either all the parties entitled shall have joined in the petition, or a summons shall have been issued for those not joining. It is not sufficient that an appearance gratis, and consent to a partition for the parties not joining, is indorsed on the petition. *Candy* v. *Stradley et al.*, 113.

3. Two or more residuary legatees under a will must be parties to a suit in equity for the recovery of the residuary legacy. If one will not join as a party complainant, he must be made a party defendant. *West et al.*, v. *Evans, Adm'x*, 122.

4. A legatee may file a bill for his legacy against the personal representative of the deceased executor of the testator (the executor having received assets to pay the legacy) without making the administrator *c. t. a., d. b. n.* of the testator a party.—*Kirkwood* v. *Mitchell, Adm'r, d. b. n.*, 130.

5. A deceased executor having left a will and appointed an executrix thereof, who, after taking letters testamentary, died: *Held*, that her personal representative was a necessary party to a bill filed for the legacy against the administrator *c. t. a., d. b. n.* of the deceased executor of the testator under whose will the legacy was claimed. *Ib.*

6. In a suit by a bank against a late cashier and the sureties in his official bond, upon the death of the cashier insolvent, the cause will proceed against the sureties, though no administrator of the cashier may have been appointed and made a party defendant. *Farmers' & Mechanics' Bank* v. *Polk et al.*, 167.

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PARTIES—*Continued.*

7. Practice in equity with respect to the necessity of joining as parties all persons interested, and the exceptions to the rule stated. *Ib.*

8. To make good a title, pursuant to a sale under a decree of the Court, the heirs at law of the testator are properly made parties and must be decreed to join in the conveyance of the estate. *Lockwood, Adm'r, c. t. a., et al.*, v. *Stradley et al.*, 298.

9. Upon a decree for the assignment of dower against a purchaser of land of the deceased husband and for an account of rents and profits, to support a claim by the widow for rents and profits from the death of the husband, all the intermediate purchasers must be made parties to the bill. *Dick* v. *Doughten et al.*, 320.

PARTITION.

1. A decree for partition will not be made unless either all the parties entitled shall have joined in it, or a summons shall have been issued for those not joining. It is not sufficient that an appearance gratis, and consent to a partition for the parties not joining, is indorsed on the petition. *Candy* v. *Stradley et al.*, 113.

2. The widow of a deceased tenant in common, who is entitled to dower in his undivided share of the lands held in common, cannot join in a petition for partition of the lands until after her dower has been assigned to her in the Orphans' Court, without metes and bounds. *Exparte Burgess et al.*, 233.

3. The proceeding for partition lies between tenants of the freehold. A widow, prior to the assignment of her dower, is not such a tenant, and therefore she cannot join in a petition for partition. *Ib.*

4. After dower, without metes and bounds, has been assigned and the widow enters, she is a tenant, and holds her undivided dower; and then, by the equity of the Statute, 32 Hen. VIII., c. 32, and of the Statute of this State, partition may be made between her and the tenants in common. *Ib.*

PARTNERS AND PARTNERSHIP.

1. Payments made by a surviving partner, on account of a partnership debt, are admissible in a suit against the representatives of the deceased partner, to take the debt out of the Act of Limitations. *Warner & Wardell, Ass's*, v. *Allee & Allee, Adm'rs*, 49.

2. Upon the insolvency of the surviving partner, a creditor is entitled to have his debt satisfied out of the estate of the deceased

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PARTNERS AND PARTNERSHIP—*Continued.*

partner, unless his equity to relief has been lost by laches. Ordinary forbearance is not such laches. *Ib.*

3. The executors and administrators of a deceased partner are held to diligence in pursuing their remedy against the surviving partner, in a case of threatened mismanagement or insolvency; and their laches in this duty will preclude any equity they might otherwise have, growing out of laches on the part of a creditor of the partnership. *Ib.*

4. A provision for arbitration, in articles of partnership, does not bar a suit in equity as to matters not comprehended within the scope of the arbitration provided for. *de Pusey* v. *du Pont et al.*, 82.

5. Principles upon which a court of equity deals with provisions for arbitration in partnership articles. *Ib.*

6. One of several partners, to whom, in a suit for the final settlement of the partnership accounts, a share of the balance struck is payable under the decree in such suit, may set it off in equity against a judgment at law held against him by the defendant in the decree. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

7. Such right of equitable set off is not affected by the fact that, under the same decree, shares of the partnership balance are made payable to other partners also; provided, the partners are entitled under the decree *severally*, and not *jointly*. *Ib.*

PART PERFORMANCE.

See FRAUDS, STATUTE OF, 5, 6, 7, 8, 9.

PAYMENT.

1. A person indebted by bond paid a balance due upon it in notes of an insolvent bank, which was not known, at the time, to have stopped payment. *Held*, not to be a discharge in equity of the debt, but that the creditor might recover the balance due before such payment. *Jefferson et al.*, v. *Holland*, 116.

2. Satisfaction of a judgment having been entered of record, upon the representation of the debtor that a specified balance was due and upon his promise to pay it a bill was filed by the creditor, alleging a larger balance to be in fact due, and praying relief: *Held*, that a court of equity has jurisdiction in such case to decree an account and the payment of the true balance. *McFarlan* v. *Frazier, Adm'r*, 124.

3. Notwithstanding a judgment at law has been entered under a warrant of attorney, relief may be had at law against the judg-

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PAYMENT—*Continued.*

ment for payments and matters of discount. For, as to payments made upon the bond *prior* to the entry of judgment, the court of law is competent, to that extent, to vacate the judgment, on motion; while payments and matters of discount accruing *after* judgment entered may be pleaded in the *scire facias*. *Conner* v. *Pennington et al.*, 177.

4. The Statute of 4 *Anne, Ch.* 16, *Sec.* 12, enabling a defendant in an action of debt or *scire facias* on a judgment to plead payment, in bar of such action, is in force in this State; and such has been the practice. *Ib.*

See JUDGMENT, 2, 3, 4.

TIME.

PLEA.

1. In a plea of purchase for value and without notice, it is not sufficient to state only by way of recital, in connection with the statement of title, that the defendant purchased for a valuable consideration and without notice. The matter should be alleged, separately and distinctly from the statement of title, and insisted upon as a bar to the equity of the bill. *Dick* v. *Doughten et al.*, 320.

2. It is not sufficient to allege generally that the defendant purchased for a valuable consideration; but it must be specifically alleged of what the consideration consisted. *Ib.*

3. The statement that the defendant gave "a full, fair and just price for said tract of land without any notice, knowledge or belief that there existed any defect in the title of the same, or that the said tract of land was liable to any claim or demand of dower by the said M. D. (the complainant) or of any other person," is not sufficient (if excepted to) as a plea of purchase for a valuable consideration, without notice. But such a plea, (or answer) if not excepted to, will be taken as sufficient. *Ib.*

4. A plea (or answer) relying upon the equitable defence of a purchase for a valuable consideration, without notice, must set forth the consideration,—of what it consisted,—and must aver the actual, *bona fide* payment of it, independently of the usual recital of payment in the deed. Also, the plea (or answer) must deny positively the fact of notice of the complainant's title or claim previous to the execution of the deed; and must deny every circumstance, charged in the bill, from which notice might be inferred. Notice must be denied, though not charged in the bill. *Gilder* v. *Gilder et al.*, 331.

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PLEA—*Continued.*

5. This defence may be taken either by plea or answer; but a denial of notice or fraud, charged in the bill, should be by answer also, in order that the complainant may be at liberty to except to its sufficiency. *Ib.*

6. *It seems*, that the defence of compromise or release is available by plea only, and not by answer. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

See LIMITATIONS, STATUTE OF, 2.

POSSESSION.

1. The joint possession by the husband and wife of the goods and furniture stipulated to be for her separate use is not evidence of fraud, nor a bar to the wife's claim,—such joint possession, after marriage, being consistent with the wife's title under the contract. *Cochran* v. *McBeath, Adm'x, et al.*, 187.

2. The Court, in relieving a purchaser against a prior fraudulent deed, will only set aside the deed impeached, without decreeing a delivery of possession. *Hall* v. *Greenly et al.*, 274.

POWER.

A power to sell real estate, given by will to the executor, cannot, upon the renunciation of the executor, be executed by an administrator, *c. t. a. Lockwood, Adm'r, c. t a., et al.*, v. *Stradley et al.*, 298.

PRACTICE.

I. *Accounts of Trustee.*

1. Heirs at law of a deceased lunatic were admitted to except to the accounts of the trustee of the lunatic,—the attorney in fact of the trustee, who had acted for him and passed the accounts, being the administrator of the lunatic. *Vinson et al.*, v. *Vinson, Trustee*, 120.

2. Under exceptions, the accounts of a trustee, although they have been passed by the Chancellor, are open to re-examination. *Ib.*

II. *Affidavits on motion for injunction.*

1. Practice as to the admission of ex parte affidavits in support of the bill, upon motion for a preliminary injunction. *Tatem et al.*, v. *Gilpin et al.*, 13.

2. Affidavits are admissible to support the bill, though it be denied by the answer, in cases where the injunction may be necessary to prevent irreparable mischief. *Ib.*

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PRACTICE—*Continued.*

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III. *Appeal.*

1. An order for an injunction *pendente lite* cannot be appealed from, if it be such an order for an injunction as a court of equity, according to its established rules, can issue. *Tatem et al.*, v. *Gilpin et al.*, *Ib.*

2. An injunction must be suspensive only, and must not operate so as to alter or affect the pre-existing situation of the parties. An order for an injunction having the latter effect may be appealed from. *Ib.*

3. After an appeal prayed and allowed in the Court of Chancery, the cause is out of the Court of Chancery, and cannot be further proceeded in until its return from the Court of Appeal. *Ib.*

4. After a cause has been removed into the Court of Appeals it cannot be further proceeded in by this Court, until the record shall have been remanded by order of the Court of Appeals. *Woolaston et al.*, v. *Mendenhall*, 23.

5. The affirmance of a decree of the Chancellor by the High Court of Errors and Appeals, upon an equal division of that Court, is of the same effect as a judgment of affirmance under ordinary circumstances. *Clark et al.*, *Adm'rs, d. b. n.*, v. *McKean et al.*, *Adm'rs*, 114.

IV. *Attachment for contempt.*

1. An attachment for contempt in the breach of an injunction should not be granted unless the affidavit, on which the motion is grounded, allege service of the writ; nor, without such allegation in the affidavit, can the service be proved upon interrogatories administered to the defendant taken under the attachment.—*State* v. *Gilpin et al.*, 25.

2. A discharge from an attachment for contempt, for the want of a sufficient affidavit of service of the injunction, is no bar to a second attachment for the same cause. *Ib.*

3. A party having been arrested under an attachment for contempt and having on his examination, under interrogatories, denied the contempt, *quere*, whether a commission can be taken out to prove the contempt?—*Rice* v. *Small*, 68.

4. Interrogatories filed under an attachment for contempt should be entitled in the name of the State as the prosecutor, and not of the party on whose application the attachment is issued. *Ib.*

V. *Bills to perpetuate testimony.*

1. A bill to perpetuate testimony need not be verified by the

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PRACTICE—*Continued.*

complainant's affidavit, nor is it essential, in order to support such a bill, that the witnesses to be examined shall be aged, infirm, non-residents of the State or likely to remove therefrom. Distinction, in these respects, between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*. *Hickman* v. *Hickman*, 133.

2. Distinction at large between bills to perpetuate testimony and bills for the examination of witnesses *de bene esse*, and the practice under the two proceedings respectively. *Ib.*

3. If the bill has not made a sufficient case to entitle the complainant to an examination of witnesses, whether it be to perpetuate the testimony or to take the testimony *de bene esse*, the defendant should demur. It is too late, after the commission has been ordered, to object that the complainant has failed in any matter necessary to give him the benefit of this course of proceeding. *Ib.*

4. The defendant is generally entitled to costs under a bill to perpetuate testimony. *Ib.*

VI. *Bills of Review.*

1. Practice stated at large with respect to bills of review. *Fennimore, Adm'r, d. b. n.*, v. *Rahow, Ex'r*, 88.

2. After a final decree in the cause and pending an attachment for its non-performance, leave was granted to the defendant to file a bill of review. After some delay, without any bill of review filed, the defendant being still held under the attachment, and the complainant proceeding to enforce the same,—upon motion, the Chancellor discharged the defendant, but with leave to the complainants to take out another attachment, unless the defendant should, before a certain day appointed in the order, file a bill of review, and should also make affidavit of his inability to pay the money decreed and give bond, with surety, for the payment of the same, or of so much thereof as should not be otherwise ordered and decreed under the bill of review,—such security, if given, to have the effect of suspending the original decree until the event of the bill of review. *Dushane* v. *Ryland*, 230.

VII. *Election of Remedies.*

1. A bill to recover legacies was filed by two residuary legatees under a will against the administrator of the executor, the executor having been also, in his life-time, guardian of the legatees. One of the legatees, before the filing of the bill, had brought a suit at law on the guardian bond. *Held*, that the legatees must elect

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PRACTICE—*Continued.*

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whether to proceed at law on the guardian bond, or to prosecute the pending suit in equity. *West et al.*, v. *Evans, Admx*, 122.

VIII. *Exhibits.*

The rule of court for the filing of a list of exhibits applies as well to records and documents which prove themselves as to papers proved by witnesses. *O'Daniel* v. *Vandegrift*, 128.

IX. *Ne exeat republica.*

1. It is sufficient, in an affidavit to found a motion for a writ of *ne exeat*, to refer to the facts charged in the bill as shewing the ground of the complainant's demand or complaint, without restating them in the affidavit: *Provided*, the facts so charged are such as entitle the complainant to the writ. *Clayton et al.*, v. *Mitchell*, 32.

2. In the case of a bill for an account, where the balance between the parties is yet to be ascertained by an account and settlement, it is sufficient, in an affidavit for a *ne exeat*, for the complainant to swear *to his belief* that a sum certain is due to him. *Ib.*

3. Bill for an injunction and an account. Upon the petition of the complainant, an infant, &c., by his guardian, under the oath of the guardian and of her husband, (the guardian being a married woman), setting forth that the defendant "threatens and intends to leave the State of Delaware and to withdraw himself out of the jurisdiction of the Court," and that deponents believe that he is indebted to the complainant in the sum of $3000.00 and upwards,—a *ne exeat* ordered. *Clowes et al.*, v. *Judge*, 295.

X. *Parties.*

1. A party having been arrested under an attachment for contempt and having on his examination, under interrogatories, denied the contempt, *quere*, whether a commission can be taken out to prove the contemp.? *Rice* v. *Small*, 68.

2. Interrogatories filed under an attachment for contempt should be entitled in the name of the State, as the prosecutor and not of the party on whose application the attachment issued. *Ib.*

3. Two or more residuary legatees under a will must be parties to a suit in equity for the recovery of the residuary legacy. If one will not join as a party complainant, he must be made a party defendant. *West et al.*, v. *Evans, Admx*, 122.

4. A legatee may file a bill for his legacy against the personal representative of the deceased executor of the testator (the executor having received assets to pay the legacy) without making the

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PRACTICE—*Continued.*

administrator *c. t. a., d. b. n* of the testator a party. *Kirkwood* v. *Mitchell, Adm'r. d. b. n.*, 130.

5. A deceased executor having left a will and appointed an executrix thereof, who, after taking letters testamentary, died: *Held*, that her personal representative was a necessary party to a bill filed for the legacy against the administrator *c t. a., d. b. n.* of the deceased executor of the testator under whose will the legacy was claimed. *Ib.*

6. In a suit by a bank against a late cashier and the sureties in his official bond, upon the death of the cashier insolvent, the cause will proceed against the sureties, though no administrator of the cashier may have been appointed and made a party defendant. *Farmers' & Mechanics' Bank* v. *Polk et al.*, 167.

7. Practice in equity with respect to the necessity of joining as parties all persons interested, and the exceptions to the rule stated. *Ib.*

8. To make good a title, pursuant to a sale under a decree of the Court, the heirs at law of the testator are properly made parties and must be decreed to join in the conveyance of the estate. *Lockwood, Adm'r., c. t. a.*, v. *Stradley et al.*, 298.

9. Upon a decree for the assignment of dower against a purchaser of land of the deceased husband and for an account of rents and profits, to support a claim by the widow for rents and profits from the death of the husband all the intermediate purchasers must be made parties to the bill. *Dick* v. *Doughten et al.*, 320.

XI. *Partition.*

A decree for partition will not be made unless either all the parties entitled shall have joined in it, or a summons shall have been issued for those not joining. It is not sufficient that an appearance gratis, and consent to a partition for the parties not joining, is indorsed on the petition. *Candy* v. *Stradley et al.*, 113.

XII. *Re-hearing.*

1. A petition for the re-hearing of a cause, upon the ground of newly discovered evidence, not granted—the Chancellor considering that the evidence, if before him, could not vary the decree to be made in the cause, as it originally stood. *Dale* v. *Smith et al.*, 11.

2. A re-hearing after decree made, will not be granted for the purpose of examining witnesses, or of admitting newly discovered evidence, as to matters which were in issue in the cause as originally heard. *Fennimore, Adm'r, d. b. n.*, v. *Rahow, Ex'r*, 88.

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PRACTICE—*Continued.*

3. Practice stated at large with respect to petitions for re-hearing. *Ib.*

4. An order, granting a re-hearing of a decree in equity, does not *per se* vacate the decree; but only opens it for reversal, alteration or correction. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

5. If an order for a re-hearing is dismissed, or discharged by agreement of the parties, without a re-hearing had, the original decree stands precisely as if such order had not been granted. *Ib.*

XIII. *Revivor.*

Under a bill of revivor, upon default to put in an answer, the original suit will be revived. *Fennimore, Adm'r, d. b. n.*, v. *Rahow, Ex'r*, 88.

XIV. *Sale of real estate to satisfy a decree.*

1. Under the statute, enabling the Court of Chancery to make orders for the sale of real estate, when necessary in order to give effect to its decrees, the Chancellor has power to order the sale of real estate of a defendant against whom a decree for the payment of money has been made after a return of *non est* to an attachment against him for the non-performance of the decree, and upon its appearing that his personal property has been exhausted by executions at law. *Woolaston et al.*, v. *Mendenhall*, 23.

2. Practice upon applications for an order to sell the real estate of a defendant in satisfaction of a decree for the payment of money. *Wollaston* v. *Phillips*, 271.

XV. *Supplemental Bills.*

Practice stated at large with respect to supplemental bills. *Fennimore, Adm'r, d. b. n.*, v. *Rahow, Ex'r*, 88.

XVI. *Witness—objections to competency.*

1. Objections to the competency of a witness must be made by articles filed, according to the rule of court, and cannot be taken at the hearing. *Webster* v. *Hopkins et al.*, 70.

2. The rule of court, which requires that objections to the competency of a witness be filed within the first three days of the term to which the commission is returned, does not supersede the necessity of filing articles. *Westcott* v. *Allston et al.*, 74.

See EVIDENCE, IV, V.

PRINCIPAL AND SURETY.

1. In a suit by a bank against a late cashier and the sureties in his official bond, upon the death of the cashier insolvent, the cause will proceed against the sureties, though no administrator of

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PRINCIPAL AND SURETY—*Continued.*

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the cashier may have been appointed and made a party defendant. *Farmers' & Mechanics' Bank* v. *Polk et al.*, 167.

2. One of two defendants in a joint judgment being deceased, he having been the principal debtor in the judgment and the surviving defendant being the surety, the lands of such deceased defendant are held in equity, subject to the debt; and his lands having been sold in execution of another judgment against him alone, and the proceeds of sale being sufficient to pay the joint judgment, the sheriff is responsible for the amount to the judgment creditor, so as to bar a claim by the latter to receive satisfaction out of a fund raised from the lands of the surety by sale under a decree of the Court of Chancery. *Ex parte Dixon, Ex'r*, 261.

3. An agreement to exonerate sureties in a recognizance entered into by a defendant in a writ of *ne exeat*, upon their paying part of the decree recovered against the defendant, does not discharge the liability of the defendant under the decree. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

PROBATE.—See WILL, V.

PROCESS.—See ATTACHMENT—PRACTICE, IV, XIV.

PROMISSORY NOTE.

1. Parol evidence of the indorsement of a promissory note, without the production of the note, held inadmissible, though not offered in order to charge the indorser. *de Pusey* v. *du Pont et al.*, 77.

2. The indorser of a promissory note, though fixed in his liability by protest, is not entitled, as a *creditor*, to a share of the estate of the maker under an assignment for the benefit of creditors. *Farmers' Bank* v. *Gilpin et al.*, 409.

3. Such an indorser is entitled only to be reimbursed payments actually made by him. *Ib.*

4. The holder of the note can claim, under the equity of the indorser, out of the assigned estate, only to the amount of payments so made by the indorser. *Ib.*

PURCHASER.

See EXECUTION, 2. FRAUDULENT CONVEYANCE, 1. INTEREST, 2. SET OFF, 2. TIME, 1, 2. TRUST AND TRUSTEE, IV. WASTE, 1, 4.

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PURCHASER FOR VALUE, WITHOUT NOTICE.

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1. The equitable defence of a purchase of land for valuable consideration, without notice, may be made by answer as well as by plea; but such defence, when made by answer, must be alleged with the same fullness and precision as is required in a plea. *Dick* v. *Doughten et al.*, 320.

2. It is not sufficient that in the answer it be stated only by way of recital, in connection with the statement of title, that the defendant purchased for a valuable consideration and without notice. The matter should be alleged, separately and distinctly from the statement of title, and insisted upon as a bar to the equity of the bill. *Ib.*

3. It is not sufficient to allege generally that the defendant purchased for a valuable consideration; but it must be specifically alleged of what the consideration consisted. *Ib.*

4. The statement by the answer that the defendant gave "a full, fair and just price for said tract of land without any notice, knowledge or belief that there existed any defect in the title of the same, or that the said tract of land was liable to any claim or demand of dower by the said M. D. (the complainant) or of any other person," is not sufficient (if excepted to) as a plea of purchase for a valuable consideration, without notice. But such an answer or plea, if not excepted to, will be taken as sufficient. *Ib.*

5. Under the defence of a purchase for value and without notice, the *onus* of proof is on the defendant. The acknowledgment in the deed of the receipt of a consideration is not evidence to support such a defence. *Ib.*

6. A plea of purchase for value and without notice is a bar only against an equitable and not against a legal claim. It is no bar against a bill for the assignment of dower, that being a legal title. *Ib.*

7. A plea or answer, relying upon the equitable defence of a purchase for a valuable consideration, without notice, must set forth the consideration,—of what it consisted,—and must aver the actual, *bona fide* payment of it, independently of the usual recital of payment in the deed. Also, the plea or answer must deny positively the fact of notice of the complainant's title or claim previous to the execution of the deed; and must deny every circumstance, charged in the bill, from which notice might be inferred. Notice must be denied, though not charged in the bill. *Gilder* v. *Gilder et al.*, 331.

8. This defence may be taken either by plea or answer; but a denial of notice or fraud, charged in the bill, should be by

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PURCHASER FOR VALUE, WITHOUT NOTICE—*Continued.*

answer also, in order that the complainant may be at liberty to except to its sufficiency. *Ib.*

9. Under an assignment made to secure a pre-existing debt, the creditor has not the equity of a purchaser for valuable consideration. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

REAL ESTATE.

See PRACTICE, XIV, *as to sale of real estate to satisfy decree.*

RE-HEARING.

1. A petition for the re-hearing of a cause upon the ground of newly discovered evidence, not granted—the Chancellor considering that the evidence, if before him, could not vary the decree to be made in the cause as it originally stood. *Dale* v. *Smith et al.*, 11.

2. A re-hearing, after decree made, will not be granted for the purpose of examining witnesses, or of admitting newly discovered evidence, as to matters which were in issue in the cause as originally heard. *Fennimore, Adm'r, d. b. n.*, v. *Rahow, Ex'r*, 88.

3. Practice stated at large with respect to petitions for re-hearing. *Ib.*

4. An order, granting a re-hearing of a decree in equity, does not *per se* vacate the decree; but only opens it for reversal, alteration or correction. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

5. If an order for a re-hearing is dismissed, or discharged by agreement of the parties, without a re-hearing had, the original decree stands precisely as if such order had not been granted. *Ib.*

RELEASE.

1. Under an Act of Assembly divorcing a wife from her husband, *a mensa et thoro*, and granting to the wife *all the rights, privileges and immunities of a feme sole*, the wife becomes competent to execute a release of land charged with an annuity bequeathed to her, under the will of a deceased husband, in lieu of dower. *Stilley* v. *Grubb*, 406.

2. By the release executed to the purchaser of the land charged with the annuity the complainant claimed the right to dower in the land, and released the same for a valuable consideration. *Held*, that she thereby precluded herself from claiming, against the purchaser, the annuity bequeathed to her in lieu of dower. *Ib.*

3. *It seems* that the defence of compromise, or release, is available by plea only and not by answer. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

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REMEDIES.

See BOND AND MORTGAGE.

ELECTION OF REMEDIES, 1, 2.

RENTS.

1. Rents of real estate of a ward, received by the guardian after the guardianship ceased, are, unquestionably, the subject of an account in equity. *Davis, Adm'r*, v. *Davis*, 256.

2. Upon a bill to set aside a fraudulent conveyance, the Court, in granting relief, will only set aside the deed impeached. It will not decree a delivery of possession to the purchaser, nor an account of the rents and profits. *Hall* v. *Greenly*, 274.

3. Upon a decree for the assignment of dower against a purchaser of land from the deceased husband and for an account of rents and profits, the purchaser is liable only for rents and profits which accrued subsequent to the date of his purchase. To support a claim by the widow for rents and profits from the death of the husband all the intermediate purchasers must be made parties to the bill. *Dick* v. *Doughten et al.*, 320.

RESULTING TRUST.

See TRUSTS AND TRUSTEES, VI.

REVIEW, BILL OF.

See BILL, III.

REVIVOR.

Under a bill of revivor, upon default to put in an answer, the original suit will be revived. *Fennimore, Adm'r, d. b. n.*, v. *Rahow, Ex'r*, 88.

SALE OF REAL ESTATE.

See CONTRACT, 6, 7.

EXECUTORS AND ADMINISTRATORS, 7.

ORPHANS' COURT, 1—PRACTICE, XIV.

WILL, III.

SATISFACTION.

See JUDGMENT, 2, 3, 4.

PAYMENT, 1, 2.

SEAL.

A written submission to arbitration directed that the award should be made in writing, indented, under the hands and seals of

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SEAL—*Continued.*

the arbitrators. The award was made in writing, but was not indented nor under seal. *Held* to be void in equity as well as at law—that a Court of Equity will not decree performance of an award which is void at law, except upon a subsequent agreement between the parties to abide by it. *Raisin* v. *Wood*, 57.

SECURITY.

The Statute which provides that no suit at law for a legacy shall be instituted against an executor until security to refund, in case of a deficiency of assets, be given or tendered, does not control the Court of Chancery. *Killen et al.*, v. *Adams, Ex'r.*, 184.

SERVICE OF WRIT.

See ATTACHMENT, 1, 2.

SET OFF.

1. The defendant in a *scire facias* at law on a judgment, which had been entered under a warrant of attorney for the confession of judgment upon a bond, claimed to be allowed certain credits against the bond, which were disputed. By an entry on the docket of the *scire facias*, it was agreed between the parties that judgment should be confessed, with stay of execution for three months, the confession not to preclude any equitable relief the defendant might be entitled to in chancery. The present bill was filed by the defendant in the *scire facias*, in order to obtain the benefit of the credits claimed by him against the judgment at law, the credits being for certain payments which he had made for the obligee in the bond in the course of settling the affairs of a former partnership between them. *Held*, That the defence against the bond being one which could have been effectually made at law, a court of equity will not interfere. *Conner* v. *Pennington et al.*, 177.

2. A purchaser under a contract for the sale of land, held entitled to set off, in equity, against the purchase money, payments made by him of debts due from the vendor. *Lofland* v. *Maull*, 359.

3. One of several partners, to whom, in a suit for the final settlement of the partnership accounts, a share of the balance struck is payable under the decree in such suit, may set it off in equity against a judgment at law held against him by the defendant in the decree. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

4. Such right of equitable set off is not affected by the fact that, under the same decree, shares of the partnership balance are

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SET OFF—*Continued.*

made payable to other partners also; provided, the partners are entitled under the decree *severally*, and not *jointly*. *Ib.*

5. Mutual credits between two parties, though they cannot be set off at law, are ground for a set off in equity. *Ib.*

SHERIFF.

See EXECUTION, 1, 2.

SOLICITOR.

The solicitor of a party in a suit in equity must be taken to have notice of equities arising out of the suit in favor of other persons, so as to affect the party whom he represents. *Lockwood* v. *Bates, Ass'ee, et al.*, 435.

SPECIALTIES.

It seems that an assignment of a specialty, made under the Statute of Delaware, passes it subject to the equities affecting them in the hands of the assignors. *Robinson* v. *Jefferson, Adm'r, et al.*, 244.

SPECIFIC PERFORMANCE.

See TIME, 1, 2.

FRAUDS, STATUTE OF, 5, 6, 7, 8.

STALE DEMAND.

See LACHES, 3, 6.

STATUTES,—CONSTRUED, EXPLAINED, &C.

1. *It seems*, that under the Delaware Statute about contracts and assumptions, a written contract for the sale of lands cannot be waived except in writing. *Wilkins* v. *Evans*, 156.

2. The Statute of 4 *Anne, Ch.* 16, *Sec.* 12, enabling a defendant in an action of debt or *scire facias* on a judgment to plead payment, in bar of such actions, is in force in this State; and such has been the practice. *Conner* v. *Pennington et al.*, 177.

3. The Statute which provides that no suit at law for a legacy shall be instituted against an executor until security to refund, in case of a deficiency of assets, be given or tendered, does not control the Court of Chancery. *Killen et al.*, v. *Adams, Ex'r*, 184.

4. After dower, without metes and bounds, has been assigned and the widow enters, she is a tenant, and holds her undivided dower; and then, by the equity of the Statute, 32 Hen. VIII., c. 32, and of the Statute of this State, partition may be made be-

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STATUTES—*Continued.*

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tween her and the tenants in common. *Ex parte Burgess et al.*, 233.

5. *It seems*, that under the Statute of this State for assigning specialties, an assignment passes the specialty assigned, subject to equities affecting it in the hands of the assignor. *Robinson* v. *Jefferson Adm'r, et al.*, 244

6. The Act of Assembly requiring a guardian to give bond, with surety, was intended to provide an additional security for the ward, and not to take away the jurisdiction of this Court. *Davis, Adm'r*, v. *Davis*, 256.

7. In the case of an award made in a suit or amicable action at law, pursuant to the Statute of 18 Geo. II (Digest Delaware Laws, 112,) the remedy against irregularity or mistake in the award is in the court of law to which the award is returnable. *Beeson, et al., Adm'rs*, v. *Elliott Ex'r*, 368.

8. Awards under the Statute of this State, made pursuant to a rule of court, with judgment thereon, stand upon a different footing from awards under the English Statute of 9 and 10 William III; and the English decisions under the latter Statute are not in force here. *Ib.*

9. Under the Statute of this State of 1726–36, limiting the powers of the courts of equity, our Court of Chancery has no jurisdiction of a case in which there is a "sufficient remedy at law." What *is* a "sufficient remedy at law," in the sense of the Statute is not clearly settled. *Ib.*

SUPPLEMENTAL BILL.

See PRACTICE, XV.

SURETY.

See PRINCIPAL AND SURETY.

SURVIVENCY OF JUDGMENT.

See JUDGMENT, 5, 6.

SURVIVORSHIP—OF LEGACY.

A testator, having provided for the raising of a fund out of certain real estate, by a charge or sale thereof, bequeathed one moiety to his three nieces, the daughters of J. W., and the other moiety to his five nephews and nieces, the children of P. R., "or to such of them as shall be alive when the time of such division shall arrive." The fund was raised by a sale of the real estate, prior to which sale the three daughters of J. W., all died. *Held*, that the moiety bequeathed to the daughters of J. W. did not survive to the children of P. R. *Booth Ex'r*, v. *Ward et al.*, 345.

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TENANCY IN COMMON.

See PARTITION, 2, 3, 4.

TENANT.

See ELEGIT.

TERM FOR YEARS.

See EXECUTION, 1, 2.

TILLAGE, IMPROPER.

Injunction to restrain, as waste. *Wilds et al.*, v. *Layton et al.*, 226.

TIME.

1. Under a lease of lands, for the term of six years, with the right in the lessee to purchase the same, upon paying a stipulated price therefor, within the six years. *Held*, that the lessee, having paid the purchase money within the time limited therefor, was entitled to a decree for specific performance, though after the six years had elapsed. *Wilkins* v. *Evans*, 156.

2. *Held, also*, that even though the purchase money had not been fully paid within the time limited therefor, the purchaser was nevertheless entitled to relief, if full payment were prevented through the default of the vendor. *Ib.*

TITLE.

See ORPHANS' COURT, 1. PARTIES, 8.

PRACTICE, X, 8.

TRUST AND TRUSTEE.

I. *Accounts of Trustees.*

1. Heirs at law of a deceased lunatic were admitted to except to the accounts of the trustee of the lunatic,—the attorney in fact of the trustee, who had acted for him and passed the accounts, being the administrator of the lunatic. *Vinson et al.*, v. *Vinson, Trustee*, 120.

2. Under exceptions, the accounts of a trustee, although they have been passed by the Chancellor, are open to re-examination. *Ib.*

II. *Cestui que trust,—remedy.*

1. A person for whose benefit a trust is created may, in equity, compel the performance of it, although he be no party to the contract which created it.—*Rodney, Adm'r, d. b. n.*, v. *Shankland, Ex'r*, 35.

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TRUST AND TRUSTEE—*Continued.*

2. Pending execution against the debtor under several judgments, it was agreed in writing, between N. the first judgment creditor and those holding judgments subsequent to the second, that H. N. should be allowed to purchase, at sheriff's sale, a portion of the debtor's real estate, without "let or hindrance" by the subsequent creditors; and that in consideration thereof, he would hold the other lands of the debtor discharged from his judgment, and would pay the second judgment. Held that H. N. became a trustee for the second judgment creditor, and that the latter, although not a party to the agreement, had a remedy under it in equity. *Ib.*

III. *Execution of trusts by Court.*

A testator directed the sale of his real and personal estate by his executors, and the division of the proceeds among certain persons, born and to be born. The persons named as executors renounced. *Held*, that this was such a trust as the court could execute, *the property given and the objects to be benefitted being certain.—Lockwood, Adm'r c. t. a., et al.*, v. *Stradley et al.*, 298.

IV. *Express and implied trusts—purchase by trustee.*

The defendant, an adm'r of N. V. D., dec'd, sold, pursuant to an order of the Orphans' Court, certain lands of his intestate, for the payment of debts. At the sale the lands were bid off by G. M., for the defendant and at his request. The sale being returned to the Orphans' Court and confirmed by it, the lands were conveyed by the defendant, as adm'r of the intestate, to G. M., the bidder, and were subsequently re-conveyed by G. M. to the defendant, in fee simple. Upon a bill filed by the heirs at law of N. V. D., dec'd, the intestate, to charge the lands with a trust for their benefit: *Held*,

1. That, upon the evidence, there was no *express* trust of the lands for the heirs at law—there being no proof of any declaration of trust between the parties; neither of any declaration in writing, under the Statute of 29, *Car. II. ch.* 3; nor of any declaration by parol, supposing that Statute not to be in force in this State.

2. That there was no trust *by legal implication*—there being no consideration between the parties, which is necessary in order to raise a use upon a legal estate created by deed of bargain and sale—by which mode of conveyance the present title was made.

3. That the rule of equity that a trustee cannot purchase the trust estate is subject to some limitations. The English decisions seem to hold that such purchase, made through a third person,

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TRUST AND TRUSTEE—*Continued.*

where creditors are the *cestuis que trust*, may afterward be sanctioned by the Court, with the assent of a majority of the creditors. In the present case, the estate of the decedent being insolvent, his creditors, supposing there to be a trust, are *cestuis que trust*, prior in right to his heirs at law. The creditors have never objected to the sale and are not parties to this suit. The interest of the creditors and their non-joinder, are alone a fatal objection to the bill.—*Van Dyke et al.*, v. *Johns*, 93.

v. *Marriage contract—trusts under.*

Under a marriage contract a separate estate may be created in the wife, without the intervention of trustees.—*Cochran* v. *McBeath, Adm'x, et al.*, 187.

See, more at large, HUSBAND AND WIFE, 3, 4, 5, 6.

VI. *Resulting Trust.*

A trust of real estate resulting from its having been purchased with trust funds, will not avail against the legal rights of judgment creditors of the purchaser of the real estate.—*Roberts, Adm'r, et al.*, v. *Broom et al.*, 388.

VOLUNTARY CONVEYANCE

See FRAUDULENT CONVEYANCE, 1, 2.

WAIVER.

See BILL, IV. 3, 4.

EVIDENCE, I. 5.

WARD.

See GUARDIAN AND WARD.

WASTE.

1. A purchaser of land at sheriff's sale, the sale being not yet returned nor a legal title acquired, has nevertheless a remedy by injunction to stay waste of the premises purchased. *Thompson* v. *Lynam*, 64.

2. Injunction granted to restrain a tenant, holding a farm under a writ of elegit, from tilling it contrary to the established rotation of crops on the farm, and to the usage of the country in which it is situate. Such improper tillage, when tending to depreciate the value of the inheritance, is waste. *Wilds et al.*, v. *Layton et al.*, 226.

3. Waste may be committed, as well of land as of houses and timber. *Ib.*

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WASTE—*Continued.*

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4. A judgment creditor, having obtained an injunction to restrain the commission of waste upon lands which were subject to the lien of his judgment, afterward and pending the injunction purchased the premises at sheriff's sale in execution of the judgment. *Held*, that the party committing the waste was not liable in equity to account to the purchaser for the waste committed prior to the purchase. *Hughlett* v. *Harris et al.*, 349.

5. A title to the land at the time of waste committed is necessary in order to sustain the right to an account for the waste. *Ib.*

WILL.

I. *Apportionment of annuity.*

Bequest to the testator's daughter, "during her natural life," of "*the yearly interest*," on one half the proceeds of certain land directed by the will to be sold. The premises were sold on the 25th March, 1808. Interest on one half the purchase money was paid to the legatee regularly up to 25th March, 1817. She died, 23d December, 1817. *Held*, that her administrator was entitled to interest up to the day of her death. *Matson, Adm'r.*, v. *Walters et al., Ex'rs*, 146.

II. *Charge of Legacy.*

1. A testator by will directed that his just debts and burying expenses be "paid" by his executors. He devised to his two sons his whole real estate "to them and their heirs, in equal moities forever, *and also all his personal estate after paying the legacies in the will mentioned.*" *Held*, upon the construction of the will, that the legacies were not charged upon the real estate devised to the sons. *Gilder* v. *Gilder et al*, 331.

3 A testator, after bequeathing certain pecuniary legacies, and among others a legacy of $866.66 to a daughter, and one of $1000.00 to another daughter, devised the residue of his estate, including some real estate, to the same daughters, as follows; "My further will is that the remainder of my estate, if any there be, shall be equally divided between my two daughters Martha and Lydia, whom I appoint my executors." Bill filed by the representative of one of the legatees, alleging a deficiency of personal estate and praying that the unpaid balance of the legacy be charged upon the residuary real estate. *Held*, that the legacy was a charge on the real estate. *Hilford, Adm'r.*, v. *Way et al.*, 342.

III. *Descent of legal estate under direction for sale.*

T. C., by will, directed that his executors, thereinafter named, should sell and dispose of all his real and personal estate, whereso-

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WILL—*Continued.*

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ever or whatsoever, at such time or times as they, or the survivor of them, could do it to the best advantage, and either at public or private sale, as they or he might think best, in their or his discretion,&c. *Held*, That under this provision no estate passed to the persons named as executors but that the real estate descended to the heirs at law of the testator. *Lockwood, Adm'r, c. t. a., et al.*, v. *Stradley et al.*, 298.

IV. *Devise of privileges in dwelling house—construction.*

A testator devised as follows; "I give to my dear and loving wife, the "reasonable use of two suitable rooms in the house that "we may happen to dwell in at the time of my decease, whether "in town or country, with suitable provisions in the cellar, kitchen, "garden, necessary house, well or pump: To hold to my said "wife for and during her natural life, with full and free ingress, or "egress and regress." After the death of the testator, his widow removed from the house in which he was living at his decease, and to which the rights and privileges devised to her had attached. The premises were for some years occupied and rented by her two sons, the devisees thereof in fee simple, but without any contract for compensation in respect of the widow's privileges. *Held*, that under the devise the widow took such an interest in the premises, that the law would imply a contract to pay a compensation therefor in the absence of an express contract; and that the allowance of such compensation by referees in an arbitration between the widow and one of the devisees, submitting all matters in controversy, was not a mistake in law. *Beeson et al., Adm'rs*, v. *Elliott, Ex'r*, 368.

V. *Nuncupative Will.*

1. A nuncupative will, made according to the law of the testator's domicil at the time of his death, will pass personal estate situated in a foreign State or country, although not executed according to the formalities required by the laws of that State or country. *St. James' Church* v. *Walker, Adm'r, c. t. a.*, 284.

2. To give effect, in Delaware, to a foreign nuncupative will, a probate thereof must be made in the county where the personal property is situated,—the formalities of such probate to be according to the law of the domicil of the testator, and not such as are required by the Statute of this State. *Ib.*

3. A nuncupative will executed in the State of Pennsylvania, according to the laws of that State, but not proved in this State, *held* not sufficient to pass a legacy to a religious corporation within this State, to be paid out of assets situated in this State. *Ib.*

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WILL—*Continued.*

4. A paper signed by witnesses and produced as a nuncupative will, *held* not sufficient to be admitted to probate as such, because the words spoken by the decedent did not show an *animus testandi*,—also, because it did not appear that the persons signing the paper were desired by the testator to attest it as his will. *Ib.*

VI. *Survivorship of legacy to several.*

A testator, having provided for the raising of a fund out of certain real estate, by a charge or sale thereof, bequeathed one moiety to his three nieces, the daughters of J. W. and the other moiety to his five nephews and nieces, the children of P. R., "or to such of them as shall be alive when the time of such division shall arrive." The fund was raised by a sale of the real estate, prior to which sale the three daughters of J. W., all died. *Held*, that the moiety bequeathed to the daughters of J. W. did not survive to the children of P. R. *Booth, Ex'r*, v. *Ward et al.*, 345.

WITNESS.

1. Objections to the competency of a witness must be made by articles filed, according to the rule of court, and cannot be taken at the hearing. *Webster* v. *Hopkins et al.*, 70.

2. The rule of court, which requires that objections to the competency of a witness be filed within the first three days of the term to which the commission is returned, does not supersede the necessity of filing articles. *Westcott* v. *Allston et al.*, 74.

3. The attorney in fact, by whom a bill in equity is filed, is not a competent witness for the complainant. *de Pusey* v. *du Pont et al.*, 77.

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