REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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before the Court, and, therefore, we can make no decree against them.

Upon the whole, I concur in opinion with the other Judges, that the decree was pronounced on just principles, and ought to be affirmed.

EPPES AND OTHERS EX'RS OF WAYLES *v.* RANDOLPH.

[125]

Saturday, November 9th, 1799.

Deed re-acknowledged within eight months from its date, and recorded within four months from the re-acknowledgment, is good from the date of the re-acknowledgment, although there are more than eight months between the time when the deed was first executed, and the day of recording it.*

Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it.†

Judgments do not bind lands after twelve months from the date, unless execution be taken out within that time, or an entry of *elegit* be made on the record.

[A surety in a bond who discharges the debt, has a right to be placed in the shoes of the obligee, and considered a bond-creditor of the obligor.]‡

This was an appeal from a decree of the High Court of Chancery, in a suit wherein the executors of Wayles were plaintiffs, against David Meade Randolph, Richard Randolph, Ryland Randolph and Brett Randolph, sons and devisees of Richard Randolph, deceased; the bill stated, that in December, 1772, the said Richard Randolph, deceased, being indebted to Bevins in £740 sterling, executed his bond, binding himself, his heirs, &c., for payment of the same; that Wayles

* For the statute under which this was decided, see Pleasants' edition of Rev. Code, p. 157, ch. 90, § 1, 4, and note to 4 Leigh, 551.

A like decision, *Roanes* v. *Archer*, 4 Leigh, 550.

By 1 R. C. of 1819, p. 364, § 12, every conveyance, &c., except trust-deeds and mortgages, properly proved or certified and delivered for record within eight months from its execution, was valid as to all persons from the time of its execution; but trust-deeds and mortgages were valid as to subsequent purchasers, without notice, and as to all creditors, only from the time of delivery to the clerk for record.

The Code of 1849, p. 508–'9, § 4, 5, 6, substitutes *sixty days* for *eight months*, and gives to trust deeds or mortgages made *in consideration of marriage*, the same privilege (of sixty days' relation) that other conveyances have.

† See *ante*, p. 5, and note there.

‡ Other cases of *substitution* or *subrogation*: 3 Leigh, 272; Id. 695, 700; 2 Rand. 428; 4 Rand. 458 (*Enders* v. *Brane*); 10 Leigh, 382; 2 Gratt. 178; 2 Gratt. 419; 4 Gratt. 81; 6 Gratt. 320; 8 Gratt. 140, 533, and 496.

Cases of substitution refused: 8 Leigh, 588; 1 Rob. 461; 2 Gratt. 419; 3 Gratt. 493.

was security to this bond. That Bevins, going out of this State, left the bond with Wayles, who died in possession of it, no part thereof having been paid; that Bevins brought suit and obtained a decree in Chancery, in the Federal Court, against Skipwith and his wife, executrix of Wayles, for the said £740, with interest; that the plaintiffs have paid off great part of the said decree, and are going on to discharge the residue. That the said Richard Randolph, deceased, by his will, after several devises, gave the residue of his estate, to his four sons above mentioned, whom he made executors; that he died largely indebted, and the executors allege a want of assets to pay his creditors; that on the 11th of October, 1780, the said Richard Randolph, deceased, being indebted on the bond aforesaid and otherwise to an amount equal to the whole of his estate, executed a deed for a tract of land in Bermuda Hundred, Chesterfield county, with the stocks thereon, and nineteen slaves, to his son David M. Randolph, *for and in consideration of his natural love and affection for his said son, and for his advancement in life;* that the said Richard Randolph, deceased, being indebted as aforesaid, did, on the 20th day of September, 1785, execute a deed for [126] his estate called Curles to his son Richard Randolph, after the death of the said Richard Randolph, deceased, and Anne his wife: "The consideration, expressed in the said deed, being a marriage, shortly to be had and solemnized, between the said Richard the son, and Miss Maria Beverly, the daughter of Robert Beverly;" but that the said Maria was not a party to the said deed. That the said deed was not recorded until the third day of July, 1786. That the said Richard Randolph, deceased, was, at the time of making his will and at his death, seised in fee simple of two tracts of land in the counties of Cumberland and Prince Edward; one called Sandy Ford, the other Clover Forest, also a mill and acres of land in Prince Edward, and of two other tracts of 130 acres each, in Chesterfield county, one of which was called Elams. That he devised Sandy Ford to his son Brett, and Clover Forest, with one of the 130 acre tracts in Chesterfield, to his son Ryland; that he devised the mill and fifty acres of land adjoining it, to his sons Brett and Ryland, and Elams to his son David M. Randolph. That the said Richard, the son, is heir at law to his father, the said Richard Randolph, deceased. That the said deeds were made by the said Richard Randolph, deceased, when he well knew that his estate in possession was insufficient to pay his debts, and that the said deeds were made with a view to de-

fraud his creditors; that they are void as to creditors, not only for that reason, but because the conveyance to David M. Randolph was not made on consideration good in law against creditors, and that to Richard was not recorded in due time according to the act of Assembly. That, if there be no personal assets, the plaintiffs are entitled to satisfaction out of all the said lands, or any other real estate of the said Richard Randolph, deceased, as they have a right to stand in the place of Bevins, and of any creditors by specialty, who have been
[127] paid their debts out of the assets in the hands of the executors, and that Richard the son has mortgaged Curles to Singleton and Heath. The bill, therefore, prays a discovery of the personal estate; and if that should prove insufficient, that the plaintiffs may have satisfaction as well out of the said lands mentioned in the deeds, as out of those devised by the will; and for general relief.

The answer of David Meade Randolph, as acting executor, says, That he knows nothing of his own knowledge relative to the bond: That the testator died greatly indebted by judgments, bills of exchange, bonds, notes and simple contracts, to a greater amount than the assets which have come to his hands: That the assets will not be sufficient to pay the debts of higher dignity. He also demurs to that part of the bill which prays, that the plaintiffs may be put in the place of the bond creditors, because the plaintiffs by their own shewing are not bond, but simple contract creditors. In his own right he pleads, that he took no lands or slaves by the devise, except the tract of 130 acres in the County of Chesterfield, called Elams; which he did not take to his own use, but has sold it, and applied the money to the use of the testator's estate: That, in the year 1780, the defendant, having made proposals of marriage to Mary the daughter of Thomas Mann Randolph, the latter wrote a letter to the said Richard Randolph the defendant's father, consenting to the marriage, provided the said Richard would give the defendant a decent and competent fortune, and put him in possession of it; that this letter was delivered open to this defendant, to be presented to his father the said Richard Randolph the elder; which the defendant did: That it has been since lost, but the contents can be proved: That, in consequence of the said letter and the intended marriage, the said Richard Randolph the elder, upon
[128] the 8th of August, 1780, wrote a letter to the defendant, to be shewn to the said Thomas M. Randolph, in which he promised, in consideration of the marriage taking

place, to give the defendant a fee simple estate in all his Bermuda Hundred lands, and a tract of 1000 acres situate upon Dry Creek in the County of Cumberland, with the slaves and stocks thereon and two negro carpenters. That the marriage afterwards took effect; but a little before the celebration thereof, to wit, on the 11th of October, 1780, in consideration of the said intended marriage, the said Richard Randolph the elder conveyed to the defendant the Bermuda Hundred lands in Chesterfield, with 19 slaves thereon; and as he had not the legal estate in him, he gave the defendant a letter of attorney to sue for and obtain a conveyance from the Royalls, of whom the said Richard the elder had purchased it; by virtue of which letter of attorney the defendant obtained a decree for a conveyance against the heir of the Royalls; and a deed hath been accordingly executed to him. That the said Richard, in compliance with his letter aforesaid, conveyed to the defendant the Cumberland estate also. That, owing to a mistake in the attorney who drew the deed, the marriage is not expressed as the consideration, although it was the real consideration.

Richard Randolph, in his own right, pleads, that he took no lands or slaves by devise; and demurs to that part of the bill which prays that the plaintiffs may stand in the room of the bond creditors, as, by their own shewing, they are not bond creditors. By way of answer, he says that he knows nothing of Bevin's bond of his own knowledge; and states the want of assets to pay debts of superior dignity.

The answer of Brett Randolph states, that he knows nothing of Bevins' debt mentioned in the bill; admits his father's will, but says that he never qualified as executor. It likewise admits the devise to him of Sandy Ford lands, and a moiety of the mill; of which he has sold acres, including a moiety of the mill, for the sum of £ : That the [129] testator was indebted by bond to Pleasants in £ , who has brought suit and obtained judgment thereon against him and the said Ryland as devisees as aforesaid; of which judgment the defendant is bound in law to satisfy a moiety: That the testator was likewise indebted by bond to Benjamin Harrison, jr., & Co. in £ ; who have also obtained judgment against him and the said Ryland as devisees, and have sued out execution against the whole of the residue of the devised lands unsold by the said Brett; that the said residue was naked and unimproved at the time of the testator's death, but has been improved by the said Brett, which has increased its value: That, after the execution aforesaid issued, the defen-

dant let the said Benjamin Harrison have the said residue, at a fair valuation, in discharge of part of the sum due by the said execution: That he was also obliged to purchase of Jackson (who had the fee simple therein,) 371 acres of the Sandy Ford tract at £ . ; which should be allowed, or the said 371 acres should not be considered as any part of the devise: That these sums, to wit, for Pleasants' judgment, that for the improvements, and that for the purchase of Jackson's lands, are of greater amount than the alienations made by the defendant.

The answer of Ryland Randolph is to the same effect with Brett's respecting the plaintiff's debt, the executorship, the devises to the defendant, the judgment of Pleasants, that of Harrison & Co., and the issuing of the execution by the latter; that the defendant sold the Chesterfield tract for £371. 16s., and 74 acres of Clover Forest for £76. 15s: That Harrison & Co. have taken the mill and all the lands unsold by the defendant in execution, which were not sufficient to pay the interest of the defendant's proportion of that judgment, [130] whereby Harrison & Co. obtained a perpetual title thereto: That the defendant, after the testator's death, was obliged to pay an arrearage of taxes due on the testator's several tracts of land in Cumberland: That the defendant had bought Brett's moiety of the mills, which was also included in the extent on the execution: which, together with the defendant's moiety of Pleasants' judgment, exceeds the amount of his alienations.

The deed from Richard Randolph the father, to Richard Randolph the son, was dated on the 20th of September, 1785; was re-acknowledged on the 21st of March, 1786; and was recorded on the 3d of July, 1786. The consideration is expressed to be, "for the purpose of advancing him the said Richard Randolph the younger, and for and in consideration of a marriage intended shortly to be had and solemnized between him and Miss Maria Beverley the eldest daughter of Robert Beverley of Blandfield, and also, for and in consideration of the sum of five pounds to the said Richard Randolph, by the said Richard Randolph the younger, in hand paid."

The deed from Richard Randolph the elder, to his son David Meade Randolph, for the Bermuda Hundred lands, is dated on the 11th of October, 1780; and the consideration is expressed to be, "the natural love and affection which he beareth to his son the said David Meade Randolph, and for his better advancement in life." And that for the Dry Creek land in Cumberland, expresses to be made, "for and in con-

sideration of the natural love and affection, which the said Richard Randolph beareth unto his son the said David M. Randolph and for his advancement in life."

There is a letter from Richard Randolph the elder, to his son David Meade Randolph, in the following words:

"Dear Davy,

Ever since you informed me, you had a prospect of forming a connexion so very agreeable to your friends here, I [131] have exerted myself to little purpose, to procure you a seat to carry a wife to, as it never was consonant to my notion of things, any man should think of marrying until he had a home, (let it be ever so indifferent,) to present those with, that ought to be most dear to him: which, I flatter myself, is the sole motive that induced you to engage in a business so serious; because you may be assured without such honorable intentions, there is little happiness to be expected from such a measure; and having not the least doubt of your plans being on the most noble principles, I shall think it a duty incumbent on me, to enable you to carry them, without delay, into execution: which I shall do cheerfully, as I wish to live now, altogether for the sake of my children, having lost my relish for almost every thing else.

When I furnished your uncle with twelve thousand pounds for the reversion of Turkey Island, it was with a view of securing it to you; but, as your present situation may make it inconvenient to you to wait for dead mens' shoes, instead thereof I am very willing, in consequence of your marriage taking place with Col. T. M. Randolph's daughter Polly, to give you a fee simple estate, in all the lands I have in Bermuda Hundred, one thousand acres in Cumberland county, called and known by the name of Dry Creek, together with all the slaves and stocks thereon of every kind whatsoever, with two negro carpenters, mulatto Peter and Mingo; so that, should this proposal be agreeable to all concerned, I shall hold myself in readiness to ratify it any moment, and am with love to the good family, your loving father.

RICHARD RANDOLPH.

Curles, Aug. 8, 1780."

Curry, a witness to the re-acknowledgment of the deed, states, that both Richard Randolph the father, and [132] Richard Randolph the son, re-acknowledged the deed from the former to the latter, when he attested it as a witness.

There are several depositions, proving the amount of the value and improvements put by Brett on Sandy Ford; the sales made by him; and the valuation at which the residue was taken by Harrison.

The deposition of Richard Randolph the son, states, that in the year 1780, he heard his father read a letter from Thomas M. Randolph, which was said to be *a joint letter*, and requiring a settlement of property to a certain amount, previous to their consenting to the marriage of their daughter Molly to David M. Randolph; in consequence of which, the said Richard Randolph, the elder, agreed to make provision, and actually gave Presque Isle (the name of the Bermuda Hundred lands,) and Dry Creek, to the said David M. Randolph.

Harry Randolph's deposition states, that the marriage of David M. Randolph was postponed, only on account of Col. Richard Randolph not having given his son David Meade Randolph certain property in fee simple in lands, &c.; and which the deponent understood was to be partly in or about Bermuda Hundred. That the deponent remembers seeing a letter, signed by Col. Thomas Mann Randolph, demanding a settlement prior to the said marriage; and this deponent understood that such a settlement was made.

Pending the suit, Hanbury as surviving partner of Capel & Ozgood Hanbury, and Main as executor of Hyndman, surviving partner of James Buchanan & Co. were admitted plaintiffs, and filed their bill charging that the said Capel & Ozgood Hanbury, had obtained three judgments of £1039. 0s. 8d. sterling each, against the said Richard Randolph, the elder, in the County Court of York, on the 16th of July, 1770: That the said Richard the elder, was indebted to the surviving
[133] partners of the said James Buchanan & Co. by bond, in a balance of £2355. 11s. 3d. on the 5th July, 1775: For which sums the plaintiffs respectively ask relief, having regard to the dignity of their debts.

The following agreement was entered into:

"It is agreed in this cause, that the judgment creditors are not to be considered as subject to the disadvantage attendant on their being plaintiffs in equity, with the admission of their having no legal title; nor are the defendants to be understood as admitting that they have a legal title; but, it is agreed that the claim and defence are to be first considered, as they would stand at law, and if the defendants have a defence at law, they are to receive the benefit of it: If, on the contrary, it is the opinion of the Court that the plaintiffs ought to succeed at

law, then it is agreed that the case shall be so considered, and the defence of the defendants, as well legal as equitable, shall be estimated as it would be, if they were now praying to be relieved against those judgments. Any issue which the Court may deem necessary may be directed notwithstanding this agreement. It is further understood, that nothing in this agreement shall bar the Court, if the right be determined in favor of the complainants, from extending the remedies according to the principles of equity."

Pleasants as executor of Robert Pleasants, also filed a bill for the amount of a judgment of £40. obtained against Richard Randolph the elder, in his life-time, in the County Court of Henrico.

There is also a claim on behalf of Byrd's trustees upon a judgment of Henrico Court, against the said Richard Randolph, deceased, on the 6th day of July, 1784, on [134] which a writ of *fieri facias* issued, and was satisfied, except as to £394. 15s. 9d. which was injoined by the said Richard the elder, but the judgment was revived by *scire facias*, against his executors, in the year 1788, as to the injoined sum.

To these bills, the defendant Richard Randolph and David Meade Randolph, by answer, deny any knowledge of Hanbury's judgments until after the death of Richard Randolph; that they are respectively purchasers for valuable consideration; and, therefore, they severally pray that their respective purchases may be saved to them, in the same manner as if specially pleaded; that at the time of rendering those judgments, the said Richard Randolph the elder, lived in Henrico county; that they believe the said judgments have been in the whole or in a great part paid; and rely upon the presumption arising from length of time.

The defendant Richard Randolph, by way of amendment to his answer, says, that on the 21st of March, 1786, the said Richard Randolph the elder, lay ill of the sickness of which he died on the 5th of June, 1786: That the portion of £1200 sterling promised by Robert Beverley, in consideration of the marriage between his daughter and the respondent, has been paid; that the executors of Wayles knew of the deed to the defendant, shortly after it was executed; that the deed was executed in consideration of the marriage contract; and that the defendant has mortgaged to Singleton and Heath.

The answer of Heath states, that the mortgage was made to to him, by the defendant Richard Randolph, who had a conveyance from, and was heir at law to the said Richard Randolph, deceased; and that he is a purchaser without notice.

The answer of Singleton's executors states, that the defend-
[135] ant Richard Randolph, being seized either by descent or purchase, mortgaged to their testator.

The executor of Hanbury replies, that he was a British subject; that the debts claimed are within the treaty of peace; that the defendant David M. Randolph had notice of the judgments on or before the 1st of June, 1791; that the plaintiff and the said Capel & Ozgood Hanbury have always resided in parts beyond sea, and out of the limits of Virginia.

Amongst the exhibits are copies of Hanbury's judgments; the bond of Richard Randolph the elder, to Hyndman, as surviving partner of James Buchanan & Co. and that to Bevins; the exhibits spoken of in the answers of Brett and Ryland Randolph, and the will of Richard Randolph the elder.

The Court of Chancery directed one of the commissioners to take an account of the lands, tenements and hereditaments, whereof the said Richard Randolph the elder was seized on the 16th of July, 1770, and which descended to his heir at law, and also, which were settled upon or devised to any of his sons; and also to take an account of such parts thereof as had been conveyed, or otherwise disposed of by the said heir and devisees respectively, with the considerations paid, or secured to be paid for the same; and also an account of the permanent improvements, upon any of the said lands, tenements and hereditaments made by the said devisees.

Upon the coming in of the report, the Court of Chancery delivered its opinion, that the deeds from Richard Randolph the father, to David M. Randolph the son, said to be one "for his advancement in life," and the other "for his better advancement in life," might be averred to, have been in consideration of the marriage, being congruous with the consideration
[136] mentioned in the deeds: That the judgments of Hanbury, and of Byrd's trustees, if revived against the heir of Richard Randolph the father, would not by relation, defeat or impair lawful mesne acts, such as those deeds, and the judgments and proceedings against Brett and Ryland: That, the deed to the defendant Richard Randolph the son, if it had been cancelled and re-executed in March, 1786, and had been altered in another part, would have been an act of that day, in the same manner as if another conveyance had been then executed; and, having been proved within eight months from that time, would have been good against the creditors of the father; although the marriage of the son and Maria Beverley, in consideration of which the conveyance was executed, had preceded; because marriage is a considera-

tion continuing: But, the said deed being only acknowledged before the witnesses who proved it, which could mean nothing more than an acknowledgment that the deed had been sealed and delivered on the day of its date, and the said deed being stated to have been made in consideration of a marriage to be had and solemnized, whereas the marriage had been actually solemnized before, could not be considered as an act of the day when it was so acknowledged, and, consequently, not having been proved within eight months from the sealing and delivery thereof, was void against creditors, by the words of the act of Assembly: That, therefore, if the judgments of Hanbury had been revived against Richard the father, or his heir and devisees, writs of *elegit* or *levari facias* might, by the act of [Feb.] 1772, [c. 5, 8 Stat. Larg. 516,] have been lawfully directed to the Sheriff of any county, and in that case, must have been first satisfied: But, not having been revived, they were not entitled to a priority against creditors of equal dignity. That, if Wayles' executors had taken an assignment to their trustee of Bevins's bond, they would, in his name, have been entitled to the same relief that Bevins himself would; and that a Court of Equity would have injoined the heir of Richard Randolph, deceased, from pleading payment by the sureties' executors: That they ought to [137] have the same remedy as if such assignment had been made; and that they had an equal right, with the judgment creditors, as the heirs were specially bound by the bond. Therefore, that Court dismissed the bill as to David Meade Randolph; and declaring the lands conveyed to the defendant Richard Randolph the son, liable to the creditors, deducting the improvements made thereon by him, ordered a sale by commissioners: And pronounced the lands devised to Brett and Ryland, and which had been extended and sold for payment of the testator's debts, to be exonerated from the lien, to which they would otherwise have been subject. From this decree, Richard Randolph appealed to this Court.

On the day of pronouncing the decree, the following agreement was entered into: "The plaintiff's counsel agree that a suit, which is contemplated to be brought on behalf of Robert Beverley and Maria Randolph, his daughter, in order to obtain a specific performance of the marriage contract in this suit, alleged to have been made, for settling Curles estate on the marriage of the defendant Richard Randolph and the said Maria, shall not be prejudiced by the decree in this cause having been entered before such suit is instituted; but that the plaintiffs in such suit, shall have the same benefit there-

from, as if the suit had been instituted prior to the pronouncing of the decree in this cause, provided that the said suit shall not be unnecessarily retarded, by the complainants in the said suit."

The bill by Robert Beverley and his daughter, was against the plaintiffs in the other suit, and against Richard Randolph the son, and the executors of Richard Randolph, deceased. It stated, that, in 1785, Richard Randolph, the son, applied to
[138] the said Robert Beverley for permission to address his daughter, the plaintiff Maria, in the way of marriage: That the said Robert informed him he should give his daughter a portion of £1200 sterling, in addition to a legacy of £500 sterling, upon which a considerable interest had accumulated; and, therefore, should expect that the said Richard Randolph the father, would make a comfortable provision for his said son, and when this was properly done, he should have no objection to the proposed marriage: That, in a short time after, the said Richard, the son, returned with the following letter from his said father: "Sir, the connection my son Richard is about to form, with your amiable daughter Maria, is perfectly agreeable to all his friends upon James river; and you may be assured, on so desirable an event taking place, I shall prepare for making the best provision my situation will admit of, for their accommodation. The place where I now live, known by the name of Curles in Henrico county, is what I intend for him, at the death of his mother and myself, with forty slaves; that is to say, eight men, six women, six ploughboys and twenty children; together with the use of Turkey Island plantation, during the lives of Richard and Anne Randolph, when it is to revert to my estate again; and am, with a tender of our compliments to the family, your most obedient servant. Richard Randolph. Curles, July 20th, 1785." That the said Robert Beverley, thereupon, assented to the marriage, which accordingly took effect; and the plaintiff Robert hath paid the portion and legacy aforesaid: That the said Richard Randolph, the father, intending to execute his promise aforesaid, made a deed to Richard, the son, for the Curles estate, upon the 20th of September, 1785, which was before the marriage. That the said Richard, the father, being ill of the sickness of which he died, and finding that he would be unable to go to Court, to acknowledge the deed, reacknowledged it before three other witnesses, on the 21st of
[139] March, 1786, and the same was recorded in July following. That the deed varies from the articles, as to the interest which ought to have been granted. That the de-

fendants have set up claims against the estate, alleging that the deed was not recorded in time. That the re-acknowledgment, if not equal to a re-execution of the deed, was agreeable to the construction of the act of 1748: That the original articles may now be enforced; and that compensation should be made for the loss of the interest in Turkey Island; the sales of which are in the hands of the defendant David M. Randolph, as executor of the said Richard, the elder. Therefore, the bill prays that the deed may be established as far as it consists with the articles; that compensation may be made for Turkey Island; and that the plaintiffs may have general relief.

The answer of the creditor defendants, admits the letter of the said Richard Randolph the father, to the plaintiff Robert Beverley, previous to the marriage, but relies upon their rights as explained in the former proceedings and decree.

There was a narrative signed by the said Robert Beverley, which was admitted to be read in the cause, and is as follows: "When Mr. Richard Randolph, jr. applied to me in 1785, for permission to address my daughter Maria, I observed to him, that as I should give my daughter twelve hundred pounds sterling, and Mr. Mills had left her five hundred more, upon which had accumulated a considerable interest, I should expect that his father should make a comfortable provision for him, and that when this was properly done, I should have no objection to the marriage. In a short time after this was done, he returned with the following letter. (Here follows the letter recited in the bill addressed to Mr. R. Beverley.)

"Deeming the provision above specified, adequate to the fortune I should give my daughter, and supposing that Col. Richard Randolph had a right to make the proposal, I told Mr. Richard Randolph, junior, the marriage might take place, but that without such a provision, I should not [140] have consented to it.

ROBERT BEVERLEY.

Blandfield, March 4, 1797."

The Court of Chancery, for the reasons explained in the proceedings in the former cause, dismissed the bill with costs. From which decree the plaintiffs appealed to this Court.

Both causes came on to be heard together in this Court.

CALL, for the appellants.

There are four questions to be considered on the part of the appellants in these causes: 1. Whether the judgments bind

the lands, in the hands of the alienees? 2. Whether the re-acknowledgment of the deed, from Richard Randolph the father, to Richard Randolph the son, was effectual to convey the estate out of the grantor, from the date of the re-acknowledgment so as to defeat the rights of creditors? 3. Whether if the re-acknowledgment be insufficient, the original agreement, on account of the fraudulent execution of it, may not be enforced according to the first intention of the parties? 4. Whether if the deed, from Richard the father, to Richard, the son, be void, the mortgagees, as deriving title under the heir at law, will not be preferred to the other creditors?

1. The judgments do not bind the lands in the hands of the alienees; because no executions were sued within a year from the rendition thereof; and therefore the lien, if there ever was one, expired.

For, the reason why judgments bind lands at all, is not that the statute says they shall be bound in so many words; but it is merely a consequence which the Court draws from the statute, by holding purchasers to constructive notice of the judgment. So that the lien is created not by the statute, but [141] by the knowledge which the Court presumes the purchaser to have had of the judgment.

But, there is also a rule of law, that, after twelve months and a day have expired, the judgment shall be presumed to be satisfied. 3 Black. Com. 421. So that after twelve months and a day have elapsed, without any execution, the plaintiff is driven to the necessity of removing the presumption, before he can make his judgment effectual.

Thus then it appears, that there are two presumptions against each other; 1. The presumption of notice; 2. The presumption of payment: Of which, the presumption of payment is, at least, as strong as that of notice; and therefore is entitled to the same weight, in the present discussion.

But if there be a presumption of payment, as well as a presumption of notice, and the equity of the parties be equal, the purchaser ought to prevail. For he had a right to make the same presumption of payment, which the law did; and therefore, was guilty of no fault: Whereas, it was gross negligence in the creditors, to suffer their judgments to sleep so long, without actually suing executions, or continuing the award of them upon the roll; so as to put purchasers on their guard. For, it operated as a fraud upon the purchasers, which shall give them priority. It is like the case of an execution delivered to the Sheriff and the property taken, but not sold,

at the instance of the plaintiff; which will be postponed to a subsequent judgment and execution, at the suit of another creditor. [Per Ld. Hardwicke, Ch. in *West* v. *Skip.*] 1 Ves. sen. 245.

Thus far upon principle; but a great writer states the very case, now under consideration; and decides against the lien. I mean the Lord Chief Baron Gilbert, who in his book upon the Law of Executions, after having shewn in the preceding pages, the time in which judgments, in personal actions, were to be executed at common law, and that a judgment gave an authority to the party to sue execution within [142] a year and day; but, if he did not do it within that time, that it was presumed to be paid, adds, "This time of limitation of judgment, was not only in personal, but real actions; for though the judgment on a real action settled the right of the land forever, as in the personal it did the right of the thing in demand, yet that judgment could not lie dormant forever, to be executed at any time; for then dormant judgments would over-reach conveyances between the parties, and therefore, there was but a year's time to execute such judgments, which judgment over-reached all conveyances, and forced the party to an *audita querela;* but after the year, the judgment over-reached nothing; but he was put to his *scire facias* on that judgment, and not to his action, for the right of the land had been already determined, and therefore it was only to revive the determination touching the lands, unless something had been done by intermediate conveyances." Gilb. Law Ex. 12.

This passage establishes all that I have been contending for: It shows the genius of the law upon subjects of this kind; and proves that the judgments do not over-reach the conveyances in the present case. For, it would be difficult to conceive why a judgment should over-reach mesne conveyances in personal, and not in real actions; why, in a real action, where the land itself is demanded, it should not disturb the purchaser, and in a personal action, where the land itself is not specifically sued for, it should; why in a real action, where the land itself is actually recovered, the conveyance should not be postponed, and in a personal action where money only is recovered and payment may be made various ways, that it should; finally, why in a real action, where the execution can only go against the lands, the purchase should be protected, and in a personal action, where the execution is usually issued against the person and effects in the first instance, and [143] the lands are seldom resorted to, until all other means have failed, the purchase should be avoided.

Perhaps it will be said, that as the statute has now given a *scire facias* in personal actions, a different rule will result; for, the judgments might have been revived by writs of *scire facias;* and that when revived, they would have related back to the day of the first rendition. That, however, would not be correct. 1. Because relations, which are legal fictions only, never have that effect: For, they are created rather for necessity, *ut res magis valeat quam pereat;* and, therefore, they extend only between the same parties, and are never strained to the prejudice of innocent persons. 2. Because that argument is directly contrary to the doctrine laid down in the passage just recited. For, the author expressly says, that a *scire facias* lay at common law; and, therefore, in this respect, the cases are alike: But, when he speaks of an expired judgment, and says it will not over-reach, it is plain that he must mean after it is revived; for, until revived, it could not be enforced. So, that in fact he puts the case of an expired judgment, revived by *scire facias;* and decides that it will not over-reach. For, it would have been nugatory, to have peremptorily said, that the judgment would not over-reach, without mentioning, because not revived, if by a subsequent process, it could have been revived, and made to over-reach by relation.

But, if, as was argued in 3 Mod. 189, the *scire facias* be a distinct action, and the judgment on it a new judgment, it is conclusive that the judgment on it does not relate back to the first, so as to avoid mesne purchases; because, in that case, it would be the second judgment which would bind, and not the first; as it is only by considering the first as the real judgment, and the second, merely as an award of execution on the first, that the lien can be preserved. For, the statute gives the *elegit* on judgments, upon which executions may issue; but, if the second be a new judgment, then the execution issues upon that; and of course the *elegit* could only issue upon the judgment in the new action or *scire facias;* which would create a new obligation, and would be the point from whence the lien would re-commence. Accordingly, in the case in the 3 Mod. [186, *Obrian* v. *Ram,*] where judgment was obtained against a *feme sole,* who afterwards married, and then a *scire facias* was brought against husband and wife, and upon two *nihils* returned, judgment obtained against them; after which the wife died, and a second *scire facias* was brought against the husband alone; and it was held that it lay: which could not have been the case, unless the judgment upon the first *scire facias* had been considered a new

[144]

judgment altogether; for, if it had related back to the first, that was a judgment against the wife only before the marriage, and, therefore, would not have bound the husband after her death.

This reasoning is strengthened by the act of Assembly concerning executions, which recites that the plaintiff may take execution within a year after the judgment; and, therefore, impliedly, that he cannot have it afterwards. But, when he can no longer have execution, the lien which arises from it, must expire. For, if the lien is created by the Court, merely, because the plaintiff has a right to sue execution, it must follow, that when he has no longer a right to the execution, there can be no lien. Because the lien, when the right to execution expired, lost its support; and to use the language of Lord Coke on another occasion, became a flower fallen from the stock, without any thing to nourish and keep it alive.

These arguments are the stronger in Hanbury's case, when it is considered, that at the time of the conveyances no *scire facias* could have issued on those judgments, without special leave of the Court, on account of the length of time which had elapsed; because, that increased the presumption of payment, and more completely justified the purchaser. For, where the plaintiff could not make use of the process of the Court *ex debito justitiæ*, it rendered the presumption greater that the right was extinguished. [145]

But there is another objection to those judgments, namely, that at the time of the rendition of them, no execution could have been sued upon them into another county. But, if the lands are only bound because execution might be sued against them, it follows necessarily, that where no execution could issue against those lands, they could not be bound. For, how absurd would it be to say, that lands could be affected by a judgment, upon which no execution, that would reach them, could issue. It is like the case of judgments in the Federal Courts, which do not bind the lands in any other State than that where the judgments are given, because an execution cannot issue into any other State.

Nor does it alter the case, that, by the subsequent act of 1772, an execution against lands might be issued into any other county upon a judgment in a County Court. For, the Legislature could not intend that it should relate to expired judgments, which could not be enforced without new process. The words of the act are opposed to that idea. For, they give the Clerk power to issue execution; which supposes the judgment to be capable of affording an execution without any

new act to be done. But, when no execution could issue, it necessarily followed that it was not a case contemplated by the Legislature; and the Court will not extend the construction in favor of a negligent creditor, to the injury of fair purchasers, who are seeking to avoid loss, in a case where they have ho-
[146] nestly laid out their money upon this specific property; whereas, the creditor is seeking to *make gain* out of property which he did not particularly hazard his money on; and the principle of universal justice in such cases is, that his condition, who seeks to *avoid loss*, is better than his who seeks to *make gain.*

But, as the judgment only binds in respect of the constructive notice, which is a legal fiction and a creature of the Court; the Court, by analogy to the record laws, will confine the lien to the same jurisdictions and limits as the recording of conveyances is confined to; which will be no inconvenience to any body, as the creditor will have his lien over reasonable limits, and the purchaser will be exposed to no greater difficulty in enquiring for judgments than he will for conveyances: whereas the inconveniences, from a general lien all over the State, will be incalculable and intolerable. For, there are ninety County Courts, six Corporation Courts, and eighteen District Courts; besides the Courts of general jurisdiction. So that the labor of the purchaser would be endless, and he would sooner relinquish the purchase than encounter the difficulties.

But, in addition to this, the opportunities of fraud which it would afford would be infinite; for it would put it in the power of the debtor and creditor to deceive all mankind. Thus, a man living in Henrico, may have a judgment rendered against him over the Alleghany; and seven-and-twenty years afterwards, this dormant judgment may be trumped up, in order to defeat a fair purchaser, who has honestly paid his money, without the least suspicion of any incumbrance: an observation which is particularly applicable to the present case. Because, here were judgments obtained in York, twenty-seven years before the commencement of the present suit; and it is now sought to charge them on lands in Prince Edward and Cumberland; although no purchaser of those lands would ever have had the slightest suspicion that they were bound by a judgment in York.

But, for other reasons, the judgments in York do not bind these lands.

1. Because, at the time of the conveyances, no *scire facias* from a County Court ran into another county against the

terretenants, who must be actually summoned in person or upon the lands; nor can it even now run into another county upon such judgments. For, the *scire facias* into other counties, given by the act of Assembly, is only against parties to the judgments and their representatives, and not against other persons. So that if the judgments were revived by *scire facias* against the executors, they would not be effectual against the purchasers.

2. Because the *scire facias*, as between the plaintiff and the *terretenant*, is an entire new proceeding altogether; and, being an action concerning the realty, the venue must be laid in the county where the lands lie, as necessarily as in an ejectment or writ of right; and therefore the County Court of York, having no jurisdiction of lands in another county, could not try the issue which the *terretenant* might think proper to make. So that the *terretenant*, if accidentally summoned in the County Court of York, might plead to the jurisdiction of the Court; or, failing to do so, he might state any matter in bar of the plaintiff's right, and then the Court of York, not having jurisdiction of the subject matter, must desist from further proceedings in the cause, in the same manner as every Court of limited jurisdiction must do, whenever it appears that the question is beyond the bounds of their authority.

Therefore, under every point of view, it may be affirmed that the lien was at an end, and that Richard Randolph the elder might lawfully convey.

2. The re-acknowledgment of the deed was effectual to convey the estate out of the grantor from the date of the re-acknowledgment, so as to defeat creditors.

This clearly consists with the view of the Legislature; for, that was only to enable creditors and purchasers [148] to enquire for the title, and to find out the true owner of the estate; which is as effectually done by a re-acknowledged deed, if recorded, as by an original deed.

But then a technical reason is urged against it; namely, that the deed being good between the parties, the grantor had nothing to dispose of at the time of the re-acknowledgment; and therefore the re-acknowledgment is void. That argument however is not sound. For, if the mere execution of the deed passed the estate out of the grantor, as against creditors and purchasers, then the giving up the deed again to the grantor, destroyed the grantee's evidence of his title; and therefore the grantor might re-grant either to the same or another person. Litt. Sect. 377; where it is said, "If the feoffee granteth the deed to the feoffor, such grant shall be good, and then

the deed, and the property thereof, belongeth to the feoffor, &c. And when the feoffor hath the deed in hand, and is pleaded to the Court, it shall be rather intended that he cometh to the deed by lawful means, than by a wrongful mean." Upon which Lord COKE observes, "Hereby it appeareth that a man may give or grant his deed to another; and such a grant by parol is good. Co. Litt. 232 (*a*)." These passages decide the very point; and shew that the grantee may give up his deed to the grantor, and that the latter may avail himself of the benefit of it. Of course it follows, that he may grant to whomsoever he pleases, afterwards.

Nor could the grantee resume his title; for, as by statutory conveyances the estate only passes by the deed and not by transmutation of possession, it follows that, when the grantee cannot shew a deed, he can claim nothing in the land; because to recover at law he must produce the deed; but this he cannot do, when he has not the possession of it; and a Court [149] of Equity would not assist him against his own voluntary surrender of the deed: whereas the second grantee would always have it in his power to shew proper title papers; and consequently, his right could not be disturbed.

It is therefore like the case of a deed that is cancelled and afterwards re-delivered (which is admitted to be good;) because it is precisely the same thing, in principle, by whatever means the property in the deed is lost; for it cannot be material whether it is lost by this or that mode.

But the re-acknowledgment would pass an interest, if the estate, as between the grantor and grantee, was actually transferred. For, if it was after the eight months, then it would pass the right, which had resulted to the grantor for the benefit of creditors and purchasers; and if it was before, then it passed the possibility of such reverter, as it is now clearly held that a possibility is assignable. [*Jones et al.* v. *Roe*,] 3 T. R. 88. For, the grantee being in possession under the grantor, the re-acknowledgment would operate either as a confirmation or release of the interest.

These observations have been made, upon the supposition, that the whole interest passed out of the grantor upon the first delivery of the deed. But in truth the deed passes nothing, as to creditors and purchasers, until it is recorded. For, as against creditors and purchasers, the act of Assembly, [Oct. 1748, c. 1, § 1, 5 Stat. Larg. 408,] makes four things necessary to be done, in order to perfect the conveyance. 1. Writing; 2. Indenting; 3. Sealing; 4. Recording. For the words are, "That no lands, &c., shall pass, alter or change

from one to another, &c., by bargain and sale, lease and release, deed of settlement to uses, of feoffment, or other instrument, unless the same be made by *writing, indented, sealed and recorded, &c.*" So that all four are absolutely requisite against creditors or purchasers; and the absence of either of those things will leave the estate, as to them, in the grantor still.

It is, therefore, as to creditors and purchasers, exactly like the case of the statute of enrolments in England, passed in the 27 H. 8, chap. 16: From which our act of Assembly appears to have been copied; as the words are nearly the same, except that, that statute, although it says no estate shall pass without enrolment, does not declare, in so many words, that the conveyance shall be good between the parties to the deed, as our act of Assembly does: But, in practice, the Courts, there, have put the same construction on it. [150]

Now, it has always been held under the statute of enrolments, that, until the enrolment is actually made, the estate abides in the grantor against creditors and purchasers: So here, the deed, until it is actually recorded, has no effect against either creditors or purchasers; but, as to them, the estate remains in the grantor. For, the right of the creditors and purchasers is more than an *estoppel;* it is an actual beneficial interest, which the act prevents from passing out of the grantor at all, unless the prescribed regulations are observed. So that the deed, before it is recorded, only passes part of the interest out of the grantor and not the whole; like the case of a conveyance of an estate tail or any lesser interest out of the fee.

But then perhaps, it will be said, that according to this construction, a man would lose his estate, against creditors and purchasers, on the next day after his deed was executed, provided it was not previously recorded; although it might actually be recorded within eight months afterwards. This, however, would not be correct. For, when it has been recorded, it is good by relation from the day of the date. 2. Inst. 675. Because when several things are necessary to be done, in order to perfect any act, when the last is done it relates back to the first; and the whole are good *ab initio.* [Sir R. Loyd and Mr. Ford arg. in *Morrough* v. *Comyns,*] 1 Wils. 212: [*Needler* v. *The Bishop of Winchester,*] Hob. 220. Ventr. 360. Therefore, although the deed is not good, as to creditors and purchasers, before it is recorded, yet after it has been recorded, it relates back to the delivery, and avoids the rights of all other persons indiscriminately; because the

grantee, having by law eight months allowed him to record it
[151] in, was guilty of no fault in not doing it sooner; and as he had made the first contract, he had the first right in conscience. So, that the relation in such a case wrought no injustice.

But, if nothing passed against creditors and purchasers by the first delivery, then the grantor had an interest to pass by the re-acknowledgment. For, he had that portion of the estate which remained in him for the benefit of creditors and purchasers; and this interest he might well grant, notwithstanding the deed. Hinds' Case, 4 Co. 71. Where, Hawe bargained and sold lands to Libbe, and before enrolment, levied a fine to him; and it was held that the fee passed by the fine: which proves two things expressly: 1. That the estate remains in the grantor until the enrolment: 2. That the grantor may pass that estate to his own grantee. So, that it is precisely our case, as far as respects creditors and purchasers; and proves that, as to them, the land is considered as remaining in the grantor until the deed is recorded; but that when it is recorded, it takes effect from the delivery by relation, and destroys the rights of the creditors and purchasers.

Any other construction produces inconsistency in the effects of the act. For, if the deed *ispo facto*, by the first acknowledgment, passed the whole estate into the grantee, it would be difficult to conceive how it would revest in the grantor, for the benefit of creditors and purchasers, after the eight months had elapsed. Because, the act does not declare that the estate shall re-vest, but that the deed shall be void only. Now, the deed might be void, and yet the estate, once vested in the
[152] grantee, would remain there, and could not re-vest in the grantor, by the words of the act of Assembly, without a new deed.

But, then it will be said that admitting this construction to be right, this was not a new deed, but a mere re-acknowledgment of the old one; which, according to the Chancellor's reasoning, can mean nothing more than an acknowledgment that it was delivered the day of its first date. This position is never true; because, when it is re-acknowledged, the grantor repeats the ceremony, and says in the presence of the witnesses that he acknowledges it to be his seal, and delivers it as his act and deed. So, that it is in fact, always an act of the day of its re-acknowledgment. But however true the position may be in general, it is certainly not so in this particular case. Because, the grantor here has actually caused the real date of the re-acknowledgment to be noted by the witnesses, thereby

manifesting his design that it should be considered as an act of that day.

Nor is it a circumstance of small weight, that the general custom and practice of the country, is conformable to the exposition which we contend for. Many deeds, soon after the act of Assembly was first made, were re-acknowledged and recorded in the proper Courts; and the practice has been continued in various instances down to the present day. So, that the proportion of estates, held under deeds in that situation, is probably very great. Therefore, admitting the construction to have been mistaken at first, it is certainly better that it should be adhered to, upon the principle, that *common error makes the law*, than that a third part perhaps of all the titles in the State should be overturned.

It is upon this principle, that if a decision of a Court is against a statute, the decision, though wrong, will always after be adhered to. Yet, the decision no more repeals the act, than the custom of the people; but the Court adheres to it as a less evil than uncertainty in the law.

Accordingly, instances are not wanting, both in England and in this country, where men acting under a [153] common delusion, with respect to the law, have been protected. Thus, in the case of *Long* v. *The Deane and Chapter of Bristow*, 1 Roll. Abr. 378: where a lease was made, by the Deane and Chapter, at a time when it is supposed that the statute of Eliz. did not bind the King, and afterwards that it was held that it did; yet, because the law had been mistaken, the lease was supported. So, in this Court, in the case of *Currie* v. *Donald*, 2 Wash. 63, the custom of the country was mentioned as a circumstance of weight: And *Branch* v. *Burnley*, Nov. 1799, 1 Call, 147, 158, was expressly decided upon the ground of the custom. The language of one of the Judges in that case, after stating the situation of the law record, was, "In equity the custom is set forth, and though, as stated in the demurrer it was illegal, yet, since the practice had impressed on the minds of the people, an idea of its legality, and under that idea the payment was made, he ought in this Court to have the benefit of it." Now, there can be no difference whether the custom is illegal by common law or statute. For, the law is equally binding in either case, and, therefore, if custom can sanctify a mistake with regard to the one, it may with regard to the other.

There is nothing in the objection, that the marriage was already had before the deed was re-acknowledged; because the recital should be considered as surplusage, and then the con-

sideration of the money and blood was sufficient to pass the estate; which could not be avoided, because the marriage contract would prevent the conveyance from being considered as voluntary, in the same manner as if a deed is expressed to be made for the consideration of five shillings, when full [154] value was actually paid, the estate passes and the true sum paid, will secure it to the grantee.

The result is, that the re-acknowledgment was sufficient; and, as the deed was recorded within eight months afterwards, it is good against creditors.

3. But, if the deed is void, because not recorded within the eight months, then the contract was not well executed: and, therefore, on account of the fraud may now be enforced.

For, the contract was not merged in the deed; because Beverley was no party to it; and did not even know that it had been made until long after the eight months had expired. It was, therefore, a transaction between other persons without his privity or consent; and, consequently, could not affect his contract, which he had a right to have effectually fulfilled.

The § 4, of the act of Assembly makes no difference: 1. Because that means the actual settlement itself, and not the mere agreement for it. 2. Because that was intended to operate on the claims of the husband and wife or their trustees only, and not upon those of third persons. 3. Because Beverley was a purchaser for money actually paid; and, therefore, it does not stand on the common footing of a marriage contract. 4. Because the execution was a fraud upon Beverley. For, the father and son, who pretended to have the articles executed and did not do it effectually, were guilty of a fraud, in the same manner as in the case of an under-hand agreement to pay back money, contrary to the tenor of the contract. [*Butler* v. *Chancy*, 1 Eq. Ca. Abr. 88; *Pitcairn* v. *Ogbourne*, 2 Ves. sen. 375;] 2 Pow. on Contr. 164. Others, therefore, will not be allowed to take advantage of the omission to record, for that, on account of the fraud can create no right: But, Beverley is left at liberty to avoid what has been done, and to assert his contract. 2 Pow. Contr. 55.

But, if the contract remains, then it specifically binds the lands; for, the act does not avoid the contract but only the deed. So, that if the contract was never merged, it remained with all its consequences, and formed a lien on the [155] lands even against judgments. [Assented to by Ld. Cowper, in *Finch* et al. v. *Winchelsea*, 1. P. Wms. 278;] 2 Pow. on Contr. 58.

4. If the deed be not good, and the marriage contract cannot now be carried into effect, still, as the judgments are no lien on the estate, the mortgagees will be preferred.

Because, they have the title of the heir at law; and being purchasers, they have, at least, an equal equity with the creditors: Therefore, having got the legal estate from the heir, they must prevail against the creditors.

Nor does the deed alter the case; because, the resulting interest for creditors and purchasers descended on the heir, who might lawfully convey it: For, the mortgage, which is a sale *pro tanto*, is good, although the heir will be liable to the creditors for the value of the alienations. This position, evident in itself, is particularly true in the present case: Because, it is in his character of heir that Richard Randolph is sued: which, indeed, was absolutely necessary; for, in any other mode he would not have been liable; nor could a suit in any other form have been maintained against him; because, the statute only renders devisees liable; and as he was not a devisee, if the deed be void, and the same as if never made, he must be liable as heir or not at all.

The mortgagees, therefore, have got the legal estate; and the Court will not take it away from them, in favor of the other creditors, who have no superior equity.

Duval, on the same side, contended, that Richard Randolph, the son, was a *bona fide* purchaser of the estate, and, therefore, would not be affected by implied notice of the judgments: 1 Eq. Ca. Abr. 354; 2 Eq. Ca. Abr. 682; 1 Ca. Ch. 37. That the re-acknowledgment of the deed was sufficient; or if not, still it would operate as a covenant to convey; or if the deed was void, that the fee descended on the son; [156] who might fence against the creditors with the equity arising out of the contract. Upon which points he cited Shep. Epit. 273, 407; Cro. Eliz. 217; 2 Eq. Ca. Abr. 683; 1 Eq. Ca. Abr. 358. That the judgments were not a lien after the year and day; for, the negligence of the creditors will postpone them. Besides, as to some of the lands, the judgments never did affect them; because they were purchased by Richard Randolph, the elder, after the rendition of the judgments.* In support of these propositions, he referred to 2 Eq. Ca. Abr. 684, 362; 3 Atk. 273, 357; 2 Inst. 470; 2 Salk. 598; 2 Bac. Abr. 343, 362, 364, 596; Roll. 470; Cro. Jac. 424, 477; 2 Hugh. Abr. 790, 893; 2 Mo. Ent. 390, 391.

[* See *Colhoun* v. *Snider*, 6 Binney, 135; and *Richter* v. *Selin*, 8 Serg. and Raw. 439, as to this position.

HAY, for the appellees,

Made four points. 1. That Wayles' executors were creditors by bond. 2. That the judgments were a lien on the lands. 3. That the deed was void as to creditors. 4. That the deed to David M. Randolph was not for a valuable consideration: which observation, he said, also applied to that of Richard Randolph, junior, for the Curles estate.

As to the first point:

The effect is the same, as if Bevins himself had sued; for, the debt was originally due by bond; and if the money had been paid by a person not security thereto, and he had taken an assignment of it, he would have been a bond creditor. So, if the executors of Wayles had had it assigned to a third person for their use; because a Court of Equity would not have permitted the defendants to plead the payment. If bond-creditors are satisfied out of the personal estate, the simple contract-creditors shall have payment out of the real: which is more than what is contended for here. Because there, the satisfied bond is revived in favor of another person; but here, it is only asked, that the same bond may be made effectual in favor of the representatives of one who was originally a party to it; and this for the benefit of the security too, which [157] is a favorable case.

As to the second point:

If the judgments gave a lien, when in force, they will, when revived. There is no necessity for taking out execution, but the plaintiff may continue the entry on the record. 2 Bac. Abr. 362; and, therefore, the lien attached, notwithstanding the subsequent alienation of the land. The Stat. 13 Ed. 1, which gave the *scire facias*, makes no other difference in the common law, than merely to continue the execution, and enable the plaintiff to carry the judgment into effect at a later time than he could have done at common law. So that, upon this statute, execution may go at any time, if the notice mentioned in the act is given; and, therefore, upon Mr. Call's own ground, the lien continued, as the execution might be issued. If the plaintiff sues an *elegit*, although he never executes it, or makes an entry on the roll, the lien continue and he may defeat a future sale. Therefore, the argument, on the other side, goes to prove, that there is a difference between a judgment revived by the law, and one kept alive by the party himself; which cannot be true. The *scire facias* is but a mere judicial writ; and the entry is, that the plaintiff may have ex-

ecution of the judgment; upon which no damages are given. So, that to every intent it is but a mere restitution of the original judgment and its consequences. Of course, if it ever was a lien on the lands, which is admitted, that lien remains unimpaired.

As to the third question:

The deed not having been recorded within the time prescribed by law, is absolutely void: or else the ways of law, like *The ways of Heaven, are dark and intricate, puzzled with mazes, and perplexed with errors.* The re-acknowledgment has not the effect which has been contended for; because the act is, that the recording of the deed shall take place [158] within eight months from the sealing and delivery; which means the original sealing and delivery, and the subsequent re-acknowledgment is vain and ineffectual. Shep. Touch. 69. If the deed had been delivered up to be cancelled, it would have been good; but this was not done in point of fact; and, therefore, the defendants must contend, that it was a surrender of the old deed to be cancelled. But that posi ion cannot be maintained; for, the fact is not so; and the re-acknowledgment only amounts to a confession that he delivered it on the day of the original date: Whereas, a new deed implies the contrary; for, a new deed respects time future only, but the old deed comprehends also the interval of time between the date of the old deed and the re-acknowledgment. That the re-acknowledgment is vain, is clear from Perkins, § 154, who says, "It is to be known, that a deed cannot have and take effect at every delivery as a deed; for, if the first delivery take any effect, the second delivery is void. As in case an infant, or a man in prison, make a deed and deliver the same as his deed, &c., and afterwards the infant, when he cometh to his full age, or the man imprisoned when he is at large, deliver again the same deed as his deed, which he delivered before as his deed, this second delivery is void. But, if a married woman deliver a bond unto me, or other writing as her deed, this delivery is merely void; and, therefore, if after the death of her husband, she being sole, deliver the same deed again unto me, as her deed, the second delivery is good and effectual." This doctrine, which is confirmed by Lord Mansfield, in *Goodright* v. *Straphan*, Cowp. 203, proves clearly, that a re-acknowledgment, where the first delivery has actually had effect, has no operation. But, in the present case, the original execution and delivery of the deed had full effect, and, therefore, the subsequent re-acknowledgment was void. It is said, indeed, that no estate passed until the deed

was recorded; but by the express words of the act, the deed
[159] is good between the parties: which conpletely answers the argument. When the deed was re-acknowledged, the estate was already in the grantee, and, therefore, the only effect of the doctrine contended for on the other side, would be, to give a longer time for recording the deed than the law allows. But, if the re-acknowledgment would have been good, between the parties themselves, as a new deed; yet, the positive words of the law had already operated on the old one, so as to avoid it in favor of the creditors; and had put it out of the power of the parties to defeat them by any act of theirs.

As to the fourth point:

The question is, if this princely provision by a father for his son, shall be good against creditors? There is no decision in this State which supports the claim set up in favor of the son; and the welfare of the country is certainly opposed to it. The deed itself shews him to be a mere volunteer, and if it was for a valuable consideration, he ought to prove it. Even marriage is not shewn to be the consideration. The letter of Thomas Mann Randolph, which says that he would consent, if Richard Randolph the father, would give his son David Meade Randolph, an estate, and put him into possession of it, does not alter the case. For, if a father conveys an estate to his son, without any previous treaty, it would be clearly void; and then the question is, whether there was a sufficient communication in the present case? The letter states that the writer will consent, if the estate is given; but it does not appear that Richard Randolph the father, was at all moved thereby. For, in his letter to his son David, he takes no notice of it; but appears to have acted from parental tenderness only. His language is, that he had long intended to give him the estates. So that he, in fact, only gave it at one time instead of another.
[160] The deed was written under the direction of Richard Randolph, and only states affection and advancement: thereby plainly proving, that he did not act under the idea of a contract, but from motives of affection only. Consequently, unless it could be shewn, that if a father makes a conveyance because his son is about to be married, it will be good against creditors, the defence in the present case cannot be supported. For, it makes no difference that Thomas M. Randolph required it as a condition; since it does not appear that the requisition had any effect, upon the mind of Richard Randolph. Besides, the letter did not ask a settlement on the wife; but merely on

David himself; so that the interest of the wife does not appear to have been contemplated. If it had required a settlement on the husband and wife, and the conveyance had pursued the requisition, it might be argued from; but here was nothing to shew that any regard was paid to the wife; and although Thomas M. Randolph might have intended her benefit, he did not say so; and Richard Randolph was not bound thereby, if he had. Richard Randolph was largely indebted at the time, and Thomas M. Randolph, who was his security in one instance, knew it. His object, therefore, was to put the property out of the reach of the creditors; and consequently, as to them the transaction was void. But, if that was not the motive, still it was voluntary, and therefore of no effect against creditors; so that, either way, the conveyance forms no defence against the creditors. Richard Randolph perhaps acquired credit on this very property; and therefore, the creditors ought to be satisfied out of it; especially as David shews no settlement; but may do as he pleases with it under the deed, and may totally deprive the wife and children of it. Therefore, if marriage be a sufficient consideration against fair creditors at all, yet, as it is not shewn to have been the consideration of the present deed, it will not avail the defendants in the case before the Court; but this property [161] as well as Curles, will be declared subject to the demands of the creditors.

WARDEN, contra,

Spoke to the same effect with Call, and cited in addition, Com. Dig. 63-4; [*Bellingham* v. *Alsop*,] Cro. Jac. 52.

MARSHALL, on the same side. 1. The executors of Wayles are not specially creditors: For, the original debt has been paid to the obligee, and no action to recover it is sustainable at common law; because the bond having been paid off, and not assigned, lost its obligation. It is not true that the executors are in the place of an assignee; for the assignment preserves the bond, but the payment destroys it.

The principle that the Court goes on, in the case of marshalling assets, is not correctly stated by the opposite counsel; for, it is not that the specialty debt, is revived in favor of the simple contract creditor, but that the specialty creditor, having two funds, has, contrary to equity, taken the personal estate from the simple contract creditor, and thereby let the real estate which ought to have contributed, go quit of bearing any proportion of the debts: An act which operates as a

fraud; because it relieves the land that was justly bound to the prejudice of a fair creditor, contrary to the rule of equity, which uniformly compels the party, having two funds, to resort to that, which does not interfere with the claim of him, who has but one. But that is not our case. For, this is not a question concerning the unjust exercise of a right against two funds: but whether a man, who has paid off another's debt, without taking an assignment of it, shall be permitted to the prejudice of third persons, to revive the debt which had been extinguished by his own act? It is therefore not within the principle of marshalling assets.

[162] Moreover, that principle is never applied to affect a purchaser; because he has as much equity as the claimant, and he has the law besides. But, in this case, a Court of Equity is called on to assert, to the injury of fair purchasers, a principle invented for the sake of effecting justice: An attempt contrary to the nature of that Court; which always refuses to act when injustice would follow from it. But in the present case, the plaintiffs had at most only an equitable claim; and therefore it would be monstrous to set it up, after it had been extinguished, in order to avoid the mesne acts of others.

The question has a great resemblance in principle, to the case of old incumbrances in the doctrine of mortgages. For, there, an old incumbrance will protect a latter mortgage, if it has not lost its legal force; but, if it has lost its legal effect, it will not. Pow. on Mortg. 215. So in this case, the bond, if it had not lost its legal effect, might have availed the plaintiffs; but having been paid off by one of the obligors, its legal force is gone; and therefore, the executors can only be considered as simple contract creditors.

2. The judgments are not specific liens on the lands.

At common law, lands were not bound, and the lien is only in consequence of the statute; which does not bind them, in express terms, but only by implication. The lien is a mere creature of the Court, resulting by construction from the election given to the creditor by the statute; and therefore, the Court will never extend it beyond the limits of public convenience. No case has been produced where lands conveyed after the year and day were held to be bound; nor indeed can such an inference be fairly drawn, where there is no right to take an execution. For the lien is predicated on, and is only co-extensive with the right to take execution. If the case be

[163] taken by analogy to real actions, it is clear. For in those, the lien is gone when the right to take execution

cases; which is the same principle contended for, in the case now before the Court.

It is said, that the *scire facias* revives every thing. But, that can only be where the right is continuing; for it cannot retroact upon a mesne act, where the right has ceased. The statute which gave the *scire facias*, does not say it shall over-reach mesne acts; and the lien is gone before the *scire facias* becomes necessary.

The argument, that the *scire facias* is a judicial writ, and that a release of the execution will discharge it, proves nothing; for, it will also be released by a release of all actions; and therefore it may as well be called an action, as an execution. Relation is fair between the parties; but it would be iniquitous, that it should have effect, against third persons; and accordingly it never does, unless in favour of one who has a superior equitable or legal right. Suppose a legal title extinguished and afterwards revived, would this revival avoid the mesne act against a third person, who had innocently acquired a title in the mean time? It would be shocking that it should; and the law would never countenance such injustice. Yet, that is the amount of the principle contended for, on the other side.

It is said, that since the statute, if notice is given, execution may go at any time. But this is contrary to all practice; the statute never was so understood; and the mischiefs of such a doctrine, to creditors and purchasers, would be incalcuable.

It is not true, that there is no difference between the case at bar, and one where the plaintiff continues his *elegit* on the roll. For, the continuance is a notice to the world, as much as the original judgment, and of itself imports that the judgment has not been satisfied; whereas, when no further steps are taken, it affords a presumption that the judgment has been satisfied. This doctrine is applicable to all the [164] judgments; but, as to those of York Court, it is entitled to still greater weight. For, as it is the case of a lien by implication merely, it will not be extended by the Court, to all judgments indiscriminately.

Generally speaking, when the law obliges a man to take notice of any act, it affords the means of doing it. But how can that take place, in the case of County Court judgments? For the County Courts are so numerous, that no prudence or industry could enable a purchaser to guard against them. No matter how many transfers may have taken place; no matter how many years may have elapsed since the judgment was rendered; no matter how many precautions may have been taken to guard against injury, the judgment would over-reach

them all, and bind the lands in the hands of the innocent purchaser. So that the shackels on property would be infinite; especially, when it is considered that judgments are always docketed in the names of the plaintiffs and not of the defendants: A purchaser, therefore, before he could venture to contract, would be obliged to search through all the judgments of all the Courts in the country: A labour which would be endless, and the pursuit intolerable.

The true idea therefore is, that the lien should be confined to the same Courts, which the law requires the recording of deeds to be confined to. So that a man should not be obliged to search further for a judgment than for a deed: Especially as the Legislature by the record laws meant to favour and secure purchasers; and therefore the Court ought not, by mere construction and implication, to raise up an inference, entirely contrary to the spirit and intent of those laws: but on the contrary, should promote the object of the Legislature as much as possible. It is not to be believed, that the Legislature could intend that the implied lien should extend every where, when the express lien was confined to certain limited jurisdictions: Because the danger from implied liens, [165] was much greater than from express liens, and therefore more to be discouraged.

But the necessity of a *scire facias* against the *terretenants* is decisive; for there could be no such proceeding, where the lands lay in another county; and therefore, as the *terretenant* could not be brought before the Court, the lien could not be revived by the *scire facias*. In such a case, there can be no inference of notice; because the lands could not be reached in the hands of the *terretenants*, between whom and the creditor there is no privity; although it may be otherwise as to the heir, on account of the privity between him and the creditor.

Therefore, whether the principles of the common law, the object of the Legislature, or the reason and convenience of mankind be consulted, it will be found to be true, that the judgments constitute no lien upon the lands in the present case.

3. There is no question, but that the policy of the record laws may be as well answered, by allowing a re-acknowledged deed to prevail, from the time of its re-acknowledgment, as by allowing an entire new deed to have effect from its date. This position has been stated by us, and has not been answered by the counsel for the appellees. Nor indeed can any just answer be given to it. For, in both cases, not more than eight months will elapse between the acknowledgment and the re-

cording of the deed; and that is all which the policy of the law appears to have required.

But, forsaking this point, the counsel for the appellees insists, that the act of Assembly is express that it shall be recorded within eight months from the execution of the deed, and that a plain man would necessarily so understand it; therefore, he concludes that a second acknowledgment will not supply the omission. He admits, however, that if the deed had been given up to be cancelled, and then had been re-acknowledged, it would have operated as a new [166] deed: which is not very consistent with the other position contended for by him, that nothing could pass by a subsequent deed; or with the words of the act of Assembly, according to the construction which he puts upon them. For how, in the case he supposes, would the estate get back to the grantor, or how could he have any thing for the second delivery to operate on, if the whole was out of him? This very admission necessarily proves that the grantor has an interest which he may grant, so as to be effectual against creditors from the second delivery; or else the new deed would have no effect at all; which is contrary to the terms of the admission.

It is said, however, that the re-acknowledgment was no delivery. But for what purpose was it made then? Certainly the intention was to deliver; and here the evidence is express, that it was delivered on the date of the last acknowledgment. Besides, there ought to be positive evidence of the first execution of the deed; and I submit it to the Court whether that be proved or not.

But it is argued, that if the re-acknowledgment be a second delivery, that still the second delivery was void, and Perkins and Cowper are cited in support of the position.

The case in Cowper, was that of a re-delivery by one who was a *feme covert* at the time of the original delivery, but sole at the time of the re-delivery; and, if it proves any thing, it rather supports what we contend for; because it was decided there, that the re-delivery amounted to a confirmation, and that circumstances might amount to a re-delivery. The same argument would apply with equal force, in the present case, as the first delivery has been rendered void, as to creditors and purchasers, by the statute.

The passage in Perkins, is of a case where the first delivery takes effect; but we insist that the estate in [167] the present case remained in the grantor, as to creditors and purchasers; and, therefore, that the second delivery did operate. For, our law is like the English statute of enrolments,

and, therefore, as against creditors and purchasers, the estate does not pass out of the grantor until the deed is recorded. But, it is said that the 4th section makes a difference; because by that the deed is to be good between the parties. The cases cited, though, prove that to be nothing more than the English Judges had, by construction, implied before; and it was probably inserted in our statute, in conformity to their decisions. The only difference, therefore, is, that in England, the Judges declared it to be good between the parties, upon principle and construction; but, in this country, the act of Assembly, pursuing the course of their decision, has declared it so in express words. If this reasoning be correct, then Hinde's Case, 4 Co., shews that there may be a second delivery, which will not only confirm the estate between the parties themselves, but will be effectual as to every other purpose. Indeed, the contrary doctrine would be intolerable; as, according to that idea, a defective deed could not be made effectual by any conveyance. There is no similitude, therefore, between the case in Perkins, and that under consideration. For, Perkins supposes a case, where nothing remained in the grantor; but, here we prove an existing interest which he might part with; and if he could grant it at all, he might as well convey it to his own grantee, as to any other person.

It was said, that according to this argument, a judgment between the date and recording of the deed would be good against the grantee; although the deed should be actually recorded within eight months from its original date. But that position is not sound; for, the judgment would, by relation, be over-reached by the recording of the deed according to the doctrine in Hinde's Case, as there would be no injustice in it. For, as the first purchaser would have the first right in equity, no injury would be done to those whose rights were subsequent to his. From all this, it follows, that the re-acknowledgment was clearly good; and, therefore, that the creditors cannot affect the lands.

4. But the mortgagees have clearly the first right; because they had both titles, that is to say, the title under the deed, and that by descent.

For, 1. Their case resembles that of the alienee of a devisee, whose right will be good against creditors, although the devisee himself continues liable to them. For, the statute of 3 and 4 W. and M., like our act for recording deeds, expressly declares, that the devise shall be void against creditors; but, nevertheless, the title of the alienee of the devisee is [168] good, and the estate cannot be touched in his hands.

Matthews v. *Jones*, 2 Anstr. R. 506. In that case, it was expressly argued, that the devise being void as to creditors, nothing passed by it, as against them; and of course, that the devisee could convey no estate to their prejudice. But the Court unanimously held, that the devise did pass the estate, so as to enable the devisee to alien, and that he would only be personally liable. The same doctrine applies to this case; for, the conveyance here will be good, except against creditors, and the alienation by the grantee will be good, although the grantee will be personally liable to the creditors. For, the two statutes are equally strong, and the principles precisely the same. Before the record laws in this country, the alienation would have withdrawn the lands from the creditors here, in the same manner as the devise there; and of course, if the alienation of the devisee there will prevail, so will the alienation of the grantee here.

But, 2. If this doctrine were not true, then the consequence inevitably would be, that the title of the mortgagees under the lien must prevail. For, if the conveyance is void altogether, then it is the same thing as if it had never been made, [169] and in that case Richard Randolph must, as to the creditors, take as heir necessarily. But, if he took as heir, then the mortgages by him are certainly good; because alienations by an heir are good, although he is liable to the creditor for the value. But a mortgage is so far an alienation; and, therefore, necessarily good.

5. The conveyance to David Meade Randolph is not liable to exception.

It is in vain to argue, that a considerable property has been conveyed, without any valuable consideration paid for it. Such an argument may be proper to the Legislature, but not to the Court; as it is no longer a question, whether a conveyance, in consideration of marriage, be sustainable or not. For the law is settled, that such a conveyance is good.

But, it is said, that a voluntary conveyance to a son about to be married, is void. As that, however, is not the present case, I will not say whether the position be correct or not; but there are some cases which might make it very doubtful. As for instance, in the case of the *East India Company* v. *Clavel*, 3 Bac. Abr. 315, [Gwil. ed.] Prec. Ch. 377, where A. agreed with the East India Company to go as President to Bengal, and entered into a bond of £2000 for performance of articles; but, before he set out, he made a settlement of his estate, and among other things, he declared the trust of a term of 1000 years to be for the raising of £5000 as a portion

for his daughter, who afterwards married I. S. a gentleman of £700 per annum, who, before the marriage, was advised by counsel that the portion was sufficiently secured, and who afterwards on her death, had, at her request, expended £400 on her funeral, *but never made any settlement on her;* and A. having embezzled the goods and stock of the company to a
[170] considerable value, the question was, whether this settlement was voluntary and fraudulent as to them; and, it was held to be a prudent and honest provision, without any color of fraud; and though in its creation it was voluntary, yet being *the motive and inducement to the marriage*, it made it valuable. This case and others, which might be mentioned, seem to refute the position advanced on the other side; but deeming it altogether unnecessary, I shall not go into the argument of that point now:* Because, an express marriage contract has been proved in our case. The letter of Thomas M. Randolph, and the depositions of Richard and Harry Randolph, shew that the marriage was suspended until the conveyance was made. The letter of Richard Randolph the father, to David, was clearly intended as an answer to that of Thomas Mann Randolph. For, in it he says, that he had been looking out for an estate, ever since he heard of his addressing the lady; and that, in consideration of the marriage, he would give the property. The conveyance was the real ground upon which the consent of the lady's parents was obtained; and without it, the marriage would not have taken place. So, that it is much stronger than the case of the *India Company* v. *Clavel;* because, here was an actual treaty for the property, but there was none in that case. To which may be added, that without the marriage, David Meade Randolph could not have compelled a conveyance.

It is objected though, that he also says, he intended to give him the same property before. But, can that destroy the claim arising from the marriage? Surely not; for, it is saying no more than was necessarily implied; because, before he would enter into the agreement, he must have been previously disposed to give the property. So, that the objection does in fact, amount to no more than this, that a man, who is disposed to make an agreement, ought not to make it, because he was previously disposed to do so.

[171] It is said, however, that the letter from Richard Randolph to David Meade Randolph does not refer to

[* See *Atherley* on Marriage Settlements, ch. 14. p. 238-242, and *Sterry* et ux. v. *Arden* et al. 1 Johns. Ch. R. 261, 12 Johns. R. 536, S. C. in error.]

that of Thomas Mann Randolph. But the contrary is expressly proved. Besides, if it removed the objections of Thomas Mann Randolph, it was the same thing.

Another objection raised is, that the conveyance is to David Meade Randolph, and not to his wife. But so was that in the case of the *East India Company* v. *Clavel;* and yet the settlement was held good. Besides, the estate contributes to the benefit of the wife and her family; and the husband cannot deprive her of her right of dower in it. So that she, in fact, is benefited by it. In the common cases of settlements on marriage, the remainder is generally limited to the husband and his heirs: which, according to the doctrine contended for by the opposite counsel, would be void; but the marriage has always been considered as protecting the whole settlement.

It is urged, that it is mockery to say, that the letter turned him into a purchaser. But in point of law it does; and although he may afterwards defeat the provision, by squandering or alienating it away, that will not alter the case. For, there is a confidence that he will keep it; and as the object was the ease and comfort of the daughter and children, that end was thought to be sufficiently attained by the conveyance to the husband.

But a singular objection is raised, namely, that Thomas Mann Randolph must have known of the embarrassment, under which the affairs of Richard Randolph were at that time. Now, besides that such knowledge is not necessarily to be inferred, from any proofs in the cause, it cannot be contended, that that circumstance would make any difference in law. For, most marriage settlements originate from apprehensions of that kind; and therefore, the knowledge, instead of operating against the conveyance, would rather strengthen it. Because Thomas Mann Randolph would not have permitted the marriage without it, and the testimony expressly proves that to have been the consideration of the conveyance. The words of the statute of Eliz. are not opposed to this doctrine; in which nothing, relative to such a case, is said: Nor, indeed, does that statute render even mere voluntary conveyances void, unless made to deceive and defraud creditors. [*Parslowe* v. *Weedon,*] 1 Eq. Ca. Abr. 149. But that is not important to be enquired into in the present case; because here was a sufficient consideration in law to support the conveyance. [172]

As to the form of the deed, it is to be remembered, that Richard Randolph the father, had not got the legal estate conveyed to him, as to part of the lands, when the marriage con-

tract was entered into, but David procured it afterwards; and therefore the argument contended for, with respect to the form, does not apply, as to that part. But, independent of that, if the deed does not secure the estate according to the terms of the agreement, then it is contrary to the contract, which the Court will consider as still standing, and controlling the deed,

RANDOLPH, on the same side, before Wickham began, stated, that articles in the form of a deed would be good. 1 P. Wms. 339; Pow. on Contr. 432, 334. That if the deed was improperly recorded, the Court might still order it to be done, so as to have the effect intended; and that the consideration might be averred in the case of David Meade Randolph. Upon these points he cited [*Bothomly* v. Ld. *Fairfax*,] 1 P. Wms. 339; Pow. on Contr. 432, 334; [*The King* v. *The Inhab. of Scammonden*,] 3 T. R. 474; 1 Ch. Cas. 37.

WICKHAM, for the appellees.

The judgments bind the lands; for, all judgments give a lien; and it is not important whether this be a rule of the common or statute law: although it may, perhaps, be affirmed, that the lien existed before the statute, as there was a *levari facias* against the issues, which Lord Coke says, are the land itself. However, whether it proceeds from the common or the statute law, it is equally clear, that it extends to all [173] the lands; as well those owned at the time of rendering the judgments, as those acquired afterwards. 10 Vin. Abr. 563.* But it is said, that the judgment only binds for a year; and Gilb. Law Ex. 12, is relied upon. That book, though, speaks of the law before the statute which gave the *scire facias;* and in a subsequent page it states a different rule. It is said, that there is no instance of a lien where more than a year has elapsed: but the argument of Mr. Hay is just, that the *scire facias*, merely revives the judgment itself. The precedents, to that effect, are numerous; and the general doctrine is contained in 3 Co. 13, (*b.*) And, if analogy be attended to, it will be perfectly clear. For instance, if the debtor die, still the lands are bound in the hands of the heir, notwithstanding the necessity of a *scire facias;* of which many cases may be produced: and although writs of *scire facias* to ground the *elegit* in the debtor's life-time are more rare, this is owing to there being no necessity for actually issuing the *elegit* in

[* *Brace* v. Duchess of *Marlborough*, 2 P. Wms. 491; *Dalton's* Shff. 134; *Sugden* on Vend. & Purch. 340; *Richer* v. *Selin*, 8 Serg. & Raw. 439, 440.]

that case. 6 Bac. Abr. 107, [Gwil. ed.] But if there be a lien notwithstanding the necessity of a *scire facias* in one case, why not in another? Perhaps it will be said, that the election should be made within the year: but that is not so; for he may do it when he will: against the heir, clearly; and, therefore, against the *terretenant:* Because, a *scire facias* may issue against the heir and *terretenant* jointly; 6 Bac. Abr. [114, Gwil. ed.] It is said, that the *scire facias* is necessary, because the judgment is presumed to be satisfied. But, that is only *prima facie;* and, therefore, when the writ has issued, the defendant must plead and prove payment. The right to execution exists at the time of the *scire facias;* for, the very writ supposes it; and the issuing of it is only required, in order to give the defendant an opportunity of proving the payment. It is said, that a *scire facias* is released by a release of all actions; but a release of all executions has the same effect: which proves that the judgment is the principal, [174] and that the *scire facias* is but auxiliary, and partakes more of the nature of an execution. The case cited from Ves. is not material; because, possession is evidence of property; and, therefore, creditors and purchasers are liable to be deceived: but, lands always depend upon title, and ignorance of the plaintiff's right is no *defence.* That the lands lay in another county will make no difference; for still they are bound, in the same manner, as in the case of a *fieri facias,* by which the property is bound from delivery of the writ to the officer although the goods be in another county. The inconvenience of the doctrine has no weight in a Court of Justice, however proper it may be to the Legislature; for inconvenience never is allowed to do away a positive right. *Wilson* v. *Rucker,* 1 Call, 500, in this Court the other day, was a strong case to that effect. As to the charge of neglect, it ought to have no operation on the question: for, the judgments were originally entered as a security for the money, and that payment was urged, appears by the letters: besides that, the fee-bill soon after expired, and some of the plaintiffs were British creditors, and could not sue. It is said, that there could be no *scire facias* into another county; but there is a difference between issuing and serving of the writ: for, a return of two *nihils* would be sufficient; and no *venue* was necessary, as was supposed. Neither is there any difference, in law, between the case of one who seeks to make gain, and one who seeks to avoid loss. There is no reason for confining the lien, according to the restrictions of the record laws: for, although it may be difficult for the purchaser to know, whether there be any

judgments against the debtor, it is not impossible; and, therefore, the rule of *caveat emptor* applies: for, he should buy of one who is able to give a good title, or a sufficient warranty. [175] The case from 1 Ch. Cas. does not apply; because that was a case in equity; but the present is to be considered as if it was in a Court of Common Law.

Wayles' executors are bond-creditors. For, at the time of bringing the suit the bond was not satisfied; and, therefore, the obligation was then actually subsisting. It is said, however, that the principle of marshalling assets, depends upon the specialty creditor having two funds, and being, therefore, bound in conscience to go against the realty in order that the simple contract creditor might be satisfied out of the personal estate. But specialty creditors may resort to which fund they please; and equity puts the simple contract claimants in their stead, if they go against the personal estate instead of the lands. Of course, if the deed is void, the executors, as specialty creditors, may charge the lands. For, the Court can with the same propriety put them in the place of Bevins, as the simple contract creditors in the place of the bond creditors in the other case. If there be a difference, it would seem to be in favor of the executors in the present case; because, of the privity between the parties.

The deed for the Curles estate is clearly void against creditors. The words of the law are express and clear; and no abstract reasoning is either necessary or proper in order to explain it. The policy of the law was to prevent secret conveyances; but the construction contended for on the other side, tends to encourage them and to elude the law. The second delivery of the deed was clearly void, Shep. Touch. 72, 60; and, if there be no proof to the contrary, the inevitable presumption is, that it was executed upon the day on which it bears date.* Here, then, was a complete delivery, and from that time the whole estate was out of the grantor, who had nothing to grant after that; and, therefore, according to the authority, the second delivery was merely void. There is a [176] wide difference between a re-acknowledgment and a new deed, after the first is cancelled; for, in the latter case the estate is gone back from the grantee, who no longer hath any thing in the land; but, in the other case, he has the whole estate in him still. The case is not like the statute of enrolments in England; because, there the statute is positive;

[* 2 Inst. 674, *Colquhoun* v. *Atkinson*, 6 Munf. 550; *Harvey* et al. v. *Alexander* et al., 1 Rand. 219.]

that the estate shall not pass until the enrolment. 1 Bac. Abr. 470, [Gwil. ed.] But, our act of Assembly is expressly otherwise; and, in effect, declares that the estate shall instantly pass to the grantee. As to the argument, derived from what is called the custom of the country, it is entitled to no weight; for, a custom, however general, cannot change a positive law; but, the truth is, that the custom spoken of, is more general in the case where the eight months have actually expired, than where, as in this case, the re-acknowledgment was before the expiration of the eight months.

Beverley's articles will not help the appellants. Such a decision would repeal the act of Assembly, which expressly requires that all such contracts shall be recorded; and, although the two Randolphs may have practised a fraud upon him, that will not alter the case, or destroy the effect of the act.

The claim of the mortgagees is no better than that of the other appellants. To entitle them to any preference, they should have been purchasers without notice; which must be pleaded and cannot be affirmed at the hearing. Mitf. Plead. 222, [3d. ed.] [*Brandlyn* v. *Ord*,] 1 Atk. 571; [*Beckett* v. *Cordley*,] 1 Bro. C. C. 353. That Richard Randolph, was heir to his father, makes no difference; because the descent was broken. The case cited from Anst. proves nothing in favor of the appellants. For, before the statute, the heir was only liable for the lands remaining in his possession at the time of the suit, but as to those previously aliened, he was exonerated; and as the statute only put the devisee on the same footing with the heir, it followed, that the lands which were aliened before the suit brought, did not remain [177] liable in the hands of the alienee.

As to the case of David Meade Randolph, it is on the face of the deed a voluntary contract; and as the evidence is not positive, we must recur to the deed itself; especially as the deed and evidence do not agree together. The case cited from 3 Bac. 315, was different from this; because, there, the father was not indebted at the time of the settlement, as was the case in the present instance. The deed was before the marriage, and yet the wife is not made a party, which increases the difficulty of admitting that the marriage was the foundation of the conveyance; for, there was nothing to protect the wife's interest, and the husband might have sold the estate before the marriage, so, that she could not even have been endowed. The case in 1 Eq. Ca. Abr. 149, cannot be

law,* according to Mr. Marshall's construction; but perhaps it was only a mere abstract principle advanced by the Court. These lands, therefore, as well as the others, are liable to the creditors.

RANDOLPH, in reply.

The deed to Richard Randolph is good. For, marriage is a favorite consideration in law; and when the grantor made the deed, he supposed himself in affluence: To which I add, that his will shews he possessed a very large estate still. It is no objection, that an express estate is not given to the wife by the deed; because it is all that Mr. Beverley demanded. Besides, the right of dower, with the comforts resulting from the affluence of the husband, were real advantages to the wife; and the deed contains a restriction as to alienation in case of no heirs, that looks as if the children were contemplated: In addition to which there was a real moneyed consideration. All which puts the motive for the deed beyond all question.

But, then it is said, that the deed was not recorded within eight months from its original delivery; and, that the [178] re-acknowledgment only amounts to a confession, that he had originally delivered it; but does not operate as a new delivery. This, however, would be, to suppose that the parties meant a weak and absurd thing; and, therefore, no such presumption will be made; but, it will be considered as a new delivery altogether.

It is said, though, that there cannot be a double delivery of the same deed. But no substantial reason is, or can be offered for the position; because, there is nothing which prevents the grantee from giving up his deed, and the grantor from re-granting the estate to him. The doctrine from Shepherd and Perkins, is not against us; because, those authors proceed upon the idea of a re-delivery only. But, there is a very material distinction, according to the opinion of Lord Mansfield, in the case cited from Cowp. 204, between a mere re-delivery and a re-execution of the deed. In the present case, there was not only a re-delivery, but a re-attestation and re-execution also. For, the time of the re-delivery is expressly noted on the deed, by the witnesses, in order to shew when the attestation and re-execution took place; so as to remove all doubt that it was intended to operate as a new deed. Put the

[* On this case being cited, in *Jones* v. *Marsh*, Cas. Tem. Talb. 64, the Lord Chancellor said, that Mr. Vernon had always grumbled at the determination of that case, [*Parslowe* v. *Weedon*,] and never forgave it the Ld. Macclesfield; saying it was contrary to the constant practice of the Court.]

case that the old date in the deed had been erased and the new date inserted in its room, it would clearly have been good. But what was done was essentially the same thing. Let us suppose a case which may and does very frequently happen, that all the witnesses do not attest at the same time: In that case, according to this doctrine, about double delivery, the deed would not be well proved. But, surely the Court would not endure such a position. Shepherd puts three technical cases, which he probably took up from mistake; and one of the year books does not warrant his inference: A circumstance, tending greatly to weaken his authority. Besides, the doctrine was before the statute of enrolments, and no instance is produced since. If any circumstance prevents the grantee from having his deed recorded, he may file a bill in equity and compel the grantor to make a new deed; [179] which will be good against subsequent purchasers, and all creditors who had not made their claim effectual, before the institution of the suit. But, if he may be compelled to re-execute, why may he not do it voluntarily?

The case is peculiar to Virginia,* and consequently the custom is very material. For, it is a custom known to every body; and in practice every where. Such universal usage should, therefore, make the law; and, in fact, the question never was made before; but, the practice considered, by all ranks of men, as founded in the law of the land. It is, therefore, like the case of the scroll instead of the seal, or that of omitting to indent, or many of the decisions of our Courts upon the law concerning the office of executors and administrators: none of which have any better foundation, perhaps, than the long-established practice of the country; which the case, cited from Roll's Abr., proves should give the rule in such cases. Besides, it is remarkable that this practice was in use at the time of passing the law; and, therefore, the presumption is, that the Legislature intended to conform to it.

There is no weight in the objection, that the re-acknowledgment was before the expiration of the eight months; for, it does not open any door to fraud, as the opposite counsel supposes: Because, that is more presumable in the case of a re-acknowledgment after the eight months have expired; whereas, the other shews an honest intention, by making use of a timely precaution. In the present case, it was particularly so: 1.

[*In *Curtis* v. *Perry* (March 10, 1802,) 6 Ves. jun 745, Lord Ch. ELDON stated, as a familiar case, that if a bargain and sale be not enrolled in due time, equity will compel the vendor to make a good title, by executing another deed, which may be enrolled.]

Because, it was on the day the grantor made his will, and when he lay ill, and feared he could not be got to Court. 2. Because it was discovered that the witnesses could not be produced at Court within the eight months. So that there was a necessity for it from both causes; and, consequently, there
[180] is not the least room to suspect a fraud. The cause, therefore, stands in the same situation, as if the old deed had been destroyed, and a new one made; in which case, as the title on the destruction of the old deed would have been in the grantor, he might unquestionably have re-granted it by the new one to whomsoever he pleased.

That the marriage was prior to the re-acknowledgment, makes no difference; because, the old consideration, which was the motive to the deed, continued. Indeed, in support of the real justice of the case, the Court would now permit it to be recorded *nunc pro tunc.* [*Bothomly* v. Ld. *Fairfax*] 1 P. Wms. 334; [*Fothergill* v. *Kendrick*,] 2 Vern. 234; [*Taylor* v. *Wheeler*, Ibid.] 564.

The deed to David Meade Randolph, cannot be impeached. For there was an immediate communication between Thomas Mann Randolph, the father of the lady, and Rich'd Randolph, the father of the husband; in consequence of which, the letter to David M. Randolph was written. So, that the marriage was the positive, pointed consideration of the deed. It is not material, that Thomas M. Randolph did not ask for any specific property; for, he required a competent provision for the son, so as to enable him to maintain his daughter in comfort; and that was given.

Nor was the act fraudulent, either upon intention, or upon the principles of law. Not upon intention; because, at the time the grantor thought himself rich; and there is not a syllable of testimony to shew that the two fathers meditated any fraud. On the contrary, it is not even shewn, that Thos. M. Randolph knew of the declining circumstances of Richard Randolph. But, suppose he had, it would not influence the question. For, he would still have had a right to have insisted on a settlement: Indeed, prudence would have the more strongly dictated it upon that account; and that, in fact, is very often the reason, why settlements are demanded. Therefore, upon no legal principle, can a fraud be inferred; but, as the latter, which is expressly proved by the witnesses, demon-
[181] strates, most clearly, what was the true consideration of the deed, it will be received in support of it.

The judgments do not constitute a lien upon any of the lands. For, at common law, judgments did not create a lien;

and the *levari facias* does not prove anything to the contrary; for, that writ had other objects. The lien, therefore, was the mere consequence of the statute of Westminster which confined the *elegit* to the King's Courts; and, therefore, to Courts of general jurisdiction, like our old General Court. So, that a County Court judgment is not within the reason of the rule. Indeed, any other construction would be intolerable: It would introduce inconveniences too great to be borne; and as there is no positive law which says that there shall be a lien created by such judgments, there can be no reason for abiding by a rule which was intended to apply to the judgments of Courts of another kind.

But, it is said, that the act of 1772, giving a general execution, produces the same consequences.

This, however, is not correct in any case, and certainly not in this; for, no application appears to have been made for executions, and the act clearly supposes that to be necessary. However, be that as it may, the neglect forfeited the right, if the plaintiffs, in the judgments, ever had any; for the judgments were suffered to expire, without any excuse being made for it; and, therefore, they ought not afterwards to affect the rights of third persons. Gilb. Law. Ex. 12, is extremely applicable: For, the case of a judgment in a real action, is stronger, infinitely, than a judgment for debt; because, in the former, the land is specifically recovered, and, therefore, the purchaser more bound, in conscience, to enquire concerning it. The negligence in the present case has been gross; and therefore, ought not to affect innocent purchasers who had no cause to suspect a lien; because, it is contrary to natural justice, that such negligence should be encouraged. [*Churchvill* v. *Grove*,] Ch. Cas. 36. The case cited from Ves. contains a very just principle; and there can be no difference between real and personal property in that respect; for, in both instances, the delay was equally prejudicial; and, therefore, the rule as to one, will hold with regard to the other. [182]

The case cited from Bac. Abr. relative to taking an *elegit, nunc pro tunc*, does not apply; because it is a mere fiction of law, which never is allowed to produce an injury to those who have acted fairly, if the others have no superior equity. The *scire facias* is only a substitute for the action of debt which was the common law proceeding, and as the land would only have been bound from the last judgment in the action of debt, no more would they in a *scire facias*. If all County Court judgments are to bind, the impossibility of getting notice will create a disability, which will clog all alienation.

Wayles' executors are not bond-creditors; but if they were, we have at least articles under seal for the property; and the Court will not allow it to be taken from us, by those having no greater equity.

But, at any rate, the mortgagees have a clear equity, whether the deed be good or not: for, the purchase was from the heir, whom the plaintiffs sue in that character. The mortgagees knew nothing of the debts, and therefore are purchasers without notice: So that, as the law allows the heir to alien before action brought, and the mortgagees have fairly ventured their money on the estate, they ought not to be postponed to dormant claims in favor of negligent creditors. Therefore, if the conveyance be considered as absolutely void, then the mortgagees have the title of the heir; and if it be considered as passing the estate, then, like an alienation by a devisee, they will still be entitled, although Richard Randolph will be personally liable, for so much, to the creditors. These
[183] views of the subject are completely supported by the case cited from Anstr. and by 2 Bac. Abr. 607, (*a*); 1 Eq. Ca. Abr.. 105.

Cur. ad. vult.

PENDLETON, President., (after stating the case, and mentioning that the Court were unanimous as to their judgment and the principles on which it was founded,) delivered the resolution of the Court as follows:

We lay down this general proposition, that where a creditor takes no specific security from his debtor, he trusts him upon the general credit of his property, and a confidence that he will not diminish it to his prejudice. He has, therefore, a claim upon all that property, whilst it remains in the hands of the debtor; and may pursue it into the possession of a mere volunteer; but, not having restrained the debtor's power of alienation, if he or his volunteer convey to fair purchasers, they, having the law and equal equity, will be protected against the creditors.*

We then proceed to consider whether the sons Richard and David were such purchasers for a valuable consideration?

1. As to Richard.

There can be no objection to his consideration: It is natural affection, marriage,† and money paid.‡ But, the objection is,

[* See Coalter, J. in *Coutts et al.* v. *Greenhow*, 2 Munf. 368.]

[† *Coutts et al.* v. *Greenhow*, 2 Munf. 363.]

[‡ Where marriage is one of the considerations, the amount of pecuniary consideration is immaterial, Lord ELDON in *Prebble* v. *Boghurst*, 1 Swanst. 319.]

that the deed was not recorded within eight months from the sealing and delivery thereof; and, therefore, by the express words of the act of Assembly, is void as to creditors. If the fact be so, the operation of the law is positive, since it comprehends all creditors; although in reason, the recording would seem to affect only mesne creditors, between the date and recording.

We consider this deed to have been sealed and delivered on the 21st of March, 1786, and that the recording, within four months afterwards, complied strictly with [184] the law. The term *re-acknowledgment* seems to have produced, in the mind of the Chancellor, mistaken ideas. He understands it as meaning no more, than that Richard the father, on the 21st of March, acknowledged that he had, on the 20th of September before, sealed and delivered that deed: A mistake, which information from our Clerk would correct. It would be, that when a man comes into Court to acknowledge a deed, the question put to him, is not, whether he delivered the deed at the date? but whether, he then acknowledges the indenture to be his act and deed? So, the oath to the witnesses is, that they saw the bargainor seal and deliver the paper as his act and deed.* Such was the oath administered to Currie and the other witnesses to this deed. When did they see it sealed and delivered? Not on the 20th of September, 1785; (for then they were not present, and other witnesses attested that delivery;) but on the 21st of March, when they subscribed it, noting upon the paper, the day of the delivery which they attested.

It is admitted by the Chancellor, that if this deed had been cancelled and a new one made, it would have been good. This the counsel also admit; but, pursuing the Chancellor's idea, they have produced a number of cases, some stating that, between the date and recording, the estate is in the bargainor; others, that it is in the bargainee; and others still, that it is in suspense.

Leaving it to others to reconcile this clashing jargon, we consider what would be the opinion of a plain man on the occasion? It would be, that the estate was in the bargainee whilst he held the deed, which was the evidence of it; but, when he surrendered that deed to the bargainor, his legal title ceased, and the other was at liberty to convey to him, or any other:† And if to him, might either destroy that deed and

* See this passage remarked on by CARR, Ch. in *Roots* v. *Holliday et al.*, 6 Munf. 258-9.

[† See EYRE, C. J. in *Bolton* v. The Bish. of *Carlisle*, 2 H. Bl. 263]

make a new one, or, by a re-execution of the same paper, give it force, as a new deed from that period.

The reason mentioned for re-execution, to increase the number of witnesses, applies in this case, and repels a suspicion of fraud: The deed was to be recorded in Richmond, where all the Courts were held for its admission; the eight months were near expiring, and only three witnesses to the deed; two of which resided at a considerable distance, and might not be had in time, the eight months being nearly run out.

What difference can it possibly make, between a new deed and the old one re-executed? Mr. Wickham stated two; in both of which the old deed is best.

First, he justly complained of the practice of renewing deeds, from time to time, and keeping them secret: by which means, creditors and purchasers may be deceived, and against which Chancery will relieve as a fraud. But, this will apply equally with respect to both cases; with this difference, that in case of new deeds each time, it might be difficult to prove the renewals; whereas the old deeds re-executed, shew the progress from the first date and is more beneficial to the creditors.

The same observation applies to his other case. That of a mesne purchaser from the bargainee; since the renewed deed would shew an existing title, at the time of his purchase.

Upon the whole, we are of opinion that the deed is to be considered, to every intent and purpose, as a deed of the 21st of March, 1786, and not before; that it was, therefore recorded in due time; and, that Richard is to be considered as a purchaser for a valuable consideration.

2. As to David.

Being at liberty to aver and prove the real consideration,* he has satisfactorily proved the deeds to have been in [186] consequence of a marriage agreement between the fathers of himself and his lady; and, he is to be considered as a purchaser for a valuable consideration also.†

It, therefore, only remains to enquire, whether at the time of their purchase, there was such a lien upon the land, by the judgments, as restrained the alienation of Richard the elder?

Hanbury's judgments are the great subject of controversy. They were entered in July, 1770, when an *elegit* could not issue upon them, into any other County than *York;* and,

[* See TUCKER, J. in *Duval* v. *Bibb*, 4 H. & M. 121.]

[† *Harvey et al.* v. *Alexander et al.*, 1 Rand. 219, 234.]

therefore, in reason and justice could only bind the lands in that County: And, this is not contradicted by authority shewing, that judgments in England, entered in the Courts of General Jurisdiction over the whole nation, bind the lands throughout.

The act of 1772, however, changed the principle, and by permitting the *elegit* to run into other counties, is supposed at present, but not decided, to extend the lien into all the lands in the country; and that Hanbury had a right, in July, 1772, (that being the last day to which the executions were to be staid,) to sue out an *elegit*, on those judgments, into any other County.*

We are then to enquire, what he was to do, in order to preserve his lien?

He was either to issue his *elegit* within a year, which expired in July, 1773, or to enter upon the roll in England, or in the record book here, that he elected to charge the goods and half the lands; which would be equal to issuing the *elegit*. If he did neither, he might, on motion, be allowed to enter the election *nunc pro tunc;* but, in the latter case, if there had been an intervening purchaser, the motion would have been denied, upon the principles of relation:† which being a legal fiction, contrived to support justice, is never to be admitted to do any injury to a third person.

But the creditor here has taken no steps; he has sued out no execution; has made no election upon record. The judgments have long since expired; and no *scire facias* taken out to renew them. If he had done so, the *lien* would have been revived; but to operate prospectively, and not to have a retrospective effect, so as to avoid mesne alienations. [187]

So, that we can with great propriety say, in the language of Chief Baron Gilbert, that these judgments *overreach nothing;* and did not prevent the fair purchases of the sons in 1780, and 1786, unless the causes, assigned in the replication, should be a sufficient excuse for the delay.

Presuming, that if this constructive notice from dormant judgments will bind a purchaser at all, (contrary to what is said in 3 Bac. 645 and 646, that express notice is necessary,) it ought to be taken strictly and not extended by equity, we proceed to enquire into the facts.

[* See ROANE, J. in *Nimmo's Ex'r.* v. The *Com.*, 4 H. & M. 77.]

[† See *Avery* v. *Robinsons*, 4 Munf. 546.]

From July, 1772, to April, 1774, there is no excuse. This is 21 months, during which the judgments expired and the lien was at an end; if it could be revived by a *scire facias* on the judgment which has never been issued.

Admitting his excuses to be good, from April, 1774, to 1791, they ceased to operate from the latter period. At that time, if he had sued out his *scire facias*, there were lands in the hands of the devisees, which he might have charged in exoneration of the purchases. But by lying by, until 1797, he suffered them to be exhausted by other creditors, by bond (for the proceedings against them are all subsequent to 1791;) and now comes into equity to set up his lien against purchasers. This appears to me, to be contrary to every principle of law and equity.

The other judgment creditors are liable to the same objection, of not having kept their liens alive, by the means before stated.

[188] The decree of the Chancellor ought, therefore, to be reversed, so far as it concerns the conveyance to Richard Randolph the son, and he and those claiming under him are to hold the estate according to the deed: But the decree is to be affirmed as to the residue; with this reservation, as to the claim of Wayles' executors, that they are to be considered as bond creditors, standing in the place of Bevins, so far as may affect the distribution of assets remaining;* but not so, as to charge the executors with a *devastavit*, on account of payments, or judgments to simple contract creditors.

The decree was as follows:

"The Court is of opinion, that the deed from Richard Randolph the elder, to Richard the younger, was made upon good and valuable consideration, and was binding upon the creditors of the father, having been duly recorded within eight months from the twenty-first day of March, 1786; when the said deed was re-executed by sealing and delivery, and attested by new subscribing witnesses, and ought to be considered, to every intent and purpose, as a new deed of that date. That, although, the deeds for David Meade Randolph expressed the considerations to be for natural affection and advancement in

[* *Tinsley* v. *Anderson*, 3 Call, 333; *West* v. *Belches*, 5 Munf. 187, 194; *Wright* v. *Morley* 11 Ves. jun. 22; *Hayes* v. *Ward* et al. 4 Johns. Ch. R. 129; *Tompkins* v. *Mitchell*, 2 Rand. 429. And it *seems* that, a surety who pays off a specialty debt, is to be considered as a specialty creditor of his principal. *Robinson* v. *Wilson* et al. 2 Maddock's R. 434. The principles recognized in the preceding cases, were sanctioned by the Court of Appeals, in the recent case of *M'Mahon* et al. v. *Faucett* et al. (June 11, 1824,) 2 Rand. 514, 529, 530.]

life, he was, nevertheless, at liberty to aver and prove an additional consideration; and having established, by satisfactory proof, that the said deeds were made in consequence of a treaty of marriage between the fathers of him and his lady, he is to be considered as a *bona fide* purchaser of the estates. That the said purchasers are not to be affected by the supposed lien upon the lands from the judgments in the proceedings mentioned, such lien not existing at the time of their respective purchases, for the reasons stated in the decree of the said High Court of Chancery. That the appellees, executors of John Wayles, ought to stand in the place of James Bevins, and be considered as bond creditors, so far as [189] may affect the distribution of remaining assets; but not so as to charge the executors with a *devastavit* on account of payments or judgments to simple contract creditors; and that there is error in so much of the decree aforesaid, as declares the deed to Richard Randolph the son, void as to creditors, and directs a sale of the lands by commissioners, and the application of the money to the benefit of the appellees, and as to so much as subjects the money for which the land called Elams,* devised by Richard Randolph the father, to his son David M. Randolph, hath been sold by him, to the payment of the demand of the appellees, the Court being of opinion, that the money, for which the said land was sold, is only liable to the demand of the appellees, if it has not already been applied to the payment of debts which bound the devisee. Therefore, it is decreed and ordered, that so much of the said decree as is herein stated to be erroneous be reversed and annulled, that the bill be dismissed as to the appellants; that the residue of the said decree be affirmed, with the reservation herein before stated, as to the executors of John Wayles; and that the appellees pay to the appellants the costs expended in the prosecution of the appeal aforesaid here."

In the suit of *Beverley* v. *Eppes*, the decree was as follows:

"The Court is of opinion, that the said decree is erroneous. Therefore, it is decreed and ordered that the [190] same be reversed, &c.; and this Court proceeding to make such decree as the said High Court of Chancery ought to have

* The decree of the Court of Chancery as to this part of the case, was in the following words: "The money for which the land, called Elams, which was devised by Richard Randolph the father, to his son David Meade Randolph, hath been sold by him, is liable to the plaintiff's demands."

And the devise to David Meade Randolph was in the following words: "I give to my son David M. Randolph, and to his heirs forever, my tract of land called Elams, in the county of Chesterfield, containing by estimation one hundred and thirty acres."

pronounced, it is further decreed and ordered, that the deed from Richard Randolph the father, to Richard Randolph the son, mentioned in the proceedings, be established: And the cause is remanded to the said High Court of Chancery, for the appellants to proceed further therein for the compensation prayed in their bill; if they shall think proper."

TALIAFERRO *v.* MINOR.

Friday, October 18, 1799.

Receipts and payments by an administrator, ought not to be reduced to specie by the legal scale of depreciation; but should be stated in paper money.

The act of Assembly declares, that all payments made in paper money, in discharge of debts or contracts, should stand at their nominal amount, without being scaled; nor are such payments within the proviso empowering the Courts to vary the scale upon equitable circumstances.

[Administrator allowed 5 per cent. commissions on the amount of sales and debts received by himself, that allowance not being too great for selling and receiving, paying and accounting for the money, and risking the receipt of counterfeit paper.

Under what circumstances a decree between co-defendants is improper.*]

This was an appeal from a decree of the High Court of Chancery, where William Minor and Mildred his wife, and Lawrence Washington, executor, and Griffin Stith and Frances his wife, executrix of Thornton Washington, deceased, brought a bill, stating, that John Thornton died intestate in 1777, and that his personal estate devolved on his daughters, Mary, the wife of Woodford, Betty the wife of Taliaferro, on Thornton Washington his grandson, and his grand-daughter Mildred, the plaintiff. That Taliaferro and Woodford took administration on the estate; and that the plaintiffs William and Mildred have intermarried. The bill, therefore, prays an account and distribution of the personal estate, and for general relief.

[191] The answer of Taliaferro states, that many of the debts due the decedent, were paid in paper money. That

* A decree between co-defendants refused, *Toole* v. *Stephen*, 4 Leigh, 581; *Yerby* v. *Grigsby*, 9 Leigh, 387.

It may be rendered between co-defendants, where their respective rights and obligations are ascertained by the pleadings and proofs between the plaintiff and all the defendants. *Morris* et al. v. *Terrell*, 2 Rand. 6. *Templeman* v. *Fauntleroy*, 3 Rand. 434.

But it seems, not unless the plaintiff is entitled to a decree against both, or either, *Hubbard* v. *Goodwin*, 3 Leigh, 492, 522.