REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

NEWYORK:

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1814.

reversed, the injunction dissolved, and the bill dismissed with costs.

MARCH, 1811.

Coutts v. Greenhow.

Decree unanimously reversed, and bill dismissed.

Coutts and others *against* Greenhow.

Friday, June 7th.

UPON an appeal from the decree of the superior court of chancery for the *Richmond* district, in the case of *Greenhow* against *Coutts and others*, reported in 4 *H.* & *M.* 485.

1. A marriage settlement on a wife and her children by the husband, though born in *fornication*, is a conveyance to *purchasers for valuable consideration*, as to the *children* as well as the *wife*; and not void as to creditors; *no fraudulent intention being proved.*

Call, for the appellants. The decree is erroneous upon principle. Marriage of itself is a sufficient consideration for a settlement; not marriage and previous chastity. Property, also, is not necessary. If a man as rich as *Crœsus* marries a poor woman worth nothing, and makes a marriage settlement, it is good. Neither is the husband's being indebted of any consequence.

In another respect, marriage settlements differ from all other contracts. Although they contain mutual stipulations, and a failure on one side take place, a court of equity will decree in favour of the party failing;(*a*) "for a woman's fortune falling short of the husband's expectations is no reason for setting aside a marriage agreement."(*b*) The very circumstance of prior cohabitation has been considered effectual to support the agreement. In *Gray* v. *Mathias*, 5 *Ves.* jun. 286. a voluntary bond, during cohabitation, to a woman previously of a very loose life, was supported in equity; and in *Hill* v. *Spencer*, (*Amb.* 641.) the same thing was done in favour of a common prostitute, which is not the case here. In that case there was no circumstance of fraud; neither is there in this case; for fraud is denied, and there is not a tittle of proof. The argument in support of a voluntary bond applies, *à fortiori*, to a marriage contract; first, because the woman, by en-

2. If a mortgagee of lands (though not in his actual use or occupation) suffer them to be sold for taxes; *quære*, whether he shall be indemnified out of other property *bona fide conveyed*, by the mortgagor to a *mere volunteer*.

(*a*) 1 *Bridgm. Dig.* 209.
(*b*) 1 *Atk.* 159.

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tering into marriage, gives up many privileges; and, secondly, because marriage alone is a valuable consideration.

The conveyance here is good in law. Upon what ground can a court of equity take away the legal right. *Coutts's* motive was one of the most honourable that could be. He had long lived with his intended wife, and had no complaint against her that she had connexion with any other man; he had several children by her; the object of the marriage was to legitimate those children in conformity with the act of assembly. Where agreements are entered into to save the honour of a family, and are reasonable, a court of equity will, if possible, decree a performance.(*a*) The woman might have abandoned *Coutts*, and endeavoured to maintain herself and children in some other way; or she might have married another man with a better fortune; she gave up the chance of this, and, in honour and conscience, *Coutts* was bound to provide for her.(*b*)

(*a*) 1 *Atk.* 5. *Newland on Contracts*, 78.

(*b*) 2 *Wils.* 341 *Turner v. Vaughan.*

In *Eppes* v. *Randolph*, 2 *Call*, 183. the circumstance that rights of creditors were involved was decided to be unimportant. But it appears in evidence that *Coutts* retained other property sufficient to satisfy *Greenhow*, the creditor now suing; and his particular debt was secured by a mortgage upon land in *Kentucky*. As mortgagee, having the legal estate, it was his duty to have paid the taxes, and not to have suffered the land to be lost.

The decree is erroneous on another ground. The chancellor should not have disturbed the marriage settlement until the other property, not included in it, had been applied to satisfy *Greenhow's* claim. The case of *Galton* v. *Hancock*, 2 *Atk.* 430. is similar in principle to this.

As to the right of the children to the benefit of the settlement; it appears from *Tabb and others* v. *Archer and others*, 3 *H.* & *M.* 400. that a marriage settlement is good, even in favour of collateral relations.

Williams, for the appellee. I admit the general rule of

law that marriage is a sufficient consideration; but this court ought not to carry the doctrine farther than it has been carried in *England*. The court of equity will never, in favour of volunteers, disappoint the just expectation of creditors. In all the cases cited by Mr. *Call*, the question was between the holder of the estate and parties claiming under the agreement; in not one of those cases were the rights of a creditor in question.

According to the *British* authorities, children born before the marriage are but volunteers, and cannot be preferred to creditors. As between the husband and wife, and the issue *of the marriage*, the marriage is a *valuable* and sufficient consideration; but all other persons, in whose favour limitations may be made in marriage settlements, are mere volunteers.(*a*) No consideration for this settlement existed, except the marriage: and that was only on the part of the *wife*. The children are provided for, by *name*, and, at the date of the settlement, were not legitimated.

(*a*) *Sugden*, 434. 2 *Bro. Ch. Cas.* 148.

Does the act of assembly(*b*) change the doctrine? According to that act, the marriage must first take place, and *afterwards* the children must be recognised, to make them legitimate. It does not say they shall be considered as *children of the marriage*, and entitled, as such, to the benefit of a *settlement*, but only empowers them to take by *descent*, as being legitimated. Whether this woman *might* have had children *after* the marriage, is nothing to the purpose. It is sufficient that she had not. If there had been such other children, a different question might have been presented for discussion.

(*b*) *Rev. Code*, v. 1. p. 170. s. 19.

It is not necessary, in this case, to prove actual *fraud;* for a *voluntary* conveyance, even without fraud, is void against creditors; and *Coutts* was as much bound, "*in honour and conscience*," to pay his just debts, as to provide for the woman and children in question.

As to the *mortgage;* it contained a covenant, that *Greenhow* should not proceed to *foreclose* "*until after*

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the year 1804;" before which time the land was sold for taxes. The universal custom of this country is for the *mortgagor* to remain in possession. He cannot be turned out but by ejectment, or decree to foreclose. The *mortgagee* holds the deed only as a *security;* and it never has been decided that *he* is bound to pay the taxes. Surely, the person in possession ought to pay them. No person would take a mortgage if he was responsible for the taxes, though not in possession of the land.

Wickham, in reply. It was *Greenhow's* duty to have saved himself by means of the mortgage, if he could. According to the maxim "*sic utere tuo ut alienum non lædas*," he should have taken care of his own security, so as not to injure *us*. He is *plaintiff in equity*, and ought to have done equity. The *general* question, whether the mortgagee of lands ought to pay the taxes, need not be discussed in this case. The land was in a distant country, and not in the actual occupancy of *Coutts*. *Greenhow*, therefore, was equally bound to see that it was not forfeited for non-payment of taxes. But if *Coutts* was to blame, his wife and children, who are purchasers under the marriage settlement, are not responsible for his neglect. After the deed to them was executed, it was particularly incumbent upon *Greenhow* to have taken care to get satisfaction out of his mortgage.

As to the effect of the settlement; Mrs. *Coutts* had a good right to *dower:* why not, then, to the benefit of a *settlement?* Wherever a woman is entitled to dower she may take by *jointure*. I believe that, in fact, Mrs. *Coutts* made a bad bargain; the jointure secured to her by the deed, being worth less than her dower would have been. But the *plus*, or the *minus*, is a matter of no consequence. Mr. *Williams* admits the decree must be reversed as to *her*. Why not, then, as to her *children?*

In the case of children *born of the marriage*, no consideration moves from *them:* they claim only through

their mother, without any merit of their own. Yet whatever consideration flows from *her* enures to *their* benefit. The same reason applies to *her* children *born before the marriage.* They are equally meritorious, and she is equally bound to provide for them. Indeed, there are stronger motives, on her part, to provide for children *actually existing*, than for mere *potential* children.

There never was a decision, that a child, *begotten before* the marriage, and *born afterwards,* should lose the benefit of a settlement made after it was begotten. Yet such child is not *a child of the marriage.* The principle upon which such a settlement is held good in *England*, is, that every child *born in wedlock*, is *legitimate;* and this entitles such child to the benefit of the settlement. Under our act of assembly, (which makes children, *born before* the marriage, and *recognised* by their father, *legitimate*,) the same principle applies in favour of children born *before the marriage, if recognised.* All *such* children must, in this country, be considered *children of the marriage.* Recognition need not be *after* the marriage: if made *at any time*, it is good: and in this case they are recognised in the settlement itself.

In *Tabb and others* v. *Archer and others*, the collaterals could not have been considered *volunteers.* In that case the conveyance was defective; yet the court decreed the defect to be supplied. This they would not have done in favour of *mere volunteers.* The court must have regarded the consideration of the marriage as enuring in favour of the collaterals.

But even if the children *were volunteers*, the court will respect their rights; and, if there be other estate, will make the creditors take satisfaction out of that. There is no proof in this record that *Coutts* was insolvent, or that he had not other funds to satisfy creditors. The estate of which he died possessed was liable for his debts (whether in the hands of executor, heir, or de-

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visee) before the property in the hands of volunteers, claiming by deed, could be disturbed. Even a voluntary bond is preferred to a legacy.

The chancellor, therefore, should have directed an account of all the estate to be taken in the first place, and should not have subjected to *Greenhow's* claim the property mentioned in the settlement, until all the rest had been exhausted.

Thursday, *June* 20th. The judges pronounced their opinions.

(a) 2 *Call*, 183.

Judge COALTER. In the case of *Eppes* v. *Randolph*,(a) Judge PENDLETON, in delivering the opinion of the court, lays it down as a general doctrine, "That where a creditor takes no *specific lien*, he trusts his debtor upon the credit of his property generally, and on a confidence that he will not lessen 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 hands 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 creditor." The only question is, whether, in this case, as in that, the appellants are such fair purchasers for valuable consideration.

There can be no doubt whatever but that this deed is good, against creditors, as to the wife and the *issue of the marriage*. The only question is, whether the *children born before the marriage* are mere volunteers, and the deed, as to them, void against creditors.

As to this point, the case has some analogy to the case of a man, or woman, about to contract a second marriage, and making a provision for the children of a former. In such cases, very strong authority, I believe,

can be produced to prove that those children are not *mere volunteers.*(*a*)

This, however, is a stronger case. *These* are the children of *both* the contracting parties. They were bound as well by the ties of affection, as by those of morality and justice, not only to provide a comfortable support for their innocent offspring, but to raise them to that station in society in which the laws of their country, upon the marriage of their parents, places them: and, in this point of view, I cannot perceive the difference between the situation of *these* children, and a *child*, in *England*, who is born a week after marriage.

(*a*) 1 *Ves.* 216. 1 *Atk.* 265. and *Tubb and others* v. *Archer*, 3 *H. & M.* 399. and the cases there cited.

That child is not (*in rerum natura*) *a child of the marriage*, yet he is *so* by the laws of his country, and would be a purchaser for valuable consideration under a marriage settlement. In this case, too, the *marriage*, under the influence of *our* laws, makes *these* the legitimate children of the parties contracting. And, in this particular case, nothing but marriage was wanting; inasmuch as *Coutts* had always recognised them as *his* children; they bore *his* name, and are called *his children* in the marriage settlement.

I am therefore of opinion that they were not volunteers, but purchasers for a valuable consideration. But, it may be said, that a deed may be fraudulent and void under the statute, though made upon a good and meritorious consideration; nay, that even *valuable consideration* will not avail, unless it be also *bona fide*.(*b*) And to avoid the deed on this ground, it is charged in the bill, that *Coutts* conveyed *all his* property in trust, &c.

(*b*) 5 *Ves.* jun. 870. 3 *Co.* 80. *Twyne's Case*, and *Cowp.* 705. *Doe* v. *Routledge.*

The amended bill, however, admits that the party, on the day he gave his bond for the debt, executed a mortgage for a moiety of 7,000 acres of land in *Kentucky* to secure it.

If this land was not considered sufficient for that purpose, why did not the party *then* take additional security? But, in addition to this, *Coutts* died possessed of

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a considerable real estate in lots and lands in *Manchester* and *Henrico*, and his executor is now in pursuit of a large debt, which may be recovered.

I will not pretend to say how far the neglect of the creditor to pay the taxes on the lands in *Kentucky* might affect him, in a controversy with the mortgagor, were they the only parties before the court; but, surely, there is a wide difference between the case, as it would stand between those parties, and the case where the mortgagee suffers the mortgaged premises (which may have been a sufficient security) to become forfeited, and then comes into a court of equity to set aside the legal rights of the appellants; even admitting that they are mere volunteers.

In the case of *Eppes* v. *Randolph*, the court notice the improper conduct of the plaintiff in not proceeding, in time, to charge the lands in the hands of the devisees, *which he might have charged, in exoneration of the purchasers.*

In this case there are not only lands in the hands of devisees, which may *yet* be charged, but I am by no means certain that the *Kentucky* lands are entirely lost. The last sale made, probably in 1804, or 1805, (for it was for the taxes of 1802 and 1803,) was of 5,355 acres, which was sold to *Philip Buckner*. The patent was originally granted to him; and it is not improbable that he was the cotenant of the other moiety, equally bound to pay the taxes, and now holds the land in trust for the creditor, if *he* would take the trouble to look after it.

The decree must, therefore, be reversed; and, as the amended bill mentions the mortgage, and there is a prayer for general relief, the cause must be sent back, to be proceeded in to a foreclosure of the mortgage; with liberty to the plaintiff to amend his bill, so as to pursue the property devised into the hands of the devisees; unless, indeed, the consent of the parties, before the commissioner, (as stated in his report,) would have authorized a decree against them for a sale of the property devised,

and a foreclosure of the mortgage; in which case, this court might at once pronounce the decree.

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Judge CABELL. The appellants, claiming under the marriage settlement, must be considered either as volunteers, or as purchasers for a valuable consideration. Admitting them to be volunteers, the settlement will not be void, even as to creditors, unless the creditors cannot be otherwise satisfied. For, although the maxim is, that a man must be just before he is generous, yet an act that is merely generous, or voluntary, can be set aside in favour of those only who are injured by it. He who asks equity, must first do equity. *Greenhow* should have gone against the other estate of *Coutts* before he invaded the settlement; and even common justice required that he should resort to that fund which had been set apart, with his own consent, for the payment of his debt, before he disturbed arrangements made in favour of others, for whom *Coutts* was, at least, morally bound to provide. There is nothing like actual fraud proved in this case. It does not appear that *Coutts* owed any other debt than that to *Greenhow:* and for the payment of that debt, he conveyed, before the execution of the marriage settlement, property which is admitted to have been amply sufficient for the purpose. If that property has been lost in consequence of the non-payment of taxes, it will be a question for subsequent inquiry on whom that loss shall fall; at least, so far as relates to the payment of *Greenhow's* debt.

But the appellants are *purchasers for a valuable consideration;* and, as such, will hold the property settled on them, even against all creditors. So far as relates to Mrs. *Coutts*, it seems difficult to imagine on what ground a doubt could have been founded. That marriage is a valuable consideration seems to be so firmly established as a general principle, as to preclude the necessity of referring to authorities. I will, however, barely mention

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the case of *Eppes* v. *Randolph*. But the chancellor, in declaring the settlement void, must have gone, I presume, on the idea that the cohabitation of the parties, before the marriage, will take this case out of the general rule. This is the first time, so far as I have observed, that this exception has been contended for, either in this country or in *England*. Supported neither by authority, nor reason, it cannot be admitted. I shall not be the apologist of the conduct of the parties before their marriage. They have, however, legitimated the innocent offspring of their criminal intercourse, and have made to society all the atonement in their power; and I am unable to perceive any reason, in justification of marriage settlements generally, which does not apply to this in particular. If the consideration of the marriage be valid as to the *parties* to the marriage, it would undoubtedly be equally so, as to the *issue* of the marriage; for there has never been an attempt to distinguish between them. Nor does our act of assembly make any difference between children, born (as in this case) before the marriage, but recognised by the father, and those born after it. As far as relates to the *husband*, *they are the children of the marriage*; for, without the marriage, they would not be considered as his children. By the common law, a child *begotten before*, but *born after* marriage, is legitimate, and would certainly be entitled to the benefit of a settlement providing for the issue of the marriage; and our act of assembly has placed the children, in this case, on the same ground. I am therefore of opinion that the decree of the chancellor, so far as it affects the marriage settlement, is erroneous, and ought to be reversed; and that the cause be remanded for farther proceedings in relation to the property not contained in that settlement.

Judge BROOKE. It does not appear by any thing in the record, that it was the intention of the parties, by

executing the marriage settlement, to commit a fraud on the creditors of *Reuben Coutts*. On the contrary, it does not appear that there were any debts except the one, the payment of which was provided for by the mortgage of the *Kentucky* lands.

With respect to the want of personal inducement to the marriage, if it existed, as seems to be supposed by the chancellor, I am not prepared to say that fraud would be deducible from that circumstance. The case appears to me (with the exception of a single circumstance attending it) to present the naked question, whether a marriage settlement, intended to provide for the husband and wife and their children, is a valid contract against creditors. In the case of *Eppes* v. *Randolph*, on a question between creditors and those claiming under the marriage articles, it was decided by this court that the settlement was valid against creditors, and that those claiming under it were *purchasers*, and not *volunteers*; but it is relied on, in this case, that, though the settlement, as to the husband and *wife*, is valid, within the rule laid down in the foregoing case, yet that, as to the *children born before* the marriage, the consideration of the contract cannot enure to *them*, and that *they* must take as *volunteers*, and not as *purchasers*.

By the common law, base *begotten* children, if *not base born*, are legitimated by the marriage of the parents.

By the civil law, the marriage of the parents legitimated *base born* children. Our act of assembly on this subject has adopted the rule of the civil law, with this addition, that the children must be *recognised* by the father to be his. This was obviously to remove the objection of those who contended for the superiority of the common law rule over the rule of the civil law, (in this,) that, by the latter rule, the husband by the marriage was compelled to father children not acknowledged to be his own, and, of consequence, the motive to marry would not be so strong as under the rule of the common law.

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The case now under consideration is, completely, as to this point, within the act of assembly before mentioned: the children, though base born, are legitimated by the marriage of the parents, and the recognition of them, as his own, by the husband, both before and after the marriage. Upon this view of the subject, I cannot perceive the accuracy of that reasoning which would put them in a worse situation than that of those born after the marriage. It cannot be founded on any thing, in the moral condition of the parties, to invalidate the contract. It never has been contended, that I know of, that a *base begotten* child could not be provided for by marriage settlement, to the exclusion of creditors, by the principles of the common law. No case to that effect has been produced; and I can see no difference in reason between a provision for a base *begotten* child, legitimated by the marriage of the parents according to the rule of the common law, and for base-*born* children legitimated by the marriage of their parents under the rule of our law. The policy is the same, though, perhaps, not so strong in the last case as in the first.

The time of the marriage must be unimportant. Upon this point, then, I am of opinion the chancellor erred, and that the decree should be reversed, and this cause sent back to the court of chancery for further proceedings to be had in relation to the property of *Reuben Coutts*, not comprehended in the marriage settlement; the claim to which not having been charged in the bill, nor controverted in this case, I give no opinion respecting it.

Judge FLEMING. On an attentive examination of the record, it appears to me that the decree is erroneous, and that the bill ought to have been dismissed with costs. The decree is expressly founded on an opinion that the deed of marriage settlement, in the proceedings mentioned, was fraudulent as to the creditors of *Reuben Coutts*. To

show the grounds of a contrary opinion, and my reasons for thinking the bill ought to have been dismissed, I must take a short view of the facts and circumstances as they appear on the record.

Reuben Coutts being indebted to *Hicks & Campbell*, on the 29th of *August*, 1799, executed to them three notes, or single bills, under seal, for 154*l.* 8*s.* 4*d.* each, payable respectively, on the first days of *September*, 1800, 1801, and 1802, with interest from the dates; which bills were immediately assigned to *George Greenhow*, with recourse on the assignors, in case of insolvency. On the same day *Coutts* executed a mortgage to *George Greenhow*, the assignee of the bills, for a moiety of a tract of 7,000 acres of land, on *Locust Creek*, north fork of *Licking*, in the state of *Kentucky*, which mortgage was duly recorded in the court of appeals in the state of *Kentucky*, the 29th of *June*, 1800. In the years 1802 and 1803, *Greenhow* instituted suits, and obtained judgments against *Coutts* on those bills; and issued writs of *fieri facias* thereon, which were returned "*no effects*," and, in *July*, 1806, those judgments were assigned to *James Greenhow*, the complainant in this suit: who, in his original bill, charges that *Coutts*, being indebted, not only to *George Greenhow* and *himself*, but also to various other persons, on the 10th of *September*, 1799, executed to *Samuel M'Craw* and others a conveyance of his whole estate, real and personal, under the *guise and pretence* of marriage articles, &c. when it appears by the record that *Coutts* was not indebted to him, but by the assignment of the judgment aforesaid, which took place near seven years after the date of the marriage settlement. In his amended bill, he charges that the said *Reuben Coutts* executed a mortgage to *George Greenhow* upon some lands, alleged to belong to him in the state of *Kentucky*, to secure the payment of the debt; and further charges, that *Coutts* executed the mortgage, *merely as a colour to justify the fraud, then meditated, of conveying away all the property he had;* that being informed of it, he made inquiry respecting

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the same, (having understood *that* to be the only objection to paying the debt out of the pretended trust estate,) and has been informed, believes, and therefore charges, that *Reuben Coutts* having neglected to pay the taxes on the said land, it was sold for the same, *about the time of executing* the said mortgage, of which the said *Coutts* had notice; and *George Greenhow*, in his answer to this amended bill, says, "that some time after the execution of the said mortgage, *he*, upon inquiry, discovered that the lands *had* been sold for the payment of taxes; and understood the sale happened *some time in, or about, the year* 1799: and, finding the mortgage afforded him no security, he instituted the suits on the single bills, and recovered the judgments referred to by the plaintiff." It seems that both the plaintiff and himself (whose duty it was to pay particular attention to the important subject) had been most egregiously misinformed, from whatever source their information might have been derived; for it appears, by a certificate of *George Madison*, auditor of public accounts in the state of *Kentucky*, that, on the 11th day of *November*, 1802, (upwards of three years after the date of the mortgage,) 750 acres, part of the said land, were sold, for the tax of 1800, to *Samuel C. Hall* and *Anthony Foster*, for the sum of 8 dollars and 75 cents. At an after date, (but when is not stated in the certificate,) 875 acres more were sold (supposed to be for the tax of 1801) to *J. & L. Henderson & Co.* for the sum of 7 dollars and 81 1-2 cents. And 5,355 acres, the remainder of said undivided 7,000 acres of land, were sold for the taxes of 1802 and 1803, to *Philip Buckner*, (who, it seems, was equally interested with *Coutts* in the said 7,000 acres,) for the sum of 19 dollars and 31 cents. The precise time of this latter sale is not stated; but it could not have been before the year 1804; (long after the judgment had been obtained on the notes;) for the sales of lands in *Kentucky* for taxes, are never made sooner than *October* next succeeding the year after

which they become due. Thus did *George Greenhow*, the mortgagee, (in whom the legal title to the land was vested, no interest remaining in *Coutts*, except his equity of redemption on paying the debt with interest thereon,) suffer this valuable tract of land (a moiety of 7,000 acres) to be sold for about half a cent per acre, when less than 36 dollars, divided into four equal annual payments, would have saved the whole undivided 7,000 acres! And *James Greenhow*, the assignee of the judgments, (standing on no higher ground than *George Greenhow* occupied,) comes into a court of *equity* to annul, and set aside, as *fraudulent*, a marriage contract, fairly and *bona fide* made, upon one of the most important and valuable considerations known in civil society. *Coutts*, after having lived many years with *Jane New*, and having several children by her, born out of wedlock, took the laudable resolution to marry her; and, on the 10th of *September*, 1799, (12 days after the date of the notes and mortgage,) executed the marriage settlement, in the proceedings mentioned; and on the 17th day of the same month, intermarried with the said *Jane New*; and thereby legitimated his said children, five in number; which I consider a very laudable and meritorious transaction, especially as he had given ample security for the debt, now sought to be made out of the trust estate, or marriage settlement; which security was lost, as I conceive, through the gross negligence of the mortgagee, as it may be fairly presumed that the taxes of the land had been regularly paid, down to the date of the mortgage; it appearing by the record, that the *first* sale of the land for taxes, was for the tax of 1800, though not made until the 11th day of *November*, 1802. Admitting, however, that the mortgagee was no way responsible for the loss of the mortgaged land, the deed of marriage settlement, *bona fide* made, on a valuable consideration, was, nevertheless, valid, both in law and equity, and ought to be supported. See the decree in the case of *Eppes* v.

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Randolph, 2 *Call*, 188. where the deeds to *Richard Randoph*, jun. and to *David Meade Randolph* were sustained, upon much slighter foundations. It seems, by the report of the commissioner, that *Coutts* was possessed of considerable property, not comprised in the marriage settlement; which he afterwards disposed of by his will; (but whether acquired before, or after the settlement, does not appear;) and which was neither charged in the bill, nor noticed in either of the answers; but may perhaps be liable to satisfy *Greenhow's* debt. On this point, however, I give no opinion, as there may be other superior claims upon it. My opinion, upon the whole, is, that the decree be reversed, and the bill dismissed with costs; but without prejudice to any future suit the appellee may be advised to bring for the recovery of his debt, to be satisfied out of other property than that comprised in the marriage settlement. But a majority of the court being of opinion that the cause ought to be remanded for further proceedings to be had therein, the following entry (which has been seen and approved by Judge ROANE)(1) is to be made.

"THE COURT is of opinion that the decree is erroneous in adjudging the deed of trust, or marriage settlement in the proceedings mentioned, to be fraudulent as to the creditors of *Reuben Coutts*, and in ordering the slaves and personal estate mentioned in the said deed, and in the commissioner's report of the 18th of *September*, 1810, to be sold to pay to the plaintiff his debt and costs, also in the proceedings mentioned; this court being of opinion that the said deed of settlement, having been *bona fide* made on a valuable consideration, is valid, and ought to be sustained, and that no part of the estate therein comprised is subject to the debts of the said *Reuben Coutts*."

Decree reversed, and cause remanded for further proceedings.

(1) Note. Judge ROANE was one of the court which heard the cause argued, but was not present when the opinions were delivered.