# REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

# COURT OF APPEALS

OF

# VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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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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## ANDERSON *v.* ANDERSON.

*Monday, November* 11, 1799.

The power of the Court of Chancery, over an appeal to this Court, ceases on the first day of the next term, after the decree was pronounced.

And, therefore, if security be given in the vacation, that Court cannot disallow the appeal, because the appellant does not give other security.

Marriage settlement must be recorded within eight months, or it will be void against prior creditors of the husband.*

This was an appeal from a decree of the High Court of Chancery, in a suit brought by Jane Anderson, by her next friend, against George Anderson and others. The bill states, that the plaintiff, before her marriage with George Anderson, was entitled to the remainder in certain slaves after the death of her mother, Rebecca Tucker. That, in the year 1787, she agreed to marry the said George Anderson, who was, at the time, indebted beyond his fortune: but, that circumstance was unknown to the plaintiff. That her friends thinking it advisable, a marriage contract, to secure her property from his creditors, was agreed upon; and the friends of the plaintiff recommended that Col. George Nicholas, an eminent practitioner of the law, should draw it; to which, the said George Anderson objected, because he said his brother, who was a lawyer, would draw it without expense. This, the plaintiff and her friends, who confided in the said George, could not refuse; and, accordingly, he was requested to get his brother to draw proper articles for securing the property. That, a short time before the marriage, the said George produced a paper, which he said was such an one as would [199] answer the intended purpose; but the plaintiff's friends were not satisfied, and an addition was made: which they (who were ignorant of the law, and no counsel could be had) supposed to be sufficient. That the marriage afterwards took effect; and the plaintiff has since discovered, that the debts

* *Scott and wife* v. *Gibbon, &c.*, 5 Mun. 86, is rather *contra*. For there, a marriage settlement, *executed before*, but acknowledged and *recorded after* the marriage, (and *validly* acknowledged by the husband alone,) though, within the time required by law, was held good against the husband's prior creditors. And

A woman, just before marriage, with the intended husband's consent, conveys her personal property to her brother by an absolute deed, which is not duly recorded, and the husband retains possession of the goods. Yet held, the deed is valid against his creditors: for the statute of frauds refers to creditors of the *grantor* only. *Land* v. *Jeffries*, 5 Rand. 211.

See also *Pierce* v. *Turner*, 5 Cra. 154, and 2 Cond. R. 219, abridged in note, p. 207, *post*.

of the said George, contracted *before marriage*, are more than sufficient to swallow up the whole estate. That the marriage contract has been supposed insufficient to protect the property *from former creditors*, and that the brother of the said George has since declared, he intended it should be insufficient, *the creditors being chiefly his relations*. That the creditors have taken the slaves in execution; although they did not trust him on the faith of the same. That the intention of the plaintiff and her friends was to secure the property to herself and children. The bill, therefore, prays that the said George and his creditors may be made defendants; that the creditors may be injoined; that the slaves may be settled agreeable to the marriage contract; and that the plaintiff may have general relief.

The answer of George Anderson admits the plaintiff's right to the remainder in the slaves: That the marriage contract was proposed in order to protect the property from the creditors of the defendant; and that Colonel Nicholas should draw it. That the defendant objected, and proposed his brother should draw it; but that this was not done with any improper motive. That he applied to his brother, and requested him to draw the contract according to the agreement with the plaintiff and her friends. That his brother drew a writing, which he delivered to the defendant as sufficient; but Colonel Coles, with whom the plaintiff then lived, after shewing it to the plaintiff and her mother, objected to its sufficiency; and, thereupon, the addition was made. That he believes his brother [200] was actuated by unworthy motives, but this was not known or suspected by the defendant until after the marriage.

The creditors say they know nothing of the fraud, if there was any.

The depositions prove, that the debts existed *prior to the marriage*, that a marriage contract was stipulated for; and Anderson's brother says he wrote one. That he considered it immaterial at the time, in what manner it was drawn, as the said George informed him it was only to satisfy the plaintiff's mother, and that it would be destroyed afterwards.

The marriage contract is in the words following: "This indenture made the 24th of March, 1787, between George Anderson of the city of Richmond of the one part and Jane Tucker of the county of Albemarle and parish of St. Ann of the other part witnesseth, that whereas a marriage is about to be solemnized between the said parties, and for the greater ease, satisfaction and assurance of the said Jane, the said George doth hereby agree on his part, that in case he should

have no issue on the body of the said Jane, and in case the said Jane should survive the said George, that then and in that case the said George doth agree to relinquish and renounce all claims and demand to all the slaves now in possession of the said Jane or all the slaves that are now her property, that may accrue to him the said George by the union aforesaid, and by the laws of the land, and the said George doth further agree that in case he should leave no issue by the said Jane and in case she should survive him, that then and in that case, the said Jane may dispose of by will, deed or any other conveyance whatever, all the slaves now in her possession with their future increase or that are now her property to any person or persons as she may think fit. In witness whereof, I have hereunto set my hand and affixed my seal the day and year above written. [201]

GEORGE ANDERSON.

*Signed, sealed and delivered in the presence of*
JOHN COLES.

It is also agreed by the said George Anderson, that none of the slaves above mentioned or that may accrue to him by the union before named or their future increase shall be given to any other than the issue of the said Jane, or shall they or any of them be sold on any account whatever, without the consent of the said Jane.

GEORGE ANDERSON."

JOHN COLES.

At Albemarle September Court, 1788, it was acknowledged by George Anderson, and ordered to be recorded; and at Albemarle May Court, 1791, it was proved by John Coles the witness thereto..

The Court of Chancery on the 5th of June, 1794, dismissed the bill; and the plaintiff prayed an appeal to this Court, which was allowed on her giving bond within two months.* This she failed to do; and afterwards, that is to say, on the 26th of August, 1794, petitioned the Chancellor out of Court to be allowed to give bond and prosecute the appeal, as she had been prevented by accident from giving it before. The Chancellor allowed the petition, and the plaintiff gave bond; but at the September term following, the Court of Chancery set aside the allowance of the appeal, unless the plaintiff by the 26th of that month gave such security as should be ap-

[*See *Stealy* v. *Jackson*, 1 Rand. 413; *Broaddus* v. *Turner*, 2 Rand. 5.]

proved of by the Court. In March, 1797, the plaintiff having failed to give the last mentioned security, the Court of Chancery allowed her to give bond within two months, if the Court
[202] of Appeals should be of opinion that the Court of Chancery then had power to grant the appeal.

RANDOLPH, for the appellant,

Made two points. 1. That the appeal was regularly depending in this Court. 2. That the fraud would protect the estate for the benefit of the plaintiff.

As to the first:

After the appeal had once been allowed, the Court of Chancery had no further control over it; and the situation of the appellant will induce the Court, who are not confined to any limited time for allowing the security, to extend the period farther in this, than ordinary cases.

As to the second:

If George Anderson only were concerned, there could be no question about it; for, it is clear that relief would be given: But, his creditors ought not to be in a better situation than himself, as they can only have the same rights which he has. Nor will the failure to record, within the eight months, help their case; because it was owing to George Anderson himself, whose neglect was a fraud, which ought not to injure the rights of the wife.

WICKHAM, contra.

The act of Assembly is express, that the deed not having been recorded within the eight months, is void against the creditors. So that it is as if there had been no settlement: But if there had been none, then the law would have vested the property in the wife; and as the deed was not recorded, the presumption was, that it had vested by the intermarriage. The alleged fraud can make no difference. For, if one man gets possession of another's estate, and sells to a third person without notice, it is good: And the case, in effect, is the same here. It makes no difference whether the debts originated before or after the marriage; for, as the settlement was not recorded within the eight months, the act would equally affect them in either case.

[203] WARDEN, on the same side. The settlement is extremely defective. For, proper trusts and limitations to preserve the estate are not inserted: and upon that ground also, the creditors must prevail.

MARSHALL, on the same side. If any fraud has been committed, the creditors were not concerned in it; and, therefore, it cannot be objected against them. It is no objection to say, that they did not trust Anderson upon the credit of this property; for, the act includes them, nevertheless, as it renders the deed void against all creditors. In which respect the act makes a difference between creditors and purchasers. Of course, if the creditors have been guilty of no fraud, it follows that the settlement cannot operate against them; but they have the same rights which they would have had, if the settlement had not been made.

RANDOLPH, in reply.

Recording the deed in September, 1788, was sufficient by relation. That is the principle with regard to the enrolment of deeds of bargain and sale in England. By the act of [Oct.] 1785, [c. 62, 12 Stat. Larg. 154,] for regulating conveyances, property, moving for the covenantor only, is contemplated; and, therefore, that law does not apply to the present case, where the property belonged to the wife. For, the covenants here are all on the part of the husband. The word *creditors*, in the act, is to be understood with an exception of the wife's interest. It is used more strongly in the statute of Elizabeth, than in our act, and yet it has always been taken there in a sense according to the rule in the Bankrupt laws, which excepts the rights of the wife, although the terms in those laws are stronger than the words of our act. [*Brown* v. *Jones*,] 1 Atk. 190; [*Tyrrell* v. *Hope*,] 2 Atk. 562; [*Darley* v. *Darley*] 3 Atk. 399. It was the culpable neglect of the husband, to whom it was confided, that prevented the deed from being recorded within eight months; and that was a fraud, which will take the case out of the operation of the statute. For, the Court will supply the omission to record, [*Taylor* v. *Wheeler*,] 2 Vern. 564. Geo. Anderson [204] was a trustee for his wife; whose interest was prevented, by the contract from vesting in him; and, therefore, his creditors can have no right. [*Pawlet* v. *Deleval*,] 2 Ves. sen. 665. He could not, by any act of his, bar her equity. [*Pope* v. *Crenshaw*,] 4 Bro. C. C. 326; [*Bosvil* v. *Brander*,] 1 P. Wms. 459. Of course, as the creditors attempt to charge the estate merely by the operation of law, it is competent to the wife to rebut that operation, by shewing the fraud and its effects in preventing the proper steps from being taken for her security.

WICKHAM.

As the deed was not recorded, the creditors relied, that this was the property of George Anderson, and gave faith to it accordingly. So that, if he be a trustee for the wife, still, the deed, not having been recorded, is void against the creditors; for, whether trustee or not, it will make no difference in that respect, as he has the legal estate in him, and the deed is void by the act of Assembly. The arguments drawn from the statute of Elizabeth are irrelevant; because, here, was no intention to defraud. But, if there was, and the creditors were not concerned in it, they would not be affected by it. There is no foundation for the distinction taken between the property of the wife and that of the husband; for, settlements are more frequently made of the property of the wife, than that of the husband; and the construction contended for on the other side would repeal the law. As the deed contained no settlement of lands, recording it in Albermarle Court would not have been sufficient; for, that is expressly against the words of the act of Assembly.

RANDOLPH.

The deed was executed in Albemarle county, and, therefore, that was the proper Court to record it in.

*Cur. adv. vult.*

LYONS, Judge, after stating the case, delivered the resolution of the Court as follows:

[205] The first question is, whether the appeal is properly brought up?

We are of opinion, that the power of the Court of Chancery ceased on the 10th of September, 1794; when the next term after the making of the decree commenced; and, from that period, that it belonged to this Court only to determine on the sufficiency of the security; as the cause was then here, and the Court of Chancery had no longer any control over it. For, the authority of that Court, according to the true construction of the Act of Assembly, expired with the vacation, which followed the decree; and, therefore, its subsequent proceedings were altogether void. Of course, the appeal having been granted in August, 1794, and security given according to law, it must stand.

The next question is, whether a Court of Equity can supply the omission and defect in not recording the marriage articles, within eight months, according to the act of Assembly for regulating conveyances?

Chancellors in England have gone great lengths in supplying defects in conveyances, as appears from the case of *Taylor* v. *Wheeler*, 2 Vern. 564, and other cases cited at the bar; but, we do not know what provisions or reservations there might have been in the act of Parliament or custom referred to in those cases, or in the Bankrupt laws of that country alluded to in the argument.

The act of Assembly, for regulating conveyances in this State, was made to protect creditors and purchasers against secret trusts and latent titles; and for that purpose only: Since it contains a proviso, that the deed, although not proved within eight months, shall be binding between the parties, as it was at common law; and the proviso is an exception which proves the rule, that is to say, that the deed shall not bind any but the parties themselves.

But when a statute says expressly, that a conveyance shall not bind, can a Court of Equity say that it shall? [206] Surely, that would be to repeal the act; and, therefore, equity will not interpose in such cases, notwithstanding accident or unavoidable necessity. For, the power of a statute is so great, that it has been said, that even infants would have been bound by the act of limitations, if there had been no exception with regard to them, contained in the statute itself.

It is true, that there are no negative words, in the act of Assembly, to exclude the jurisdiction of a Court of Equity in the present case. But, a Court of Equity must consult the intention of the Legislature as well as Courts of Law; and when the Legislature have determined a matter with its circumstances, a Court of Equity cannot intermeddle, or relieve against the express provisions of the statute.

Fraud, however, is still left open for a Court of Equity to act upon; and if a creditor or purchaser has been guilty of a fraud, by preventing the deed from being recorded, or otherwise, Equity may still relieve; as no person ought to take advantage of his fraud and obtain the benefit of the statute by undue means. For, the act was intended only to secure fair and honest creditors and purchasers; and not to protect the fraud and circumvention of either of them.

But, as the appellees, in this case, do not appear to have been parties or privies to any fraud, nor are even charged with it in the bill, they certainly are entitled to the full benefit of the act for securing their just debts; and the marriage agreement cannot now be set up in Equity to defeat them: Especially, as no excuse, for keeping up the marriage articles so long, is even alledged; if any could be admitted.

Rebecca Tucker does not shew any title to the slaves she claims; and, if she has any, she may recover at law.

[207] The other qestions made are not now necessary to be determined: and, therefore, they are reserved for future discussion.

The decree of the Court of Chancery is to be affirmed.*

[* On the 14th Feb. 1797, R. Kemner, being a *feme sole*, and seised and possessed, in her own right, of certain land and slaves, conveyed the same by deed, in consideration of an intended marriage between herself and Charles Turner, to trustees, to be held in trust for the use of herself, until the marriage should be solemnized, and from and after thereof, to the use of herself and the said Chs. Turner, and the *longest liver of them*, and from and after their deaths, to the use of *her heirs*. The deed purports to be an indenture tripartite, in which Charles Turner is named as the second party, and as such only, executes the deed, merely for the purpose, as it seems, of testifying his privity and consent.

Soon after the execution of the deed, (in same month) the contemplated marriage took place: whereupon the trustees put the land and *slaves*, into the possession of Turner, who continued in possession thereof with the approbation of the trustees until Dec. 1802, when he died.

The deed was not duly recorded; and Mrs. Turner having remained in possession of the land and slaves, claiming exclusive property therein, and right of possesion with the assent of her trustees, the creditors of Turner instituted a suit for their debts against Mrs. Turner, as executrix *in her own wrong*, of her late husband. And the question was, as to the effect of this deed. The Court held (WASHINGTON, J. delivering their opinion,) that, although the deed was not recorded, it protected the property from the creditors of the husband: That the words "*all creditors and subsequent purchasers*," in the 4th sec. act of Virg. passed, Dec. 13, 1792. R. C. 157, ed. 1803, [and which is a re-enactment of act 1785,] only included creditors of, and subsequent purchasers from *the grantor*. "The Court has felt some difficulty, said J. WASHINGTON, in consequence of a decision of the Court of Appeals, in the case of *Anderson* v. *Anderson*; but it is believed that the judgment in that case was perfectly correct, let the particular point which occurs in this cause be settled one way or the other. In that case, the contract was not only executory and rendered void, at law, by the subsequent intermarriage of the parties to the contract, but it was, at the time when the slaves were taken in execution, perfectly contingent, whether the wife could ever claim any interest in them, in opposition to persons deriving title under the husband. For, if the husband should have survived the wife, or if they should have had issue, the absolute legal estate of the husband, gained by the intermarriage, would have remained unaffected by the deed. There was, therefore, no reason why the creditors of the husband should be prevented from receiving satisfaction of their debts out of his legal estate in the slaves, because it was subject to an equitable contingent interest in the wife, which might never become effectual. A Court of Equity might well say to her, as you have no remedy at law, for a breach of the contract by the husband, in consequence of not having interposed trustees to protect your rights, and have omitted to record the deed by which creditors and subsequent purchasers might be defrauded, we will not now decree you a specific performance against creditors who have law and equity on their side." *Pierce* v *Turner*, 5 Cranch, 154. 2 condensed Rep. 219.

See *Scott et ux.*, v. *Gibbon et al.* 5 Munf. 86.