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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.

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TINSLEY *v.* ANDERSON.

Wednesday, November 10th, 1802.

1. At the instance of a *living* insolvent debtor's surety and creditor, who alleges that the debtor's property is encumbered by mortgages and judgments to an amount less than its value, which yet obstruct his redress at law; a Court of Equity will take the estate in hand, have it sold, allow the encumbering and other creditors (whether by bond, or by simple contract,) to come in and prove their claims before a commissioner, and adjust the priorities and distribute the proceeds among them.*
2. Some of the principles on which a living insolvent debtor's estate will be applied in payment of his debts, by a Court of Equity.
3. In apportioning an insolvent's estate among his creditors, &c. by a Court of Equity, sureties will be placed in the situation of the creditors they *have* paid, or *are bound* to pay.†
4. A bond dated more than twenty years before it is sued upon, or exhibited for payment in a judicial proceeding, is to be taken, *prima facie*, as paid.‡

Nelson Anderson brought a suit in the High Court of Chancery against various persons having mortgages from Richard Anderson, upon lands, slaves, and personal property. The bill charges, that the said Richard Anderson hath incumbered his whole estate to the defendants; that the property in mortgage is more than sufficient to pay the debts due the mortgagees, and praying that the same may be sold, the mortgagees paid, and that out of the balance a sum for which the plaintiff is bound, as security for the said Richard Anderson, may

* See Judge Green's questioning of the general principle acted upon by the Court in this case— *W. Green's Appendix to Wythe's Reports*, p. 430, B. B. Minor's Edition.

† Accordant, *Eppes, &c.* v. *Randolph*, 2 Call, 125.

If one bind *himself alone* by bond for another, who does not join in the bond; yet the obligor, on paying the bond, will be substituted, in Equity, in place of the creditor, and have every preference that the creditor was entitled to against the real debtor. *Enders, &c.* v. *Brune*, 4 Rand. 438.

Other cases of *substitution*— *Watts, &c.* v. *Kinney and wife*, 3 Leigh, 272; *Ford's adm'r.* v. *Thornton*, id. 695; *Robinson, &c.* v. *Sherman and others*, 2 Gratt. 178; *Leake* v. *Ferguson*, 2 Gratt. 419.

Cases where substitution was *refused*—*Douglass* v. *Fagg*, 8 Leigh, 588; *Givens, &c.* v. *Nelson's ex'or. and others*, 10 Leigh, 382; and *Brown* v. *Glasscock's adm'r.*, 1 Rob. 461.

‡ What will rebut a presumption of payment, arising from lapse of time, see *Eustace* v. *Gaskins*, 1 Wash. 190; *Payne's ex'or.* v. *Dudley*, id. 198.

The obligee's having endorsed a credit on a bond within twenty years after it was due, is evidence for him, to rebut the presumption of entire payment. *Dabney's ex'rs.* v. *Dabney's adm'r.*, 2 Rob. 622.

By Code of 1849, p. 591, ¿5, suits on bonds of executors, sheriffs, and other fiduciaries and public officers, are barred by *ten* years; and on *any other sealed contract*, by *twenty* years.

be paid, the plaintiff being unable to obtain redress any other way.

The answer of Richard Anderson, filed September, 1796, states, that it will be highly ruinous to him, if, in order to pay the plaintiff, the mortgage property should be sold for satisfaction of so many debts at once. That he has a reasonable expectation of raising the money before the next year's crop is finished, and is desirous that the plaintiff should be paid by a sale at that time, if not paid before.

Several other creditors filed bills, and were admitted parties plaintiffs, praying leave to prove their demands [330] before the commissioner, and to have them paid; offering to pay their parts of the costs. Among these was Thomas Tinsley, administrator of Charles Tinsley, who claimed by judgments, secured by a trust deed not duly recorded.

The debts consisted of mortgages, judgments, (some of which had been satisfied out of the effects of the securities thereto, but those securities had never been repaid by Anderson,) bonds and open accounts.

In March, 1791, the Court of Chancery decreed a sale, and in March, 1799, ordered the proceeds to be applied, first to discharge the mortgages and judgments according to priority, and the residue among the other creditors proportionally, and the Commissioner was ordered to take an account. In March, 1800, the distribution was ordered to be carried into effect. And, thereupon, Tinsley, adm'r., appealed to this Court.

WICKHAM, for the appellant.

Three objections to the decree occur in this case. 1. That the report is not certain enough to enable the Commissioners to proceed. 2. That, as there are separate mortgages and specific liens, they ought to be considered separately, and not blended together; but each lien ought to be satisfied according to its date. Therefore, the Commissioner ought to have reported the date of each judgment and mortgage. 3. That securities are suffered to take preference of specific liens. Thus Woodson, without any lien, is preferred to judgment creditors; although it was decided, in *Eppes* v. *Randolph*, 2 Call, 125, that an expired judgment constituted no lien, and although the contest here was not between the debtor and the creditor only, but between the latter and other creditors, having equal equity: in which case they ought to be permitted to retain their legal advantages. Of course, Tinsley having a legal right, ought to take preference in the distribution.

DUVAL, contra.

[331] There is no impropriety in the direction, for the first mortgage is to Anderson; and of course, according to the appellant's own principles, it ought to be preferred. The security, having paid off the judgment, ought to be substituted in the room of the creditor, and to take his preference.

Cur. adv. vult.

PENDLETON, President. The Court doubt whether judgment creditors, or sureties, *who are to be placed in their situation*, are to be paid by priority, or rateably out of the general fund? But they doubt also on a more important question, whether in this case, where equity is applied to, to distribute the funds of a living debtor, the legal preference of debts according to dignity, in distributing legal assets of the dead, ought to give the rule, or that of Chancery in the distribution of equitable assets?

On these points, we wish to hear counsel.

WICKHAM. They are not to be considered as equitable assets; but as property generally, subject to legal consequences. Therefore, the first mortgages are to have preference over all other claims, and the judgments next; even against subsequent mortgages. Of judgment creditors, those prior in time have the preference where they can sue Elegits; but where they cannot, they are to be postponed to those who can. *Eppes* v. *Randolph*, 2 Call, 125. After these two classes are satisfied, bond and all other creditors, without liens, are to be paid *pro rata*. 1 Pow. on Mortg. 163. The mortgages not recorded fall within the latter class; because, against creditors, they are void as mortgages. With respect to the securities, they will have the advantage where the mortgages and judgments remain unsatisfied; but not where they have been discharged. Several of the creditors are defendants, and are not asking [332] any favor of the Court; they therefore cannot be bereft of any legal advantage which they may have.

DUVAL. Where the bond creditor comes as plaintiff to ask equity, he will be postponed to mortgages and judgments; because he has no lien. [*Bristol* v. *Hungerford*,] 2 Vern. 525. The sureties are to stand in the room of the judgment creditors, and to have the same liens, as they might compel an assignment of the judgments. [*Parsons et al.* v. *Briddock et al.*] 2 Vern. 608; [*Eppes* v. *Randolph*,] 2 Call, 125.

WICKHAM. The difference between this case and that of *Eppes* v. *Randolph*, is, that in this some of the judgments have been completely satisfied; but in that, the bond was not discharged; for there was only a decree in Chancery, which had not been fully paid. So that Randolph's representatives might have been sued upon the bond itself.

PER CUR. The Court is of opinion that the decree aforesaid is erroneous in this, that it directs the Commissioners of sale to assign bonds to such creditors who had incumbrances upon the lands by mortgages, and creditors by judgments allowing prior satisfaction to prior demands, leaving to the said Commissioners the power of judging what was the force of the different incumbrances and their operation upon the different funds, which should have been decided by the Court, and specific sums decreed to each claimant, to be paid out of his appropriate fund; that the claims ought to be adjusted upon the following principles, that is to say: The mortgage to William Anderson is legally proved; but he appearing to be fully indemnified, except as to twenty shillings, that sum, together with the money paid by John Woodson, another surety, to Charles Thompson, in part of his judgment, ought to be first paid out of the money for which the land conveyed by the said deed was sold; and the residue of that sale to go into the general fund. That the mortgage to John Fox being for personals only, is of no consequence, but he is to [333] be considered as in the place of William Johnston, who is a creditor by judgments. All the other conveyances stated in the record, not being proved and recorded according to law, are void as to creditors, and those meant to be benefited thereby are to be considered as specialty creditors at large, except where they have judgments so as to be arranged in that class. That all the creditors, by judgment or decrees, ought to be paid out of the general fund, according to the priority of recovery, with this reservation, that when a prior creditor shall not have received his money of sureties, or sued out execution on his judgment within a year, he shall yield priority to subsequent judgments, on which executions shall have been so issued, or the money received of sureties. In both instances of the money paid by sureties, as well as in all other instances, sureties ought to be placed in the situation of the creditors they shall have paid, or be bound to pay.* That the remaining funds, if any, shall be distributed, *pro rata*, among the

[**Eppes* v. *Randolph*, 2 Call, 188, and cases there cited.]

several creditors who have no lien upon the lands. And that the bond to Dorothy Johnston appearing to be dated above twenty years before it was exhibited, is to be presumed paid, and rejected, unless William Johnston, having notice, shall give to the Court of Chancery satisfactory reasons to avoid the said presumption.* The decree, therefore, is to be reversed, and the Court proceeding to make such decree as the High Court of Chancery ought to have pronounced, decrees, that the said Court of Chancery, after having directed a Commissioner to state the several claims of the parties, according to the principles of this decree, to direct specific sums to be paid to each claimant, and that the costs in the said Court be first paid out of the general fund.

[**Eustace* v. *Gaskins*, 1 Wash. 188; *Hillary* v. *Waller*, 12 Ves. jun., 266.]