REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)
PRINTED AND PUBLISHED BY I. RILEY.
1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. Volume II. By William W. Hening and Wil- "liam Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie- "tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

Freelands *against* Royall and Anderson, Executors of Clarke.

Wednesday, May 25.

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced in *May*, 1803, by which an injunction obtained by the appellees against the appellants was made perpetual.

Under what circumstances an *unconditional* judgment confessed by an executor, in an action brought on the bond of his testator, bars his relief in equity.

John Clarke, jun. the testator of the appellees being indebted to *James and Archibald Freeland* in the sum of 1,136*l.* 1*s.* 10 3-4*d.* by bond, dated the first of *September*, 1790, executed to them a mortgage, on a tract of land, bearing date the 4th of *March*, 1791, to secure the payment of the same debt. In 1792 he died.

The answer of *one* joint partner, in the *name of both*, deemed sufficient, the complainant having filed a general replication, and taken no steps to compel an answer from the other partner.

A bill was filed in the High Court of Chancery to foreclose the equity of redemption in the mortgaged premises; and while that suit was still depending, an action of debt was brought in the County Court of *Prince Edward*, against the executors, on the bond. Several pleas were filed by the defendants: such as prior judgments, assets to a certain amount, and no assets *ultra*, and finally the plea of *fully administered*. On the 18th of *May*, 1795, these pleas were withdrawn by consent, and an *unconditional* judgment confessed. On the next day, judgments *when assets* were also confessed by them, in seven other actions of debt.

These confessions of judgment were the result of a compromise between the plaintiffs' counsel and the defendants, after conference with their counsel.

A decree having been obtained in the year 1797, to foreclose the mortgage, the lands were sold, and purchased by the *Freelands* for 400*l.* There still remaining a considerable balance due on the judgment of *May*, 1795, (on which no execution had issued, in consequence of the compromise, one of the terms of which was, that the judgment was to be held up till the mortgaged lands were sold and credited on it,) the plaintiffs revived their judgment by *scire facias*, in 1798; and afterwards instituted a suit,

MAY, 1808.

Freelands v. Royall and Anderson.

on the executors' bond, to subject them to a judgment for a *devastavit*.

While the last mentioned suit was depending, the executors exhibited their bill in the High Court of Chancery, stating among other things, the bond and mortgage executed by their testator to the *Freelands*; the prosecution of suits thereon, and the judgment confessed in *May*, 1795; but expressly charge, that when the suit was about to be tried, they with their attorney, and the attorney for the plaintiffs, agreed that the pleas should be relinquished, and a judgment entered, "*when assets*;" as a confirmation of which they refer to several other similar judgments confessed by them during the same term; and further aver that, having fully administered, they would on no other consideration have assented to a relinquishment of those pleas; since it must be apparent from the account of their administration, (which was annexed, *and was passed by the County Court of Prince Edward in* 1797, stating a balance of upwards of twenty-six pounds due them,) that they could not have been otherwise than conscious of having fully administered, and since it was also manifest that they must have been impressed with a conviction that the mortgaged lands would have overreached the balance due to the *Freelands*, who, they allege, offered their testator 1,000*l.* for those lands, (as one of them had been informed by him,) and which lands were well worth a thousand or twelve hundred pounds, the latter of which prices had been actually offered, on three years' credit. They further state that their counsel always told them that the judgment of the *Freelands* was one *when assets*.

The prayer of the bill was for an injunction to the suit on the executorial bond, and for general relief.

Process appears to have been served on *both* the *Freelands*, who are named defendants, but *one* only (*Archibald*) answers in the name of *both*, styling himself sole representative of *James and Archibald Freeland*: no further proceedings were had against the other.

In the answer of *Archibald Freeland*, it is stated that the defendants neither believe nor admit that their attorney ever agreed to accept a confession of judgment "*when assets*;" on the contrary, that he refused to accept such judgment, but insisted on a *general* confession without any qualification whatever; because he was prepared to prove assets, and defeat the pleas of the complainants, who, conscious thereof, consented to give an *unconditional* judgment. That, as to the other confessions of judgments *when assets*, it was part of the agreement; for their attorney being also attorney for the plaintiffs in the other suits, and knowing that these defendants were entitled to priority, from the circumstance of having first commenced their action which was then ready for trial, he would not consent to give a preference to those who instituted their suits at a later period, but insisted that the suit of the defendants should be first satisfied. They charge that the complainants (as appears from their own accounts, the justice of which they do not admit) had paid considerable sums of money to others after the rendition of their judgment, which they had no right to do, till that was satisfied; nor do they admit that the executors were under any mistake as to the effect of the judgment, which was confessed; the balance of which, after deducting the price of the land at 400*l.* (fairly purchased by the defendants as they allege,) they are now justly entitled to. They do not admit that they ever, either directly or indirectly, offered any sum for the land prior to the sale under the decree; nor do they believe that any person would have given more than the sum of 400*l.* for it at that time. To this answer there was a general replication.

The deposition of *Creed Taylor*, Esq. counsel for the *Freelands*, states, that after this bond was put into his hands for the purpose of bringing suit thereon, several other persons applied to him to bring suits against the said executors on the bonds or notes of their testator; that he informed them of his having brought suit for the *Free-*

MAY, 1808.
Freelands v. Royall and Anderson.

lands, for a very large debt, which must have a preference, and that if any thing could be obtained after satisfying their demand, he would endeavour to get it; and on these conditions he brought the other suits. That the whole of these suits were depending on various issues of law and fact, when at *May* Court, 1795, (at which time, he believed, there was also a suit between the *Freelands* and the executors of *Clarke* and others, in the High Court of Chancery, to foreclose a mortgage on some lands for the same debt,) he proposed to the counsel for the executors, that if he would withdraw his pleas in the case of the *Freelands*, and confess an *unconditional* judgment, he would, as he was authorised, take a judgment, *when assets*, in the other cases: that, after a consultation between the executors and their counsel they all returned into Court, and it was agreed that if the counsel for *Freelands* would take an *unconditional* judgment by confession in their case, and let it rest till the mortgaged land could be sold and credited on it, and would take judgments in all the other cases, *when assets*, that they would do so, and put an end to any further contest; to which proposal the counsel for the plaintiffs acceded; and, to prevent any clashing or confusion in the entry of the judgments, that of *Freelands* was to be entered on the 18th, and the others on the 19th of the month. The deponent believed from what then passed between him and the defendants and their counsel, that it was well understood that the executors were confessing a judgment to the *Freelands* which would bind them for the amount, and that the said executors had, as they stated themselves, sufficient assets to pay the same, *after receiving just credits with the aid of the mortgaged land.* Such were the impressions of the counsel for the *Freelands*, or he never would have acceded to the proposals of the executors, with which event they appeared to be well pleased, and seemed, from their conversation, to entertain no doubt but they should have assets to meet the balance, *if the land sold tolerably well.* That the judgment so confessed to the *Free-*

MAY, 1808.

Freelands v. Royall and Anderson.

lands remained without being enforced till some time after the mortgaged lands were sold ; and the executors not having adjusted the balance, it was renewed by *scire facias*, and an execution issued, which was returned " no " effects."

The Chancellor, on a motion to dissolve the injunction, referred the accounts to a Master Commissioner, who reported a balance in favour of the executors of 59*l.* 14*s.* 0 3-4*d.* but upon the allowance of some exceptions taken to the report, (the most considerable of which were for three hogsheads of tobacco carried to the *Manchester* inspection, the expenses of which were charged to the estate, but the tobacco not credited,) they fell in debt 67*l.* 13*s.* 4 1-2*d.* as to so much of which sum as remained after deducting the complainants' costs, the injunction was dissolved, and perpetuated for the residue. From which decree the *Freelands* appealed to this Court.

Call, for the appellants. The judgment at law is obligatory on the executors, and operates as an *estoppel.* The record proves that an *unconditional* judgment was entered by *consent.* A party can never come into Court and ask to falsify a record. He may indeed allege a collateral matter, that by fraud and a combination between others, a judgment was procured against him ; but he never can be received to say that a record is not true.(*a*) But if it be true that the *estoppel* is not in the way, still the appellees cannot prove the facts upon which they rely. They state as a *fact* that the judgment was to have been *conditional ;* the proof states directly the reverse.

(*a*) 10 *Vin.* 240. 245. tit. " Estoppel."

It is positively proved that the executors knew the judgment was to be unconditional ; they said they had sufficient assets with the aid of the mortgaged lands to pay it ; and it is evident that they knew the effect of the judgment, that it would bind them to pay the amount. In consequence of this confession, they obtained a stay of execution, which was of itself a sufficient consideration to make the judgments obligatory. Under this view of the case,

MAY, 1808.

Freelands v. Royall and Anderson.

the Chancellor ought not to have directed an account; but should have dissolved the injunction, and dismissed the bill.

Randolph, for the appellees. Whatever may be the rigour of the *black letter* doctrine of *estoppels*, it is impossible to look at this case, without perceiving strong grounds for the interposition of a Court of Equity. To the honour of our country, the strict law of *England* in relation to the liability of executors has been relaxed. Whenever an executor is found *honestly* to have administered the assets, he will not be made personally liable for a *devastavit*. Executors and administrators, uninformed in the subtilties of the law, may often be unjustly involved in ruin from a too rigid adherence to the strict rules of the common law. The executors in this case are called on to pay nearly 2,000 dollars, for which they have received no consideration. On the ground of equity—on a full and fair administration of the estate of their testator, they expect relief.

If the cause had gone to trial on the pleas filed by the executors, they must have been exonera ted. Can it be believed then that they would have been willing to waive all the advantages of those pleas, and confess a judgment which would bind them and their estates, if they had known the effect of that judgment? This would have been the most illustrious instance of temporary insanity ever manifested. They were evidently labouring under a *mistake*, and when they agreed to confess a judgment, they had no idea that it would bind them further than for the assets of their testator *when they should come to their hands.*

The fact as stated by the respectable witness, will not be disputed. But even from the evidence of that witness himself, it is apparent that they calculated on assets *with the aid of the mortgaged land.* This land, with a thousand or twelve hundred pounds, was sacrificed for four hundred pounds, and purchased by the mortgagees. Is it equitable that innocent executors shall be losers, from a miscalcula-

tion of the amount of the assets, when they have fairly administered all that ever came to their hands ?

It is admitted by Mr. *Call*, that the doctrine of estoppels does not apply to cases of *fraud ;* but is not *mistake* equally a ground for relief in equity ?

Call, in reply. As to the hardship of the case, an executor is always the best judge whether there are assets or not ; and if he will, rather than hazard a trial on his plea, confess a judgment, where is the hardship ? In this case, the executors voluntarily confessed a judgment, well knowing the effect of it. Who can say what would have been the verdict of the Jury ? Who can say but that they might have found the executors guilty of a *devastavit ?* It is a fair conclusion, from their own conduct, that they were conscious they could not stand a trial by their peers. They might have confessed a judgment to the *Freelands* to prevent others from pursuing them for a *devastavit* after the way had been opened.

Estoppels are as effectual in equity as at law. A Court of equity may relieve against collateral matters, but it cannot say that an *absolute* and *unconditional* judgment was not given, when it is evident from the record that *such judgment was given.*

Friday, June 3. The Judges delivered their opinions.

Judge TUCKER. The bill charges that *Clarke* mortgaged certain lands worth 1,000*l.* or 1,200*l.* to the *Freelands* to secure a debt for which he had also given them his bond ; that after *Clarke's* death they brought suit against his executors, the complainants, on the bond ; that they employed an attorney to defend the suit, to which they filed several pleas, and in particular the plea of *plene administravérunt.* That when the suit was about to be tried, they with their attorney, and the attorney for the plaintiffs, agreed that the pleas should be relinquished, and a judgment entered *when assets ;* and aver, that having

MAY, 1808.

Freelands v. Royall and Anderson.

fully administered, they would on no other consideration have relinquished those pleas; that they were also impressed with a conviction that the mortgaged lands would have overreached the balance due to the *Freelands*, who, they allege, offered their testator (as they were informed by him) 1,000*l.* for those lands; which, however, have since been sold under a decree of foreclosure, and purchased by the mortgagees themselves for 400*l.*; that the *Freelands* have since instituted a suit upon their executorial bond against them for a *devastavit*, and pray an injunction, which was granted.

Process appears to have been served on both the *Freelands*, who are named defendants: but one only answers in the name of both, styling himself *sole representative of J. and A. Freeland.* No further proceedings were had against the other. *A. F.* insists that their attorney refused to accept a confession of judgment, when assets, but insisted on a general confession without any qualification whatever, as he was prepared to prove assets; and does not admit that the executors were under any mistake on that occasion; nor that the appellants or either of them, either directly or indirectly, made any offer for the land prior to the sale. To this answer the plaintiffs replied generally. Mr. *Taylor* the attorney for the *Freelands*, deposes that the confession of judgment was entertered unconditionally in consequence of some proposals made by him to the attorney of the executors, who consulted his clients, who thereupon came into Court, to the deponent, when it was expressly agreed by them in presence of their attorney, that if the deponent as attorney for the *Freelands* would take an unconditional judgment by confession, and let *it rest* until the mortgaged land could be sold, and credited on it, and take judgments in several other suits, in which he was the attorney prosecuting "*when assets*," they, the executors, would then do so, and put an end to any further contest; that he believes they very well understood that they were confessing a judgment which would bind them for the amount thereof; and

that they had, as they stated, sufficient assets to pay, after receiving *just credits, with the aid of the mortgaged lands ;* that he well remembers that such were his impressions at the time, or he would not have acceded to their proposals, for which they appeared well pleased, and appeared also from their conversation to have no doubt, but *if the land sold tolerably well*, that there would be assets enough to meet the balance. The Chancellor perpetuated the injunction as to all but about 67*l.* appearing to be due from them, upon an account stated, to their testator's estate. From which decree the *Freelands* have appealed.

I have felt in myself, a strong disposition to affirm the principle upon which the Chancellor must have proceeded in pronouncing his decree in this cause, by relieving the defendants against the effect of the judgment confessed by them, unconditionally, beyond the assets of their testator, in their hands to be administered. If the real value of the lands were equal to what they state in their bill, it was a reasonable expectation which they cherished that it would either overreach the debt for which the lands were mortgaged, or leave but a small balance to be paid out of the assets in their hands, if the lands should sell even tolerably well ; and that they would have enough to meet the deficiency. The creditors having themselves become the purchasers of the land, if it were in fact worth more than double as much as they gave for it, as is charged in the bill, it seems to me against conscience that they should insist on retaining all the advantages they have acquired by purchasing the lands far under their value, and by an unconditional judgment confessed under such reasonable expectations, as I have before stated. The proof of the value of the lands, it must be confessed, is not made out. On the other hand, one of the defendants, who, possibly, might have been the one that made the offer to the testator of the appellees, never answered the bill ; nor does any reason appear why he has not answered it. Perhaps the Chancellor erred in proceeding to make a final decree without an answer from that defendant. The de-

MAY, 1808.
Freelands v. Royall and Anderson.

cree which he has pronounced, is not altogether such a one as I could have supposed might have been proper; although I think the principle a good one, that under all the circumstances of this case, the executors ought to be relieved from a judgment confessed under mistake, or misapprehension. There are a number of cases in the books, where relief has been granted upon this ground, though not one perhaps, that goes quite to the extent of the present, if the executors really meant to confess judgment *generally*. They swear in their bill that they had no such intention; their attorney is deceased; but were he living, I do not know that his testimony would be admissible, or if admissible, could avail them. Upon the whole, I think the merits of this cause are not so fully before this Court, as that we can pronounce any decree upon them: by sending it back to the Court of Chancery, the answer of *James Freeland* may be got at, and such further light may, perhaps, be thrown upon the merits, that the Court of Chancery may, without injustice to either party, relieve the appellees from the penalties of a judgment against them for a *devastavit*.

There is another feature in the cause which may render such a step proper: relief is prayed against a prosecution against them upon their executors' bond. It appears that a judgment at law was confessed in that suit, a few days after the injunction was awarded, not only by the executors but by their *securities* also. The *latter* cannot be charged beyond the assets which came to the hands of the executors.(*a*) Supposing the executors liable out of their own estates for the full amount of the debt claimed, the securities are still entitled to protection against the judgment obtained against them for all that may remain due above the assets in the executors' hands. Ought not leave to be given to them to become parties to this suit, that a final decree may be made in the cause, which may terminate the whole contest, instead of leaving them exposed to a judgment, against which they can obtain relief only by instituting a new suit, and perhaps, going over the whole ground again?

(*a*) *L. V.* edit. 1794, ch. 92. sect. 23. p. 165.

Upon the whole, I think the present decree ought to be set aside, and the cause remanded to the Court of Chancery, for the answer of *James Freeland*, and such further proceedings to be had as may enable that Court to pronounce a final decree upon the merits, both in respect to the present parties, and all others who may be interested therein.

Judge ROANE. The answer in this case denies the allegation in the bill respecting the terms on which the judgment was confessed; and states, that that confession was *unqualified*. This answer is entirely corroborated and supported by the testimony of Mr. *Taylor*. Unless, therefore, we say that it is not competent to an executor to admit assets and confess an unqualified judgment, we cannot interfere in the case. Besides; this confession was founded on a consideration, namely, the *gaining time* for the payment of the money, as stated in the deposition of the witness. If the executors were under any *mistake* touching the state of the assets, it is not shewn that the appellants were any how contributing to produce it: but it is not shewn that there was any *mistake* in the business, and the sale of the land may have been affected by a fall in value after the time of the judgment, or by other extraneous circumstances. Upon the whole, although this is, *possibly*, a *hard* case, it is also a *naked* one.

As to the answer of *James Freeland*, it does not appear by this record that he is still alive: and if it did, it is believed to be very usual for the *acting* partner of a mercantile house, to answer for the firm in cases of this kind. The answer of the other partner, stating himself to be the acting partner was accepted and *replied to* by the appellees, and the case went to trial without objection. It was indeed set down for hearing on the motion of the appellants; but this, I presume, is always the case in injunction causes, as the defendants are in pursuit of their money. But if it were regular now to require the answer of the *other* defendant, *cui bono* shall it be required? The ap-

MAY, 1808.
Freelands v. Royall and Anderson.

pellees indeed state that *some years back*, the appellants offered one thousand pounds for the land, which offer was not accepted; and the principle is clear, that an offer not accepted is as if it was never made. If that answer, therefore, were now before us, and came fully up to the charge in the bill, it would prove nothing to arrest the judgment; it would not prove (according to the appellees' own statement,) that the appellants were any how aiding to deceive the appellees touching the value of the land. If that value turned out on the sale to be less than was counted upon, it arose from causes not imputable to the appellants, who are fair purchasers thereof at public auction.

On the ground then that under present circumstances it would not be regular to arrest this cause for want of that answer; and if it were, that (as far as we can judge from the bill itself) it would not vary the decision ultimately; I am of opinion to reject this idea, and that the bill ought to be DISMISSED.

Judge FLEMING. This appears to be a hard case on the part of the appellees; but it seems to have arisen from their own miscalculation, as to the sufficiency of the assets in their hands to discharge the debt, and not from a misconception of the effect of their waiving their plea of fully administered, and confessing an unconditional judgment; with this only qualification, that it should rest until the mortgaged land should be sold, and the amount of the sale be credited on the same.

The affidavit of Mr. *Taylor* is too pointed and explicit to leave a doubt on my mind but that the executors, acting by the advice of able counsel, thoroughly understood that if the assets in their hands (including what was to arise from the mortgaged premises,) should prove insufficient to satisfy the debt, they made themselves liable for the deficiency out of their own estates.

As to the charge in the bill that 1,000*l.* had been offered for the land by the appellants, to the testator in his life-

time, there is no proof of the fact; and if there had been it could not have availed them; because an offer made and rejected, is not binding on either party. And there is no suggestion that there was any thing unfair in the sale of the land, and therefore the circumstance of the mortgagees' having become the purchasers, cannot with propriety be complained of.

As to the circumstance of *James Freeland* (one of the partners) not having answered the bill, it might have been good ground for arresting the proceedings until he should have done so; but as no exception was taken on that account, they cannot avail themselves of it in this Court.

I am therefore of opinion that the decree is erroneous, and ought to be reversed, and the appellants allowed to take the benefit of their judgment on the *devastavit*. If the securities in the executors' bond be charged beyond the assets, they may obtain relief in equity.

By the opinion of a majority of the Court, (absent Judge LYONS,) the decree of the Superior Court of Chancery REVERSED; the injunction of the appellees dissolved, and their bill dismissed.

GENERAL RULE.—*Friday, June* 3, 1808. After the end of this present term all causes depending in this Court shall be called in the order in which they stand upon the docket; and such as may be ready for hearing pursuant to the former rules of this Court, shall, unless good cause be shewn to the contrary, be heard in the same order in which they stand upon the docket, until the whole shall be gone through: and the causes which shall be passed over, shall, unless for some very special reason appearing to the Court, be put at the end of the docket of each term.