REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME III.

BY WILLIAM MUNFORD.

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OCTOBER, 1811.

Foster and wife, and others v. Crenshaw's executors.

bond was mere *surplusage*, being not necessary to be stated in the declaration.(*a*)

No counsel appeared for the defendant.

Saturday, January 9th, 1813, the president pronounced the opinion of the Court, that the obligation, on which this suit was brought, not appearing to be an original credit of the intestate, *John M'Murray*, but taken and made payable to the testator of the plaintiff, and on which he could have maintained an action, in the *debet* and *detinet*, as for his own credit, that right of action, therefore, devolved on the plaintiff, as his executor, who was, therefore, competent to maintain this suit. The judgments of both the Courts below were, therefore, reversed, and judgment entered for the plaintiff upon the bond.

(*a*) 1 *Wash.* 259. *Peter* v. *Cocke.*

Argued *Nov.* 23d, 1810, and reargued *Sept.* 20th, 1811.

Foster and wife, and others *against* Crenshaw's executors.

THE appellees filed their bill in the late high Court of chancery, against the executors and devisees of *John Shelton*, deceased; (praying, also, that the representatives of *John Pendleton*, deceased, "*if it should appear*

1. Lands devised (without any *specific* charge by will or deed) ought not to be charged in equity to satisfy a bond debt of the devisor, until the personal estate is exhausted, including a remainder in slaves, expectant upon an estate for the life of the testator's widow.

2. A judgment at law being obtained against one of two obligors, in a joint and several bond, and no proceedings to enforce it appearing, a Court of equity ought not to charge the lands of the other obligor, in possession of his devisees, without having made the obligor, against whom the judgment was rendered, or his representatives, parties to the suit.

3. When lands, held by several devises in the same will, are charged in equity to satisfy a bond debt of the devisor, the decree should be against the lands of *all* the devisees, (or the money received, or claimed, in lieu thereof,) in ratable proportions, and not against the land of one only, with liberty to that one to sue the others for contribution.

necessary," should be made defendants;) setting forth that on the 25th day of *November*, 1782, *John Shelton* and *John Pendleton*, bound themselves and their heirs, to *Charles Crenshaw*, in the penal sum of 2,000*l.* in gold or silver, conditioned for the delivery of certain negro slaves; that a suit being instituted thereon in the district of *Henrico*, against the said *Shelton* and *Pendleton*, judgment was rendered *against the said Pendleton*, at the *September* term, in the year 1799, for 659*l.* 1*s.* 6*d.*, by way of damages; that the said suit *abated as to the said Shelton*, who departed this life some time in the year 1798, having, by his last will, devised and bequeathed a considerable real and personal estate to *Anne Shelton*, his widow, and to his children and co-heirs, *Walter*, *John*, *Alexander*, *Turner*, *Harriet*, and *Edwin*, *Shelton*, and appointed the said *Anne Shelton* his executrix, and *Henry Toller*, *James Parker*, and *Edward Winston*, executors; " that all, *or some*, of the said executors, but especially the said *Anne Shelton*, *have taken possession of the personal estate of the said John Shelton, deceased*, and pretend that there is not a sufficiency thereof for the discharge of the bond aforesaid; that they are endeavouring to throw the burthen of the said bond on the estate of the said *John Pendleton*, who is, also, dead, and whose property is greatly embarrassed; that the said *Anne Shelton has wilfully sold the property of her said testator at an under value*, and caused it to be purchased for the benefit of herself, or of her children; and that there are several tracts of land belonging to the devisees aforesaid, under the last will aforesaid, which are liable to the bond aforesaid; it being, in truth, *immaterial*, as to the satisfaction thereof, *whether the personal estate be, or be not, sufficient.*" The prayer of the bill, therefore, was, that the executors of *John Shelton* be compelled to discharge the bond out of the assets in their hands, or account for the same, so as not to obstruct or delay the direct remedy against the lands; that a statement be rendered, by the devisees, of the various

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tracts or parcels of land devised to them; and that the said lands *be sold* for the satisfaction of the bond aforesaid.

Anne Shelton, (who afterwards became the wife of the appellant, *Foster*,) by her answer, averred, that she had never qualified as executrix; that no part of the personal estate of the testator ever came to her hands, except a small quantity of household furniture, and some few plantation utensils, (among which was a wheat fan,) and a stock of 30 or 40 hogs, all of which (except the wheat fan, which she sold for eight dollars, and the furniture, which remained in her possession) were sold since the death of the testator, *under executions* against his property. She further stated, that a number of negroes, belonging to the said *John Shelton*, were sold during his lifetime, under execution, and purchased, on the 20th of *September*, 1797, for her benefit, and paid for by *Stephen Southall*, with money which he held as her trustee under the will of her father, *Turner Southall*; that, at the same time, the said *Stephen* purchased for her six beds and furniture, which were sold to satisfy taxes and fees due from the said *John Shelton*; that, in his lifetime, the said *John Shelton* conveyed to a trustee, for her benefit, during her life, certain negroes, (some of whom were part of those before mentioned,) with their future increase, *in consideration of her relinquishing her right of dower in certain tracts of land*, as mentioned in the conveyance, which was exhibited; that, on the 3d of *November*, 1798, (after his death,) a negro woman was sold to satisfy an execution in favour of *Nathaniel Pope*, and sundry other specified articles were sold to satisfy an execution in favour of *Cochran's* executors, which executions were issued and levied during his life; that the property so sold was purchased by *James* and *John Parkers*, who suffered this defendant to take it, upon her advancing, out of her own funds, the money they had given for it; that the only real property which this defendant held under the will of the said *John Shelton*,

was a tract of land in *Hanover* county, devised to her for life, "on her paying her son, *Walter Shelton*, fifteen pounds annually, to the amount of 210*l.*;" which sum she has fully paid, except about 40*l.*, and she considered it unjust that this tract of land should be sold, and herself deprived of a provision made for her by the will of her husband.

Henry Toller and *Edward Winston*, by their answers, denied that they had ever qualified as executors, or intermeddled with the estate. No answer was filed by *James Parker*, and no proceedings against him appear in the record, except a decree *nisi*, which does not appear to have been served.

The separate answer of *Walter Shelton* described the lands devised to him by the will of *John Shelton*, as consisting of the reversion in the plantation devised to Mrs. *Shelton* for life, and one hundred acres in *Goochland* county; both of which he had sold (the reversion to Mrs. *Shelton*, and the land in *Goochland* to *Matthew Anderson*) before the institution of this suit, and before he knew that the claim of the complainants existed.

The plaintiffs replied, generally, to the answer filed, and sundry depositions were taken, which, in substance, confirmed the statements in the answers. In *June*, 1801, the cause was set for hearing, "*as to the defendants, Anne Shelton and Henry Toller, on the plaintiffs' motion.*"

In *October*, 1803, *Parke Street*, on motion by counsel, was admitted a party complainant in the cause, and filed his bill, praying that satisfaction might be decreed to him out of the estate of *John Shelton*, in the hands of the defendants, for three bonds, conditioned each for the payment of twenty-five pounds, assigned to him by *John Trevillian*, the 24th of *May*, 1800; but without stating whether the *heirs were bound* in those bonds, or not; and no copies of them were inserted in the record.

To this bill an answer was filed by Mrs. *Foster*, late Mrs. *Shelton*, stating several circumstances which induced her to believe that those bonds were discharged

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before their assignment. On this subject no depositions were taken on either side, and no replication to this answer appears in the record.

On the 3d of *June*, 1805, the cause (which abated as to *James Parker*, by his death) came on to be "*partly*" heard on the bills, answers, exhibits, and examinations of witnesses; and Chancellor WYTHE decreed, "that, towards satisfaction of the plaintiffs' demand, the defendant, *Anne Shelton*, pay eight dollars, admitted by her to have been received by herself for a wheat fan belonging to the said *John Shelton's* goods; that so much of the land, called ————, in the county of *Hanover*, as may be sufficient to satisfy the plaintiffs, *Crenshaw and wife, one hundred and sixty pounds*,* with interest thereon, at the rate of five per centum, from the 25th day of *February*, 1783, be sold at public auction, subject to the defendant, *Anne Shelton's*, right of dower in the premises, after the expiration of one hundred and fifty days from this time, and advertising the day and place of the sale, for three weeks, in some *Richmond* newspaper, for ready money, to be deposited in the bank of *Virginia* until the further order of the Court; and ———— were appointed commissioners for that purpose, who, or any two of whom, might act, and report their proceedings to the Court; liberty being reserved to the plaintiff, *Parke Street*, to resort to the Court for a just dividend of the money so to be raised, if it shall be found necessary; and to the defendant, *Anne Shelton*, and to the defendants, devisees of the said *John Shelton*, to require of the

* Note. Two affidavits, bearing date the 21st of *May*, 1805, are inserted in the transcript of the record, from which it appears that *Foster* and wife claimed a considerable credit against the sum recovered at law by *Crenshaw's Executors*; but in what manner it became reduced to 160*l.* does not appear. The bond executed by *Shelton* and *Pendleton* was joint and several, and conditioned to be discharged *by payment by Shelton*. It was, therefore, contended, in the argument, that, as *Shelton* was the *principal*, and *Pendleton* only the *security*, a Court of equity ought to give relief against the estate of the former, without the necessity of making the representatives of the latter parties to the suit.

defendant, *Walter Shelton*, who sold the land in *Goochland*, the proportion which he ought to pay of the plaintiffs' demands; and also the plaintiffs, *if they shall think proper*, to institute an inquiry into the liability of the slaves, in the answer of the said *Anne Shelton* mentioned, or any of them, to the claims of the plaintiffs."

From this decree the defendants, *Foster* and wife, appealed.

Nicholas, for the appellants.

Peyton Randolph and *Wickham*, for the appellees.

The ---- day of *January*, 1813, the following opinion of this Court was pronounced.

"The Court not deciding, at present, upon a principle of such general importance, as that under which the land in the proceedings mentioned was decreed to be *sold*, to discharge the claim of the appellees, (a principle deserving great consideration, and which, in event, may not be necessary to be decided in this cause,) is of opinion that the decree in question is erroneous, in the following particulars: 1st. In proceeding to sell or charge the land now in question, without having directed an account to be taken of all the goods, chattels, rights, and credits of *John Shelton*, deceased, including the remainder in the slaves conveyed in trust, for the use of his wife for life, by the deed among the exhibits; all of which should be first applied to pay the claim in controversy, before the lands of the said *John Shelton* should be charged therewith; liberty being reserved to the appellees, or to any of the devisees, other than the female appellant, to institute an inquiry into her title to the slaves claimed in and by her answer in the proceedings contained." "2dly. In so decreeing, without having proceeded against the executor of *James Parker*, if he left any, or shown that the said *James Parker* never qualified as the executor of *John Shelton*, deceased. 3dly. In having proceeded so to de-

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cree, without having made the representatives of *John Pendleton* parties to the suit, and regularly proceeded against them, who, or the said *John Pendleton*, in his lifetime, may have already paid the debt in question, or a part thereof; and whose assistance is, consequently, necessary, to prevent the appellants, possibly, from being compelled to pay the said debt a second time. 4thly. In having charged the appellants, as devisees aforesaid, on the ground only of a *judgment* obtained against the said *John Pendleton*; whereas, according to the decision in the case of *Mason's devisees* v. *Peter's administrators*,(a) a judgment, *even* against the *executors* of the said *John Shelton*, would not have been sufficient for that purpose. 5thly. In having charged the lands of the appellee, Mrs. *Foster*, *so ely*; whereas, according to the decision last mentioned, the lands of *all* the devisees, or the money received or claimed in lieu thereof, ought to have borne their ratable proportion of the debt claimed; and *that* by a direct decree in the first instance, instead of turning the appellants round to seek a contribution by another suit; and in not holding (if any decree at all were to be made affecting the devisees) the said *William Shelton* ratably liable, as aforesaid, on account of the money received for the *Goochland* lands, and for the annuity upon, and one sixth part of the *reversionary* interest in, the *Hanover* land, in discharge of all the said lands, and the interests acquired therein, by the respective purchasers; (Mrs. *Foster* included;) and who, as to the same, having purchased them *bona fide*, and before the institution of this suit, should not be affected, in relation to the same, by any decree. 6thly. In proceeding so to decree before the infant devisees of the said *John Shelton* were before the Court, to defend their interests, or had answered and disclosed to the Court, whether any, and what proportion, of their father's estate had come to their hands. 7thly. In admitting the plaintiff, *Parke Street*, to a participation in the money to be raised by virtue of the decree aforesaid, before he had shown that

(a) 1 *Munf.* 437.

the bonds or notes, in his bill mentioned, were such as *bound the lands of John Shelton;* and in proceeding to decree in his favour, without giving the appellants, or the other devisees of *John Shelton*, an opportunity to show, by the proper proceedings, that the said bonds or notes were paid off to, or otherwise discharged in equity as to, *John Trevillian*, from whom the said *Street* derived them; on the grounds stated in the answer of the female appellant."

"The decree is, therefore, reversed, so far as it is in conflict with the foregoing principle, and affirmed as to the residue: and the cause is remanded to the Court of chancery to be finally proceeded in."

Wright *against* Hencock & Company, and others.

Argued *Dec.* 3d, 1812.

UPON a petition of appeal, and writs of *supersedeas* issued thereupon, to stay proceedings, in part, on a decree of the superior Court of chancery for the *Richmond* district, pronounced in six suits, which were all heard together.

The first was an attachment in chancery, in the *Hust-*

1. What circumstances of collusion and combination, between a debtor and one of his creditors, to injure and defraud the rest, are sufficient to prevent such creditor from being entitled to any prior *lien* by virtue of a deed of trust executed for his benefit by the debtor.

2. The *badges of fraud*, in this case, were, that the deed was executed on the eve of the debtor's departure from the state, and shortly after the receipt of intelligence materially affecting his credit; that the value of the property conveyed by it, was more than double the amount of the debt intended to be secured; that a bill of lading, for part of the property, was *antedated* by the grantee, for the purpose of overreaching another creditor, who had previously obtained a bill of lading for the same; that the grantee, on applying for an injunction, to prevent a sale at the instance of a third creditor, refused to accede to just and reasonable terms offered him by the Court; and, finally, that he permitted the grantor to take, use, and sell the property, contrary to the tenor of the deed, or connived at his doing so.

3. A *copy* of a bill of exchange and notarial protest, with an affidavit of the *payee* that the *original* is lost or mislaid, is not legal evidence to charge the drawer.