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Case No. 5,227.

GARDNER ET AL. V. GARDNER ET AL.

[3 Mason, 178.][1]

Circuit Court, D. Rhode Island. June Term, 1823.[2]

WILLS—CONSTRUCTION—DEVISE CHARGED WITH PAYMENT OF DEBTS—NOTICE—PROCEEDS.

1. Where a testator devised to one of his sons in fee two third parts of a certain farm, "he paying all my just debts out of said estate," it was *held* that the debts were not a mere charge on the devisee, but a charge on the land devised also; but the charge being for the payment of debts generally, a bona fide purchaser from the devisee, who has paid the purchase money, is not bound to look to the application of it.

[Cited in Sands v. Champlin, Case No. 12,303; Patterson v. Gaines, 6 How. (47 U. S.) 584.]

[Cited in Andrews v. Sparhawk, 13 Pick. 401; Pickering v. Pickering, 15 N. H. 290; Tilden v. Tilden, 13 Gray, 107; Tilton v. Tilton, 41 N. H. 485; Frampton v. Blume, 129 Mass. 156; Amherst College v. Smith, 134 Mass. 546; Nudd v. Powers, 136 Mass. 277; Munson v. Cole, 98 Ind. 510; Lovejoy v. Raymond, 58 Vt 510, 2 Atl. 156; Woonsocket Inst, for Savings v. Ballou, 16 R. I. 353, 354, 16 Atl. 144.]

[See note at end of case.)

2. There is no difference in this respect between a charge on the land, and a trust created to pay the debts. Notice of the charge does not vary the rights of the purchaser.

3. If the purchase money is unpaid, it may be followed into the hands of the purchaser.
4. Real estate being assets for the payment of debts generally, in Rhode Island, by statute, the executrix may sue the devisee and the purchaser before payment of the debts, to compel them to appropriate the purchase money to the payment of the debts, and to exonerate the assets of another devisee entitled to be exonerated. If a purchaser, instead of paying over the purchase money, applies it, with notice of the charge, to the payment of the devisee's own debts, to the injury of the creditors of the devisor, it is misapplication of the purchase money, for which he may be made responsible in equity at the suit of the executrix.

This was a bill in equity [by Hannah Gardner and others against Ezekiel W. Gardner and Elisha R. Potter]. The facts were as follows: Peleg Gardner, of South Kingston, by his will, dated the 7th of July, 1817, having given his wife (one of the plaintiffs) a part of his mansion house and the use of one third of his stock. &c, for her life in lieu of dower, made the following devise: "I give and devise to my beloved son, Ezekiel W. Gardner, two third parts of all that my 'Ferry Farm,' so called, formerly owned by John Franklin, and now in the possession of the said Ezekiel W. Gardner; with two third parts of the sloop, boats, scow, wharf, rights and privileges, to my said Ferry estate belonging, of every kind whatever, to him, the said Ezekiel W. Gardner, and to his heirs and assigns forever, he my son Ezekiel W. Gardner paying all my just debts out of said estate." The testator then proceeds to devise the other third of the Ferry estate and some other real estate to his daughter Isabel in fee. He then devises other real and personal estate to his other daughters, Martha C. Gardner, Hannah Gardner, and Mary Ann Gardner in fee; and gives an annuity to his daughter Dorcas Gardner, of 300 dollars, payable out of the estates given to her four sisters. Then comes the following clause: "And I do hereby order, and it is my will, that my son, Ezekiel W. Gardner, shall pay all my just debts out of the estate, herein given him as before mentioned." He then gives the residue of all his estate, real and personal to his wife, Hannah Gardner, in fee, and makes her the executrix of his will. The testator died, and his will was duly proved in the court of probate, in April, 1818. A commission issued from the probate court to ascertain the debts of the testator in July, 1818, and the commissioners made a report of their doings in July, 1820, which was duly accepted. The report stated the debts of the testator at $7373.14; and rejected two accounts presented to the commissioners, one of which was an account of Ezekiel W. Gardner, the other of John P. Mann. In April, 1819, Ezekiel W. Gardner, having purchased the third of his sister Isabel, sold the whole to the defendant, Elisha R. Potter, for the asserted sum of 15,000 dollars. None of the testator's debts having been paid, and suits at law having been commenced against the executrix, to establish and enforce the rejected claims, the present bill was brought by the executrix and her daughters, Hannah Gardner and Mary Ann Gardner (two of the devisees in the will,) to enforce the trust in the will for the payment of the debts of the testator out of the Ferry estate, devised to the defendant, Ezekiel W. Gardner, and afterwards, fraudulently, as it was charged, conveyed to the defendant, Elisha R. Potter. There was also a prayer for general relief. The

defendants put in their answers; and the cause came on for a hearing, after the general replication filed, upon the answers and other proofs in the cause.

Webster, Hazard, and Bridgham, for plaintiffs.

It is a well known principle, long established both in courts of law and equity, that in the construction of a will the intention of the testator is to be sought for and collected from the whole instrument, "ex visceribus testamenti," and when found is always to govern. It is a maxim of the English law, "quod ultima voluntas testatoris perimplenda. est." 6 Cruise, Dig. (Eng. Ed.) 157; 7 Bac. Abr. 341, 342; Baddeley v. Leppingwell, 3 Burrows, 1533; Andrew v. Southouse, 5 Term R. 292; Strong v. Cummin, 2 Burrows, 770; Thellusson v. Woodford, 4 Ves. 311; Cook v. Holmes, 11 Mass. 528. Every will ought to be so expounded as to give effect to every part of it; so that each word may have its peculiar operation and not be rejected. "Every string ought to have its sound." Barker v. Giles, 2 P. Wms. 282; 6 Cruise, Dig. (Eng. Ed.) 157; 1 Fonbl. Eq. 448, note; Chambers v. Brailsford, 2 Mer. 25. Applying this principle to the will in question we would ask what the intention of the testator was in regard to the devise to Ezekiel Did he not mean that his debts should be first paid out of the estate devised to Ezekiel? or in other words, that the estate itself should be the fund out of which his debts should be paid? that the same estate should at all events be liable therefor, and thereby exonerate the whole of the personal and all the rest of the real estate from that burthen? To secure the payment of the debts out of this fund and not to put the payment of them off merely upon Ezekiel personally, who might fail to do it, he guardedly uses the words "he paying," &c. This expression amounts, we conceive, to a condition, and we contend that Ezekiel took under this will a fee simple conditional in the real estate devised to him. "He paying," or "upon paying." or "on condition that he pay," &c. are all terms importing one and the same thing, to wit, a condition precedent. Vide Co. Litt. 236b; Orphans Leg. 364-360; Crickmere v. Paterson, 1 Cro. Eliz. 146; Id. 205, 379; 6 Cruise, Dig. (Eng. Ed.) 428; 2 Cruise, Dig. 47; Barnadiston v. Fane, 2 Vern. 366;

Acherley v. Vernon, Willes, 153; Cary v. Bertie, 2 Vern. 333; Berty v. Faulkland, 12 Mod. 182; Grimston v. Lord Brace, 1 Salk. 156; Turner v. Goodwin, 10 Mod. 153; Peters v. Opie, 1 Vent. 177; Large v. Cheshire, Id. 147. This testator meant that his debts should be paid out of the estate devised to Ezekiel; that he, Ezekiel, should not have it in his power to defeat that intention; that the other devisees should not be remediless in case Ezekiel should not pay, and therefore he annexed the condition to the devise. Not only the words of this particular devise showthis to be the intention of the testator, but the whole tenor of the will confirms it, "Et interest reipublieae suprema hominum testamenta rata haberi." Blackstone, in his Commentaries (volume 2, p. 382), says, "that every will is construed with equal favor and benignity in courts both of law and equity, and is expounded rather on its own particular circumstances, than by any general rules of positive law." But should this devise not be considered as giving a mere conditional estate to Ezekiel, still the will creates a lien upon the land devised to him, to the extent of the testator's debts, and the land will stand charged therewith in whosesoever hands it may be. By the laws of England real estate is not liable or chargeable with the payment of simple contract debts unless made so by will. But in this country, the laws are founded on more just and equitable principles. The relics of feudal law are discarded; a more liberal policy prevails, and just debts of every nature stand on the same footing; and all the property of a deceased, both real and personal, is liable for the payment of them; the latter first, and in case of a deficiency in that, then the former, or so much thereof, as may be necessary to complete the object This is a principle well known by every citizen of this state old enough to transact any business, and undoubtedly was well understood by the testator when he made his will.

Both in England and here the personal estate is in the first place to be applied to the payment of debts, but a testator may discharge his personal and charge his real estate with the payment of them. Freemoult v. Dedire, 1 P. Wms. 430; Masters v. Masters, Id. 421; Harris v. Ingledew, 3 P. Wms. 95, 98; Bang v. King, Id. 358; Davis v. Gardiner, 2 P. Wms. 190; Lypet v. Carter, 1 Ves. Sr. 499; Earl of Godolphin v. Penneck, 2 Ves. Sr. 271; Thomas v. Britnell, Id. 313; 4 Bac. Abr. 283-285; Shallcross v. Finden, 3 Ves. 738; 1 Madd. 474 et seq.; Kightley v. Kightley, 2 Ves. Jr. 328; Walker v. Jackson (in chancery) 1 Wils. 24. The debts being made payable out of the estate, is the same as if they had been made payable out of the profits or rents or income of the estate. So says Justice Wilmot in delivering the opinion of the court in the case of Baddeley v. Leppingwell, 3 Burrows, 1541. Ezekiel is not therefore personally answerable or liable for the payment of the debts. The estate alone is chargeable and it is quite immaterial so far as relates to the present case, whether Ezekiel accepted the devise or not. If he had not accepted it, the estate would have gone to the heirs generally of the testator, subject however to the charge. But as he has accepted the devise, he takes the estate subject to the same charge.

As words of limitation are used in this will, the estate being devised to Ezekiel and his heirs, no question can arise as to the quantity of estate or extent of interest, which he took. It was, we think, undoubtedly, either a fee simple conditional, as herein first attempted to be shown, or a fee simple subject to the lien or charge thereon for the testator's debts, as lastly above urged. Livingston v. Livingston's Ex'rs, 3 Johns. 180; Denn v. Mellor, 5 Term R. 558; same case decided in same way, 6 Term R. 175; same case decided in same way in house of lords, 2 Bos. & P. 247; Baddeley v. Leppingwell, 3 Burrows, 1541; Jackson v. Harris, 8 Johns. 109; Newman v. Kent, 1 Mer. 240. If Ezekiel had the power to sell as is contended for by the respondents, his power so to do must have been derived from the will, and must have been implied from the circumstance, that the testator's debts were to be paid by him out of the estate, and a sale was needful, in order to raise the money out of the estate to enable him to comply with this provision. If this position is correct; if Ezekiel had the power to sell and did sell, for the purpose above mentioned, he could have acted in no other character than that of a trustee under the will, and in that case he was bound to respect the rights of the complainants as beneficially interested under a sort of resulting or constructive trust in their favour. Had not the estate been conveyed by Ezekiel, the complainants could have proceeded against it under a bill in equity, and compelled a sale, and thereby raised the needful sum of money out of it to enable them or the executrix to pay the debts. This being the purpose of the testator the estate is liable even in the hands of a purchaser. 1 Cruise, Dig. 547; Wynn v. Williams, 5 Ves. 130.

Again, viewing Ezekiel, for the reason already mentioned, in the character of trustee under the will, and the complainants as the cestuis que trust, the latter had such a vested interest in the estate as could not be impaired or destroyed by the voluntary act of the trustee, and therefore the trust followed the estate into the hands of Potter, he, as will be shown hereafter, having knowledge of the trust Shepherd v. McEvers, 4 Johns. Ch. 136; 1 Cruise, Dig. 486, 540, 548, 549, 405, 406; Fearne, Rem. 479; 2 Vern. 5; Crewe v. Dicken, 4 Ves. 97.

Lord Hardwicke is reported to have expressed himself thus emphatically on this subject "If a person will purchase with notice of another's right, his giving a consideration

will not avail him, for he throws away his money voluntarily, and of his own free will." Potter purchased of Ezekiel under a full knowledge of this trust, if it may he called or considered such. The peculiar provisions of this will, taking the whole of it together, are such as to make it the bounden duty of a voluntary purchaser to look to the application of the purchase money, and Potter's failing to do this, in this instance, is such a crassa negligentia as renders him answerable to the complainants in the present suit. 2 Ponbl. Eq. c. 6, § 3; Hiern v. Mill, 13 Ves. 114; Lord Montfort v. Lord Cadogan, 17 Ves. 485.

We contend then, first, that equity will give relief against the person entrusted, and his heirs, and such alienees as have purchased either without a valuable consideration or with express notice. 2 Fonbl. Eq. 145, and note f; Id. 147, and note h; 2 Bl. Comm. 329; Willoughby v. Willoughby, 1 Term B. 763. Lord Bacon, in his readings on the Statute of Uses (page 312), says, that "the chancery looketh farther than the common law, viz. to the corrupt conscience of him that will deal in the land knowing it in equity to be another's, and therefore if there were radix amaritudinis the consideration purgeth it not, but that it is at the peril of him that giveth it, so that consideration or no consideration is an issue at common law, but notice or no notice is an issue in chancery." 2 Fonbl. Eq. 151; Fermor's Case. 3 Coke, 78b; Lord Bacon's Readings, 312. Secondly, that whatever is sufficient to put the party upon inquiry is good notice in equity. 2 Fonbl. Eq. 151, and note m; Id. 152; Bovey v. Smith, 1 Vern. 149; Ferrars v. Cherry, 2 Vern. 384; Dunch v. Kent, 1 Vern. 319; Draper's Co. v. Yardley, 2 Vern. 662; 1 Cruise, Dig. 546; Smith v. Low, 1 Atk. 490; Hall v. Smith, 14 Ves. 426. Thirdly, that notice is not confined to the time of the contract, for if a person, who has a lien in equity on the premises, give notice of such equitable lien before actual payment of the purchase money it is sufficient (2 Fonbl. Eq. 148. in note i; Tourville v. Naish, 3 P. Wms. 307; Story v. Lord Windsor, 2 Atk. 630; Hardingham v. Nicholls, 3 Atk. 304); or before the execution of the conveyance though the purchase money be actually paid (Wigg v. Wigg, 1 Atk. 384). Fourthly, that a person claiming as bona fide purchaser for a valuable consideration must deny the fact of notice of the trust and of every circumstance from which notice might be inferred. Murray v. Ballou, 1 Johns. Ch. 566. He must deny it though it be not charged. Denning v. Smith, 3 Johns. Ch. 345; Frost v. Beekman, 1 Johns. Ch. 302; Brace v. Duchess of Marlborough, 2 P. Wms. 491. Fifthly, that by taking a conveyance with notice of the trust, the purchaser himself becomes the trustee, notwithstanding any consideration paid. 2 Fonbl. Eq. 149; 1 Cruise, Dig. 485, 486, 492, 540, 541; 1 Schoales & L. 262; Saunders v. Dehew, 2 Vern. 271; Murray v. Ballou, 1 Johns. Ch. 566; Fearne, Rem. 479; Pye v. Gorge, 1 P. Wms. 128; Taylor v. Stibbert, 2 Ves. Jr. 437. Sixthly, that it is true, that generally a purchaser is not liable in equity for misapplication of purchase money where an estate is chargeable generally with payment of debts and vested in a trustee to sell, but that it is otherwise if an estate is made chargeable with particular debts. And that if there is any collusion

between the trustee and purchaser, the purchase would be infected with the fraud or collusion. 7 Bac. Abr. 155, in margin, and the cases there cited; 2 Fonbl. Eq. 149, and note k; Dunch v. Kent, 1 Vern. 260; Spalding v. Shalmer, Id. 303; Crewe v. Dicken, 4 Ves. 100; Hill v. Simpson, 7 Ves. 152; Cotterel v. Hampson, 2 Vern. 5; Lioyd v. Baldwin, 1 Ves. Sr. 173; 1 Madd. 496; Culpepper v. Aston, 2 Ch. Cas. 115, 221; Murray v. Ballou, 1 Johns. Ch. 575; Sugd. Vend. 349, and the other cases there cited; Whale v. Booth, 4 Term R. 625, note; Hiera v. Mill, 13 Ves. 114; Crane v. Drake, 2 Vern. 616; Taylor v. Hawkins, 8 Ves. 209; Ewer v. Corbet, 2 P. Wms. 148; Burting v. Stonard, Id. 150; Lord Montfort v. Lord Cadogan, 17 Ves. 485. Seventhly, that a bonifide purchaser has, in equity, been postponed, in respect of his conniving at the subsequent fraud of him under whom he derived his title, and those instances are evidently exceptions to the general rule. 2 Fonbl. Eq. 147, in note h; Hill v. Simpson, 7 Ves. 152; Throughout the whole of these transactions Potter knew that the complainants intended to resort to this fund for the means of paying the debts, and he and Ezekiel both confess, in their answers, that the purchase money, as fast as paid, was applied by Ezekiel, with the knowledge and aid of Potter, to the discharge of Ezekiel's own debts, and that even in June, 1820, when all the first payment, being between six and seven thousand dollars, had been thus applied, Ezekiel was still so hard pushed by his creditors as to induce him to urge Potter so to alter the contract as to obtain more money to relieve himself there from, which was accordingly done. Eighthly, that it is the duty of a trustee not to bring the property to sale, until all information has been acquired by him for the benefit of the cestui que trust, under circumstances likely to make it yield its utmost value. Hart v. Ten Eyck, 2 Johns. Ch. 110; Ex parte Bennett, 10 Yes. 38a. Agreeably to the above principle Ezekiel ought not in fairness to have sold (admitting he had power to sell) till the commissioners had made their report, and the amount of debts had been thereby precisely ascertained. And Potter, having full knowledge of the trust aforesaid (if trust it may be called), together with all the circumstances attending it, ought not, for the same reasons, to have purchased at that time. Ninthly, we admit that no schedule of the debts has ever been delivered to the respondents,

or either of them; and that the commissioners had not made report of the debts at the time of the sale; but in answer thereto we say, firstly, that Potter, as well as Ezekiel, well knew the debts; and, secondly, that a commission of insolvency was then pending in order to ascertain the debts judicially, and that both the respondents were bound by every principle of justice and equity to take notice of said commission, and to govern themselves by it. It was a public proceeding, a sort of judicial proceeding, a proceeding in a court of record, of which all persons are presumed to be cognizant, and of which, in this instance, both the respondents had actual notice. It was a lis pendens, and a lis pendens is constructive notice, agreeably to the following authorities. Murray v. Ballon, 1 Johns. Ch. 566; 1 Cruise, Dig. 514; Culpepper v. Aston, 2 Ch. Cas. 115. Tenthly, that the law so guards the interests of all mankind that any collusion, by any person, in any transaction, prejudicing the rights of others, cannot and ought not to be supported either in courts of law or equity. Even the alienation of assets by an executor, who has by law complete and perfect control over them, is not good, if there is collusion between him and the purchaser. Vide 2 Fonbl. Eq. 150, in note 1, and many of the authorities already cited under the ninth head. Eleventhly, the purchasing of assets of an executor for a pre-existing debt is a badge of fraud. Vide McLeod v. Drummond, 14 Ves. 361, and some of the authorities already cited under other heads. In applying this principle to the present case we will but just observe that Potter purchased, as is expressly confessed by him in his answer, for the purpose of securing his own private, pre-existing debt, due from Ezekiel.

Hunter and Searle, for defendants.

It is contended on the part of the defendants, that the complainant is not in a situation to maintain the present suit She has not paid a single cent of any debt, for which the defendant, Gardner, is liable. A mere liability to pay gives no cause of action. There is no privity in fact between these parties, and there can be none in law until actual payment has been made. The only relation in which these parties stand to each other, and which law or equity can notice, is that both may be liable to the creditors of the devisor, and that relation may place them in the situation of quasi sureties, separately, for the same debts. But it will not, we apprehend, be Seriously contended that a surety can either at law or in equity call upon his co-surety for indemnity, in any case whatever, nor for contribution, until actual payment Indeed upon principle, and so far as it relates to creditors, the complainant, Hannah, is first liable, as having the personal estate, which is the fund first liable in point of law and equity. It has never yet been established, that an executor, as residuary legatee, or otherwise, could ever sustain a bill against an heir or devisee, to restrain him from selling the real estate of the original debtor, on the ground merely of its liability for debts in relief of the personal estate. It is not admitted that a bill under any circumstances would lie, but it is confidently contended, that none could be sustained until the executor had paid debts chargeable on the defendant to the bill by reason of

the fund in his possession, and also upon full and plenary proof that the defendant was insolvent and wasting the fund Nor is it, we contend, competent even for a creditor to sustain such a bill generally. A creditor could not support a suit in equity, to restrain an heir or devisee from selling, merely because the land might ultimately be required for the payment of debts in case of a deficiency of personal estate. And for the same reason, if the sale had already been made, no bill, either by executor or creditor, would lie to restrain the payment of the purchase money to the heir or devisee. In the case at bar, the creditors are not parties, nor have they ever demanded payment of the defendant, Gardner; and the counsel for the defendants are utterly at a loss to discover any principle upon which the complainant Can sustain her present suit, either with a View to set aside the sale of the estate, restrain the payment of the purchase money by the grantee to his grantor, or to appropriate it to any object or purpose whatever. Suppose the court should think the sale to be fraudulent in point of fact, or void in point of law, can they set it aside? For what purpose is it to be nullified? As between the parties, the sale is decidedly legal. If then it is to be set aside, it must be done at the suit of some party, who has a title paramount to that of the defendants; is this complainant of that description? Has she any claim to this estate or its proceeds? Can the court order it sold? Can they apply its avails to the payment of the testator's debts? No creditor is a party, ho creditor has ever demanded his debts of the devisee of the, land, and no creditor can, under the present bill, have any decree passed, touching himself or his debts. With the creditors, their rights and their remedies, the court has nothing to do, nor can it exercise a single judicial act in relation to either. It is therefore insisted that the court cannot legally exercise any jurisdiction over the subject matter of this bill. There are no competent parties before it, and no decree can be passed touching the defendants, the land, its sale, or its proceeds. It is also in proof, that the note given for part of the consideration, and also a part of the obligation for mortgages, had been negotiated for a valuable consideration long before the exhibition of the bill, and ever since has been the bona fide property of the endorsee, who is no party to this suit; and the lease has expired. There is, therefore,

no part of the consideration money specifically remaining in the possession of the defendant, Gardner, as his property, except a part of the obligation to be discharged in mortgages. That the intention of the testator, to be collected from the whole will together, is to govern in the construction of his will, is a rule not susceptible of doubt, provided that intention is conformable to the rules of law. We are not permitted, however, to traverse the boundless fields of conjecture in ascertaining it This legal intention, or that which courts are bound by the established rules of construction, to annex to his language, must undoubtedly furnish the rule of decision.

The counsel for the complainant have laboured exceedingly to show that an estate may be given upon condition, and that the devise in question is of that kind. But there is hardly a colour for such a pretence. It is, we contend, settled, both by principle, and by the uniform current of adjudged cases, that the devise to Gardner, the defendant, is not an estate upon condition, but belongs to a class of cases totally different, and governed by totally different principles. If, however, it should be judged to be an estate upon condition, that consideration alone is, we hold, fatal to the complainants' bill. If Gardner takes an estate upon condition only of paying the debts, he not having paid them, his estate is lost, and he, as devisee, has no interest in it In such a case the fee is clearly in the heirs at law, who are not parties to this bill and who must be, before any decree concerning it can be passed. The court cannot deal with this estate as to payment of debts or other purposes, upon a bill by the present parties. If this be an estate upon condition, as the complainants' counsel insist, Gardner has forfeited it by nonperformance of the condition; and there being no devise over of the estate, it descends to all the heirs at law; and all the heirs at law must be parties, before any decree for the disposition of the land or its proceeds can be passed by this court. That a testator may, by his will, exonerate his personal estate, and subject the devisee of his real estate, to the payment of his debts, is a principle so fully settled as to require, at this day, neither authorities nor arguments to support it. His discharging one fund and charging another, however, is a matter to be arranged between the legatee and devisee. The creditors cannot be affected by it without their consent The testator may devise his land and impose on the devisee the terms of paying his debts in relief of the legatee of the personal estate; and if the devisee accepts the devise he is no doubt liable. But this by no means concludes the creditors. They have the same right to resort to the personal estate as though no such devise had been made. As to creditors, a testator cannot, in England, exempt his personal, nor in this state, his real or personal, estate, from the payment of his debts. He may direct, as amongst his legatees and devisees, how his debts shall be paid, and that direction will clearly bind all who accept the provisions and gifts in the will. It is also admitted that a testator may, by apt and proper language, charge specifically upon his real estate his debts, so as to create a lien thereon for the same. But none of these provisions can affect his creditors until they assent. They

have a right to resort to their legal remedies and to seek the payment of their debts from the whole mass of their debtor's property according to the provisions of law, unembarrassed by any restrictions which that debtor may attempt to impose. By his last will, Peleg Gardner, amongst other devises and bequests, devises to his son, Ezekiel W. Gardner, and to his heirs and assigns forever, two thirds of the Ferry estate, he, Ezekiel, paying his, Peleg's, just debts out of said estate. Peleg Gardner, it is said, left debts to a large amount, and it is contended by the counsel for the complainant, that the language of the devise creates a specific charge and lien, on the land devised, for those debts. That it is a trust estate, and that a purchaser for a valuable consideration, takes it charged specifically with the payment of those debts. It is contended by the defendant's counsel, that Gardner, the devisee, took a clear, absolute, and unconditional fee simple, unincumbered as to his title, and unrestricted in his right to convey a fee simple estate, free of the debts. They insist, that the charge is personal upon the devisee, and not specific on the estate; that it may make the estate less valuable ultimately to him, to the full amount of the debts, but that it does not charge, impair, diminish, or restrict his title, or the nature of the tenure, and that he has precisely the same full and perfect right to sell the estate, exempt from all liability for debts, as though no provision had been made in the devise for the payment thereof.

It has already been observed, that the estate in question was devised expressly to Gardner, the defendant, his heirs and assigns, he paying the testator's debts out of the same. By this devise the fee simple is clearly vested in the devisee; and the only question is, whether the debts create an incumbrance, and a specific lien on the estate, in the hands of a bona fide purchaser for a valuable consideration. The counsel for the defendants hold the negative of this question, and they confidently submit to the court, that they are fully "supported both upon principle and authority. Numerous cases have been cited on the other side upon the subject of devises to pay debts, and charges upon land, and the like, but not a single case reaches the point in controversy in the case at bar. The principal point in all or nearly all those cases was, what estate a particular devisee took, not whether the lands are chargeable specifically after a fair sale. In the present case no such question can arise, for, by the

very language of the will, the devisee takes most assuredly a fee simple estate. The cases cited do not, it is believed, present a single instance of a devise similar to the one in the will of Peleg Gardner. There were no words of limitation in them, and the question before the court was, whether, by a sound construction of the will in the particular case; the devisee took an estate for life, or in fee simple, ascertaining the devisor's intention according to the rules of law. Amongst the rules established by law on this subject, is one giving to the devisee a fee simple without words of limitation, when he is personally liable for the payment of debts or legacies, and the question generally raised in the cases cited was, whether or not the will created a charge on the devisee. If it did he took a fee simple. If however there was no charge on the devisee, but on the land devised to him, the authorities are, we admit, not uniform, some few deciding that he takes a life estate only, and the others that he takes a fee simple. But all these Cases are different in fact and principle from the one at bar. Here are words of limitation, and a fee simple undoubtedly passes. The two principal cases on which the complainants seem to rely are Doe v. Clarke, 5 Bos. & P. 342, and Jackson v. Bull, 10 Johns. 148. But these cases in fact or principle, hold no relation to the one at bar, and afford no countenance to the argument of the counsel.

In the case at bar the devisee undoubtedly takes a fee, and according to the principle of the complainants' own authorities, his estate is exempt from the charge. By reference to some additional authorities, it will, we hold, be perfectly apparent, that Gardner, the defendant, took an estate in fee simple exempt from all charges for debts, and that the charge is on him personally. In Baddeley v. Leppingwell, 3 Burrows, 1533, Thomas Ives devised to Sarah Boreham certain estates, she paying thereout to Elizabeth Boreham 40s a year. In this case Sarah took the inheritance, though the 40s were payable out of the estate devised. And the court treat the charge as personal on Sarah, for they say the provision must be considered as a lasting one, to continue through Elizabeth's life and "not that she should be left to starve in case her sister Sarah should happen to die before her." The charge then is clearly on the devisee and not on her estate, for if it were, Sarah could not be left to starve on the death of the devisee, but the land would remain liable. Sarah then, under a devise of land to pay thereout 40s yearly to her sister, took a fee simple, exempt from any specific lien or charge on it, but was personally chargeable therefor. So in the case at bar, the estate is given to the devisee, he paying thereout the testator's debts. Frog-morton v. Holyday, 3 Burrows, 1018. Margaret Hasselwood devises to her son John certain real estates charged and chargeable with the payment of $50 out of the yearly rents, issues, and profits of the estate devised. John took a fee simple estate. The court do not even intimate any specific charge or lien on the estate, but expressly say that at the age of 21 he might dispose of it himself. Doe v. Holmes, 8 Burn. & E. [8 Term R.] 1. Devise to Elizabeth Gibson, "she paying all my just debts." The devisee, says Lord Kenyon, "is bound to pay the debts at all events in respect of the real estate." and he was

adjudged to take a fee simple. Good-title v. Maddern, 4 East, 49S. Devise by husband to wife of personal and real estate, she to pay all his debts in good time. And if the personal estate was insufficient to pay the debts, she was to sell the house at Penzance first The court adjudged her to take a fee simple, "for she is charged with the payment of all the debts." "The distinction has turned in all the cases on this; whether the debts &c. were merely a charge on the estate devised or a charge on the devisee himself in respect of such estate in his hands." To the same point the eases of Doe v. Richards, 3 Durn. & E. [3 Term R.] 356; Jackson v. Merrill, 6 Johns. 185; Denn v. Mellor, 5 Durn. & E. [5 Term R.] 561, 562,—may be cited. Andrew v. Southouse, Id. 292. Devise to E. Southouse of certain estates, charged and chargeable with the payment of £20 to T. Tooth during life. Southouse took a fee simple, and the charge was personal on him; for, say the court, if Southouse did not take a fee, and Tooth survived him, the annuity might be lost Here the charge could not be on the estate; if it were, it would not be lost by the death of the devisee. Doe v. Snelling, 5 East, 87. Devise to George Snelling and Sarah, his wife, of certain real and personal estates, "after having thereout first paid and discharged all just debts &c." The court say that these words "impose a charge on the devisees personally;" and wherever the charge is on the devisee, to be paid at all events out of the estate in his hands, the devisee must take a fee. The payment thereout, say the court, means a payment by the devisee out of the estate in his hands, and imposes personal charges on him.

From the current of authorities then, as well as from the express language of the will, it is submitted that Gardner, the defendant, took an estate in fee; that the charge of the debts is personal on him and not on the estate; that he held the estate free and exonerated from all charge or lien for the testator's debts, and had a perfect right to sell it, and that the purchaser bona fide, and for a valuable consideration, has a right to hold it, fully discharged from all claims of creditors in law and equity. In point of principle no material difference can be discovered between the case at bar and the ordinary case of a devise of land. No new charge is imposed on the estate devised by reason of the will. By the law of this state (Dig. 1798, p. 305), the real estate of

the deceased is liable for debts, if the personal is deficient, and while it remains in the possession of the devisee or heir. The will only limits the liability to the devisee of part of the estate instead of the whole, and requires the devisee to pay the debts out of it, in the first instance, without resort to the personal estate. But this, we contend, does not change or affect the devisee's title, or the nature of it, nor make a shade of difference in the principle of the cause. Here the devisee is liable by the declaration of the testator, and in the ordinary case he is liable by the provisions of the statute. In both cases the devisee is liable, and so the land would be, while in the devisee's possession, by express provision of the statute. Mimes v. Slater, 8 Ves. 306. But was it ever contended that a devisee could not sell before the devisor's debts were paid? or that the land passed to the purchaser, charged with these debts? or that he was liable to creditors for the purchase money, and that he could not pay the devisee? The statute of the state (page 306) settles all these questions beyond all doubt, and our whole system of laws, and the uniform practice under them, perfectly accord with the provisions of that statute. While the devised estate remained the property of the defendant, Gardner, it might, no doubt, have been attached for the testator's debts, not by reason of the will, but because it was a part of the debtor's property, and as such liable under the law of the state. But the will, we contend, imposed no incumbrance on the estate, nor restraint on the devisee as to his right to sell, and when he had sold in good faith, the purchaser will most unquestionably hold a clear indefeasible estate, exempt from all charges for the testator's debts, and the purchaser himself is accountable to no one for the purchase money, except to the devisee of whom he purchased.

The case seems analogous in principle to the case of the heir with assets descended at common law, and who is bound in the bond. In that case the heir is liable at law, and the land descended is liable in equity, while in possession of the heir, but after a bona fide sale even equity cannot reach it for the benefit of the bond creditor. 1 Cruise, Dig. 20, 21. It may be safely admitted, that courts of equity in England may exercise jurisdiction in case of estates devised, charged with the payment of debts, while the estate remains as the property of the devisee. But after a fair sale, equity has never attempted to charge the lands specifically with the debts in the hands of the purchaser. Nor has a court of equity, in such a case, ever compelled a purchaser, who has paid his grantor, to repay the purchase money to creditors, or for their use; although we need not deny that under particular circumstances and with proper parties before it, equity may decree the money, still unpaid by the purchaser, to be applied to the discharge of debts. And the principal reason for the interposition of equity in England is, that land there is not generally liable for debts. Without the aid of equity therefore, creditors might often be remediless in such cases. But in this state, where the will in question was made, and the land devised is situate, the creditors have abundant remedy at law, against the land, while owned by the heir

or devisee, and against them personally after a sale. It may perhaps be doubted whether equity has jurisdiction; we are not anxious however to raise that question, until a case, proper for its discussion, shall arise. And in England, where equity has exercised the jurisdiction in question, it was not on the ground that the debts created any specific lien or incumbrance on the estate, or that the creditors have any legal vested interest in it, but it is owing to the peculiar powers of that jurisdiction. "A mere charge is no legal interest," says the lord chancellor, "it is not a devise to any one, but that declaration of intention upon which a court of equity will fasten, and by virtue of which they will draw out of the mass, going to the heirs or to others, that quantum of interest which will be sufficient for the debts." Bailey v. Ekins, 7 Ves. 323. If we recur to the powers of executors, in relation to the assets in their hands, to illustrate the principles by which the case at bar is to be decided, the result is conclusively in favour of the defendants. At common law the executors may sell the personal estate of their testator, and vest a perfect and clear title in the vendee. Pow. Mortg. 135, 136, 299; Nugent v. Gifford, 1 Atk. 462; Mead v. Lord Orrery, 3 Atk. 235; Parr v. Newman, 4 Durn. & E. [4 Term R.] 621. And the vendee is not liable either to legatees or creditors, Rayner v. Pearsall, 3 Johns. Ch. 578; Newland v. Champion, 1 Ves. Sr. 105, 125; Andrew v. Wrigley, 4 Brown, Ch. 125; 2 Ves. Sr. 429; 8 Ves. 208; 17 Ves. 165. Even if a chattel, so sold, is specially devised. 1 Cruise, Dig. 545; Ewer v. Corbet, 2 P. Wms. 148. And creditors have no specific lien upon the assets. McLeod v. Drummond, 17 Ves. 162; Nugent v. Gifford, 1 Atk. 463; 2 Ves. Sr. 269 [cited]. And under the statute of Rhode Island (Dig. 1798, p. 295), power is clearly given to executors to sell all the assets at public auction, or by permission of the court of probate, at private sale. In the case of executors, they are decidedly trustees, first for the creditors and then for the legatees and heirs; they have no interest beyond the purposes of the trust, and yet they may sell absolutely and vest a full and perfect title in their vendee. In the case at bar the devisee has an interest beyond the payment of debts; he has the fee simple subject to a personal charge on himself. This charge becomes perfect by accepting the devise, and he must bear it whether the estate is sufficient to reimburse him or not. If then the executor has power to sell and vest

a good title in his vendee, for much better reason would the devisee have power to sell, and to convey a perfect title to, the devised estate. In examining the statute, in respect to the powers of executors, devisees, and heirs, over the estate of the testator, it is apparent that the legislature meant to invest them all with full authority to dispose of the estate, free, and discharged from all lien for debts, in the possession of fair purchasers. Should we resort to the particular intention of the testator, as far as it can be legally collected from the language of the will in relation to this devise, the result is equally in favour of the defendants. On reading the bill no one can possibly believe, that the debts were intended to be a charge on the estate devised, in the sense contended for by the complainants; the language is not such as would have been used to express such a purpose. Although the scribe, or the testator, might not have been familiar with any technical phraseology, pertinent to such a purpose, yet some mode of expression would have been selected, more fully indicating the intention; some circumlocutory provision would have been introduced, showing, plainly enough, the intention that the land should pay the debts, or be holden to pay the debts, or the like. But the plain unequivocal meaning and intention of the testator was, that the devisee, in consideration of the devise, should pay the debts; and he refers to the estate, in the words, "paying out of said estate," not with intent to charge the estate, but merely showing the devisee, he had given him a fund, from which he was, or might, be enabled to pay them.

Looking at the facts and circumstances of the case, it is apparent that the testator knew the devisee must sell. It is not pretended by either party that the devisee could have paid all his father's debts from his own property, exclusive of that devised to him. The testator therefore knew that his son must sell to be in funds to discharge the very debts, with the payment of which he had charged him. The testator therefore could have had no other idea in his mind but that the devisee had the power of absolute disposition. The words used in this will "he paying the debts out of said estate," have not, as has already been observed, ever been holden to create a specific incumbrance on the estate. They amount to no charge of any kind on the land. They have not the same legal import or effect, as the" words "charge" or "chargeable," and yet these words by no means give a specific lien on the estate to which they refer. Elliot v. Merryman, Barnard. Ch. 78; Pow. Mortg. 293, and the authorities there cited. The words, "he paying the debts out of said estate," have no legal effect upon the devise; they neither enlarge, restrain, qualify, or in any manner whatever affect the title or interest which the devisee takes. His title and his interest are precisely the same, as to all legal purposes, as though these words had been omitted and he had been charged generally with the payment of the debts. And in the latter case, that he takes a fee with full power of absolute disposition is settled beyond a doubt. Upon the particular intention of the testator, therefore, upon the whole current of adjudged cases, and upon the soundest principles of law, it is contended, that the defendant, Gardner,

took an estate in fee simple, with the power of selling it free of all incumbrances for debts or otherwise, and that the defendant, Potter, a bona fide purchaser for valuable consideration, has a right to hold it free from all claims of the creditors thereon, or for him, for the purchase money. The counsel for the complainant have also argued that the devise to the defendant, Gardner, is a trust estate, or in the nature of a trust estate for the benefit of creditors, and that it must be sold, subject to the trust There is no foundation for this position. It is not of the class of cases denominated trust estates, nor is it governed by the same or similar principles. An estate in trust is one given by deed or will for a particular purpose, and the grantee or devisee has no interest beyond that particular purpose. He has no beneficial interest, but is accountable to the heir for any surplus beyond that particular purpose. The present is a devise in fee, subject to a particular charge on the devisee, and he has all the beneficial interest not exhausted by the particular charge. The former has no individual or personal right or interest. The latter has the whole individual and personal, right and interest, subject to the particular charge. Bang v. Denison, 1 Ves. & B. 271, 272. But admitting it to be a trust estate, for the payment of debts, the trustee has an undoubted right to sell, and the purchaser will hold, without accountability to the creditors, either for the estata or the purchase money. Sugd. 331,132; 2 Ponbl. Eq. 148; 1 Madd. Ch. 352; 2 Madd. Ch. 103; 1 Cruise, Dig. 543, 544; Pow. Mortg. 193, 285, 289; 1 Salk. 158; 1 Ves. Sr. 173; 2 Ves. Jr. 215; Amb. 188, (576; 1 Brown, Ch. 186; Barnard. Ch. 78; Sut. 504, note; Jebb v. Abbott, Co. Litt. 290b {note}, and the cases there cited; 1 Johns. Ch. 575; 2 Johns. Ch. 327, 62S; 6 Ves. 654, note; 16 Ves. 150, 155; 2 Ch. Cas. 115, 221; 1 Eq. Cas. Abr. 358; 1 Vern. 260, 301; 4 Ves. 99. And amongst the other reasons of this rule, one assigned in the books is, that otherwise the lands could never be discharged of the trusts, without a suit in chancery, which would be extremely inconvenient Pow. Mortg. 298-300; Elliot v. Merryman, Barnard. Ch. 78; Culpepper v. Austin, 2 Ch. Cas. 221.

Upon the principles then which govern devises and conveyances, strictly in trust, the case is with the defendants. Indeed there never was a doubt in such cases, but that the trustee has a complete right to convey, and that the purchaser would hold. The question has been in relation to the purchase money, and to whom the purchaser was accountable,

the trustee, or the cestuis que trust. It is however now settled beyond all doubt, we apprehend, that payment to the trustee is legal, and is a perfect discharge to the purchaser, who is not accountable for its application by the trustee. And upon the same principle it has been holden, that if the trustee mortgage the trust estate for his own debt the mortgage is valid. Pow. Mortg. 291, 300; Jthell v. Beane, 1 Ves. Sr. 216; Spalding v. Shalmer, 1 Vern. 301. And the mortgage is holden to be good, for this reason, we contend, that the trustee has a right to sell and of course to mortgage. He is there, fore in the execution of his legal right and power; but how, or in what, he receives payment, is a question about which the cestuis que trust have no right to inquire as to the purchaser. The trustee is accountable to him for the value or amount of the sale, but the mode of payment is a matter exclusively between the vendor and purchaser. It has already been shown that the purchaser is accountable to the trustee for the purchase money, and is not accountable for his misapplication of it. To this general rule an exception, it is said, in some of the authorities exists; and that is in the case of scheduled debts, the purchaser must see to the application of the purchase money in the discharge of those debts. By scheduled debts is meant debts enumerated and specified in the instrument creating the trust, or in some other document referred to and making a part of that instrument. The existence of such an exception has however been denied; and Powell, in his treatise on Mortgages, says the exception is not warranted by the cases, and is unfounded in principle. Pow. Mortg. 311, and the cases there cited. And the master of the rolls, in Balfour v. Weiland, 16 Ves. 155, says the doctrine of accountability in the purchaser "has been carried further than any sound equitable principle will warrant." It his already been shown, we presume, that the policy of the laws of Rhode Island is decidedly opposed to this exception. That policy, and those laws, clearly intend to protect purchasers from trustees, and to hold the purchaser accountable for the consideration money or the application of it to no one, except his immediate vendor. By those laws a guardian may sell the real estate of his ward to pay his debts, under the authority from the supreme judicial court. That authority is obtained upon his petition, accompanied by the statement of his ward's debts. But no judge or lawyer ever entertained a suspicion, that the purchaser of the guardian was ever accountable to the creditors of the ward.

So an executor, in particular cases, may sell the real estate of his testator. His power to sell is derived from a decree of the supreme judicial court, founded on his petition. The debts, for which he sells, are all scheduled debts, reported and allowed by the court of probate, and on record in that court; a certificate of all which accompanies and is filed with his petition. The executor sells pursuant to this authority. Is the purchaser's title defective or liable to bi affected by creditors or is he accountable to creditors for the consideration money paid to the executor? It is alleged on the other side, that the debts of the testator have been scheduled, of which Potter, the purchaser, was bound to take notice,

and that there was something like a legal fraud in purchasing under such circumstances. By recurring to dates, we find however there was no schedule of debts existing any where at the time of the sale. The estate had, it is admitted, been represented insolvent, but no report made, and not a single debt allowed by the commissioners. They cannot definitively allow, until the time appointed for receiving debts has expired, for during all that time the executor has a right to be heard in opposition to them. And their allowance is nothing until the court of probate have accepted their report and allowed the debts. Long previous to this period the snip win made. The incipient proceedings, therefore, before commissioners amount to nothing, and have no legal effect upon the cause. Besides, both these defendants were strangers to all these proceedings. They were not, and could not be parties to them, and they have never been notified of their progress or result and ought not, therefore, to be bound by them. But if the report of commissioners had actually been made and allowed, still it would not affect the purchaser. The report of commissioners gave the creditors no new lien on, or interest in, the devised estate. The amount and genuineness of the debts may be ascertained by the report, but no new or additional right or remedy, in relation to these debts, results to the creditors. They are, as to all parties, in precisely the same situation as when the testator died. The report of commissioners does not come within the rule relative to the scheduled debts. It is not that kind of scheduled debts, which binds the purchaser; those are debts scheduled by the testator, when he makes his will. They are his act and a part of the devise. The report of commissioners gave the purchaser or devisee no new information. The will informed them both, that there were debts, and the amount makes no difference. The rule is one of construction, and is, I presume, founded, if it exists at all, on the idea, that where the debts are scheduled, it is evidence of an intention in the devisor, that the purchaser should see to the appropriation for then, payment at the time of sale. So that the sale and the payment are to be considered as one indivisible object of the testator. Pow. Mortg. 311, 312, and the cases there cited. When this object exists, therefore, it must be from the sole and exclusive act of the devisor. In this case he has not done it and did not intend to do it. And there is no intimation in any of the cases,

that debts afterwards ascertained and scheduled in the course of settling the estate or otherwise, ever brought a general trust within the particular rule of scheduled debts. The case then is not one of a trust, in which the creditors have any interest in, or lie.) on, the estate, according to any principle of law or equity. And because they have no interest in, and lien on, the estate, any notice, which may immediately come to the defendant, Potter, cannot affect his title to the estate, or his accountability for the purchase money. The doctrine of notice relates to cases of equitable rights, which may be lost from want of it or preserved by fixing it on the party to be charged; but where no such right exists, there is none to lose, and notice is out of the question.

The authority from 4 Johns. Ch. 136, and the other authorities referred to in connexion with that, are, as will be seen, upon the most cursory reading, equally inapplicable. They belong to a class of cases depending upon distinct and different principles. Another attempt has been made to attach fraud to the sale, because it is said part of the consideration money (about $6000) was paid In demands against the grantor personally, which is charged as a misapplication of the fund, and is a fraud as to Peleg Gardner's creditors. It has, we hold, been established beyond controversy, that the estate conveyed was a clear, absolute, fee simple, which the devisee had a right to sell, and Potter had a right to purchase and hold free from all liens and claims. If this position be true, the sale is undoubtedly valid. A man may give away his own estate, and the gift is good against all the world except his own creditors. And as against them, he has assuredly a right to sell bona fide and for a valuable consideration, and receive payment. In what he pleases; either in his own debts, negotiable paper, or other property. The sale is no fraud on the creditors in such a case. And if we admit, for the purpose of the argument, that it was a trust estate, sill the purchaser is equally protected in his estate, and in the payment he has made. The right of the trustee to sell and of the purchaser to pay him the consideration money has already been shown. The law no where requires the payment to be made in money. If the sale is absolute, for a reasonable price, and the payment made to the amount, the kind and mode of payment are entirely out of the question. This is, we hold, settled by the case in 1 Pow. Mortg. 291 {Spalding v. Sbalmer, 1 Vern. 301}, and the authorities there cited, where the trustee mortgaged the trust estate for his own debt by bond, and the mortgage was adjudged good.

A further attempt is made by the complainant to prove a secret collusion between the defendants to enable Gardner to sell the estate and conceal and convert to his own use the proceeds with interest, to defraud the creditors of the testator. This charge is unceremoniously and coarsely made in the bill and reiterated in the argument with but little qualification. If we are right in our construction of the will, no fraud could be perpetrated; Gardner had a clear fee simple, which he had a right to sell, and Potter to purchase, upon such terms of payment as the parties agreed. Admitting, however, that it was an estate

in trust, and the sale subject to be set aside for actual fraud, it is still contended, that the charge of fraud is unsupported by a title of evidence, positive or circumstantial. The answers of the defendants are evidence, and fully sufficient until disproved. They detail plainly, fully, and explicitly the whole transaction, and positively and unequivocally deny all the imputations of fraud. The complainant has appealed to the oaths and the consciences of these defendants, and by that appeal he must be bound, unless their answers upon their oaths and their consciences can be refuted by clear, conclusive, and indisputable testimony. The sale is fair or fraudulent according to the facts and circumstances attending the transaction and the intentions of the parties at the time it took place, and the deed is valid or void according to the character of that transaction at that time. No subsequent fact or circumstance can vitiate the sale or the deed, if fair and legal at the time of the sale and delivery of the deed. And we maintain, that there is not a single fact or circumstance connected directly or remotely with the sale, which indicates, in the least degree, any collusion, trick, or artifice in either of the defendants to defraud the creditors of Peleg Gardner, the complainants, or any other person. The sale was made long (nearly a year) after the death of the testator; it was attended with no secrecy, and was not made until the grantor had publicly and repeatedly sought other purchasers and could find none, who would give the price, paid by Potter. It was not solicited by Potter, nor agreed to by him, until the application had been repeated by Gardner. The consideration was fully adequate and actually paid, or secured to be paid by legal and negotiable notes of hand. The sale was absolute, without secret trust or confidence. The promise, made by Potter to Gardner in relation to any surplus upon a subsequent' sale by Potter, was altogether gratuitous, without consideration, and was no part of the contract, or a condition of the contract, when the sale was made. It was subsequently relinquished and given up, as stated in the answers before the bill was filed. It never was of any value to Gardner, and clearly it was not at the time of its relinquishment, and he had at all times a perfect right to relinquish it upon such terms as he deemed proper.

STORY, Circuit Justice. This cause has undergone so able a discussion, and the authorities bearing upon the points in controversy have been so diligently collected, that the

labor of the court has been materially diminished. My own researches have not added much to the mass of learning brought forth from the books; and if, in deciding this case, I do not enter into a minute commentary upon all the authorities, it is because full explanations have been already given of most of them at the bar; and because, after all, the principles, upon which the case must stand or fall, lie in a narrow compass.

The first question, and upon which the cause mainly hinges, is, whether, by the devise to Ezekiel W. Gardner, the debts of the testator are a charge upon the Ferry estate, or a mere personal charge upon the devisee himself. If the latter, then the present suit, supposing it free from all other difficulties, can be maintained only against the devisee, and must be dismissed as against Potter, the other defendant, who claims it by a purchase. If, on the other hand, the debts are a charge upon the estate, the lands, or the purchase money in the possession of Potter, may be reached, unless he can protect himself by some of the doctrines that have been urged in his defence. My opinion is, that the debts are clearly a charge upon the estate. I do not mean by this to say, that the devisee himself is not personally bound by his acceptance of the estate to pay the debts; for I have no doubt he is. But the estate is also charged with the payment, and may be reached in the hands of the devisee, or any person claiming under him, who does not stand in the situation of a bona fide purchaser for a valuable consideration, who has paid the purchase money. The terms of the devise are, in my judgment, as strong as if there had been an express charge upon the estate. The testator devises the estate to his son Ezekiel, "he paying all my just debts out of the estate;" and in another part he expressly orders his son Ezekiel to "pay all his just debts out of the estate therein given him." The estate is not given to the devisee upon the condition generally, that he shall pay the debts; but it is pointed out expressly as the fund, out of which payment is to be made. And the testator having disposed of all his other estate, real and personal, to other persons, his intention to relieve them from the burden would be manifestly defeated, if the court were to reject the plain meaning of the words, and to declare, that though the testator has appropriated a particular fund to the payment of his debts, that fund shall be held discharged from them. The argument of the defendant's counsel seems founded upon this position, that if the devisee himself is personally chargeable, that establishes, that the estate also is not charged. But this conclusion is utterly inadmissible. It is unfounded in principle, and the current of authorities is irresistibly against ft There is a very numerous class of cases, most of which have been cited at the bar, where an estate devised in terms, which would otherwise have been construed to give a life estate only, has been held a fee, upon the ground, that there was a charge for the payment of debts, legacies, &c. for which the devisee was personally liable.

The general doctrine, established in these cases, is this, that if the charge is upon the estate only, and there are no words of limitation, the devisee takes an estate for life; but if the devisee is personally chargeable in respect to the estate in his hands, he takes a

fee. See cases collected in Cruise, Dig. tit. "Devise," c. 11, §§ 40, 50, et seq; Id. c. 13, §§ 25, 29. Whatever difficulty there may be in reconciling all the cases, there is no diversity as to the principle. The only conflict is in the application of it to particular cases. In some of the cases the charge is merely upon the person of the devisee; as in Collier's Case, 6 Coke, 16, where the devise was to A, be paying to one 20s. and to others small sums, amounting in ail to 45s. and it was adjudged a fee simple. So in Doe v. Holmes, 8 Term R. 1; (see, also, Salmon v. Denham, 1 Comyn, 323), where the devise was of a freehold house and furniture to A, "whom I make my executrix, &c. she paying all my just debts, funeral expenses, and legacies," it was held, that A took a fee. But in by far the largest number of the cases the estate was clearly charged with the debts, &c; and the only question was, whether the devisee was also personally charged. The observations of Lord Kenyon, in Doe v. Bichards, 3 Term R. 356, and Denn v. Mellor, 5 Term R. 558, 2 Bos. & P. 247. (see, also, Merson v. Blackmore, 2 Atk. 341; Doe v. Allen, 8 Term R. 497), evince, in the most satisfactory manner, his opinion on the subject His language in both cases shows, that he understood, that in the former there was a clear charge upon the land; and adverting to the terms of the devise in the same case, "any legacies and funeral expenses being thereout paid," he says, in Denn v. Mellor, that these words imported, that those sums were to be paid by the devisee out of the interest given to her; and if she had died immediately after the devisor, and had only taken a life estate, the fund, out of which she was to bear those charges, might have failed. In Doe v. Snelling, 5 East, 87; (and see Goodtitle v. Maddern, 4 East, 496), where the devise was to A, &c. all the testator's lands, &c. "after having thereout first paid and discharged all my debts and funeral expenses, also subject to the payment thereout all the aforesaid legacies," and it was held a fee in A, Lord Ellenborough said, that the construction of the devise was, that "the payment thereout was to be made by the devisees, and the word, 'thereout,' means out of the property before given to the devisees;" and he added, that where debts or annuities are to be paid "by the devisee at all events out of the estate in his hands, the devisee must take a fee, otherwise the charge might be greater than the estate devised, and he would be a loser." Mr. Justice Lawrence is still more expricit.

After stating, that where an indefinite estate is given to a person in lands, and that person is charged with the debts and legacies, he must take a fee (thus putting a case of a mere personal charge only,) he puts the very case now in controversy, and says, "It is the same thing, if such indefinite estate be given to one, and the debts are to be paid out of the estate given to the devisee; he must there also take the fee; for otherwise the estate may not be sufficient to pay the debt." Mr. Justice Le Blanc sums up the whole doctrine in a more precise manner. His language is, "According to all the determinations, the question, whether the devisee takes the fee or not, in respect of charges, must depend on this, whether he personally, or the estate given to him, be charged with the payment of debts; or whether the estate be given after payment of debts. If the devisee be personally charged with the payment of debts, or if the doubts be charged on the quantum of estate given to the devisee, he must take the fee; otherwise, if he only take for life, he may be a loser, or the estate may be insufficient" In the case of Denn v. Mellor, in error before the house of lords (2 Bos. & P. 217), Lord Chief Baron MacDonald, in delivering the judgment of all the judges, alluding to the terms of the devise in that case, (which had been held in the king's bench to pass a life estate only,) said, "If these words are considered as charging the lands in the hands of the widow, in that case according to established principles she would take a fee, as she might otherwise be a loser by the devise;" which is a positive and authoritative declaration of the doctrine. He goes on to state, "that he formerly held an opinion, that the words of charge in this will were a charge on the lands in the hands of the devisee," and that he was "unable to distinguish the difference between devising lands to any one after paying his legacies, and his legacies being paid thereout In both cases they are to be paid out of the land, which is the subject of the devise. A devise to an individual after paying debts seemed to him to mark the same intent of charging the lands in the hands of the devisee, as a devise to an individual, the testator's debts being paid out of the land devised. He concluded, however, by admitting the distinction, upon the weight of authority. See Goodtitle v. Maddern, 4 East, 496.

The case of Doe v. Clarke, 5 Bos. & P. 343, affords a still stronger illustration of the doctrine. The devise there was of several portions of the testator's real estate to different devisees, and the testator concluded thus: "And I charge all my estates, both real and personal, with the payment of the above as aforementioned legacies;" and it was held, that the devisees took estates for life only, because the charge was upon the estates only, and not upon the devisee. Sir James MaLsfield, in delivering the opinion of the court, adverted to and disputed the doctrine of Lord Ellenborough, in Doe v. Snelling, 5 East, 87, who, he said, seemed "to think, that if debts and legacies are to be paid out of the estate at all events, there the devisee must take a fee. But what difference does it make, whether the testator directs the legacies to be paid out of the estate, or to be paid by the devisee out of the estate? In either case can the devisee be a loser, which is the only

principle upon which a fee is given him." As to the value of this criticism upon Lord Ellenborough's opinion, I am not called upon to decide. But I quote the following words, standing in immediate connection with the former, to show the learned chief justice's own opinion (and he was an eminent chancery lawyer) on the point we are now considering. "To consider," said he, "such a charge as a personal charge is most extraordinary, since there can be no doubt, that if such devisee were to die before the testator, it would still be a charge upon the estate. That has been decided repeatedly in the court of chancery: and it is quite established, that the charge exists as a charge upon the estate, notwithstanding the death of the devisee in the lifetime of the testator." If we advert to the fact, that these comments were made in a case, where the charge was created by the direction, that the debts, &c. be paid "thereout," that is, out of the estate devised, it seems impossible to misunderstand the meaning of the language. In the very late case of Roe v. Daw, 3 Maule & S. 518, where the devise was to A, B, and C, "except £20 to be paid out of C's part of the lands to B," it was held that C took an estate for life only. Lord Ellenborough said, "It has been contended, that this is a charge to be paid out of the land, and therefore a fee shall pass; and I agree, if it be a charge to be paid out of the lands in the hands of the devisee, the argument is good." Mr. Justice Le Blanc said, "Where there is a devise of lands, generally without words of limitation, it will convey only a life estate, unless it be accompanied with a charge on the devisee, or on the lands in his hands." Mr. Justice Bailey said, "I agree to the rule, that unless there be words of limitation to denote the quantum of interest, or to charge the devisee, or the lands in the hands of devisee, a fee does not pass. That I consider as determined in Moor v. Denn, 2 Bos. & P. 247, and many other cases, and particularly in Doe v. C'a ke, 5 Bos. & P. 343, where, though the legacies were charged on the land, yet it was held clearly not an estate in fee. In this case I find nothing to make the $20 a charge on C, the devisee, or on the lands in her hands but it is a charge on the lands in whatever hands they may be. The words neither import a charge on the person, nor on the interest, which she takes."

It seems to me therefore demonstrated, so far as the language or authorities can go, that a charge may be personal on the devisee

in respect to the estate, and that it may also, if apt words are used, be a charge upon the estate; and that, wherever the testator point; out the fund of payment, a charge is created on that fund. The cases of Boddeley v. Leppingwell, 3 Burrows, 1533; Frogmorton v. Holyday, Id. 1618; Doe v. Holmes, 8 Term R. 1; Goodtitle v. Maddern, 4 East, 498; Andrew v. Southouse, 5 Term R. 292, which have been relied upon to shake this doctrine, all manifestly support it. They are explained by simply adverting to the qualifications of the general rule laid down in the cases already cited, and have been fully answered at the bar.

But it is argued, that all these were cases where the question was, whether the devisee took an estate for life, or a fee; and that no question arose as to the point, whether the estate was also charged; and that in the case now before the court, Ezekiel, by the very terms of the devise, takes a fee. This is true; but it is also true, that in all these cases no question could have arisen as to the fee, unless the debts were a charge on the estate; and that in every instance where it was decided, that, notwithstanding the charge on the estate, the devisee took a fee, it was necessarily decided, that the charge bound the person as well as the estate. It would be the most extravagant rashness to presume that the whole bar and bench, during so many controversies, should have discussed this question, and admitted the charge, as a charge on the estate, and yet none in reality have existed But the doctrine is also entirely settled in equity, even in cases where, by the terms of the will, the devisee takes a fee, that if debts and legacies are payable by the devisee out of the estate, they are a charge upon the property. That was the decision in Miles v. Leigh, 1 Atk. 573; s. c. 4 Vin. Abr. tit. "Charge," D 463, pi. 21. There was no doubt in that case, but the devisee took a fee; and the only question was, whether it was a charge on the land. Lord Hardwicke said, "It is objected, that it is not said to be paid out of the estate, &c. nor is it said, by whom it is to be paid; but there are many cases, where it is neither said to be paid out of the estate, nor by whom; yet it has been considered as a charge upon the estate, where the general intent of the testator appeared." "The testator intended it should come out of both estates, and he has charged his son in respect of the whole estate he was to have;" and he affirmed the decree of the master of the rolls, which directed the defendant to pay what should be found due, or in default, to account for the rents of the land, and the land to be sold. Clowdsley v. Pelham, 1 Vern. 411, pi. 386 (and see cases cited Vin. Abr. "Charge," and 1 Mad. Ch. Pr. 474-488; King v. Denison, 1 Ves. & R. 260; Newman v. Kent, 1 Mer. 240; Cary v. Cary, 2 Schoales & L. 173-188), is a strong case to the same effect But it cannot be necessary to multiply authorities. It is plain from the language of Lord Hardwicke, that where debts &c. are payable I out of an estate, they are a charge upon the estate. This is the common sense of the words of the present will; and if we assume any other construction, we must strike from the will the words "out of the said estate," which no court can be justified in doing without necessity, and more

especially, when it would defeat the obvious intention of the testator. I know not a single authority, that sustains the argument, that words like the present do not fix a charge on the estate. None has been cited on the present occasion. On the other hand, there are a series of authorities recognising the charge on the estate in cases of this nature; and it is difficult to turn to a decision, where the subject is before the court, that does not contain a direct or implied admission of the existence of the doctrine. In many instances indeed a charge has been created by implication from words and intentions far less significantly expressed. See Noel v. Weston, 2 Ves. & R. 269; Shalleross v. Finden, 3 Ves. 738. I agree that a mere charge is no legal interest It is not a devise to any one; but as was observed by the lord chancellor, in Bailey v. Ekins, 7 Ves. 319, 323, it is "that declaration of intention, upon which a court of equity will fasten, and by virtue of which they will draw out of the mass going to the heir, or to others, that quantum of interest, which will be sufficient for the debts." Even as long ago as Lord Holt's time, that eminent judge declared, where a legacy was devised out of the testator's land, that it ought to be paid out of the land, for it was a charge on the land. Anon., 12 Mod. 242, pi. 586. The cases of Livingston v. Livingston's Ex'rs, 3 Johns. 189; Jackson v. Harris, 8 Johns. 109; Jackson v. Bull, 10 Johns. 148: and Jackson v. Martin, 18 Johns. 31,—decided by the supreme court of New York, do not, in the slightest manner, disturb any of these principles; but, as far as they go, confirm them; and the last case particularly contains an implied admission of the very point now under consideration. I have taken up more time than may be thought necessary in considering this question; but the earnestness and ingenuity, with which it has been argued, required some exposition of the grounds, upon which I hold the debts by the terms of the present devise to be a plain charge upon the estate.

It has been argued, that there is something in the peculiar jurisprudence of Rhode Island, which repels this conclusion, or at least prevents its application to the case now before the court But I am not able to perceive any sound reason for such an opinion. By a statute of this state, the real estate of the testator is made generally chargeable with his debts, upon a deficiency of the personal assets; and the executor may, upon proper application and proof, obtain a license

from the proper court to sell so much of the real estate, as may be necessary to meet such deficiency. But this statute creates a general charge only in favor of the creditors. It does not prohibit the testator from making a particular provision or appropriating a particular fund exclusively for the payment of his debts, which shall bind his heirs and devisees. It does not in the slightest degree interfere with the ordinary construction of wills. It leaves the testator at full liberty to dispose of his property upon such conditions, as he may please, and liable to such charges, as he may please. And when he creates a particular fund for the payment of his debts, and exonerates all the rest of his estate from the charge, as to all other persons except his creditors, that fund becomes exclusively appropriated for the purpose, as much so, as if he had devised it on the special trust. Unless therefore the court were prepared to declare, that the statute overturns all the general rights of testators on this subject, a proposition too extravagant to be maintained for a moment, it is clear that the general liability of the real estate to the payment of debts, created by operation of law, does not destroy the specific charge of the same debts upon the Ferry estate devised to Ezekiel.

This being so, the next question is, whether the land itself in the hands of the other defendant, Potter, or the purchase money now due, remains chargeable with the debts. The argument is, that Potter is a bona fide purchaser, for a valuable consideration, and as such, he takes the estate discharged from the debts, and is not bound to look to the application of the purchase money, even if he had notice of the charge, and the nonpayment of the debts. As to notice, it is quite clear, as well upon the answer of Potter, as the circumstances of the case, that he had absolute notice of the devise to Ezekiel, and that it stood charged with the payment of his father's debts, before the asserted purchase. I do not say, that he had merely constructive notice, knowing that the Ferry estate was his father's, and that the son derived it from him by devise, which would be sufficient to put him upon inquiry, and bind him to take notice; but in point of fact he had seen the will, known its provisions, and the opinions of counsel respecting the nature of the devise, at least as early as the time, when he made his purchase; and according to his own confessions he had notice of the material parts of the will at an antecedent period. But notice is of no importance in a case of this nature, unless the purchaser is bound to look to the application of the purchase money. As to this the settled distinction is, that if a trust is created for specific or scheduled debts, the purchaser is bound to see to the application of the purchase money. But if the trust is for the payment of debts generally the purchaser is not bound to see to the application of the purchase money; and if he pays it over to the trustee, he, and the estate in his hands, stand discharged from the trust. But if the purchase money is unpaid, so much of it, as is necessary, may be reached in the hands of the purchaser to execute the trust. The question then arises, whether in this respect there is any difference between a trust created to pay debts generally, and a

charge upon lands for the same purpose. There is an anonymous case in Moseley's Reports (page 96), where a distinction seems to be taken between a trust to pay debts, and a charge for the same purpose. It purports to have been decided by Sir Joseph Jekyll, and is thus stated: "If an estate is devised to trustees to be sold for payment of debts, the purchaser need not concern himself to see the money applied; but it is otherwise, if the debts are particularly specified; but if lands are charged with the payment of debts and legacies, the estate remains charged in whosesoever hands it comes." From this brief note it is not perhaps easy to decide what the real meaning of the latter clause is; whether, that the charge being legacies, as well as debts, the purchaser must look to the application of the purchase money,—a doctrine that cannot now be maintained (Jebb v. Abbott, Butler's note to Co. Litt. 290b, § 12; s. c. cited 1 Brown, Ch. 186, note; Rogers v. Skillicorne, Amb. 188); or whether it means to take a distinction (as seems more probable) between a trust and a charge. If the latter be the true meaning, that case is in conflict with subsequent decisions. In Elliot v. Merryman, Barnard. Ch. 78, 2 Atk. 41, where the debts were by the will charged upon the real estate without the intervention of any trustee, and the bill was brought by creditors against the purchasers of the land, to obtain their debts out of the land, the bill was dismissed by the master of the rolls, upon the ground, that the purchasers were not bound to see the money rightly applied; and he denied, that there was any distinction between a trust to sell and a charge for payment of debts. And the like opinion was manifestly held by Lord Camden, in Walker v. Smalwood, Amb. 676; and in Jenkins v. Hiles, 6 Ves. 654, note a, Lord Eldon observed, "that it was long settled, that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application." Mr. Sugden (Sugd. Vend., Ed. 1818, p. 441, c. 11, art 11, § 1. Mr. Patch holds the same opinion. Patch, Mortg. art 11, § 1, p. 404), upon the authority of these cases, does not hesitate to affirm the same doctrine, and holds it equally strong upon principle. The same may be collected to be the opinion of Mr. Fonblanque (2 Fonbl. Eq. c. 6, § 2, note k, p. 149); and if I rightly understand the state of the facts (very imperfectly reported) in Beynon v. Gollins [2: Brown, Ch. 323] (compare that case as cited

in Butler's note to Co. Litt. 290b, § 14, and 1 Brown, Ch. 186, note, and as reported in another point in 2 Brown, Ch. 323), that was also the determination of Lord Thurlow.

Looking to the principle, upon which the general doctrine is founded, I am not able to perceive any material difference between a direct trust to pay debts and a charge upon the lands for the same purpose. The one is a trust fastened upon the estate by a court of equity by implication to effectuate the intent of the testator. The other is a direct trust created by the testator for the same object. And there is great force in the observation, that the mode, by which the trust is created, cannot be material; for if it comes in esse, it is substantially to be executed in the same manner. Sugd. Vend. (Ed. 1818) p. 441, e. 11, art 11, § 1. Lord Eldon indeed, on a recent occasion, said, "There is a great difference here between a devise upon trust, and a devise subject to a charge;" but he alluded, as the context shows, not to any difference in the effect of the lien, or charge, as to creditors, but to the nature of the interest taken by the devisee, whether beneficial, or a mere naked trust. And he added, that "the object is effected much in the same way, compelling the party to make good the charge, or trust, by very similar operations, as applied in this court." King v. Denison, 1 Ves. & R. 261, 272, 276. No authority has been cited, which establishes any distinction between the case of a trust and a charge as to seeing to the application of the purchase money; and my own researches have not enabled me to discover any, except those already referred to. I cannot but think, that the current of authority and the analogy of the law, ought to lead us to a rejection of any such distinction, as unsatisfactory in principle and inconvenient in practice.

But the most material question yet remains to be discussed; and that is, whether Mr. Potter stands in the predicament of a bona fide purchaser for a valuable consideration. It is very clear, that he has not yet paid a very considerable proportion of the purchase money; and if the whole purchase money be not paid, nothing is better settled than, that what remains, may be reached in the hands of the purchaser, to discharge the original trust, unless other equities intervene. And there is a still more salutary principle established by incontrovertible authority, viz. that, though a person, being a real purchaser, is not bound to see to the application of the purchase money, if he has bona fide paid it; yet he is not permitted to become a party to any misapplication of the fund, or knowingly to assist in diverting it to his own interest, as in payment of debts due to himself, and then to insist upon the protection of a bona fide purchaser. Even in respect to executors, who, as to personal assets, have a very large authority, but are deemed, in equity, trustees for creditors, legatees, and distributees, it is now clearly settled, that it is a misapplication of the assets to apply them to the payment of the antecedent debt of the executors; and a court of equity will reach them, as trust property, in the hands of any persons, who, knowing them to be assets, have so received them from the executors. There are numerous cases on this subject; and the doctrine was fully discussed in Hill v. Simpson, 7 Yes. 152, and

McLeod v. Drummond, 17 Ves. 152, and Bonney v. Ridgard, 1 Cox, 145. But I may well be spared any examination of the cases, since the doctrine has been recently recognised in its fullest extent by the supreme court of the United States. Wormley v. Wormley, 8 Wheat [21 U. S.] 421. See, also, Adair v. Shaw, 1 Schoales & L. 243, 262.

It becomes material then to sift the particulars of the purchase made by Mr. Potter of the estate in question; and if it shall then appear, that he has been knowingly a party to the misapplication of the trust fund, the court is bound to apply the principles of equity to the case, whatever may be its own private opinion as to the general fairness of the transaction. And I take upon myself to assert, that the imputations in the bill of positive and actual fraud, by Mr. Potter, are not sustained by the evidence. His own answer explicitly denies it; and the other evidence falls far short of establishing any meditated contrivance to cheat the heirs or creditors. Still, however, if the transaction be one, which the law deems incorrect, and admonishes the court to repudiate, as inconsistent with well considered and salutary principles, it is its duty to declare it, and grant the parties an adequate relief. As to the principal facts there does not seem to be any real controversy. It may be gathered from the evidence, that Ezekiel, the devisee, towards the close of his father's life, was in indigent, if not embarrassed, circumstances, owing considerable debts, and among others a debt exceeding three thousand dollars to Mr. Potter. It is apparent also from the answer of the latter, that he was uneasy about his debts, and looked principally, if not entirely, to the bounty of the father for the means, by which it should be paid. Indeed, there is an irresistible implication throughout the whole record, that the son possessed no substantial means of discharging his debts except the Ferry farm devised to him, and a debt asserted to be due from his father, which was controverted and disallowed by the commissioners; and at all events became extinguished in equity by the acceptance of that estate upon the terms of the will. The actual situation of the son and the unascertained state of the debts of the father were fully known to Mr. Potter, and are not even pretended to be denied in the answer. In fact, Mr. Potter puts his chief reliance upon a defence springing from other sources; upon the estate's not being legally charged with the debts, and upon the purchaser's being exonerated from looking to the application of the purchase money.

In this posture of Ezekiel's affairs, Mr. Potter, in April, 1819, about one year after the testator's death, became the ostensible or real purchaser of the whole Perry farm, and also of a lot of ten acres of land in Jamestown, for the asserted consideration of $15,800. To enable him to make this sale, Ezekiel purchased of his sister Isabel, one third of the Perry farm and the lot in Jamestown, which had been devised to her by her father; and the value of the lot was, in the sale to Mr. Potter, estimated at $800, and the value of the third of the Ferry farm at $5,000. Neither of those sums has ever been paid to his sister, but it is admitted they both still remain due. The asserted consideration for the purchase of the two thirds of the Ferry farm devised to Ezekiel was therefore $10,000. The terms of the sale were somewhat extraordinary, as they are now stated by the parties. Mr. Potter was to advance the sum of $0,000 towards the payment of Ezekiel's debts, including that of Mr. Potter, and was to reserve the payment of the residue of the purchase money by a note payable on the 25th of March, 1822, without interest In the mean time Mr. Potter was to be allowed interest upon all the advances made by him. In addition to this, Ezekiel was to have a lease of the whole estate for three years, commencing on the 25th of March, preceding the sale, and of course to end on the 25th of March, 1822, he paying a yearly rent of $948, which was equal to six per cent upon the purchase money, and was estimated as the fair value of the rent of the estate. It was further agreed, that if Ezekiel could at any time within the three years sell the estate for a larger sum than $15,000, he should have the benefit of the surplus, after deducting all repairs and expenses, which might have been incurred on account of the estate. I observe, also, that it is stated in the answer, that the lease for three years was agreed to be allowed in lieu of interest upon the purchase money, and Ezekiel, in his original answer, asserts, that no rent was in fact to be paid, and that an acknowledgment of the receipt of the same for the whole term was endorsed upon the lease. This assertion is dropped in his second answer, not apparently from mere mistake. In point of fact, upon the original lease (which is annexed to Mr. Potter's answer), there is an indorsement without date, in the following words, "Received the money part of the within lease, it being taken into consideration in the purchase of the within mentioned estate. Elisha Potter." When this endorsement was made does not appear, and it is not in any manner referred to in Mr. Potter's answer. It is an omission somewhat singular if it was made at the time of the execution of the lease, and it constituted a part of the original agreement; and if no rent was in fact to be paid, it is strange, considering Mr. Potter was himself a lawyer, that there should have been inserted in the lease itself, a formal and exact covenant for the payment of the rent annually during the term, a covenant, which was utterly repugnant to the intention of the parties. Indeed I cannot but feel a very strong regret, that the transaction did not originally assume a shape more like the character, which the parties now give it; since the explanations of it are not so satisfactory, or so free from obscurity as to leave no room for hesitation. The reason

assigned for taking the lease at all is certainly not very conclusive. It seems, that Ezekiel had previously, in 1818, hired a part of Dutch Island upon a lease of three years (one year of which was expired at the time of the sale of the Ferry farm,) at a small rent, not probably exceeding $70 or $80, and the possession of the lease is made the groundwork of the lease of the Ferry farm for a year beyond the term, at the substantial rent of the whole interest of the purchase money, and with the collateral engagement of Ezekiel to pay interest upon all intermediate advances. But I am content to leave the contract of sale, as it is stated by the parties, without farther observation; and stripped of all disguise, it is in its most favorable view a purchase of the Periy farm for $15,000, of which $6,000 was to be advanced, or applied to the payment of the debts of Ezekiel, the residue of the purchase money (which was ultimately fixed at $8,806,) was to stand on a credit of three years without interest, and Mr. Potter was to receive interest upon all his advances in the intermediate period. I lay out of consideration the purchase of the Jamestown lot, and one third of the Ferry farm from Isabel, because they were never paid for, and added nothing substantially to the funds of Ezekiel, and do not constitute any part of the fund for the payment of the father's debts.

Here then we have a case, where the trust fund, for the payment of the father's debts, valued by the parties at $10,000, at the very time when the amount of those debts was in course of being judicially ascertained, and before it was actually ascertained, was applied to the exclusive discharge of the debts of the devisee. The father's debts wore a known charge upon the estate, and the purchaser knowingly assisted the devisee, who, as to his charge, was also a trustee, to dispose of this estate in payment of his own debts, without in any shape providing for the principal charge. The surplus, after that charge was satisfied, was all that belonged to the devisee; and yet the purchaser assisted the devisee in misapplying the fund, in the first instance, to other purposes. The father's debts have been since ascertained to be about $7,400, not one cent of which has ever been paid by the devisee; and no part of the purchase money, as will be presently seen, has ever come to the hands of the devisee to enable him to discharge those debts. And all this transaction was negotiated 'and consummated between the parties, with the will before them, upon full deliberation, under

their own exposition of the law, and up on the suggestion, that the purchaser was not bound to look to the application of the purchase money.

I agree to the doctrine, in cases of a general charge of debts, that the purchaser need not look to the application, if he has bona tide paid the same. When he has once, in good faith, paid it into the hands of the devisee, he is exonerated. But he is not at liberty to assist in its misapplication; lie is not to buy the trust property in payment of antecedent debts, or to aid the devisee in diverting the fund from its proper uses; and if he does, a court of equity will fasten on the estate in his hands the original charge, which he has attempted to displace. It appears, in point of fact, that a sum a little short of 86,000 of the purchase money was, with Mr. Potter's assent, applied to the payment of Ezekiel's own debts, and of this sum more than one half went to extinguish a debt due to himself. But it is necessary to trace the transaction somewhat farther, in order to show, that the parties have always acted with the utmost indifference as to the rights of the father's creditors, and have sheltered themselves, under a supposed rule of law, for any misapplication of the fund. In June, 1820, Ezekiel notwithstanding the relief already afforded him was again pressed for some debts. He had then in his possession the note for the purchase money of $8,801. It was then agreed, that Mr. Potter should advance a farther sum to Ezekiel to pay his debts; that Ezekiel should surrender the right of selling the estate for more than $15,000, retained by the former bargain; that the note of $8,801 should be given up; and that the sum which, on a settlement, should be found due to Ezekiel, should be secured to be paid to him on the 23th of March, 1822, partly by a cash note, and partly by a note payable "in mortgages in the town of South Kingston, or in the state of New York." Accordingly Mr. Potter paid to Ezekiel's creditors, by his own notes about $3,705, and Ezekiel gave up the right of reselling the estate, and also the cash note of $8,801. Mr. Potter ascertained his advances, together with interest, to be $7,070.38, leaving a balance due from the purchase of the estate, of $7,920.02. For this last sum Mr. Potter gave two notes antedated as of the 25th of March, one a negotiable cash note for $4,000, the other a note for $3,929.62, payable to Ezekiel, or order, on the 25th of March, 1822, "in mortgages in the town of South Kingston, or in the state of New York." It is not my duty to comment on the wisdom or policy of such an extraordinary bargain, so far as it respects the pecuniary interests of the devisee. It does indeed seem to me utterly unaccountable, how a bargain so indefinite in some of its terms and objects, and so little suited to the exigency of his embarrassed situation, should have received the deliberate assent of the devisee. A readier scheme to disable him from the present means of discharging his debts, without great sacrifices, could have hardly been imagined.

The original note was negotiable, and capable of being turned into cash at any time at a reasonable discount; but by the exchange, nearly a moiety of the amount was invested in a security, not only not negotiable, but so loose in its terms and obligation, that its real value

was incapable of any exact appreciation. It appears, also from the answer of the devisee, that the negotiable note of $4,000 was immediately indorsed over to his sister Isabel, and an assignment also made of $1,800, part of the other note, by way of payment, or security, for the estate bought of her by the devisee. And this arrangement was most probably coutemplated by all the parties, when the negotiation, in June, 1820, was first entered into. It will at once be perceived, that deducting the amount thus justly secured to Isabel, the whole of the purchase money was exhausted excepting about $2,000; and the latter sum was locked up in undefined mortgages in South Kingston or New York. So that the whole trust fund was in effect gone from the reach of the creditors, the greater part being applied to the extinguishment of Ezekiel's own debts; and what remained was appropriated to other purposes. The very tenor of the note for the mortgages was calculated to embarrass, if not to defeat, any chance for redress; for the option, as to what mortgages should be taken or received, belonged to the parties, and could not be very easily, if at all, exercised by the creditors or strangers. The transaction was about the time, when the commissioners made their report of the father's debts to the court of probate; and as all the parties lived in South Kingston, the amount must have been in a great measure previously ascertained, and could scarcely have escaped the inquiry or attention of any persons interested in the estate. There is, beside, the still stronger fact, that controversies had then arisen between the plaintiffs and the devisee in respect to this very matter; and a suit was avowedly in contemplation to ascertain and adjust their respective rights. To no person was this better known than to Mr. Potter. Now, when he had notice of the non-payment of the debts, and of the application to the devisee to have them paid, of the negotiations for the purpose of an amicable settlement, and of the failure to accomplish that object, he was put upon legal notice and inquiry: and he could not farther negotiate with Ezekiel, in respect to the funds then in his hands, without being liable to have his proceedings scrutinized in a court of equity. There is much other matter in the case, which is open to observation; but the conclusion, to which the court has arrived, renders any discussion of it unnecessary. That conclusion is, that the sale by the devisee, under the circumstances, was a manifest breach of trust, in violation of his

duty to the creditors, and subversive of the great object of the testator in the devise in question.

The next consideration is, whether Mr. Potter was conusant of this breach of trust, and, upon the facts already stated, it seems be yond all doubt, that he had full knowledge of the breach, was a party to it, and voluntarily assisted in the misapplication of the purchase money. He can shelter himself from responsibility in a court of equity only by showing himself to be a bona fide purchaser, who has not aided in such misapplication. In no proper sense can he be considered as such a purchaser. He has chosen to apply the purchase money, so far as it has yet been paid, or liquidated, to the exclusive payment of the devisee's debts, and not of the debts of the testator. In this way he has been privy to the expenditure and appropriation of nearly $8,000, according to his own account of the matter; and, as to the residue of the purchase money, so far from paying it to the devisee, or applying it to the discharge of the testator's debts, he has aided in closing it up in mortgages of an undefined nature, and thus precluded it from being applied as a present fund for the purposes of the trust Unless the court therefore, is ready to surrender its duty, it can have no difficulty in holding, that the Perry farm, to the extent of the estate devised to Ezekiel, remains still charged and chargeable, in the hands of Mr. Potter, with the debts of the testator. I had some doubt originally, whether Isabel, the daughter of the testator, ought not to have been made a party to the bill, since, according to the allegations in the answer, she has an interest in the outstanding purchase money for the debt due to her. But I am now entirely satisfied, that she is no necessary party to the bill. No decree can be made against her. She is no party to the asserted breach of trust; and has no interest which can be affected by any decree between the present parties. If she has any lien on the estate for the unpaid purchase money, it is only upon that part of it, which was conveyed by her. As to her interest in any of the notes, the court will do nothing that can disturb her rights; it will act altogether upon that portion' of the estate and purchase money, which does not interfere with her claims.

Having stated these results, it remains only to advert to the objection, that the present plaintiffs are not competent to maintain the present suit because they have not yet paid the testator's debts. The argument is, that the creditors alone have a right to maintain a suit to enforce the charge, unless they have been paid by the executrix or the devisees. The right of the creditors to enforce the charge in equity cannot be doubted. See Green v. Lowes, 3 Brown, Ch. 218. But I am also of opinion that the executrix, who, by the law of the state, is responsible for the payment of the debts, where there are real or personal assets, has also a right to enforce the charge. She might procure a license from the proper authority to sell the real estate, upon a deficiency of the personal assets, pursuant to the statute. She might in this way, perhaps, reach the estate charged with the debts; but the remedy would be circuitous, and might be inadequate to all the purposes of equity. She

is not compellable to adopt that course; but may directly, by the assistance of a court of equity, reach the fund, which, in the eyes of such a court is appropriated for the payment of the debts. If she can do this after payment of the debts, there is no reason why she may not do it before, since she is entitled to avert an impending mischief, and is not bound to advance her own money to pay the creditors. Besides, the testator has disposed of all his real and personal estate by his will, and the executrix, who is residuary legatee and devisee, has no right to apply the personal estate, bequeathed to other legatees, to the payment of the debts, when there are other funds appropriated for the purpose; and she has a direct interest to relieve property devised to herself from the burden of the debts. The like remark equally applies to the other plaintiffs, who are devisees exonerated by the will from any contribution or lien. I entertain no doubt, therefore, that the plaintiffs are competent to maintain the present suit It is the common case of a party subjected to a burden chargeable upon her in law; but from which she is entitled to be relieved in equity, by a paramount obligation on another to exonerate her from the whole burthen. Upon the whole, this is, in my judgment a clear case for equitable relief, and I shall decree it according to the principles already suggested.

{NOTE. An appeal was taken by Elisha B. Potter to the supreme court, where the decree of the circuit court was modified, Mr. Chief Justice Marshall delivering the opinion, in which it was held that so much of the decree of the circuit court as may subject Potter to the payment of the debts of Peleg Gardner beyond the purchase money remaining in his hands, and beyond the money paid by him in discharge of the debts of Ezekiel W. Gardner, after deducting therefrom the amount of the estate purchased from Ezekiel by his sister Isabel, ought to be reversed, and that in all other things it ought to be affirmed. 12 Wheat. (25 U. S.) 498.

{The cause being remanded to the circuit court, the decree of the supreme court was referred to a master who made a report, upon which exceptions were taken, but overruled, and a decree pro forma entered against Potter for the payment of $5,972.42, with interest on the same from the time the report was made, and also for the payment of $2,662.23. with interest from the same time, provided that same should not be paid by Ezekiel W. Gardner or collected from him by execution. Prom this decree, Potter again appealed to the supreme court where it was held, Mr. Justice McLean delivering the opinion, that as the purchase money was not to be paid by Potter until the 25th of March, 1822, no interest should be charged against him prior to that time, and his objection to the payment of any interest on the ground that it was not in his power to pay the money and discharge his obligation before the final decree in the case was

disregarded upon the ground that he could have discharged himself from the payment of interest by bringing into court whatever balance he conceived to be due, and paying it over under order of the court As this was not done, it appears that the defendant below did not do all that was in his power to exempt himself from the charge of interest.

{The last decree of the supreme court was to the effect that there was error in so much of the decree of the circuit court as subjects Potter to the payment of interest from the 16th of October, 1820, and that said decree be reversed and annulled, and the cause remanded with directions to enter a decree that said Potter pay into the registry of the circuit court, within 30 days from tie next term, the sum of $3,920.62. with interest from March 25, 1822, to be paid over to the complainants or to the creditors of Peleg Gardner, and that a decree be entered that Ezekiel W. Gardner pay into the registry of the court, subject to its order, within 30 days as aforesaid, the sum of $1,751.74, with interest from March 25, 1822, for which he is in the first instance liable, and the said Potter ultimately. 5 Pet (30 U. S.) 718.}

[1] {Reported by William P. Mason, Esq.}

[2] {Modified in 12 Wheat. (25 U. S.) 498.}