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Case No. 5,245.

GARNETT V. MACON ET AL.

{2 Brock. 185;¹ 6 Call, 308.}

Circuit Court, E. D. Virginia.

Nov. Term, 1825.

EXECUTORS AND ADMINISTRATORS—SUBJECTING LAND TO PAYMENT OF DEBTS—COVENANT PLEADED AS A RELEASE—JOINT DECREE—SETTLEMENT OF MOIETY BY ONE—TRUSTEES—SALE TO EXCLUDE DEBTS—SPECIFIC PERFORMANCE—INADEQUACY OF PRICE.

1. To sustain the vendee's allegation that the contract was abandoned by implication, the conduct of the vendor ought to be such, as to justify a reasonable man in believing that he acquiesced.
2. In equity, whether the lands be charged by the will, or the bond, of the ancestor, creditors must exhaust the personal estate before they can resort to the lands.
3. And, in such case, a decree against the executor is not conclusive, but prima facie evidence only, against the heir or devisee.

{Cited in *McLaughlin v. Bank of Potomac*, 7 How. (48 U. S.) 229.}

4. To avoid circuitry of action, a covenant may be pleaded as a release; but it must be a covenant between those parties only; and if it contains no words of release, it will not be construed such, unless it gives the covenantee a right of action which will precisely countervail that to which he is liable; and unless, too, it was the intention of the parties that the last instrument should defeat the first.

{Cited in *Durrell v. Wendell*, 8 N. H. 372; *Berry v. Gillis*, 17 N. H. 13; *Robinson v. Godfrey*, 2 Mich. 414; *Morgan v. Butterfield*, 3 Mich. 618.}

5. Parol substitution of a third person for one of several obligors, does not release the rest.
6. If, there be a joint decree against the executors of two persons, and a creditor receives a moiety of the debt from the representatives of one of them, and covenants not to levy the residue of the decree upon the estate of that one, it does not discharge the representatives of the other.

7. What release to one will discharge the rest of several obligors; and e contra.
8. It is the course of a court of equity to decree, in the first instance, against the party who is ultimately responsible; but this is done only where the parties are before the court at the time of the decree, and their several liabilities are clearly ascertained.
9. The court of chancery has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase money.
10. But if the trustee sells with the avowed purpose of excluding the debts of him who created the trust, the purchaser voluntarily assisting him in it, would not be secure.
11. And if he have notice of a debt before he pays the money, he may be affected if he proceeds with the purchase.
12. If the executor sells a chattel, specifically devised, to a person who knows there are no debts, the purchaser takes the property subject to the bequest.
13. Both on principle and authority, a specific performance will not be decreed at the instance of the vendor, unless his ability to make a title be unquestionable.

[Cited in *Brown v. Cannon*, 5 Gilman, 182.]

14. For, if no incumbrance be communicated to the purchaser, or known to him to exist, he must suppose himself to purchase an unincumbered estate:
15. And, therefore, his objections to taking it need not be confined to cases of doubtful title, but may be extended to incumbrances of every description, which may embarrass him in the full enjoyment of his purchase.

[Cited in *Irvin v. Bleakley*, 67 Pa. St. 26.]

16. The English court of chancery has never laid down the broad principle, that time was never important: on the contrary, the present doctrine there is, that where time is really material to the parties, the right to a specific performance may depend upon it; and the same doctrine prevails in the courts of the United States.
17. Although mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, yet if an unreasonable contract be not performed according to its letter, equity will not interfere.
18. And there is no difference between a contract, unreasonable when made, and one which becomes so afterwards, if the applicant be in fault.
19. The principle is, that a very great change in the value of the article is a serious objection to a decree for a specific performance, where the Vendor is in fault, as it may affect the arrangements of the vendee for a compliance with the contract.

[Cited in *Tufts v. Tufts*, Case No. 14,233.]

William Garnett, as executor of Richard Brooke, exhibited his bill in the superior court of chancery, for the Richmond district of Virginia, against William H. Macon, John Campbell, an absent defendant, and others, setting forth, that the said Richard Brooke, devisee of George Brooke, empowered his executors to sell his real estate; and that the plaintiff, as executor, had, on the 10th of June, 1818, sold a tract of land, called Manta-pike, to the defendant, Macon, who paid part of the purchase-money, but had since refused to fulfil the contract, alleging that the land is subject to the payment of a debt which Carter Braxton owed to Robert Campbell, and for which George Brooke, whose will charged his lands with the payment of his debts, was security. That there was no

just cause of apprehension, as a detail of the circumstances would show. That Braxton's debt was the balance due upon some bills of exchange drawn by him, in July, 1768, and secured by a mortgage upon thirty slaves, and two tracts of land called Broad-neck and Foster's, both which tracts Robert Campbell afterwards released; and subsequently thereto, to wit, in 1775, William Aylett and George Brooke, without any knowledge of the release, executed an obligation to Robert Campbell, binding themselves to stand securities for whatever sum Braxton owed him; but that obligation being afterwards lost, they, on the 15th of December, 1775, entered into another, under seal, which, reciting the loss of the former, bound them to pay the debt then due. That, in August, 1777, Robert Page, by indorsement on the obligation, substituted himself in the room of Aylett, with the assent of Robert Campbell, but without the knowledge of Brooke. That Braxton, in 1779, made a deed of trust to indemnify Page and Brooke, and a mortgage in 1792, but Page released part of the subject. That George Brooke died in 1781 or 1782, and Robert Campbell in 1791. That, in 1794, the defendant, John Campbell, as assignee and representative of Robert Campbell, brought suit, in the high court of chancery, against Carter Braxton, Robert Page, and Robert Price, the executors of George Brooke, to have the mortgages and trust deeds carried into effect; but, the heirs and legatees of George Brooke were not made parties to the cause. That Page died, in 1794 or 1795, subsequent to the commencement of the suit, which was revived against his representatives. That the defence made by Braxton, Page, and Price, was usury, and the act of limitations: both which points were decided against them by the chancellor who decreed the executors of Page and Brooke to pay so much of the debt as the mortgaged subjects should prove insufficient to satisfy: which decree was affirmed by the court of appeals, and the cause sent back to the court of chancery for further proceedings. That the defendant, Campbell, has ever since been pursuing the representatives of Page only, without taking any steps against Price. That George Brooke's estate is not liable, as well because the obligation of Brooke and Aylett does not bind their heirs, as because the debt was not the proper debt of George Brooke, whose responsibility for it ceased by Robert Campbell's release of the lands; by the acceptance of Page in the room of Aylett; by the defendant, Campbell's, failure to pursue Price; and by the release of part of the indemnity subject by Page, whose estate ought, consequently, to bear the whole burden. That the plaintiff was therefore able to make a good

title; and that the contract ought to be performed by Macon.

The answer of Macon admits the contract of the 10th of June, 1818, and says that he paid \$4000 of the purchase-money in anticipation, and bought wheat from Bagby for the purpose of seeding the land: during all which time he knew nothing of the claim of Campbell, or of George Brooke's will, but supposed Mantapike to be free from incumbrances, except a mortgage to Young, which was represented of no great amount, and was to have been paid off by the complainant before he made a deed for the land, although it is still unsatisfied. That the first information which the defendant had of Campbell's claim, was in the latter end of 1818, from Govan the agent, and that he immediately applied to counsel to investigate the title, who discovered the charge in Brooke's will. Upon which the defendant, finding himself involved unexpectedly in a lawsuit of interminable length, with, numerous parties, abandoned the contract, and gave notice of it to the plaintiff by letter of the 10th of December, 1818. That the plaintiff neither returned an answer, nor apprized the defendant that he should insist upon the contract, until the institution of this suit, several months afterwards, but, on the contrary, kept possession of the land, paid Bagby for the wheat, and never tendered a conveyance:—all which, the answer insists, released the defendant from the contract. In his amended answer, he said that, after the purchase, he advertised a plantation for sale, to assist in paying for it; but gave over the idea upon discovering Campbell's claim; since which Mantapike had fallen greatly in value, and it would be ruinous now to complete the contract. The original subpoena, which issued on the 26th day of December, 1818, was not executed: the bill was filed in June, 1819, and the writ was served upon Macon in January, 1820. On the 18th of June, 1821, the chancellor, taking the bill for confessed against Campbell, who knew nothing of the suit, and declaring his opinion to be, that the substitution of Page for Aylett released Brooke from his obligation, and that the heirs and legatees of the latter had still a right to contest the debt, as they were not parties to the suit in the court of appeals, decreed a specific performance of the contract, and directed an account of the profits of the land from the 1st of January, 1819. But it being afterwards discovered that Keith, another British subject, represented him as the assignee of Robert Campbell, the plaintiff revived the suit against him, who filed a bill in the circuit court of the United States, against the plaintiff and others, to subject the Mantapike land to payment of Campbell's debt, and, by petition under the act of congress, removed this cause, of Garnett &c. v. Macon and others, into the same court, where he appeared and put in his answer, which was received, and, of course, set aside the interlocutory decree of the chancellor. While the cause remained in the court of chancery, the agent of Campbell, upon receiving a moiety of the debt from Page's representatives, gave them a discharge, with a reservation of Campbell's rights against the heirs and representatives of Brooke, as to the other moiety. The answer of Keith relies on the decree of the court of appeals: insists upon the

obligation of Brooke and Aylett which it contends was not impaired, either by Robert Campbell's release of the lands, as the obligation was given to procure it, and the release was of record when the obligation was made; or by the substitution of Page for Aylett, which was collateral nudum pactum, and gave no time; or by any of the other transactions referred to in the bill and proceedings; asserts that proper steps had been taken to obtain payment of the decree of the court of appeals, but the same had proved abortive, as none of the mortgaged property could be found: denies that the plaintiff can make a good title until Campbell's debt is paid, but claims satisfaction out of the proceeds, if performance of Macon's contract is decreed.

The exhibits consist of—1. A copy of the record in the suit of Campbell against Braxton, Page, and Price, which contains Braxton's mortgage to Robert Campbell; the obligation of Brooke and Aylett; and the substitution of Page, which is without a seal, and expresses no consideration. 2. The releases by Robert Campbell, in May and September, 1773, of the mortgaged lands. 3. The agreement of the 10th of June, 1818, between the plaintiff and Macon, which stipulates that the plaintiff should sow the land that year with wheat for the defendant, the latter furnishing the seed; and that part of the purchase-money should be paid on the 1st of January, 1819, at which time Macon was to receive possession, and give a mortgage on the land for the other two instalments. 4. Macon's notice to the plaintiffs that he had abandoned the contract. 5. Richard Brooke's two mortgages to Young and Gaines, that is to say, one to indemnify them as sureties for his administration of William Brooke's estate, and the other to save them harmless as his sureties upon an injunction to a judgment obtained against him by Price as executor of George Brooke. 6. Sundry releases from the representatives of Young and Gaines, procured since the institution of the suit, and most of them of very late date. 7. A copy of the settlement of Richard Brooke's administration of William Brooke's estate, made in the latter part of the year 1824, showing a balance due to the estate. 8. A copy of George Brooke's will, which contains this clause, "after my just debts are paid, &c." Subsequent to which it devises Mantapike to Richard Brooke. 9. A copy of Richard Brooke's will, which empowers his executors to sell his lands and distribute the proceeds among his own legatees. 10. A copy of Macon's

advertisement in the newspapers (soon after his contract with Garnett), offering an estate in Hanover for sale, in consequence of the purchase of Mantapike, which he discontinued upon abandoning the contract. Smith, who wrote the contract, proved that Garnett, on receiving payment of the first instalment, was to make “a full and complete title” to the land, to Macon, who was to give a mortgage on it for the other two instalments. That Macon was ignorant of Campbell’s claim; and, when he afterwards mentioned the information he had received from Govan to Gamett, the latter admitted that he knew of Campbell’s suit at the time of the sale, but had not told Macon of it, because he supposed it was abandoned, as no process had been served upon him. The other witnesses proved that Garnett admitted, since the contract, that he was to make a perfect title, and obtain a release of Young’s mortgage. That the seed wheat had been purchased by Macon of Bagby; but that Garnett had paid for it, used it, and kept possession of the land, which had fallen very much in value since the date of the contract.

Mr. Stanard, for plaintiff.

The case involves three questions: 1. Whether the vendor can make a good title? 2. Whether he has abandoned the contract, or forfeited his right to a specific execution of it? 3. Whether the fall in the value of the property bars the plaintiff’s claim to relief?

The only objection urged against the first, is Campbell’s debt. But that claim, whether due or not, has no influence. For, if it be not due, then there is no pretext for resistance on the part of the defendant: and, if it be due, but the charge left ineffectual through the supineness of the creditor, it will not obstruct a specific performance.

The last proposition will be first examined. In all cases of general charge, a sale, before any suit by the creditors, defeats the charge: for it makes the proceeds personalty in the hands of the executor, and exonerates the land in those of the purchaser, who may insist on a conveyance, without regard to the creditors. 1. Because he is entitled to the property from the moment of the contract; for that creates such an interest in the land, that the law gives an action for non-conveyance, and equity a bill for specific performance. He has, therefore, law and equity both on his side; and that constitutes perfect right 7 Ves. 274; 11 Ves. 554. Whereas general creditors, who neglect to put the subject into the custody of the court, have no interest in the land itself, but an equitable claim only, depending upon the solvency of the personal estate, and which can never be rendered effectual until that is discussed. 2. Because, in consequence of this doctrine, it has become a settled rule, that, if there be no suit depending, the sale can never be overreached by the charge, unless the purchaser be bound to see to the application of the purchase-money; which is the only test with respect to the validity of the sale. But the purchaser is never so bound, unless there be a lien; the objects specified; or the property” impounded by a suit. Sugd. Vend. 367, 373; 6 Ves. 654; 1 Madd. 352. Such are the rules, even where the will directs, in terms, that the land shall be sold; and the argument is a fortiori, where

the charge is a mere creature of equity raised out of indefinite words, of no effect at law, and only commensurate to an end, which may be served as well by turning the creditors upon the proceeds. Macon's right to the estate, then, cannot be disturbed, as the charge was general, and no steps had been taken by Campbell to enforce it For the suit in the court of appeals had no effect, because the decree was against the executor only, and the bill did not seek to charge the land. But, if all this were less clear, the claim of Campbell would be no impediment to relief. 1. Because, if the release of Broad-neck and Foster's was before the making of the obligation, Brooke was deceived, as he was not apprized of it; and if it was afterwards, as it probably was, that alone was a discharge in equity. 2. Because Page was substituted in the room of Aylett, without the consent of Brooke, who was consequently absolved, as a different associate was imposed upon him. 3. Because Campbell's agent released Page's representatives, which discharged the whole obligation, especially as Page had given tip part of the indemnity property, without consulting Brooke, whose security was thereby lessened. 4. Because Campbell did not pursue Price, but suffered the personal estate to be wasted.

The result is, that the plaintiff can make a good title. Which leads to the inquiry, whether he has abandoned the contract, or done any thing to forfeit it? Neither has happened. He has not abandoned it. Because the suit was commenced immediately after the defendant's offer to relinquish, and has been constantly pursued ever since. He has not forfeited it. Because the plaintiff proceeded, without delay, to get up the incumbrances, and has the legal estate now at command.

The third question is clearly with the complainant—1. Because the estate belonged to Macon from the time of the contract, and the vendor had nothing to do with future contingencies. 2. Because it is like the annuitant's dying before he receives any thing, or an exorbitant price given for property; neither of which, unless there be fraud or surprise, will bar specific performances. 1 Brown, Ch. 156; 3 Brown, Ch. 605; 1 Cox, Ch. 428; 3 Ves. & B. 187. It follows, that as the plaintiff can convey a good title, there is nothing to prevent a specific execution of the contract. *Gibson v. Patterson*, 1 Atk. 12.

Mr. Call, for defendant.

The validity of Campbell's debt is established, both by the decree of the court of appeals,

and the evidence. By the decree: 1. Because the executor represents the personal estate, and is the proper party to sue and be sued respecting it. Co. Litt 209a; 2 Saund. 137b; Id. 720. 2. Because, in collateral charges, judgment against the principal is conclusive, unless fraud be shown, as the debtor (who is the executor in the present case) is the proper person to contest them. 3 Term R. 374, 377; 1 Wash. [Va.] 33; Skin. 586; 1 Eq. Cas. Abr. 315, pi. 2; Finch, Prec. 198. 3. Because there is privity between the heir and executor; for the case of *Mason v. Peter*, 1 Munf. 437, proceeded upon an erroneous principle. Co. Litt 232a; 10 Coke, 93b; 1 Mod. 225; 1 Maule & S. 364; Plowd. 439. 4. Because it is substantially a judgment in rem; for whenever the sentence is against the proper person to prosecute or defend, the right is ascertained, and cannot be drawn into question again. 4 Brown, Pari. Cas. 718; Cro. Car. 167. By the evidence: 1. Because the obligation has not been weakened by any of the events insisted on by the plaintiff's counsel: Not by the substitution of Page, for that was not only nudum pactum, but collateral in terms, and disturbed nothing. 8 Term R. 168. Not by the release to Page's representatives. 1. Because there was an express reservation of the right to pursue Brooke's estate. 2. Because the release of part of the indemnity property, by Page, did not injure Brooke; for his rights were not affected by it. 3. Because neither Aylett nor Page, as between them and Brooke, was bound to pay more than half of the debt; and, consequently, when the representatives of Page paid a moiety, the discharge given to them was of no prejudice to those of Brooke. 6 Ves. 805; 1 Marsh. 603. Not by the failure to pursue the personal estate of Brooke. 1. Because Price could not be proceeded against until the mortgaged subject had been discussed; and he died before the pursuit was over. 2. Because, delay in pressing the personal estate does not discharge the heirs. 1 Anstr. 112. That the obligation does not bind the heirs is unimportant, because the will subjects the land to payment of the testator's debts, and that in question was the debt of Aylett and Brooke. For the correspondence shows, that their undertaking was to be the price of Campbell's release of the mortgaged lands. The consequence is, that Macon was not bound to complete his purchase. For such contracts are always upon the implied condition, that the vendor has a good title (2 W. Bl. 1078); and Smith's deposition, which may be used to rebut the plaintiff's equity (1 Cox, Ch. 406; 1 Ves. & B. 527). proves that a clear title was part of the actual bargain in this case. But the plaintiff cannot make a title. 1. Because, the contract was not carried into effect before Macon received notice, followed by a suit that Campbell claimed satisfaction out of the land, and it is not material, if no conveyance has been made, whether the notice and suit be before or after the contract: for, in either case, any further proceeding with the purchase, amounts to collusion between the executor and the purchaser. 2 Vern. 116; 1 Eq. Cas. 358, pi. 4; 3 Brown, Pari. Cas. 5; 9 Mod. 418; 5 Ves. 722. 2. Because Garnett did not act under the charge in George Brooke's will, but professed to proceed under that of Richard, which was fraudulent as to the creditors

of George, and, therefore, the plaintiff could neither convey, nor the defendant obtain, a sure title under him. 3. Because all the necessary releases have not been procured, for the creditors of William Brooke are interested in the mortgage to Young and Gaines, as Richard Brooke died indebted to that estate, and Price's judgment still binds the Mantapike land. 4. Because, if it be true, as insisted, that Keith's suit can never be tried, from the impossibility of convening the parties, that circumstance is an additional argument for the defendant, as it keeps the title in perpetual suspense. But it is not true, for whenever the personalty cannot be conveniently discussed, the court will proceed forthwith against the real estate. *D'Aranda v. Whittingham*, Mos. 84. If, however, the title could now be rendered valid, Macon would, nevertheless, be released. 1. Because there was an improper concealment: for the plaintiff did not inform the vendee of Campbell's suit and Brooke's will, although Smith's deposition proves that he had notice of the first, and his connexion with the estate must have apprized him of the second. Coop. 33S; 18 Ves. 10. 2. Because there was not only actual inability, at the time, to convey the legal estate, but just cause to believe that the title would be disputed, and a purchaser is never bound to take a litigated title, because it is a species of maintenance, and may involve him in controversies with third persons, who ought not to be unnecessarily drawn into litigation. Sugd. Vend. 15S; 2 Schoals & L. 553, 560; 2 Ves. & B. 148; 16 Ves. 274; 1 Jac. & W. 547; 5 Ves. 187, 647; 14 Ves. 547. 3. Because it comes too late, for the purchaser is not bound to wait an unreasonable time. 10 Ves. 606; 4 Ves. 689; 5 Ves. 730; 1 East, 627; 2 Mer. 140. And the cases which speak of ability to convey at the moment of the decree as sufficient must have been cases of formal obstruction only, for whenever danger of eviction is to be apprehended, the purchaser is not bound to complete, especially in this country, where expensive improvements will necessarily be contemplated, and where the opinion seems to be, that the vendee, upon eviction, can only recover his purchase-money and interest, without regard to expenditures. [*Hepburn v. Auld*] 5 Cranch [9 U. S.] 276, 279. 4. Because the conduct of the plaintiff amounted to abandonment, for he did not insist upon performance, but paid Bagby for the wheat, kept possession of the estate, delayed to file his bill, and was unusually negligent with regard to the service of his writ.

All this afforded a presumption that the abandonment was acquiesced in, and justified Macon in turning his attention to other objects. 4 Brown, Ch. 331, 471, 497. But, in no event ought the defendant to pay interest, for the profits go against it, as Garnett was in possession without being able to make a good title. 2 Taunt 146.

Mr. Hay, on the same side.

The contract must be considered as abandoned by both parties; for Macon expressly relinquished, by letter, which ought to have been promptly answered, and some decisive step taken, by the plaintiff, to show that he Insisted on a fulfilment of the agreement. But nothing of that sort happened; for no deed was tendered, nor any demand made of that part of the purchase-money which became payable in January; and although a subpoena was taken out at an early period, the bill was not filed for several months afterwards, nor the writ served for more than twelve; although Garnett, in the mean time, had sown and reaped a crop of wheat upon the land. Under these circumstances, Macon had a right to presume that his abandonment of the contract was accepted, and to give himself no further concern about it 4 Brown, Ch. 469; 5 Ves. 818. It is incumbent on the vendor to make a clear title, and to be able to do so when he contracts; for the purchaser cannot be compelled to take a doubtful one, or to wait an unreasonable period for adjustment of difficulties respecting it 2 P. Wms. 201; 5 Ves. 189; 16 Ves. 273; 2 Ves. & B. 149. Under this view of the subject, Campbell's claim justified Macon's refusal to perform. For it was a well-founded claim: 1. Because the decree of the court of appeals had established it; for the case of *Mason v. Peter*, 1 Munf. 437, is not law, as it turned upon the notion of a want of privity, which is completely refuted by the authorities already cited; and, in the case of *Mayo v. Bentley* [4 Call, 528], the court of appeals decided that a judgment, confessed by the administrator, was conclusive against every body. 2. Because the release of Broadneck and Foster's was purchased by Aylett and Brooke, with the obligation given by them; and, therefore, it does not lie In the mouths of their representatives to say, that it was not the debt of the obligors, against their own covenant founded on a full consideration. Nor is that obligation in any manner impaired. Surely not by the substitution of Page, for that was collateral, and could, at most, operate as an additional security; but, as it had neither seal nor consideration, it possibly had no operation at all. Nor did the release to Page's representatives affect the obligation; for the right to pursue those of Brooke was reserved; and the case *Ex parte Gifford*, 6 Ves. 805, decides that an express release to one, upon payment of his proportion of the debt, does not discharge the rest of the obligors. The debt, then, is not only still due, but has been shown to be the debt of Brooke and Aylett; and, therefore, it is expressly, within the charge created by the will upon the land. But if Campbell's claim had not been so well-founded, Macon would still have been at liberty to resist the contract 1. Because it had been decided, by the court of appeals, that the claim was just; and he could not have delivered himself from embarrassment by paying

the money either to the plaintiff, or to Campbell; for, as he had received notice that the debt would be asserted against the land, he would have proceeded at his peril to pay to the former (Sudg. Vend. 530); and, if he had paid to the latter, he would have run the risk of having to pay it over again, if the contract should be preferred to Campbell's claim, or that claim should not be established. 2. Because the primary liability of the personal estate threatened to protract the contest to an immeasurable length, so as to keep him in perpetual suspense, and put it out of his power either to go to market with the property, or to dispose of it among his family: a difficulty to which he ought not to have been exposed; and, as specific performance is discretionary with the court, the jurisdiction should not be exercised against an innocent purchaser, brought into the dilemma through the fault of the vendor; especially as Mantapike has greatly depreciated, and Macon, who was diverted from his efforts to sell the plantation in Hanover, which has since fallen in value, must make great sacrifices to raise the purchase-money. However, it is useless to insist any farther upon these points, as the mortgages given by Richard Brooke have not been completely released, and Price's judgment still binds the land. For those incumbrances put it out of the power of the plaintiff to make a good title, and therefore he is not entitled to relief.

Mr. Leigh, for plaintiff, said, that, in the reply, he should insist, 1. That as the obligation of Aylett and Brooke did not bind their heirs, Campbell's claim, if it were the debt of Brooke, would be no objection to a specific performance, because the charge in the will was indefinite, and the contract made before notice of the debt 2. That the release of Broadneck and Foster's by Campbell, was subsequent to the obligation, and therefore destroyed it, as Aylett and Brooke were not consulted. 3. That the substitution of Page for Aylett released the whole obligation, because a court of equity would have compelled a general release to Aylett, and that would have operated as a release to Brooke also. Co. Litt 232; Wats. Partn. 226; 5 Bac. Abr. 167. 4. That as Price's answer to the suit in the court of appeals does not deny assets, it admitted them, and therefore the failure to pursue him was culpable negligence. 5. That the release to Page's representatives was a complete discharge to those of Brooke.

Mr. Wickham, for defendant

The decree of the court of appeals is conclusive; for if it had been in favour of Price, the heirs and devisees of George Brooke would have been discharged; and the rule must be reciprocal. The case of *Mason v. Peter*, 1 Munf. 437, does not resemble this; for that was a judgment by default; this a full defence upon the merits by the executor. But independent of the decree, the cause is in favour of Campbell. For it is of no consequence whether the covenant binds the heirs or not; because the will charges the land with the payment of all the testator's debts, and not those only where the heir and executor are both bound. But as the covenant proves that Brooke owed the debt, the case is necessarily embraced within the terms of the devise. The substitution of Page for Aylett, did not release Brooke, as the case cited from 8 Term R. 168, shows; for it was a mere collateral undertaking, which did no injury to Brooke, as his situation was not altered by it; and he might, if Aylett had failed, have even derived benefit from it, as Page, in that case, must have assisted to pay the debt. This is an answer to all that has been said relative to the release to Page's representatives; for that was beneficial to those of Brooke, as it relieved them from all responsibility for Aylett's moiety, to which extent only was Page bound, even at law, and, therefore, it was but a new acknowledgment of their having fulfilled his engagement, which, in effect, was no more than to pay one half of the debt, and his representatives having done so, they were discharged, whether an actual release was given or not; for, to use Mr. Leigh's own argument a court of equity, as they were no farther liable, would have decreed one to be executed. It is therefore not like *Co. Litt 232*, and the other authorities cited by him, because it was not a release of the original obligation, but of Page's own undertaking, and Aylett was left bound as he was before. But the other view which has been taken of this part of the case by the defendant's counsel, is equally clear, for the release expressly reserves the right to proceed against Brooke's representatives, who, consequently, continue liable, according to the cases cited from 6 Ves. 805; 1 Marsh. 603. There was no delay in pursuing Price; but if there had it would not have been material, as the responsibility of the devisees arose from the charge in the will, and the creditor was not bound to prosecute for their indemnity. *Croughton v. Duval*, 3 Call, 69. Besides, Campbell was out of the country, and his course was impeded by the death of parties, and other obstructions. It is of no consequence that the personal estate is first liable, for it does not appear that it can be ascertained whether there be any which can be made effectual, and a purchaser is not to be kept in suspense forever. Macon could not have, paid the purchase-money with safety, for, after the notice, he was bound to see to the application of it. Besides, Garnett's suit created a *lis pendens*, which was followed by those of Campbell and Keith; and the whole together rendered performance, to the last degree, perilous. Campbell's equity is both prior in point of time, and derived from the highest source; for Garnett's trust is for the representatives of Richard Brooke, and not for

the creditors of George Brooke, to whom the land belonged, and who created the charge, that his own debts might be paid before his devisees took anything. But this upright intention would be defeated by the doctrines contended for by the plaintiff's counsel. For if Garnett had received the money, and paid it over to the legatees of Richard Brooke, he would not have been liable for it, because he would have acted in discharge of the trust committed to him, and there was no confidence between him and George Brooke. Another view of the subject makes the case clear. Richard Brooke mortgaged the land, and that put it out of the power of Garnett to convey the legal estate, as he had only the equity of redemption. But Campbell's prior claim gave him the first right to redeem. This refutes the notion that Macon had the best right to call for the legal estate. For if Garnett were now to obtain complete releases from all the mortgagees, and to convey to Macon, the prior right of Campbell would overreach him.

The argument that Macon may pay the money into court, and leave Garnett and the creditors of George Brooke to contest the right to it is unsound:—1. Because the price will not pay Campbell's debt, and, therefore, if the land should rise in value, Keith will have a right to insist upon a re-sale, in order to obtain the benefit of the rise. 2. Because payment into court would only bind the parties to this suit and not the other creditors of George Brooke who may join in Keith's suit and claim to have the land sold again. Surrounded with such difficulties, none of which were known to him at the time of his purchase, Macon has a right to say, "nonhaec in faedera veni."—"My contract was for a clear title, not for one embarrassed with endless disputes." If there be a well-grounded apprehension that the litigation will be protracted, and the property locked up for a long time, the court will not compel execution of the contract because the vendee will not be able to improve with safety, or go to market with the estate. Courts, in order to prevent controversies and loss, will sometimes enjoin trustees from proceeding to sell where other incumbrances exist. The present contract, therefore, will hardly be enforced, if performance would only lead to new litigation. The circumstances, in the case of *Gibson v. Patterson*, 1 Atk. 12, do not appear; but it is certain that the rule of courts of equity, upon questions of this

sort, has undergone a considerable change, and that the old cases differ widely from the modern, in respect of the period of performance. The foundation of this kind of bills for specific execution, where other persons than the contracting parties are made defendants, is simple. It is to remove formal obstructions, when the title is otherwise clear, in order that the purchaser may hold the estate without danger of interruption. But that is not the case here, for the same embarrassments will continue after the decree as before, the obstructions not being formal only, but such as the court itself cannot remove. The vendor should be able to show both that his conduct has been fair, and that he has been guilty of no laches. But Garnett is not in that situation, for he has sold an estate subject to incumbrances, without apprizing the purchaser of them; and if it was in his power to remove them, he has not used due diligence to effect it: not even in the prosecution of this suit, although professedly brought to clear the title. Compare the conduct of the parties. Garnett was bound to offer a complete title, or to disclose the defects; but he did neither, for he was not able to convey a good title, nor did he apprise the purchaser that it was defective; even Young's mortgage was represented as small, and, with respect to the rest of the incumbrances, for midable as they are, nothing was said. Macon's conduct, on the other hand, has been unexceptionable. Confiding in Garnett's representation that it was a clear title, he paid \$4000 of the purchase-money before it was demandable, and was preparing to fulfil the contract in all other respects, until he received notice from Govan, that he would proceed at his peril, upon which he abandoned the agreement, and gave notice to the defendant, who was not injured by it, as he was thereby enabled to clear the title. If he could, and go to market again with a sore estate. If, however, performance should be decreed, interest ought not to be allowed, as the title was in controversy, and the plaintiff had possession of the estate.

Mr. Leigh, in reply.

Four objections are made to a specific performance:—1. That the contract was abandoned by the plaintiff. 2. That there was laches in prosecuting the suit and removing incumbrances. 3. That there has been a change of circumstances, in consequence of a fall in the value of the property. 4. That there are existing incumbrances now upon the estate.

There is not a shadow of reason in support of the first, for the suit was brought immediately on the receipt of the defendant's notice; and if no deed was tendered in January, it was because he had refused to proceed, and it was his duty to have prepared one. Sugd. Vend. 182.

The second objection is equally as untenable, for the suit was constantly going on, and there was no delay in getting up the incumbrances; but, if there had, it would not have been material, for time is not of the essence of the contract in any case, unless expressly stipulated (Sugd. Vend. 282, 289, 293; [Hepburn v. Auld] 5 Cranch [9 U. S.] 262; [Hepburn v. Dunlop] 1 Wheat [14 U. S.] 179; 14 Ves. 205), and much less in this, for

a clearing of the title within the limit of the instalments was all that was looked for upon a fair construction of the agreement, compared with Smith's deposition. Besides, ability to convey at the time of the decree is all that is ever required, and more ought not to be insisted on here, as the incumbrances were not, in fact, known to the plaintiff at the time of the contract (Sugd. Vend. 229); and, if there was any room for constructive notice, the purchaser was as much bound to search for it as the vendor (Sugd. Vend. 336).

With respect to the change of circumstances, and fall in the value of the property, nothing favourable to the defence can be drawn from that source, for it has long been settled, that objections of that kind have no weight, any more than the premature death of the annuitant, or the inadequacy in the price of the property in the cases cited by Mr. Stanard, from 1 Brown, Ch. 156; 3 Brown, Ch. 605; 1 Cox, Ch. 428; 3 Ves. & B. 187. Indeed, inadequacy of price would appear to be the stronger objection, because it might, with some plausibility, be urged as a fault in the bargain itself; but the subsequent fall in value is unconnected with the agreement, and ought not to affect a bona fide transaction.

The fourth objection is of a three-fold character: the mortgages, Price's judgment, and Campbell's claim; but none of them are sufficient to repel a specific execution of the contract, for the mortgages have all been released; or if any thing still remains to be done, it may now be decreed, as all necessary parties are before the court, which has always been considered as sufficient, because the title is assured by the decree, and that is the same as if the plaintiff possessed it 16 Ves. 380. Price's judgment is as little to be regarded, for the prior mortgage of Young prevents it from fastening on the legal estate, and it cannot affect the equity of redemption as a specific lien. Pow. Mortg. 339, 340, 615, 620; 3 Brown, Ch. 480; 1 Ves. Jr. 431; 1 Cox, Ch. 160. Campbell's claim, therefore, is the only pretext left; but that has no influence, for it was not a specific lien, but a mere charge which might or might not become operative; and therefore, if the purchase-money had been paid, and a Conveyance taken before notice, it is admitted that the vendor could not have been disturbed. But the notice in pais makes no difference, for in cases of general charge without a lien, any other notice than a *lis pendens*, is immaterial, because the proceeds of the sale are assets, and the price of the land is all that

the creditors are entitled to. 1 Eq. Cas. Abr. 358, pl. 2; 1 Anstr. 109; Amb. 676. The force of this is not weakened by the argument that the contract is still executory, for the equity looks upon things agreed to be done as actually performed, and when an agreement is entered into for the sale of an estate, it considers the purchaser as the true owner from the date of the bargain; consequently the sale in the present case is good against the charge, as the purchaser was not bound to see to the application of the purchase-money, and was complete owner of the land at the moment of closing the contract, as there was no *lis pendens* at the time. Sugd. Vend. 130; 2 P. Wms. 277; 1 Brown, Ch. 186; 3 Brown, Ch. 96; 16 Ves. 151; Sugd. Vend. 372. Nor is it material that Garnett was not a trustee appointed by the will of George Brooke, for he had authority to sell, and the proceeds of the sale will be as available for the creditors as the land itself would have been.

The cases cited by the defendant's counsel, to prove that a purchaser is not bound to take a doubtful title, do not conflict with our right to a specific execution, for that of *Rose v. Calland*, 5 Ves. 187, was a case where there was a perpetual impropriation of hay not disclosed in the contract, but which, according to a doctrine settled in the court of exchequer, was attached to the estate. That of *Stapylton v. Scott*, 16 Ves. 272, was a case where the executor sold the whole property, when the devise was that he should sell the testator's own moiety, and his interest only in the rest. *Sloper v. Fish*, 2 Ves. & B. 145, was a doubtful question whether the deed was absolute, or had been delivered as an escrow only. *Jervoise v. Duke of Northumberland*, 1 Jac. & W. 540, was a case of uncertainty as to the nature of the estate. *Lowes v. Lush*, 14 Ves. 547, was a question of great doubt, whether the sale had not been anticipated by an act of bankruptcy. *Cooper v. Denne*, 4 Brown, Ch. 80, was a case where it was uncertain whether the leases had been confirmed, without which they were clearly void. *Hapland v. Smith*, 1 Brown, Ch. 75, was a case where there was a doubt whether there was a good tenant to the praecipe, and the chancellor was of opinion there was not. *Walker v. Smalwood*, Amb. 676, was the case of a *lis pendens*, and therefore has nothing to do with this case. *Green v. Lowes*, 3 Brown, Ch. 217, was an injunction upon motion before answer, without any decision upon the merits; and Sugd. Vend. 243, is his own inference only, and therefore is of no importance. The decree of the court of appeals does not conclude the plaintiff. *Mason v. Peter*, 1 Munf. 437, is expressly otherwise; and the authority of that case is not lessened by Mr. Wickham's argument that as the heir may avail himself of a judgment in favour of the executor, he is bound by one against him; because that turns upon the principle, that the claim is entirely destroyed by the judgment. The release of Broadneck and Foster discharged Aylett and Brooke; for Braxton's letter proves that it was subsequent to the obligation. But, if that were not so, the substitution of Page had that effect as to Brooke clearly; for equity would have decreed a release to Aylett, which would have discharged Brooke, as Page would have been left bound instead of Aylett, with whom he was asso-

ciated in the obligation. If, however, that were doubtful, the release to Page's representatives discharged those of Brooke, upon a known principle of the common law. Co. Litt 232, note 1, which is not impugned by the ease *Ex parte Gifford*, 6 Ves. 808, and *Hutton v. Eyre*, 1 Marsh. 603; for they were cases of composition with insolvents and partners, and therefore not like this. Campbell's representative has lost all pretensions against the real estate of Brooke, by the failure to pursue the personal effects in the hands of Price; for as the latter did not deny assets in the suit in the court of appeals, he admitted them, and therefore, it was the duty of Campbell to have made that fund effectual. But in any view of the case, the personal estate must be first discussed (*Sugd. Vend.* 378); and, if, through the supineness of his predecessor, Keith should meet with any difficulty in the pursuit of it, he must resort to the securities upon the administration bond. Interest is always decreed upon the purchase-money, and the purchaser is only entitled to credit for the profits actually received.

MARSHALL, Circuit Justice. Richard Brooke, by his last will, empowered his executors to sell his whole estate, and William Garnett, the plaintiff, alone proved the will, and took the executorship upon himself. On the 10th of June, 1818, William Garnett sold the estate called Mantapike, to William H. Macon, the defendant "for the sum of twenty-two dollars per acre, \$6000 of which are to be paid on the 1st day of January next, when possession will be given, and the balance in two equal annual payments from that date, which said two last payments are to be secured by mortgage on the said land. The said William Garnett farther agrees to put the present cornfield land in wheat, the said William H. Macon furnishing the seed. And it is farther agreed, that the said William H. Macon is to have power to make this agreement valid in one month from the date hereof, or to make the same null and of no effect by giving due notice to the said William Garnett to that purport, within the time aforesaid."

On the 22d of August, William H. Macon paid William Garnett \$4000 in part of the first payment; but having received notice afterwards, that George Brooke, who devised Mantapike to Richard, had by his last will, charged his whole estate with the payment of his debts; and had in his lifetime, become

surety for Carter Braxton in a large sum, to Robert Campbell, for which a decree had been pronounced in the court of chancery against Carter Braxton, Robert Price, executor of George Brooke, and against the representatives of Robert Page, who was also surety for Carter Braxton, which decree was affirmed in the court of appeals in October, 1799, and remains unsatisfied; and being advised by counsel, that he, having notice thereof, the estate called Mantapike, would be charged with the said debt in his hands, he, on the 16th of December, addressed the following letter to the plaintiff: "Sir—I am informed that Colonel George Brooke, the former owner of the Mantapike tract of land, became Carter Braxton's security for a large debt to Robert Campbell, and by his will, charged his lands with the payment of his debts; that the debt to Campbell is still due, and that the Mantapike lands are liable to be sold for the payment thereof. I, therefore, think proper to inform you, that I consider the contract which I made with you for the purchase of the said tract of land, as void, and request you to return me the \$4000 which I paid you, in part of the purchase-money, with interest I am, sir, very respectfully, W. H. Macon." On the 26th of the same month, William Garnett instituted his suit in the court of chancery of the state, against William H. Macon, and against the representatives of Robert Campbell, praying for a specific performance of the contract, and insists in his bill, that the estate called Mantapike, would not be chargeable with the debts of George Brooke, in the hands of a purchaser; and insists, also, for several reasons which are detailed at length, that George Brooke was not liable for the debts to Campbell, and that his devisees were not bound by the decree against his executor, or estopped from contesting the claim. The chancellor was of opinion, that Brooke had been released by the conduct of Campbell, and that a specific performance of the contract ought to be decreed, and directed an account of the rents and profits of the estate received by the plaintiff since the sale; but information was received of Campbell's death, on which the suit abated as to him, and was revived against William Keith, his representative, who appeared and petitioned that the cause should be removed into this court, which was ordered accordingly. Keith, as the representative of Campbell, has also filed a bill against the representatives, heirs, and devisees of George Brooke, praying that his debt may be paid; and to this bill William H. Macon is made a defendant: but this suit is not ready for trial. In May, 1820, William H. Macon filed his answer, in which, he insists that he ought to stand discharged from his contract, on account of the lands being incumbered with Campbell's debt, of which he had no notice, and that he purchased, "supposing the said Mantapike tract of land was free from incumbrances and charges of all kinds, except a mortgage by Richard Brooke to General Young, which was represented as of no great amount and which the complainant was to pay off before he made a deed for the land to this defendant, but has failed to do so, as this defendant understands." He Says, that on examining the records, which he did, in consequence of receiving notice of Campbell's debt, he found the question to be

so perplexed and intricate, that the controversy would probably not be determined during his life, in consequence of which he resolved to abandon the contract, and addressed a letter to the plaintiff giving notice of his resolution. That in consequence thereof, as he presumes, the complainant kept possession of the tract of land; failed to tender a deed to the defendant for it, or to demand the instalment in January, 1819, and paid for the seed-wheat, which Macon had purchased to seed the cornfield, according to the written contract; thus exhibiting every mark of a reciprocal abandonment of the contract on his part, and he gave no indication to the contrary till the institution of this suit, several months afterwards.

In argument, the first point which has been made by the defendant Macon is, that the contract was abandoned by both parties. It is not pretended that there has been any express or formal abandonment on the part of the plaintiff. The allegation is, that it is to be implied from his conduct. To sustain this implication, the conduct of the vendor ought to be such as to justify a reasonable man in believing that he acquiesced in the decision of the vendee, to abandon the contract; it ought to be such as might reasonably influence the conduct of the vendee, and induce him to regulate his own affairs on the presumption that it was no longer incumbered by his contract. The attempt of the vendor to re-sell the estate, or the unequivocal exercise of ownership over it, unaccompanied with any explanation showing that he still considered the contract as binding, might be such an act; but there has been no attempt to re-sell the estate, nor any unexplained act of ownership over it. On the contrary, a subpoena was taken out within ten days after the date of the letter of abandonment, and the bill, since filed in consequence of this subpoena, claims a specific performance. Had the bill been immediately filed, and the subpoena executed, this point, it is presumed, would not have been made; but the bill was not filed until June, 1819, and the subpoena was not returned executed until January, 1820. From these circumstances, the counsel for the defendant claim the same advantages to their client, as if the plaintiff had acquiesced silently in his letter of the 16th of December, 1818, until the service of the subpoena informed him that a suit was depending. But I do not think that this claim can be supported.

No laches are imputable to the plaintiff. His determination to insist on the contract,

seems to have been immediate; and the measures taken by him in pursuance of that determination, were sufficiently prompt. A subpoena was issued on the tenth day after the date of Colonel Macon's letter, but there was not time to execute it. New process was directed, and the law makes it the duty of the officers of the court, to attend to that process. I do not think the delay which took place in executing it, can be justly imputed to Colonel Garnett, nor ought any forfeiture of right to be the consequence of that delay, unless some injury to Colonel Macon had resulted from it. No injury is shown or alleged, nor is it probable that any can have arisen. From the vicinity of the two gentlemen to each other, their rank in life, the common conversations which grow out of such controversies, the interest which the parties took in it, and the inquiries they would naturally make, it is not reasonable to suppose, that while the vendor was in fact actively pressing his suit, and continually issuing new process, the vendee could act upon the presumption that he had abandoned his contract. But if these circumstances, which generally accompany transactions of this character, cannot be considered as belonging to this cause, the record, I think, furnishes satisfactory evidence that Colonel Macon was apprized of the determination of Colonel Garnett to insist on the specific performance of the contract. Thomas G. Smith deposes to a conversation with Colonel Macon, in which that gentleman said, that though the counsel consulted by him had been of opinion that Mantapike was bound for Campbell's debt the counsel consulted by William Garnett had advised otherwise, and that William Garnett said, he did not think himself at liberty, as a representative, to cancel the bargain. The deposition of James M. Garnett, too, though less explicit bears on the same point. The very fact, that the vendee did not repeat his demand for repayment of the \$4000 he had advanced, shows that he did not suppose the vendor had relinquished the contract. Since, then, the vendor did never in fact relinquish the contract but took early measures to enforce its specific performance; since the delay which took place in the service of process did not proceed from him and did not produce any real mischief to the vendee, I cannot think that the right to enforce a specific performance is in any degree affected by that delay.

It has been also argued, that the vendor ought to have done all that was required from him by the contract. He ought to have tendered possession and a conveyance, on the 1st of January, 1819. He certainly might have done so. But when it is recollected that previous to the 1st of January, 1819, he had received a letter from the vendee, announcing his determination not to receive possession or a conveyance, and had himself resorted to the laws for that remedy, which they afforded for a broken contract, I cannot think that the omission, if it may be so termed, ought to vary that remedy, so far as respects a specific performance, whatever might be its influence on other questions which would arise in the cause, should the contract be carried into execution.

I come now to consider the validity of the objections made by the vendee to a specific performance of the contract, supposing it not to be abandoned. He complains, that the title is incumbered and embarrassed with Hens, of which he had no knowledge when the contract was made, and which would certainly have deterred him from making it, had they been communicated to him. A court of equity compels the specific performance of contracts, because it is the intention of the parties that they shall be performed. But the person who demands it, must be in a capacity to do, substantially, all that he has promised, before he can entitle himself to the aid of this court. At what time this capacity must exist, whether it must be at the date of the contract, at the time it is to be executed, or at the time of the decree, depends, I think, upon circumstances, which may vary with every case. There is no subject which more requires the exercise of a sound discretion. The inquiry in every case of the kind must be, whether the vendor could at the time have conveyed such a title as the vendee had a right to command? If he could not then, whether he can now? And if he can, whether there has been such a change of circumstances, that a court of equity ought not to compel the vendee to receive it? The first and great objection to the title, is the lien supposed to be imposed on the Mantapike estate, by the will of George Brooke, for the payment of his debts. In the year 1781, George Brooke made his last will in writing, in which he devised as follows: "Aftermy just debts are paid, I give and dispose of the remainder of my estate in the manner following, &c." The testator was then seised and possessed of Mantapike, which he devised to his son Richard. Richard Brooke entered upon the property devised to him, and remained in possession of it until his death, which happened in the year 1816. By his last will, he empowered his executors, or such of them as might act, to sell his land. William Garnett, the plaintiff, alone qualified as executor to the will, and sold the land to the defendant, William H. Macon, without any intimation of the existence of Campbell's claim, or that George Brooke had charged his land with the payment of his debts. He now contends that this claim constitutes no obstacle to a specific performance of the contract, because:—First It was not one of George Brooke's just debts, at the date of his will or at the time of his death. Second. If it was a just debt, it does not charge the estate in the hands of William H. Macon.

First. Is the claim now made by Keith, on the part of Campbell, for a debt legally due

from the estate of George Brooke, deceased? As a suit for that claim is now pending, and is not yet ready for hearing, any positive decision respecting it would, perhaps, be premature. It is, however, in the power of the court to form opinions on some points of that case, subject, indeed, to future revision; because the facts on which those points most certainly depend, are in the record; and it may be proper to do so, because, if the claim be obviously unfounded, the course of the court would be different from what it ought to be, if any strong presumptions exist in its favour. The defendants insist that the decree against the personal representatives of George Brooke is conclusive evidence against his devisee of the existence of the debt. The cases cited by counsel, in support of this proposition, do not decide the very point. Not one of them brings directly into question the conclusiveness of a judgment against the executor, in a suit against the heir or devisee. They undoubtedly show that the executor completely represents the testator, as the legal owner of his personal property, for the payment of his debts in the first instance, and is, consequently, the proper person to contest the claims of his creditors. Yet there are strong reasons for denying the conclusiveness of a judgment against an executor in an action against the heir. He is not a party to the suit,—cannot controvert the testimony,—adduce evidence in opposition to the claim,—or appeal from the judgment. In case of a deficiency of assets, the executor may feel no interest in defending the suit, and may not choose to incur the trouble or expense attendant on a laborious investigation of the claim. It would seem unreasonable that the heir, who does not claim under the executor, should be estopped by a judgment against him.

In the case against Munford's heirs, in this court (*Alston v. Munford* [Case No. 267]), the question was decided against the conclusiveness of such a judgment, and I am not satisfied that the decision was erroneous. This case, however, varies from that, in a material circumstance. In that case, the heir was bound by the obligation of his ancestor, and was liable to the creditor directly. In this case the creditor is bound to proceed against the executor, and to exhaust the personal estate before the lands become liable to his claim. The heir or devisee may, indeed, in a court of chancery, be united with the executor in the same action, but the decree against him would be dependent on the insufficiency of the personal estate. Since, then, the proceeding against the executor is, in substance, the foundation of the proceeding against the heir or devisee, the argument for considering it as *prima facie* evidence may be irresistible, but I cannot consider it as an estoppel. The judgment not being against a person representing the land, ought, I think, on the general principle, which applies to giving records in evidence, to be re-examinable when brought to bear upon the proprietor of the land.

It was said, but not pressed, by the counsel for the plaintiff, that the decree of the court of chancery was not even *prima facie* evidence against the representatives of George Brooke. I do not concur with him in this proposition; but if I did, it would not, I think,

materially affect this case. The decree was against Braxton, as well as against the representatives of Brooke and Page, and is admitted to be conclusive against Braxton and his representatives. They could never be permitted to deny that Braxton owed Campbell the money specified in that decree. The undertaking on which the decree was pronounced against Brooke's executor, is dated in 1775, and promises, under seal, to stand security for Braxton to Campbell, for the sum then due. This sum is fixed by the decree against Braxton, and the defence now set up for Brooke does not controvert that decree as to Braxton, but insists on several circumstances which, as they contend, discharge Brooke from the liability incurred by his undertaking, as Braxton's surety. The first of these is, the release of Broadneck, which had been mortgaged for the debt, in 1769, when the bills drawn by Braxton and sold to Campbell came back protested. William Aylett and George Brooke became sureties to Campbell for this debt. On the 21st day of May, in the year 1773, Campbell joined Braxton in a conveyance of the mortgaged premises to John Shermer, which is recorded in September, of the same year. On the 10th of December, 1775, Aylett and Brooke transmit to Campbell an instrument in writing, under seal, which, after reciting a former undertaking as sureties for Braxton, contains these words: "We, therefore, in consideration of our former agreement, do promise and oblige ourselves to stand security for the said Braxton to the said Campbell, his heirs, executors, administrators, and assigns, for the sum of money now due from the said Braxton to the said Campbell."

It is contended for the plaintiff, that this suretyship was probably undertaken in the confidence that the mortgaged property was amply sufficient to discharge the debt, and that Campbell, by releasing this property without the consent of the sureties, discharged them. There would be great force in this objection, had the release of the mortgaged premises been dated subsequent to the engagement made by Aylett and Brooke. But that engagement was dated in December, 1775, and the deed of conveyance by Braxton and Campbell to Shermer, was recorded in September, 1773. No evidence exists that either the mortgage or its release was communicated to Aylett or Brooke, other than the presumption arising from the notoriety of such transactions, and from the fact that both deeds were recorded. These circumstances are precisely as strong to

prove a knowledge of the deed to Shermer, as of the deed to Campbell, were it even proved that the first bond of Aylett and Brooke anteeded the deed to Shermer. The undertaking made in December, 1775, cannot be presumed to have been induced by a deed of mortgage which had been released more than two years, and although it is expressed to be made in consideration of the prior undertaking, yet that prior undertaking would not have been renewed under circumstances, which, in the opinion of the parties themselves, absolved them from it, both in law and conscience. The fair inference from this renewal is, that the parties, being mutual friends, the conveyance to Shermer was with the knowledge and assent of all.

The second objection arises from a fact which is considered as an implied release of Aylett from his joint obligation with Brooke. On that instrument is this endorsement:—"Aug. 6th, 1777, I do oblige myself to perform every engagement that Colonel William Aylett was bound by the within to perform, and to be considered as one of the securities of Mr. Braxton, in the room of Colonel Aylett. Witness my hand, this 6th day of Aug. 1777. Robert Page." It is contended, that this endorsement must be considered as made with the consent of Campbell, who, from its terms, and from suing the representatives of Brooke and not of Aylett, must be considered as having agreed to discharge Aylett. The inference is, I think, a fair one. The instrument always remained in possession of Campbell, who must be presumed to have been privy and assenting to the endorsement, and who has avowed it by his suit. It is insisted, that the legal effect of this agreement is to discharge Brooke as well as Aylett, because the release of one joint obligor releases the other. It is obvious that the release of Brooke was not contemplated by the parties. If such be the effect of the instrument an operation is given to the words, which they do not naturally import, and which the parties could never have foreseen or intended. If a positive rule of law require such a construction, the court must make it; but the construction can be justified only by a positive and well-settled rule. The common rule of law, and it seems also to be the rule of reason, is, that words shall subserve the intent; but when the reverse of this rule is to be adopted, and both the words and the intent of an agreement are to yield to a technical principle, that principle ought to be sustained by decisions of unquestionable authority, the application of which cannot be doubted. The principle is, that a covenant never to put a bond in suit, is a release, and it is also settled, that a release to one of several obligors, is a release to his co-obligors. Both these points have been frequently decided, and the plaintiff is certainly entitled to the benefit of those decisions, as far as they apply to his case. The principle will be found in any abridgement,² or general treatise on the subject, with a reference to the cases which establish it. In no one of them does the obligation contain any other party than him with whom the covenant is made. In all of them, the covenant, if broken, gives a right of action to the parties bound in the obligation, and the measure of their damages is given by the recovery of the obligee in

his suit against them. If A. is bound to B. in an obligation, and they enter into a covenant stipulating that it shall never be put in suit, notwithstanding which, B. puts it in suit, this breach of covenant gives A. an action against B., in which he must recover in damages, precisely the sum 'to which the judgment obtained by B. may amount To avoid circuitry of action, this covenant may be pleaded as a release. Thus far the cases go, and if there be one which goes farther, I have not found it. To bring himself within their letter, Brooke ought to show a covenant, in which Campbell stipulates with Aylett and himself, never to put their bond in suit To bring himself within their spirit, he ought to show some agreement giving him an action against Campbell, in which his right would be commensurate with any judgment Campbell might obtain against him. In such a case, and in such a case only, would the principle of the decisions relied on apply; because, in such a case only, the sole effect of leaving the instrument to operate according to its language, would be to produce circuitry of action. In such a case, too, the parties can have no other intention than to defeat the obligation. It is the sole object and effect of their covenant To construe such an instrument, then, as a release, is to give it the effect intended by the parties. I think the proposition may be stated, without fear of its being disproved by the books, that a covenant containing no words of release, has never been construed as a release, unless it gave to the party claiming that construction, a right of action, which would precisely countervail that to which he was liable; and unless, also, it was the intention of the parties that the last instrument should defeat the first.

This general view of the precedents on which the plaintiff relies, would be sufficient to satisfy my mind that they do not apply to the case under consideration, had not the contrary opinion been urged at bar, with all the earnestness of conviction, and been supported by an authority, given on the case itself, which is entitled to the utmost respect I shall, therefore, look farther into the question, and examine some cases and principles, which are adverse to the construction claimed by the plaintiff's counsel. *Lacy v. Kynaston*, 2 Salk. 575, 12 Mod. 551, and 1 Ld.' Raym. 688, was in substance, this:—Articles were entered into by the members of a company of comedians, binding themselves

to pay £100 to the representative of the plaintiff's intestate, who was a member of the company, within three months after his death, should he continue to act during his life. The action was brought against Kynaston, who was also a member of the company, and the declaration avers, that plaintiff's intestate did continue to act during his life. The defendant pleads in bar, articles subsequently entered into by the same parties, including the plaintiff's intestate, stipulating jointly and severally, that if the defendant Kynaston, should give notice of his intent to give over acting in said companies, he should be free and discharged of and from all debts, &c, entered into by him, on account of the company, and that the plaintiff's intestate, and the rest should save harmless and indemnify the defendant from all such debts, &c, or any matter or thing relating to the company. To this plea the plaintiff demurred, and the only question was, whether the articles amounted in law to a defeasance or release, or were to be construed only as a covenant. The court was of opinion that it was only a covenant, for several reasons, which are assigned in the opinion. In discussing the question, the principle, that a perpetual covenant amounts to a release, was particularly considered, and the reason given for construing such a covenant as a release, is to avoid circuity of action—"Because," says the court, "there, one should precisely recover the same damages that he had suffered by the others suing the bond. A. is bound to B., and B. covenants never to put the bond in suit against A.; if, after, B. will sue A. upon the bond, he may plead the covenant, by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and O. covenants with A. not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B., for the covenant is not a release in its nature, but only by construction, to avoid circuity of action; for when he covenants not to sue one, he still has a remedy, and then it shall be construed as a covenant, and no more." The same point was determined in *Dean v. Newhall*, 8 Term R, 168, in which the authorities were reviewed at length, and a distinction of great importance taken, between an actual and a constructive release.

It has been insisted by the plaintiff's counsel, that these cases do not apply, because they relate to obligations which were joint and several, whereas the obligation of Aylett and Brooke was joint This objection merits consideration. It is admitted to be law, that a release to one of several obligors, whether they be bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all. 2 Saund. 48, note; 2 Salk. 574; 12 Mod. 550. That the obligation is joint, or joint and several, then, can make no difference, if there be an actual release. The difference, if there be any, consists in the construction of the instrument The same words, it may be contended, would amount to a release of a joint obligation, which would not release one which was joint and several. Has this ever been so determined? I can only say, if it has, I have not found the case. In the absence of authority, the proposition must rest upon its reasonableness, and on

analogy. The reason assigned by the plaintiff in support of this distinction, is that which is given by the court in *Lacy v. Kynaston*. In case of an obligation which is several as well as joint, the plaintiff may still sue the obligor, to whom the covenant does not apply, without violating his engagement, or subjecting himself to a suit; whereas, if the obligation be joint only, both obligors must be joined in the action. There is certainly much in this argument which deserves consideration. Without admitting its conclusiveness, which I am far from doing, it is necessary, as an indispensable preliminary to its application to the cause at bar, to show that the endorsement on the bond of Aylett and Brooke, amounts to an agreement on the part of Campbell not to sue Aylett, on which agreement Aylett might recover damages equivalent to those he had sustained by the suit. I do not think this is shown. Aylett is no party to the endorsement, and it is only upon the intention that Campbell can be considered as, coming under any stipulation to him. What, then, was his intention? Certainly not to discharge the obligation. The endorsement supposes the obligation to remain in full force, and is received in the confidence that it does remain in force. It may well be doubted, whether a destruction of the obligation would not also destroy the endorsement; for Page agrees only to stand in the place of Aylett in the obligation, and if that be annulled, it is by no means clear that Page is bound to any thing. Were this even otherwise, it is very certain that Page would be placed in a situation entirely different from what he intended. If the endorsement is to be considered as a substantive agreement, referring to the obligation, for the sole purpose of ascertaining the sum for which he was bound, and remaining in force after the destruction of that obligation, then Page would be liable to Campbell for the whole debt, without retaining that recourse against Brooke for a moiety of it, which Aylett certainly possessed. He would not then stand in the room of Colonel Aylett, as the endorsement imports, but in the room of both Aylett and Brooke, which the endorsement does not import. To construe Campbell's assent to this endorsement, then, as an agreement not to sue Aylett, if the effect of that agreement would be to destroy the obligation, would be to defeat the plain intention of the parties, and effect an object they designed to guard against. This is not to be tolerated, if the act can be otherwise construed.

I can perceive no difficulty in doing so. The intention of the endorsement being, to secure Colonel Aylett against the claim of William Campbell, and to transfer his liability to Mr. Page, leaving Mr. Brooke still bound, the endorsement must be so construed as to give full effect to the whole of this intention, so far as its words will justify. Now, if by supposing an agreement on the part of Campbell not to sue Aylett, we plainly defeat the intention of the parties, and probably annul the instrument itself, we ought not to suppose such an agreement, but some other more congenial to their views. Their object would be effected by joining Aylett in the suit on the obligation, and either not proceeding to judgment against him, or not using the judgment when obtained. If it were true, that the suit could never be brought against Brooke without joining Aylett in the writ, it would be much more rational to suppose that an agreement for his security, omitting to describe the mode by which it was to be effected, was to be carried into execution by means consistent with other objects plainly intended by the parties, than by means which must defeat those objects.

The respect which the law in all such cases pays to the intention with which an instrument is executed, may receive some illustration from the difference between the construction of a perpetual and of a temporary covenant, not to put a bond in suit; precisely the same words which, in a perpetual covenant, are a bar to an action, cannot, if used in a temporary covenant, be pleaded to an action brought during the suspension. Why is this? If the perpetual covenant can bar the action forever, why may not the temporary covenant be pleaded to an action brought while the suspension exists? The reason of the distinction is found in the principle, that a personal action once suspended, is gone forever; although, therefore, it is the intention of the parties to suspend the action, and although this intention is expressed by their words, yet, as the consequence of giving effect to this intention would be to destroy another more important object, the validity of an instrument not designed to be destroyed, such a covenant is not allowed to constitute even a temporary bar, but the party injured by its breach, must take his remedy by a cross action upon it. On general principles, then, I should, in the absence of express authority, be led to the conclusion that a covenant with one of several joint obligors not to sue him, could not be pleaded as a release; but the very case has, I think, been decided. In *Hutton v. Eyre*, 1 Marsh. 608, 6 Taunt. 289, 1 E. C. L. 385, which was cited by Mr. Call, the action was brought for money paid to the use of the defendant. The plaintiff and defendant being partners, entered into a deed on the 26th of August, 1809, to dissolve their partnership on the 1st of January, 1810, and agreed that neither would in the mean time contract any debt on the credit of the firm. On the 27th of October, 1810, the defendant executed an assignment of all his property to trustees, for the benefit of his creditors, in consideration of which the creditors covenanted and agreed with the defendant not to sue him on account of any debt due to them from him; and that in case they did sue him, the

deed of assignment should be a sufficient release and discharge for him. The trustees sold the property assigned to them, and paid five shillings in the pound to the creditors, after which the plaintiff paid the residue of certain debts contracted by the defendant between the date of the agreement and the time of dissolution, on the credit of the firm, for which this suit was brought. It was contended for the defendant that the covenant not to sue him being perpetual, was a release not only to him, but to his partner also, and that the payment being voluntary, gave no cause of action. It is observable that this case is stronger than that under consideration would be, did the endorsement made by Page, on the bond of Aylett and Brooke, even contain a stipulation that no suit should be brought against Aylett, because the instrument provides expressly, that in case suit should be brought the deed of assignment should be a sufficient release and discharge. In delivering the opinion of the court, Lord Chief Justice Gibbs noticed the cases of *Lacy v. Kynaston* and *Dean v. Newhall* [supra]; but observing the circumstance that those cases were on joint and several obligations, and were, therefore, not direct authority for the case before the court, he added: "We must look at the principle on which the rule has been applied, that a covenant not to sue shall operate as a release. Now, where there is only A. on one side, and B. on the other, the intention of the covenant by A. not to sue B., must be taken to mean a release to B., who is accordingly absolutely discharged from the debt which A. undertakes never to put in suit against him. The application, therefore, of the principle in that case, not only acts in prevention of the circuitry of action, but falls in with the clear intention of the parties; but in a case like the present, it is impossible to contend that, by a covenant not to sue the defendant, it was the intention of the covenantors to release the plaintiff who was able to pay what his partner might be deficient in. It would have been an easier and a shorter method to have given a release than to make this covenant. The only reason, therefore, for their adopting this course, was, that they did not choose to execute a release to the defendant because that would also have operated as a release to the plaintiff, whereas they considered that a bare covenant not to sue the defendant, would not extend to his partner; as, therefore, the terms of the covenant do not require

such a construction, and as such construction would be manifestly against the intention of the parties, we are decidedly of opinion that it ought not to be permitted so to operate." I can add nothing to the language of Chief Justice Gibbs, to show farther the direct application of this case to that under, the consideration of the court. That this was not a joint obligation, but a joint assumpsit, constitutes, I think, no difference in the cases.

In considering a principle of construction, which rests entirely on a technical and positive rule, as defeating a plain intention, it may not be altogether improper to consider the action of other technical principles on the case. It is clear that if this endorsement be construed as an agreement between Campbell and Page, who is a stranger to the bond, it cannot release Brooke the obligor. This is expressly stated by the court in the case of *Lacy v. Kynaston*; but if it be considered as an agreement between Campbell and Aylett, still it is an agreement by parol only, and an agreement by parol cannot release an instrument of writing under seal. This subject is discussed in *Powell v. Forrest*, 2 Saund. 47n, in a note of Mr. William S. Brooke does not allege satisfaction of the contract, but a discharge from it; he does not allege performance, but that he is not bound to perform. The instrument which will sustain such a defence, must be of equal dignity with that which it professes to dissolve. According to the best view I can take of the question, I cannot consider the endorsement made by Page on the bond of Aylett and Brooke, as implying any agreement on the part of Campbell, which could be used by Brooke, in law or equity, as a release.

The next objection to Campbell's claim is, that the estate of Robert Page, ought to be exhausted, before recourse is had to Brooke; because, in June, 1792, Braxton mortgaged sundry slaves to Page and White, to indemnify Page, on account of this suretyship, and White, for suretyships entered into by him. Braxton was afterwards taken in execution at the suit of Richard Adams, upon which Page and White agreed that a sufficient portion of the mortgaged property, should be sold to discharge the execution. It is contended on the part of Brooke, that he has an equal interest with Page in this mortgage, that it was the duty of Page to see to its application to the discharge of the debt, for which they were both bound, and that he is liable, first, for his negligence in allowing the property to be wasted; and secondly, for having allowed a part of it to be applied to a different object. As Campbell was not party or privy to this transaction, it can give Brooke no claim on Campbell, were it even admitted to give him an equity against Page. It is undoubtedly the course of the court, to decree in the first instance against the party who is ultimately responsible; but this is only done, where the parties are before the court at the time of the decree, and their several liabilities, are clearly ascertained. It would be alike unprecedented and unreasonable, to anticipate, in this action, the liability of Page to Brooke, for a transaction not before the court, and to compel Campbell to resort to that liability, and to forego his direct claim on his immediate debtor, and that without any proof of the competency of Page's estate, to satisfy the unascertained equity of Brooke. The unreasonableness

of such a pretension seems so obvious, that I presume it is brought forward only on account of its connexion with a subsequent transaction between Page and Campbell. On the 6th of June, 1821, articles of agreement were entered into between the representatives of Page, and the attorney in fact, of Campbell, in which Campbell agrees in consideration of one moiety of the whole debt paid by Page's representatives, not to proceed against them for satisfaction of any part of the decree which might be obtained against the representatives of Page and Brooke; but this agreement is to be without prejudice to his right to pursue the other defendants till the other moiety of the debt should be satisfied: "and the said Campbell farther covenants, that the representatives of Page, shall never be made to contribute anything to the estate of George Brooke, on account of any payment the said Brooke's estate may be decreed to make to the said Campbell." This agreement, not to levy the decree, which might be obtained against the representatives of Brooke and Page, upon the estate of Page, which had already paid one moiety of the whole debt, is in terms, which exclude the idea of being technically a release of the action, for that is to proceed, as if the agreement had not been made. The representatives of Brooke, can avail themselves of it so far only, as it raises an equity in their favour, against Campbell. What is this equity? It cannot be contended, that receiving one moiety of the debt from Page, is an injury to Brooke. *Ex parte Gifford*, 6 Ves. 805. Nor can he be injured by the agreement not to levy Brooke's moiety, in any possible state of, things, on Page. The liability of Brooke cannot be increased, nor his burden augmented by this transaction. It may be diminished, because his possible liability for more than a moiety of the debt, is removed. Can the covenant, that the representatives of Page shall never be made to contribute anything to the estate of George Brooke, on account of any payment the said Brooke's estate may be decreed to make to the said Campbell, give Brooke an equity against Campbell? To sustain this, it will be necessary to prove, that the estate of Brooke has an equity against that of Page, and that it is deprived of that equity by this agreement. The amount of this injury is, the precise extent of Brooke's claim on Campbell. Brooke's equity against Page, is founded on the agreement that a part of the property mortgaged to White and

Page, might be applied in payment of the debt due from Braxton to Adams, and on the failure of Page to apply the mortgaged property to Campbell's debt This mortgage was obtained for the benefit of Page and White, in proportion to their respective responsibilities, and it will not I presume, be denied, that they are to be completely exonerated, before any equitable claim on the fund can accrue to Brooke. How far Mr. White may have been relieved does not appear, nor is it shown that one cent arising from this property has ever been applied to the use of Mr. Page. Admitting him to be responsible for the sum paid to Adams, his responsibility can be only for the excess of that sum over the debts the mortgage was intended to secure, and Brooke ought to show that excess. Its existence is not and cannot be pretended.

As little foundation is there for the claim growing out of the alleged negligence of Page. It will scarcely be pretended, that one of two sureties who obtains an indemnity for himself, becomes thereby responsible to the other for that other's moiety of the debt, however insufficient the thing given as an indemnity may be, even to secure himself. If this cannot be pretended, it will certainly be required from the person who claims the residue, to show that there was a residue, and that it has been lost to him by the fault of the party whose responsibility he alleges. His difficulties would not even then, be overcome. The inquiry would still be, why did he not himself proceed to assert his equity, by calling on the mortgagee and mortgagor to apply the fund to its proper object, and thereby relieve him to the extent of his right But I enter not into this inquiry, because the subject is not, and probably never will be, before the court It is enough to say, that this equity cannot be assumed in this suit to the discharge of Brooke's debt to Campbell. I will barely add, to prevent my being understood as deciding anything which might affect a point, not strictly before the court, that I do not mean to indicate any opinion whether the contract between Campbell and Page could or could not influence any claim of Brooke on Page, growing out of the conduct of Page respecting the mortgage of 1792. In deciding on the right of the plaintiff to demand a specific performance of his contract with Macon, that question must be considered as remaining open.

An additional objection to Campbell's claim on the Mantapike estate, is derived from the length of time which has elapsed since the decree by which his debt was established. The decree of affirmance was entered on the 3d of March, 1800, in the court of chancery; and on the 29th of September, in the same year, all attempts to find the mortgaged property having failed, executions were directed by the court to issue against the estate of Brooke and Page respectively, in the hands of their respective representatives, who, on the 18th of March, 1801, were ordered to settle their several accounts of administration before a commissioner of the court From that time till the 27th of October, 1820, when the supplemental bill was filed, no step whatever has been taken against Brooke's estate. By this gross negligence, the plaintiff alleges, that his testator has been greatly injured, if

Campbell be now permitted to charge his debt upon Mantapike. There is undoubtedly great weight in this objection; but the extent of its influence on Campbell's claim, depends on circumstances, the testimony concerning which, is not to be found in the record before the court. It will form a very material part of the case, in which Keith is plaintiff. That case being not ripe for a hearing, the claim of Campbell upon Mantapike, even while it remained in the hands of the devisee, must, for the present, be considered as uncertain. Previous to any discussion of the effect of such a claim on this contract, the court will proceed to the second point made by the plaintiff in the argument, which is, that

Second. If Campbell's is one of George Brooke's just debts, and is chargeable on his lands, still it cannot charge Mantapike, in the hands of William H. Macon. In considering this point I shall assume for the present two propositions: 1. Had Keith's suit, praying a sale of Mantapike for Campbell's debt been instituted before the contract between Garnett and Macon was entered into, the subsequent sale, made by the executor, without the assent of the court or creditor, could not have relieved the land from the charge created by George Brooke's will. 2. Had the conveyance been made, and the purchase-money been paid, before notice of the claim, the purchaser would not have been affected by it. It is unquestionably true that whatever doubts may exist respecting the liability of a purchaser, for the application of the purchase-money, to schedule debts, with which lands are charged, he is exempt from all liability for its application to debts generally. Had the contract, then, been fully executed before this claim was asserted, Mantapike would have been clearly exonerated from it. These propositions are stated, for the purpose of clearing the way, to the very case before the court; the case of a contract for the purchase of land, equitably charged with the payment of debts, and notice of a debt given to the purchaser between the date of the contract, and the time when it is to be executed.

In considering this case, the question immediately occurs, whether there is any distinction between a charge on lands, which descend to the heir, or pass to a devisee, subject to the charge; and a devise to executors or other trustees, for the payment of debts. In *Anon. Mos. 96*, and in *Nels. 36*, this question was answered in the affirmative by the court; and it was determined, that where lands were charged with debts generally, they

remained liable to creditors in the hands of a purchaser. This distinction was, however, overruled in the case of *Elliot v. Merryman*, Barnard. Ch. 78, 81, 82, in which the master of the rolls determined, that in such a case the purchaser was not liable for the application of the purchase-money, and said that, "otherwise, whenever lands are charged with the payment of debts generally, they could never be discharged without a suit in chancery, which would be extremely inconvenient." There were many circumstances in the case of *Elliot v. Merryman*, showing, that the creditors acquiesced in the sales, and looked to the vendor for their money, which might have had great influence on the mind of the judge; and, if that case stood alone, the question might not be considered as settled. But it does not stand alone. The principle laid down by the master of the rolls, appears to have been followed ever since; and in *Walker v. Smalwood*, Amb. 676, which was a charge on land for debts generally, the chancellor said, "the court has established it as a rule, that where the charge is general, the purchaser is not bound to see to the application of the purchase-money." This rule has been pursued invariably in the English courts for near a century, and may, therefore, be considered as well settled. Although the charge creates no legal estate, it manifests a clear intent that the person in whose favour it is made, shall receive so much out of the land, which a court of equity considers as a trust, and converts the owner of the legal estate into a trustee. The heir or devisee, being once considered as a trustee, and the charge considered as a trust, public convenience and uniformity of decision would lead to an assimilation of these charges, or implied trusts, to those which are express; and, in general, where no other question arises than what relates to the construction of the trust, and the respective duties it imposes on a vendor and vendee, in a case attended with no peculiar circumstances, a court of equity perceives no ground of distinction between them. But, if it be admitted as a principle, that in a case of direct and culpable, or of negligent and constructive collusion between the vendor and vendee, by which the trust may be defeated, the purchaser may become responsible for the application of the purchase-money; or, in other words, the land may remain charged in his hands; it is possible that there may be a difference in the testimony required to establish this constructive collusion, in the one case, and in the other. If lands be devised to trustees or executors, to be sold for the payment of debts, the devisee possesses a legal, but not a beneficial estate in the premises. He can sell for the purposes of the trust only, and the vendee can consider him as acting no otherwise than in the execution of a trust, for which he has been selected by the owner of the property. This confidence being placed in him by the person who had the sole right to dispose of the property at his will, no other can question the correctness of his proceeding, or can be justifiable in suspecting any intention to violate the trust. The payment of the purchase-money, therefore, to the trustee, is an act which is the regular consequence of the contract, and if that be made fairly, the purchaser has no right to inquire in what manner the residue of the trust will be executed. He has

no right to suspect that the person who has been selected by the testator for its execution, will violate the trust reposed in him, and no collusion between him and the trustee ought to be implied from equivocal acts. The existence of a debt is the very circumstance which justifies a sale, and notice of its existence can never excuse the purchaser for withholding the payment of the purchase-money. But where lands descend to the heir, or pass to the devisee, he does not necessarily sell, in execution of the trust, but for his own purposes. The trust is, in a great measure, the creature of a court of equity, and the heir, or devisee, is made a trustee by the court. When he sells, he is not executing a power confided to him for the purpose of paying debts, but is parting with an interest vested in himself, for his own use, which interest is charged with debts. The purchaser does not consider the seller as executing a trust, nor does he so consider himself; but each considers him as acting for his own benefit. If, in such a case, the charge still remains unsatisfied, the purchaser who has notice of it, may be considered as aiding in, and conniving at, a violation of the trust, under circumstances which would not justify the same conclusion, if the trustee professed to act in the execution of his trust.

It becomes, therefore, material to inquire, what degree of connivance on the part of the purchaser, in acts which may defeat the trust, will leave him responsible to the creditor. It is scarcely necessary to say, that positive fraud or direct collusion, for the purpose of defeating the trust, will charge the purchaser. It is unnecessary to urge this proposition, because the principle is, I believe conceded by all, and because, too, the transaction before the court, has no taint of that description; its moral fairness is not questioned, and the sole inquiry is, whether the purchaser by proceeding with the contract and paying the purchase-money, would have exposed himself to the hazard of such a constructive collusion, as to leave him subject to the claim of the creditor. In pursuing this inquiry, it is proper to recollect, that Mantapike was devised by George Brooke, to his son Richard, charged with the payment of his debts. This devise gave Richard an absolute estate at law, subject to an equity, which could be asserted only in a court of chancery. Richard Brooke would be considered, in this court as a trustee for the creditors of his father, and had they applied to a court of equity, a sale of the property would,

if necessary, have been decreed. Richard survived his father upwards of thirty years, during which time no claim was asserted on Mantapike, and in his last will, devised his estate to be sold, and the money divided among his children. One clause is supposed to charge his real as well as personal estate with his debts. Although a court of equity will consider the trust with which Mantapike was chargeable in the hands of Richard, as passing with his land to his devisee, yet the devisee might naturally consider himself as acting under the express trust contained in the will of his immediate testator. The purpose of his sale would be, to comply with the will of Richard, and any presumption, that he might possibly hold himself bound to pay the debts of George, is prevented, so far as respects Campbell's claim, by the fact, that he denied all liability for that claim. If the purchaser should, after receiving notice of that claim, proceed to pay the purchase-money to the seller, who contested its validity, and did not hold himself responsible for it, the question arises, whether payment under such circumstances might not be considered, in a court of equity, as so far implicating the purchaser in an act tending to defeat the trust, as to charge him in the event of a failure on the part of the trustee, with the amount of the debt, so far as the purchase-money was liable for it. With full notice of the claim, he pays the money to a person who receives it not for the avowed purpose of applying it to the objects of the trust, but of applying it to distinct trusts created by the will of which he is executor. This state of things presents a case entitled to very serious consideration.

It is an old rule, that all persons acquiring property bound by a trust with notice, shall be considered as trustees. The ancient cases on this point are collected in *Equity Cases Abridged*, under the title "Notice," and the modern decisions maintain the principle; the purchaser is subject to all the consequences of notice, if he receives it before payment of the purchase-money. In one case, *Wigg v. Wigg*, 1 Atk. 382, 384, this rule has been carried so far as to affect the purchaser who had paid his purchase-money, but had not received his conveyance. Whatever may be thought of the rule as applying generally to cases of this description, it has, I believe, never been doubted, that notice after the contract and before the payment of the purchase-money, made the purchaser a trustee. That the charge created by the clause in George Brooke's will, which subjects his lands to the payment of his debts, is a trust. In the view of a court of equity, is admitted, and the purchaser with notice must take the land clothed with that trust, unless he can bring himself within the principle that he is not bound to see to the application of the purchase-money. I have certainly no disposition to contract this principle within narrower limits than have been heretofore assigned to it. On the contrary, I am strongly inclined to the opinion that if the instrument by which the trust is created, contains no provision contradicting the presumption that the person who is to make the sale is also to execute the trust through-out, it will be found difficult to maintain the dicta which are scattered thick through the books, declaring the purchaser bound to see to the application of the purchase-money, in

cases of scheduled debts, or legacies. The principle, however, which supports this opinion must be examined, to determine how far it will carry us. The person creating the trust has confided its execution to the trustee, where he has named one, and it is a part of his duty to sell the trust property, and generally to receive the purchase-money, and dispose of it for the purposes of the trust. The trust could not be executed without a sale, and sales would be very much embarrassed, if the purchaser, by the mere act of purchase, became a trustee. In all cases, therefore, where the objects are not so defined as to be brought at once to the view of the purchaser, it is settled, that he is not affected by them, and has only to pay the purchase-money. The same rule is established in the case of a charge, where the lands descend, or are devised, liable to the payment of debts. In such case, a court of equity considers the heir, or devisee, as a trustee, and exercises the same control over him as over a trustee named by a testator. In either case, if there be nothing to show that the trustee is acting in violation of his trust, the purchaser must consider him as acting in pursuance of it; and as the sale may be a necessary part of it, the purchaser has done every thing incumbent on him when he pays the purchase-money, and is, consequently, relieved from the necessity of inquiring into the conduct of the trustee.

But trusts, whether express or implied, are the peculiar objects of care to courts of equity, and are guarded from abuse with great vigilance. In the exercise of this vigilance, they extend their control, not only over the trustees themselves, but over all those who have transactions with the trustees. Their endeavours to secure the faithful execution of trusts would often be defeated, if their regulations could not comprehend and bind those who contract for the trust property. To prevent the abuse of trust by the trustee, it is necessary to annul his acts, so far as they constitute an abuse; or in other words, to consider the property in the hands of a purchaser who has aided in the abuse, as still charged with the trust. In affirmance of this principle, the master of the rolls said, in a late case (*Balfour v. Welland*, 16 Ves. 156): “Wherethe act is a breach of duty in the trustee, it is very fit that those who deal with him should be affected by an act tending to defeat the trust, of which they have notice.” Plain as this principle is, and strictly conformable as it is to the general doctrines

of a court of equity, there is some difficulty in applying it to particular cases. It is not easy to mark the precise act which constitutes such a breach of duty in the trustee as will affect the purchaser. If William Garnett be considered, in this court, as a trustee for the execution of George Brooke's will by the sale of Mantapike, it would defeat the trust to sell that estate for the uses described in Richard Brooke's will, unless the debts of George Brooke are to be considered as the debts of Richard Brooke, provided for by that clause in his will which respects his own debts:—And if William Garnett sold, with the avowed purpose of excluding the debts of George Brooke, or if he should proceed to distribute the money according to the will of Richard Brooke, disregarding the claims of George Brooke's creditors, if there be any, the trust, so far as respected those claims, would be defeated, and a purchaser intending to aid in thus defeating the trust, could not be perfectly secure. But if William Garnett sold, with the intention of paying George Brooke's creditors first, and then of distributing the residue of the money according to the will of Richard Brooke, the act of sale would be no breach of trust, since a sale would be necessary for its performance. A purchaser, therefore, of the Mantapike estate might be placed in some peril. After receiving notice from a creditor of George Brooke, he might be considered, if he proceeded with the contract, as taking upon himself a responsibility for the subsequent transactions of William Garnett, which was no part of his engagement, and which he did not mean to take. I very readily admit, that if a trustee sells for the payment of debts generally, he is at liberty to contest any particular debt, and no notice to the purchaser can involve him in the contest. But, in such case, the trustee is in the fair execution of his trust, and regular performance of his duty; and the purchaser, having no right to intrude himself into the trust, cannot be made responsible for its execution. But if the trustee, not professing to sell under the trust, holds himself absolved from it, and this is made known to the purchaser, the question, whether by completing the purchase, he assists in defeating the trust, and will be held responsible in a court of equity, becomes a much more serious inquiry. In pursuing it, all the circumstances must be considered, in order to determine whether they prove satisfactorily that the trustee is not acting in pursuance of the trust, but under the opinion that it does not bind him.

In this case, William Garnett is the immediate trustee of Richard Brooke, charged with the execution of his will, which directs the sale of Mantapike for the benefit of his children, and probably for the payment of his own debts". Although a court of equity will consider the land as charged with any debt due from George Brooke, and treat the devisee of Richard Brooke as the trustee for such creditor, yet the devisee would assume a very great responsibility, were he to undertake to pay this debt without the direction of a court. If the existence of the debt might be presumed, of which great doubts have been suggested at the bar, the extent of his testator's liability for it is far from being certain. The personal estate of George Brooke ought to have been exhausted before his real estate

became chargeable, and the proportion of the debt with which Mantapike ought, under all circumstances, to be charged, could not safely be settled by the executor. No counsel could have advised William Gannett to incur this responsibility. No court could censure him for not incurring it. William H. Macon, then, who purchased without suspicion that any creditor of George Brooke remained unsatisfied, had great reason for the apprehension that Mr. Gannett, not considering himself as a trustee for the benefit of such creditor, would apply the money to the uses prescribed in the will of Richard Brooke. This apprehension could not be removed by any inquiry. The bill filed by William Gannett to enforce a specific performance, alleges expressly that Campbell's debt was not due from George Brooke, and that if it was, Mantapike is not charged with it. Whether any direct communication took place between the parties on the subject is unknown; but as none is stated, none can be presumed. The fact, however, is sufficiently obvious, that any inquiry respecting it must have been answered "by the assurance, that the justice of the claim was denied. Whether going on to complete the contract, by paying the purchase-money, under these circumstances, would be considered by a court of equity as such a concurrence in "an act tending to defeat the trust" as would affect the purchaser, is a question of real difficulty. Some light may be thrown upon it by analogies drawn from the liability of the purchaser of leasehold estates. It is well settled, that the purchaser of a chattel from an executor is not liable for the application of the purchase-money, although such chattel be given in trust for a special purpose, or be itself a specific legacy. *Elliott v. Merryman*, Barnard. Ch. 78, 81; 2 Atk. 42; *Ewer v. Corbet* 2 P. Wms. 148; *Burting v. Stonard*, Id. 150. The reason is, that no man can exempt his personal estate from the payment of his debts, or make any disposition of it which shall prevent its passing to his executors, to be sold by them if his debts require it. Consequently, whenever an executor sells in execution of his trust, the purchaser takes the property, freed from any charge with which the testator may have burdened it by his will. But if the sale be a breach of trust, and the purchaser have notice of the fact, he is affected by it. If the executor sells to a person who knows that there are no debts, or that all the debts are paid, and that the sale is not a fair execution

of the trust, the purchaser may take the property subject to the trust. 2 P. Wms. 148, 150. So, too, if the executor sells at such under value as to indicate fraud, or for payment of his own, debt *Crane v. Drake*, 2 Vern. 616; *Scott v. Tyler*, 2 Brown, Ch. 433, 477; *Andrew v. Wrigley*, 4 Brown, Ch. 125, 130; *Hill v. Simpson*, 7 Ves. 152, 167; *Lowther v. Lord Lowther*, 13 Ves. 95; *M'Leod v. Drummond*, 17 Ves. 169. These cases proceed upon the principle, that the executor does not sell in pursuance of his trust, but in violation of it, and that the purchaser, knowing this fact aids him in its execution by making the contract. The purchaser is not bound to make any inquiry. The general power of the executor to sell protects him in buying; but if he buys with notice that the sale is a breach of trust, the property remains charged with it. I feel much difficulty in resisting the application of this principle to freehold estates charged with the payment of debts. It would seem to me as if the inquiry must always be into the fact. The question must always be—Is the sale, taking its object into view, a breach of trust? And are the circumstances such as to charge a purchaser, having express notice, with a participation in the breach? The purchaser of a chattel from an executor, with notice that no debts are due, or in payment of his own debt, seems to me to present the same question.

Two cases have been cited by the counsel for the plaintiff, as bearing very strongly on that under consideration of the court. The first is *Walker v. Smalwood*, Amb. 676. John Smalwood devised his estate to his son Thomas, charged with the payment of debts, and Thomas afterwards mortgaged the estate, and then devised it to his wife, charged with the payment of his debts. The bill was brought by bond creditors of John and Thomas Smalwood, against the wife and mortgagee. Pending the suit, they joined in selling the land to Yeomans, against whom a supplemental bill was filed, to set aside the sale; it was set aside upon the principle, that the execution of the trust had been taken out of the hands of the trustee, and transferred to the court. The chancellor said: "Though a general charge does not make a purchaser before the suit see to the application of the money, yet after a suit commenced, I should hold him bound to it; and I hold it as a general rule, that an alienation pending a suit is void." He also states, that actual notice was admitted. The propositions stated by Lord Camden in this case, have not, I believe, been questioned, but those propositions do not reach the point now in controversy. A part of the purchase-money was applied to the mortgage made by Thomas Smalwood, and the case does not inform us, that any objection was made on this account; but the case does not inform us either, whether this mortgage was made in satisfaction of a private debt due from Thomas, or for money generally, which might have been applied to the debts of the father, or for a debt actually due by the father. Notice was admitted; but of what? Probably of the application of the money, and of the pendency of the suit; but these facts do not imply a breach of trust, since it is not shown that the mortgage itself, which is an

alienation pro tanto, was made under circumstances which could involve the mortgagee in the application of the money. This case, then, has no positive application to that at bar.

The other case is, *Hardwiek v. Mynd*, 1 Anstr. 109. William Mynd devised considerable estate to his son William Mynd, charged with certain legacies to his daughters. He also devised other estates to George Mynd and John Roberts, in trust for payment of debts, and appointed them his executors. George Mynd and John Roberts renounced the executorship, and conveyed their interest in the freehold estates to William the son, subject to the trusts of the will. William mortgaged great part of the estate for his own debts, and, about eleven years after the death of his father, became a bankrupt. The creditors of the father then filed this bill for the satisfaction of their demands, and it was admitted, that the most considerable of the mortgagees took, with notice of the situation of the property. Eyre, C. B., said (and it is to be presumed the court concurred with him): "If the trustees had made these mortgages, they would not have been disturbed; in fact they are made by them, for they have assigned their whole interest to William Mynd, to act for them in the trust" If the case stopped with this opinion, it would be, perhaps, conclusive, certainly very strong in favour of the plaintiff. The mortgagees took with notice of the misapplication of the purchase-money, and were yet not held responsible for that misapplication. This decision would certainly go far in showing that a purchaser, knowing that the sale was made, not for the purpose of the trust, but of the trustee, would yet hold the land discharged from the trust; but other points were determined which deduct considerably from the application of this opinion to the ease at bar, if they do not entirely destroy it. The court held the trustees liable to make good the whole deficiency arising from the misapplication of the fund. This case, then, considering the two points which were decided in connexion with each other, amounts to nothing more than this: Where there has been a collusion between the trustee and purchaser, which results in an abuse of the trust, the trustee shall be chargeable in the first instance; but the case does not decide on the ultimate responsibility of the purchaser, should the trustee prove insolvent. Applying it to the case at bar, it would prove, that had William H. Macon proceeded, after notice, to complete the contract and to pay

the purchase-money, and a suit been brought by the creditors of George Brooke, William Garnett would have been liable in the first instance; but does not. I think, prove that “William H. Macon would not have been liable in the event of the trustee’s insolvency. The court professed to found its opinion on the case of *Burt v. Dennet*, 2 Brown, Ch. 225. Dennet was trustee in a mortgage-deed from Godfrey to Burtenshaw, by which an annuity of £30 per annum was secured to the plaintiff. Dennet, having transactions with Burtenshaw, assigned the mortgage to him without the privity of the plaintiff, and afterwards assigned his property to trustees for payment of his debts. Burtenshaw paid the annuity to the year 1784, after which he stopped the payments, upon which the plaintiff filed her bill against Dennet. The chancellor said: “The plaintiff ought to have made Burtenshaw and the assignees of Dennet’s estate parties, by which she might have gotten the mortgage-deeds; he then should have decreed Burtenshaw to have paid the annuity, and Dennet to stand as a security for having broken the trust.” This case is not supposed to be applicable to that at bar, for the assignee of the mortgage was undoubtedly responsible for the annuity. It is cited solely because it was referred to by the court, as an authority for the opinion given in *Hardwick v. Mynd*, and may, therefore, tend to explain that opinion. It would countenance the idea, that in the case in which it was cited, the court did not suppose that the liability of the original trustee discharged the assignee.

Taking together the two parts of the opinion given in *Hardwick v. Mynd*, I cannot consider them as showing what would have been the decision of the court with respect to the mortgagees, had the trustees been insolvent. The report is very unsatisfactory, inasmuch as it assigns no reason for the decision, nor does it give the principle on which it stands. If the bill was dismissed as to the mortgagees, because the receipts of the trustees or of their agent, even under the circumstances of the case, amounted to an absolute discharge, it would be an express authority for the plaintiff in the case at bar. If the bill was dismissed, because the trustees were liable in consequence of their breach of trust, and were able to make up all deficiencies, it does not affect this case. If the court meant to say, that if the trustees had made these mortgages to secure a debt due from themselves, the mortgagees would yet have held the property discharged from the trust, the decision would appear to me to be in direct opposition to the principle settled in the sales of chattels by an executor, and to the general principle, that where the act is a breach of duty in the trustee, those who deal with him, knowing the fact, are affected by it. To mortgage the property to secure their own debt, would seem to me to be a direct and palpable breach of duty in the trustees, in which the mortgagee must have fully participated; and I cannot conceive that the court meant to say that such a transaction could be innocent. I must therefore suppose, that the decision turned upon the fact that the trustee himself, who was before the court, was, of himself, unquestionably competent to pay the money, and ought to pay it. It is true, that if the court proceeded on this idea the land ought to have been held still

responsible; but the report is too defective and unsatisfactory to warrant any confidence in its being full as to this point.

These cases then, though they have a strong apparent bearing on that under consideration, are too loosely and too carelessly reported, to satisfy, the court that they were decided on principles which they are cited to support I cannot consider them as proving that land sold for other objects, in exclusion of a debt charged upon it, is relieved by the sale from that charge, if the purchaser pays with notice of the intended misapplication of the purchase-money. I repeat, then, that it is a question of fact Did the circumstances, under which Mantapike was sold, prove that the purchase-money was to be diverted from the payment of George Brooke's debts to other objects, with such reasonable certainty as to leave it probable, that a purchaser with notice would be liable for the application of the purchase-money? or, in other words, that the land would, in the event of misapplication and the insolvency of the trustee, remain charged in his hands?

These circumstances have already been stated. The most prominent are, that William Garnett was the immediate trustee under Richard Brooke's will, though considered in a court of equity as being also a trustee for George Brooke's creditors, whose claim was prior to that of Richard Brooke's creditors or legatees, but whose claim the vendor not only did not, but could not, safely mean to satisfy, unless directed by a court of equity so to do. The purchaser had certainly reason to believe, that the sale was not made with a view to satisfy the charge created by George Brooke's will, and that the purchase-money, if paid before the institution of a suit by Campbell's representative, would be applied to the purposes of Richard Brooke's will. If a suit should be instituted before the purchase-money became due under the contract, or before it was paid, the whole affair would then be transferred to the court of chancery, and he would no longer be master of his own conduct. In the one event, he would take upon himself the hazard of paying, with full notice of the charge, money which he had reason to believe was to be diverted to different objects; in the other, he would be involved in a chancery suit, the course and duration of which he could not anticipate. Do these difficulties constitute a valid objection to a

decree for a specific performance? It cannot be doubted that these difficulties, if presented to the mind of a prudent man, contemplating the purchase of an estate, and desirous of performing his contract according to its terms, might have a serious influence on his conduct, and might deter him from making the purchase. If informed of them, after making the contract, but before its execution by the paying of the purchase-money and receiving a conveyance, he would have such strong motives for stopping entirely, or at least for pausing until the impediments could be removed, as would, I think, justify him for so doing, in the opinion of any reasonable man. Had this suit come to a hearing as between the vendor and vendee only, on the day on which it was instituted, could a court of equity have pronounced the objections to the title so frivolous, as to decree that Macon should take it, without having those objections removed? Is the exoneration of the land from Campbell's debt, by a sale to a purchaser, with notice of all the circumstances which had come to the knowledge of Colonel Macon, so perfectly clear, that a court of equity ought to decree him to take the land and pay the purchase-money, without any security against the future demand of Campbell's representative?

Both on principle and authority, I think it very clear, that a specific performance will not be decreed on the application of the vendor, unless his ability to make such a title as he has agreed to make be unquestionable. *Marlow v. Smith*, 2 P. Wms. 201; *Rose v. Calland*, 5 Ves. 186, 189; *Roake v. Kidd*, Id. 647; *Stapylton v. Scott*, 16 Ves. 272; *Sloper v. Fish*. 2 Ves. & B. 149. And it is equally clear that a purchaser under such a contract as that between Garnett and Macon, had a right to expect that an unincumbered estate in fee simple would be conveyed to him. *Omerod v. Hardman*, 5 Ves. 722, 734; *Flureau v. Thornhill*, 2 W. Bl. 1078. In a contract for the purchase of a fee simple estate, if no incumbrance be communicated to the purchaser, or be known to him to exist, he must suppose himself to purchase an unincumbered estate, and a court of equity will not interpose its extraordinary power of compelling a specific execution of the contract, unless the person demanding it can himself do all that it is incumbent on him to do. It has been said at the bar, that the declarations of the chancellor to this effect, have been made in cases where the title itself was doubtful, not where there was a money charge upon the estate which would not materially affect the purchaser, and which might be paid off: by him without any material change in his contract, and without inconvenience. This allegation is not, I think, entirely correct. The objection is not entirely confined to cases of doubtful title. It applies to incumbrances of every description, which may, in any manner, embarrass the purchaser in the full and quiet enjoyment of his purchase. In *Rose v. Calland*, 5 Ves. 189, the property was stated to be free of hay tithe, and there was much reason to believe that the statement was correct. But the point being doubtful, the bill of the vendor, praying a specific performance, was dismissed. There is certainly a difference between a defined and admitted charge, to which the purchase-money may, by consent, be

applied when it becomes due, and a contested charge, which will involve the purchaser in an intricate and tedious lawsuit of uncertain duration. There can, I think, be no doubt that Campbell's claim, controverted as it necessarily was by Brooke's representative, is of this character, and that the continuance of the charge on the land in the hands of a purchaser, with full notice of that claim, and of all the circumstances under which the sale was made, was too questionable to be disregarded as entirely frivolous, if alleged in a suit between Garnett and Macon only, for a specific performance. If it could not be entirely disregarded by a court, Macon was certainly justifiable in refusing to proceed while this cloud hung over the estate. He was certainly justifiable in referring the case to a court. He was justifiable in refusing to take the title which could have been made in January, 1819. But although it was not in the power of Garnett to make a perfectly secure title, previous to a decree which would dispose of Campbell's lien, it is undoubtedly now in his power. All the parties are now before this court, and if a specific performance should be decreed, the title which can be made to Macon will undoubtedly stand clear of Campbell's lien. The question, therefore, is, whether the contract ought now to be enforced?

It has been repeatedly declared, both in the courts of England and of this country, that time is not of the essence of a contract; and that a specific performance ought to be decreed, if a good title can be made at the time of the decree. This principle is sustained by many decisions, and by the practice of the court of chancery in England, to refer it to a master, to report whether the title be good at the time. But I do not think that the English court of chancery has ever laid down the broad principle, that time was never important, and that an ability to make a clear title at the time of the decree, arrested all inquiry into the previous state of things. On the contrary, if a person sell an estate to which he has no title, he cannot, though he should afterwards acquire it, enforce the contract. There is an implied averment in every sale made without explanation, that the vendor is able to do what he contracts to do. If he is not, and the vendee sustains an injury in consequence of this inability, it would seem unreasonable that the contract should be enforced; it would be the more unreasonable, if the amount of the injury should not be the subject of exact calculation. It is a general rule, that he who

asks the aid of a court of equity must take care that his own conduct has been exactly correct. It would be strange if this general rule should be totally inapplicable to time, in the execution of a contract. If the day he carelessly or accidentally passed over without making a conveyance, and no serious inconvenience result from the omission, the objection would be captious, and would very properly be discountenanced; but if the vendor was unable to clear up the title, until such an alteration had taken place in the state of things, as materially to affect the parties, time, I think, cannot, in reason, be deemed unimportant. It is settled that mere inadequacy of price is not a sufficient ground for a court of equity to refuse its assistance, unless the difference between the sum to be given and the value of the land, be so enormous, as to countenance the idea of fraud or imposition. Yet, if an unreasonable contract be not performed according to its letter, equity will not interfere. *Sugd. Vend.* (2d Am. Ed.) 190. Between a contract which is unreasonable when made, and one which has become so before it can be executed, if the application be made by the person in fault, for the aid of the court against the party who has suffered by his inability, no clear distinction is perceived.

In the case of *Gibson v. Patterson*, 1 Atk. 12, Lord Hardwicke, is reported to have paid no regard to the negligence of the vendor in producing his title-deeds. But this case is said, by subsequent judges who have inspected the record, to be misreported; and if it were not, it does not appear that there was any incumbrance on the estate, or that the condition of the parties had been affected by the delay. In *Morgan v. Shaw*, 2 Mer. 140, the chancellor said: "The inclination of my opinion is against the old doctrine, that time is in no case of the essence of the contract;" and in *Fordyce v. Ford*, 4 Brown, Ch. 498, the master of the rolls said: "I hope it will not be gathered from hence that a man is to enter into a contract, and think that he is to have his own time to make out his title." In *Harrington v. Wheeler*, 4 Ves. 686, and *Lloyd v. Collett*, 4 Brown, Ch. 469, time was held material. I think that the present doctrine of the court of chancery of England, is clearly in favour of the opinion, that where time is really material to the parties, the right to a specific performance may depend upon it; and I think that the same doctrine prevails in the courts of the United States. *Hepburn v. Auld*, 5 Cranch [9 U. S.] 262, was a suit for a specific performance, which was objected to by the vendee, because six thousand acres of land, sold by Hepburn and Dundas, was not held by a title in severalty, but was an undivided interest in a much larger tract, and that the time of executing the contract was, in that case material. On that point the court says (page 276): "It is not to be denied that circumstances may render the time material; and the court does not decide that this case is not of that description. But the majority of the court is of opinion, that the estate is to be considered as an estate held in severalty." It was also said, in *Pratt v. Law*, 9 Cranch [13 U. S.] 456, 494, that time is made material to the specific performance of

a contract, whenever, from the change of circumstances, a specific performance, such as would answer the ends of justice between the parties, has become impossible.

In *Brashier v. Gratz*, 6 Wheat [19 U. S.] 528, the case was this:—Michael Gratz, residing in Philadelphia, sold, in March, 1807, to Walter Brashier, residing in Kentucky, a tract of land lying in Kentucky, which Gratz had purchased, and for the title to which, a suit was then depending. Brashier gave his notes for the purchase-money, and agreed to attend to the prosecution of the suit, for which service an allowance was made him in the price of the land. The land was sold at twenty-two dollars fifty cents by the acre, and it was agreed that if any part of the land should be lost by the decision of the court, Gratz should repay eleven dollars twenty-five cents for each acre that might be so lost. The suits were not pressed to a decision, and in 1811, the fees were demanded from Grata and were paid by him. In 1811, Brashier came to Philadelphia, and his notes being protested for non-payment Gratz required that they should be paid, or that the contract should be rescinded. Brashier was unwilling to do either, and the question, whether Gratz was still bound by it was left to arbiters, who decided that he was. Brashier became insolvent, and Gratz took the management of the suits into his own hands, which were decided in his favour in 1813. About this time the lands rose suddenly in value, on which Brashier tendered payment of his notes, and demanded a conveyance of the land. Gratz refused, and the bill was brought for a specific performance. It was dismissed in the circuit court, and the plaintiff appealed to the supreme court, where the decree was affirmed.

It will be readily admitted, that the case of Brashier and Gratz was a strong one against the plaintiff, much stronger than that now before this court; but the principles laid down in its decision, apply to all cases where the party demanding the aid of the court, has failed to perform his part of the contract, and a change in circumstances, unfavourable to the party resisting the demand has taken place. The court says (pages 533, 534): “The rule, that time is not of the essence of a contract, has certainly been recognised in courts of equity; and there can be no doubt that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself deprive him of his right to demand a specific performance at a subsequent day, when he shall be able to comply with his part of the engagement. It may be in the power of the court to direct compensation

for the breach of contract in point of time, and, in such case, the object of the parties is effectuated by carrying it into execution; but the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished; that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous to decree a specific performance, and a court of equity will leave the parties to their remedy at law." "If, then, a bill for specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances." In reviewing the circumstances of the case, the court says (pages 539, 540): "Another circumstance which ought to have great weight, is the change in the value of land; it was purchased at twenty-two dollars fifty cents per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years after the last payment had become due, the land suddenly rises to the price of eighty dollars per acre; then he tenders the purchase-money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase-money. This total want of reciprocity, gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article." The change in the value of the article in the case which has been cited, between the time when the money ought to have been paid, and the time when the money was tendered, was certainly enormously great, much greater than can take place in ordinary times; but the principle does not depend entirely on the excessiveness of that change. The principle undoubtedly is, that a very great change in the value of the article constitutes a serious objection to a decree for a specific performance, when claimed by the party whose fault it is, that the contract has not been executed.

In the case under consideration, a considerable change has taken place in the value of the article, and that change has been produced by a general declension in the price of lands. It must, therefore, materially affect the arrangements to be made by the purchaser for a compliance with his contract; the same property which, if sold in time, would probably have enabled him to pay for Mantapike, would not, on any reasonable estimate, now enable him to do so. If, then, William Garnett was unable to convey a perfectly safe title in January, 1819, Mr. Macon has sustained an injury by the suspension of his proceedings, the amount of which admits of no certain calculation, and which is probably equivalent to the difference in the value of Mantapike at that time and at this. Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment, to which blame, in a moral point of view, can be attached; yet a court of equity considers the vendor as responsible for the title he sells, and as bound to inform himself of its defects. The purchaser, in making a contract, may be excused for relying on the assurance of the vendor, implied in the transaction itself,

that he can perform his agreement. As I think Campbell's claim was a cloud lowering over the title Garnett could convey to a purchaser with notice, which justified Macon in refusing to go on with the contract, which cloud cannot be dissipated but by the decree of a court of chancery, and as before such a decree was attainable, the value of the article has greatly changed, that circumstance creates a strong objection to a specific performance. At the same time, it must be perceived that the vendor, who has committed no moral wrong, and who is now able to perform his contract, will sustain all the loss arising from the depreciation of the property, which he might have sold to another, had not Macon purchased. I felt some hesitation between a decree dismissing the bill, and a decree for carrying the contract into execution, considering the vendor, who has retained possession of the property, as entitled to the profits, and the vendee, who was justifiable for not proceeding with his contract, as exempt from the payment of interest. But, on reflection, I have come to the opinion, that as there is no fault in the purchaser, and as there was some remissness in the seller in not communicating Campbell's claim, that the whole disadvantage ought to fall on the vendor, and that his bill ought to be dismissed.

The point which has weighed heaviest on my mind, and about which I have felt the greatest difficulty, concerning which I have indeed at different times inclined to different opinions, is whether the sale under the will of Richard Brooke is, under all the circumstances of the case, to be considered as such a breach of trust, as respects the creditors of George Brooke, as will involve a purchaser, having notice before the contract of sale is carried into execution, in the consequences. I am rather disposed to the opinion that it is such a breach of trust. At all events, I am satisfied that it wears such a serious aspect, as to justify a purchaser in refusing to proceed.

Decree. Bill dismissed,—each party to bear his own costs.

¹ [Reported by John W. Brockenbrough, Esq.]

² See 5 Bac. Abr. tit "Release," A 2, p. 683, Ed. Gwil.