

money in the hands of the trustees or other parties belonging to their bonds, whenever it accrued. Therefore, the time when the orators acquired their bonds is not so material as was supposed and held in the decision upon the former demurrer. The bill now shows that there has accrued a large amount of money applicable and not applied to the bonds, after satisfying prior liens. So it shows good ground for relief in favor of the holders of bonds against those who have the money. The bill also shows sufficient ground for the removal of the trustees to call for an answer in that behalf.

The circuit justice concurs in this opinion.

The demurrer is overruled; the defendants to answer over by the September rule-day.

REBER, Assignee, etc., v. GUNDY.

(District Court, W. D. Pennsylvania. May Term, 1882.)

1. JUDGMENT BY CONFESSION—COLLATERAL INPEACHMENT.

A judgment to secure the purchase money of real estate consisting of three pieces of land, entered upon a warrant to confess judgment, given about one month after the delivery to the bankrupt of a deed for one of the pieces, but simultaneously with the delivery to him of the deeds for the other two pieces, cannot be impeached, either in whole or part, as an unlawful preference by the assignee in bankruptcy to whom the real estate passed, it appearing that it was substantially one transaction, consummated when the two latter deeds were delivered and the warrant to confess the judgment was given.

2. EXECUTORS—JOINT LIABILITY.

When two executors settled a joint account, charging themselves jointly with all the assets of the estate and exhibiting a general balance in their hands, but, by a statement appended to the account, it appeared (as the fact was) that they had actually received the assets and held the proceeds individually in stated proportions, *held*, that while jointly liable to the legatees for the general balance, they were not joint debtors *inter se*, and one of them having paid the legatees more than his individual proportion, was entitled to be subrogated to the lien against the real estate of the other, which the legatees had acquired by docketing the general balance.

3. BANKRUPTCY—JUDGMENT BY CONFESSION.

A confessed judgment for a debt already fully secured by a prior valid lien against the bankrupt's real estate, to which the judgment creditor had the equitable right of subrogation, is not impeachable as a fraudulent preference under the bankrupt law, for it takes nothing from the general creditors and impairs not the value of the bankrupt's estate.

In Equity.

J. Merrill Linn, Andrew A. Leiser, and Chas. S. Wolff, for complainants.

Andrew H. Dill, Alfred Hays, and Kennedy & Doty, for respondents.

ACHESON, D. J. This case arises upon a bill in equity filed by John Reber, assignee in bankruptcy of Charles Penny, to set aside a judgment of the court of common pleas of Union county, Pennsylvania, for \$5,000 in favor of John A. Gundy, the defendant in the bill, entered against the bankrupt by confession on March 13, 1878, upon a warrant of attorney dated and given March 11, 1871, within two months of the adjudication in bankruptcy. The bill charges that the judgment "was in part without any consideration, and as to the balance was for a past and antecedent consideration," and alleges it to be a fraudulent and void preference under the bankrupt law.

From the evidence the following facts appear:

The brothers, Thomas and Alexander Penny, were equal owners in common of several pieces of land in Union county. Thomas made his will July 22, 1868, constituting his brother Charles (the bankrupt) executor thereof. He directed his executor to sell his real estate, and bequeathed the proceeds. He soon died, and Charles entered upon his trust. Alexander made his will February 2, 1872, constituting as executors thereof the bankrupt and John A. Gundy, the present defendant. Alexander's will was proved, and letters testamentary issued to the executors named therein, November 16, 1874. His will directs his executors to sell his real estate, and the proceeds are bequeathed to certain named legatees.

In the fall of 1876 Charles Penny and John A. Gundy, as executors of Alexander Penny, and Charles, as executor of Thomas Penny, united in the sale of the several pieces of real estate of which their testators had died jointly seized. Tract No. 3 was sold to Thomas Church for \$6,166.63, or \$3,058.31 for each estate; tract No. 4 to D. D. Meyer for \$2,137.50, or \$1,068.75 for each estate; and tract No. 5 to D. D. Meyer for \$420, or \$210 for each estate. It subsequently transpired (although Gundy was then ignorant of the fact, and did not learn it until long afterwards) that Church and Meyer purchased, not for themselves, but for Charles Penny. The prices, however, seem to have been fair, and all parties in interest have acquiesced in Charles' purchase. The land passed to his assignee in bankruptcy, who, under an order of court, sold it discharged of liens, and holds the proceeds for distribution among the creditors of the bankrupt.

On the twenty-first of April, 1877, Charles Penny and John A. Gundy, as executors of Alexander Penny, deceased, joined in settling an account of their trust, charging themselves jointly with all the assets, including the testator's share of the purchase money, of tracts 3, 4, and 5. The account shows "a balance in the hands of the accountants" of \$9,097.02. But at the foot of the debit side is appended a statement showing that the "total amount received by J. A. Gundy" was \$3,346.61 only. And at the foot of the credit side of the account is the following statement:

“Out of the above amount J. A. Gundy paid out as follows:

Amount received for as filed, including register's fees and col- lateral tax, - - - - -	\$ 712 87½
Amount not received for, charges, etc., - - - - -	189 90
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Total amount paid out by J. A. Gundy, - - - - -	\$ 852 77½
Balance in hands of J. A. Gundy, - - - - -	2,493 88½
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	\$3,346 61”

This account was confirmed absolutely by the orphans' court of Union county, on May 26, 1877, and subsequently the court directed distribution of the balance in the hands of the accountants among the legatees. The statements from the account above referred to are shown to be truthful, and it also appears that Gundy at no time received any further assets of the estate, and that no part of the purchase money of the tracts 3, 4, and 5 ever came to his hands.

On November 26, 1877, a certified transcript from the orphans' court showing a balance of \$9,097.02 to be in the hands of the accountants, and due from them jointly to the estate of Alexander Penny, was filed in the court of common pleas of Union county, and docketed as a lien against their real estate. Charles Penny was then the owner of other real estate,—besides said tracts 3, 4, and 5,—which passed to his assignee in bankruptcy. No deed for tract No. 3 was made until February 14, 1878, when the executors executed and acknowledged a deed to Thomas Church, who, on the same day, executed and acknowledged a deed therefor to Charles Penny. The deeds for tracts Nos. 4 and 5 were not made until March 11, 1878, when the executors executed deeds therefor to D. D. Moyer, and he executed deeds to Charles Penny. On the same day (March 11, 1878) Charles Penny executed and delivered to John A. Gundy the warrant of attorney for the confession of the judgment, which is the subject of the present controversy. Prior to that date Gundy had paid to the legatees of Alexander Penny, of the balance due them under the executors' account and order of distribution, over \$5,000, and he was liable to them for whatever then remained unpaid. At the time he received the warrant of attorney he gave Charles Penny the following written agreement:

“In consideration of a judgment bond for \$5,000, dated March 11, A. D. 1878, executed in favor of J. A. Gundy by Charles Penny, I hereby agree to enter on record the following papers, viz.:

- Release of Eliza G. Gundy for A. Penny's legacy.
- “ James B. Stewart “ “ “
- “ “ “ T. Penny's “
- “ “ “ J. E. Penny's “
- “ A. B. Fowler “ A. Penny's “
- “ T. P. Fowler “ “ “
- “ A. M. Harter “ “ “
- “ Mary Burd “ “ “
- “ W. L. Gundy and wife “ “

—And to deliver to said Charles Penny a bond of indemnity for the amount of Eliza G. Gundy's legacy from T. Penny's estate; and also, within 60 days from date, either procure the following releases, or deposit, either in banks or with a justice of the peace, the amounts due them as below: