REPORTS

OF

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS IN EQUITY

AND COURT OF ERRORS

SOUTH CAROLINA.

Volume 1.

FROM DECEMBER, 1844, TO MAY, 1845, BOTH INCLUSIVE.

BY

J. S. G. RICHARDSON,

STATE REPORTER.

COLUMBIA, S. C.
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1845.

Steven C. Tennent
v.
Executors of
John Stoney 1780-1838
Son of "Captain Jack"

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CHARLESTON, EXTRA TERM, MARCH, 1845.

CHANCELLORS PRESENT.

Hon. DAVID JOHNSON, Hon. JOB JOHNSTON,
" WM. HARPER, " B. F. DUNKIN.

Stephen C. Tennant, administrator, with the will annexed, of Francis Dalcour, vs. the executrix and executors of John Stoney and others.

Where a debtor executed a penal bond to two persons, styling them "trustees for and in behalf of" some of his simple contract creditors, named in a schedule thereunto annexed, with a condition, which, after reciting that the creditors had *agreed* to receive the principal of their debts, with interest at the rate of six per cent., declared that the bond should be void, if the debtor should, within a given time, pay the said debts with interest, as therein expressed; and to secure the payment of the said bond, executed to the trustees a mortgage, expressing a covenant on the part of the creditors that they would accept in discharge of their debts the principal sums with interest at the rate of six per cent., and allow the debtor a certain time for the payment thereof; *Held*, that the bond and mortgage were valid, in favor of the creditors, who afterwards accepted the terms, all of whom, except one, were ignorant of the transaction at the time; and that the bond, after the mortgaged property was exhausted—the debtor having died—was entitled to priority over simple contract debts.

An indenture *tripartite*, executed by only two of the parties, *held* to be complete and operative, the assent of the third party only affecting the trusts of the instrument.

Where a deed of trust is made for the benefit of creditors who are absent, no expression of the assent of the creditors is required as preliminary to the vesting of the legal estate in the trustee.

It is impossible to put a deed, made with the motive of securing credit-

ors, upon precisely the same footing with one creating a trust for pure volunteers.

Whenever an instrument effectually creates a trust, even for volunteers, they may enforce it against the settlor, *semble.*

Where, in a conveyance for the benefit of creditors, terms are prescribed for their acceptance, but no time is fixed within which they are to accept, if they have never dissented they may at any time accept before the fund is distributed; provided, that other persons are not thereby placed in a worse condition than they would have been in, if the acceptance had been sooner.

An acceptance in the terms prescribed, is not in equity indispensable. The creditor's election may be presumed, from his acting in conformity with the terms. A substantial is substituted for a formal election.

Certain acts by creditors held to amount to an acceptance.

Legal assets are administered in equity in the same manner as at law.

In the administration of assets, Courts of Equity recognize and enforce all antecedent liens.

Where, on a bill to marshal the assets of a testator against his executrix, who was also his widow, the real estate of the testator was sold under the order of the court, before any claim for dower was made by the widow; *Held*, that she might come in on petition, before distribution of the funds, and claim the value of her dower out of the proceeds of the sale.

Where a husband received from his wife's father a bond, and gave him a receipt therefor, which expressed that he had received it "in trust for his daughter"—the wife of the recipient—"and her children;" *Held*, that the husband was a debtor to his wife and children for the amount of the bond, but that his estate was not liable to account for the interest on the wife's share during his life.

Where the purchaser of negroes, sold under an order of the court to foreclose a mortgage, was ready and willing to comply with the terms of the sale on the instant they were bid off, but they were not delivered for several days; *Held*, that the purchaser was not bound to pay the goal fees, for keeping the negroes in the interim between the sale and delivery.

Where a creditor furnished shoes for the use of mortgaged negroes, whilst they were in the possession of the executors of the mortgagor, and before a sale for foreclosure, *Held*, that upon shewing that the executors were insolvent, and either were in advance with the estate, or at least not in arrears with it, the creditor would be entitled to be paid out of the proceeds of the negroes.

Before JOHNSON, CH. *at Charleston, February*, 1843.

June 16, 1837

The late Mr. Stoney, having come under very heavy liabilities for Dudley & Stuyvesant, a New York house, and by their failure incurred ruinous losses, by his bond, dated 16th June, 1837,

became bound to John Magrath and James Hamilton, trustees, in the penal sum of 400,000 dollars. The condition of the bond, after reciting that Mr. Stoney was indebted as drawer, acceptor, or indorser of divers bills of exchange, and that the parties to whom he was so indebted had agreed to receive the principal secured by the said bills, with interest at the rate of six per cent., and that John Magrath and James Hamilton should be appointed trustees in behalf of the creditors, to take security for the said debts, is to the effect that the bond shall be void, in case Mr. Stoney shall pay the creditors named in a schedule annexed, the sums opposite their respective names, on or before the 16th day of June, 1841. In the schedule, the bills are set down, in some instances, without the name of the holder, and in other instances the name of the holder is mistaken.

where is schedule June 16 1841

By indenture *tripartite*, made the same day, between John Stoney of the first part, John Magrath and James Hamilton of the second part, and "the creditors whose names are signed and seals affixed to these presents," of the third part, reciting that the said John Stoney is indebted to the parties of the third part, and that they have agreed to release him "from all damages to which he may be liable to the said parties of the third part by reason of the non-payment, non-acceptance, and protest of any bills of exchange," and to allow him time for the payment of principal, and interest at the rate of six per cent. until the 16th of June, 1841; and reciting the bond aforesaid, Mr. Stoney conveys to the said John Magrath and James Hamilton, as trustees to the trusts aforesaid, four plantations, called Foot Point, Fording Island, Hilton Head, and Ferry Tract, and a tract of Pine land, all in St. Luke's Parish, and 380 negroes. The trustees covenant to perform the covenants herein mentioned, and there is a proviso, that in case Gen. Hamilton shall cease to be President of the Bank of Charleston, he shall nominate the President for the time being, to act in his place, in the execution of the trusts of the deed. To this deed is annexed a schedule of bills, similar to that which is annexed to the bond, but the schedules differ in several particulars.

Foot Point
Fording Island
Hilton Head
Ferry Tract
St Lukes Parish
390 negroes

The deeds were delivered to the Bank of Charleston, and the indenture recorded, but there was no execution by the parties of the third part.

In September, 1837, Mr. Stoney came to a settlement with the Merchants Bank of Cheraw, who held two certain bills for 10,000 dollars each, included in the schedule to the deeds of June,

1837. They calculated interest on the bills at the rate of six per cent. added exchange at three per cent. and the costs of protest. From the amount, the payments were deducted; Mr. Stoney gave his note for the balance, and the bills were delivered up to him.

On the 27th June, 1838, Mr. Stoney came to a settlement with the Bank of Charleston. Interest on the various bills held by the bank, at the rate of seven per cent. to 17th June, 1837, and six per cent. from that day; three per cent. for exchange, and an additional charge for costs of protest, were added to the principal; from the amount, the payments were deducted—and for the balance, with twelve months interest at six per cent., Mr. Stoney gave his note for 127,260 dollars, payable to the Cashier of the bank, at twelve months, and received the original bills of exchange, which were delivered up to him.

No other bill holders took any notice of the deeds of 1837—some of them were paid in full.

Mr. Levy, who held bills to the amount of 41,000 dollars and upwards, about the date of the deeds stopped payment, and soon afterwards made an assignment of all his estate, for the payment of his debts. He had notice of the proposal of Mr. Stoney, which led to the deeds, but took no part, as his affairs were to be placed in liquidation. These bills are mentioned in the schedules with a remark, that the property is disputed by the bank of Charleston, S. C., and by Dudley & Stuyvesant.

On the 7th November, 1837, Mr. Stoney filed his bill against Mr. Levy, to restrain the negociation of these bills, and to have them delivered up, on the ground that they were drawn without consideration.

Phelps, Dodge & Co. held two bills of exchange, drawn by Dudley & Stuyvesant on Peter Stuyvesant, for 12,500 each; and it is supposed that these are the same drafts described in the schedule of the bond as drafts indorsed by Mr. Stoney, and sold to the bank of Charleston—and in the schedule to the indenture as drafts indorsed by Mr. Stoney, on Peter Stuyvesant, at sight. But the bills never were sold to the bank of Charleston, and Phelps, Dodge & Co., who were the holders in June, 1837, had no notice of the deeds during the life time of Mr. Stoney. He died in November, 1838, and Mrs. Elizabeth Stoney, Peter Gaillard Stoney, and Christopher Fitzsimons Stoney, proved his will, and committed the management of the estate to John Magrath.

Died Nov 1838

In 1839, Phelps, Dodge & Co. sued out a writ against the executrix and executors in an action of assumpsit, returnable to January 1840. After this action was commenced, Messrs. Yeadon and Macbeth received information of the deeds of 1837, and of the bills thereby secured, which they communicated to Phelps, Dodge & Co. their clients, who then abandoned the suit at law, and claimed the benefit of the deeds, and now submit to be bound by them.

In 1840, the bills held by Mr. Levy's assignee were sued at law, and a verdict for plaintiff obtained, on which judgment was entered up 30th January, 1841, for $52,457 90—being the amount of principal and interest at seven per cent. and costs of protest.

On the 15th of January 1841, Mrs. Stoney and the executors filed their bill of revivor and supplement, against Mr. Levy and his assignee, for an injunction against the said judgment, alleging that the bills upon which the action was brought had been improperly obtained from Dudley & Stuyvesant, by J. L. & S. Joseph, and that they were accepted by the testator for the accommodation of Dudley & Stuyvesant, and that Mr. Levy held them as the agent of J. L. & S. Joseph, and not as an indorser in the course of business; and that as between Joseph and the other parties to the bills, the same are null and void. An injunction was granted, and the cause was yet pending.

On the 19th November, 1840, this bill was filed by Mr. Tennant, administrator of Francis Dalcour, of Cuba, planter, for the balance due on account of the crops consigned by Mr. Dalcour in his life time, to Mr. Stoney as his merchant.

Mr Francis Dalcour - Cuba

In January, 1841, Mr. Laurens was directed to take an account of the complainant's demand, and of the estate of the testator. By his report, dated the 1st of July, 1841, Mr. Laurens stated the amount due to the complainant, at $19,467 44, and that the account of the executors was incomplete, and that no account of the testator's debts had been rendered. On the 10th July, 1841, on hearing the master's report, the court ordered a sale of the whole estate, that the money be brought into court, and that the master advertise for creditors, and take an account of debts and assets.

The bank of Charleston, the Merchants bank of Cheraw, Phelps, Dodge & Co., and the assignees of J. C. Levy, appeared before the master, who made a report of the sale of the property, and of the administration of the estate by the executrix and ex-

ecutors through their agent, and of the debts and assets of the testator, and allowed to the bank of Charleston, the Merchants bank of Cheraw, Phelps, Dodge & Co., and the assignee of J. C. Levy, their claims to satisfaction out of the proceeds of the estates conveyed in trust by the indenture of June, 1837.

To this report exceptions were taken, and on the 28th February, 1843, the cause was heard on the report and exceptions, by his Honor, Chancellor Johnson, who made the following decree.

The bill prays an account and discovery of the estates, real and personal, of the late John Stoney, the defendant's testator, and the payment of a large sum due by him to the complainant's testator on an account. In the progress of the cause, other creditors have been made parties, and as it is ascertained that the estate is not sufficient to pay all the demands, it has become necessary to ascertain the amount of the assets, and to marshal them amongst the creditors. The case, therefore, necessarily involves the settlement of the accounts of the executors, and the determination of the right of priority amongst the creditors, as well as other matters, which will be hereafter noticed.

The contest amongst the creditors, the matter which I propose first to consider, arises out of a bond and mortgage executed by the testator, Mr. Stoney, to James Hamilton, President of the bank of Charleston, and John Magrath, intended to secure some of his creditors. The bond is in the penalty of four hundred thousand dollars, and bears date the 16th of June, 1837; and the condition recites that, "whereas, the above-bound John Stoney, as the drawer, acceptor, or indorser, of divers bills of exchange, is indebted as hereinafter mentioned, and the parties to whom the above bound John Stoney is so indebted, have agreed to receive the principal sum for which the said bills have been drawn, together with the lawful interest upon the same, at the rate of six per cent. per annum, in satisfaction of their demands; and that the said John Magrath and James Hamilton be appointed trustees for and in behalf of the said creditors, to take of and from the said John Stoney, good and sufficient security for the payment of the said debts. *Now, the condition of this obligation is such*, that if the above-bound John Stoney, his heirs, executors, and administrators, shall and do well and truly pay and satisfy, or cause to be paid and satisfied, the divers creditors whose names are mentioned in the schedule hereunto annexed, the several sums opposite their respective names, with the

interest thereon, as therein expressed, (and for the payment of which said principal and interest, the said parties may be legally entitled,) on or before the 16th day of June, in the year 1841, then this obligation to be void," &c. In the schedule annexed to the bond, Mr. Stoney acknowledges himself indebted, on bills drawn, indorsed, or accepted by him, and held by the bank of Charleston, to the amount of one hundred and twenty-one thousand dollars; on bills held by Phelps, Dodge & Co. to the amount of twenty-five thousand dollars, which had been sold by him to the bank of Charleston; on bills held by the Merchants's bank of Cheraw, to the amount of twenty thousand dollars; and S. N. Bishop's acceptances of three bills in favor of Dudley & Stuyvesant, to the amount of forty-one thousand, six hundred and twenty dollars. Immediately below this last item, is the following remark, "The three last mentioned bills are now held by J. C. Levy of Charleston; the property in the said bills is disputed by the bank of Charleston, and by Messrs. Dudley & Stuyvesant." And it had as well be remarked here, that these bills had been indorsed by Dudley & Stuyvesant to the Josephs & Co. of New York, and that they had forwarded them to J. C. Levy, their agent here, for collection; and that on a bill filed in this court, by the present defendants against J. C. Levy and the Josephs & Co., it has been adjudged that Levy is only entitled to recover on them about twelve thousand dollars, the sum actually paid by them for the bills. These are all the creditors provided for by the bond, that are now before the court. There were some others who refused to accept, and were paid in full.

On the same day, the 16th June, 1837, on which the bond was executed, Mr. Stoney executed a deed, which purports to be *tripartite*, between himself of the first part, John Magrath and James Hamilton, of the second part, and the creditors of the said John Stoney, "whose names are signed and whose seals are affixed to these presents, of the third part;" wherein it is recited that "the said John Stoney is now justly indebted in divers large sums of money to the parties of the third part, respectively, and it is mutually agreed upon, by and between the said parties, that the said John Stoney shall and will sufficiently secure all the debts due and owing by him to the said parties of the third part, and that the said parties of the third part shall and will remit, release, and forever relinquish the said John Stoney of and from all damages which he may be liable unto the said parties of the third part, by reason of the non-payment, non-acceptance and protest, of any bill of exchange; and that they the said parties of

the third part, will grant and allow the said John Stoney time for the payment and discharge of the principal sum of the aforesaid debts, together with the interest thereon, at the rate of six per cent. per annum, until the 16th day of June which will be in the year 1841." The bond before referred to is then substantially recited, and the deed goes on thus: "*Now this Indenture witnesseth*, That for the better securing the payment, to the said John Magrath and James Hamilton, trustees of the said creditors, the parties of the third part of the said bond, according to the condition thereof, and also in consideration of the sum of one dollar, in hand well and truly paid by the said John Magrath and James Hamilton, he, the said John Stoney, hath granted, bargained, sold and released, and by these presents doth grant, bargain, sell and release unto the said John Magrath and James Hamilton, their heirs," &c. Here follows the description of five plantations, and the deed proceeds. "And also, all and singular the negro slaves, now being and working upon the said plantations, or tracts of lands, or any or either of them, amounting in number to three hundred and eighty, and named in the schedule annexed. To have and to hold," &c.—"And the said John Stoney does hereby bind himself, his heirs, executors," &c. "to warrant and forever defend," &c. "And the parties of the third part, in consideration of the premises, do covenant, promise, and agree to and with the said John Stoney, each for himself, well, truly and faithfully to keep, preserve and perform the covenants and agreements hereinbefore mentioned, and on their part to be performed, fulfilled and kept. And it is also further agreed, by and between the parties aforesaid, that it shall and may be lawful for the said James Hamilton, in case of his ceasing to be President of the Bank of Charleston, to nominate and appoint the President of the said Bank of Charleston, for the time being, to act in the aforesaid trust, in the room or place of the said James Hamilton," &c. Then follows a covenant, that Mr. Stoney shall remain in the use and possession of the property, until default shall be made in the payment.

None of the creditors named in the schedule annexed to the bond, have signed or sealed the deed; but the Bank of Charleston, and the Merchants Bank of Cheraw, claim to be entitled to come in under its provisions, on the ground, that they have substantially conformed to the conditions, although they have not signed and sealed.

I will first examine the claim of the Bank of Charleston. It

appears from the evidence, that not long after the deed was executed, this Bank and Mr. Stoney made a settlement of their accounts, in which Mr. Stoney was charged with seven per cent. interest on the bills, from the time they became due, until the execution of the deed, and costs of protest and postage, and with exchange, at the rate of three per cent. and upon his giving a new note, payable on the second day of July, 1839, for the amount made up of the principal and these charges, (deducting a payment on account made at the time of this settlement,) the original bills were delivered up to him. Mr. Rose, the Cashier of the Bank, stated that the damages usually charged by the Bank on bills returned from New-York, under protest, were at the rate of ten per cent. that the exchange charged Mr. Stoney, in his account with the Bank, was only the rate of exchange between New-York and this place, and that the charge for costs of protest and postage, were actual expenditures, all of which were assented to by Mr. Stoney, and that the new note was taken, as it was supposed, in conformity with the intention of the parties to the mortgage, and not as an abandonment of the rights of the Bank under it. That it was the intention of the Bank not to violate, but conform to it, and that the original bills were delivered to Mr. Stoney, as he understood, to enable him to prosecute his claims against the parties he supposed to be liable to him. The Bank has received from Mr. Stoney a large sum, in part of the principal sum due on this note.

The claim of the Merchants Bank of Cheraw is founded on circumstances very like those of the Bank of Charleston. They differ in nothing except that in the statement of their account, Mr. Stoney is charged with interest on the bills, from the time they became due, to the date of the deed, at the rate of six per cent. instead of seven, and the new note was made payable at the time stipulated for the payment on the mortgage.

As to the claim of J. C. Levy. He was the holder of the three bills mentioned in the schedule annexed to the bond, the property in which was said to be disputed by the Bank of Charleston. and Dudley and Stuyvesant; and Mr. Levy, who was examined as a witness, testified that about the time the bond was executed, he was informed that Mr. Stoney was desirous of making terms with certain of his creditors, and securing the payment of their demands, and a paper containing their names, including his own, was read to him. That he was afterwards called on to attend a meeting of the creditors at the Bank, and found there

Hamilton, the President of the Bank, Magrath, the Solicitor and another, (one of the creditors.) That on Hamilton's asking his assent to the terms proposed, he expressed his willingness to do all that was desired by Mr. Stoney, but stated that he was on the point of making an assignment of his own effects, for the benefit of his creditors, rendered necessary by the failure of the Josephs & Co., and not knowing how far he was authorised to act, he declined acting at all. Hamilton replied that he thought he was right, and added, that there would be a law suit about these bills. Witness thought that he alluded to an attachment that the Bank was about to issue, and did issue, against the Josephs & Co., in which he was garnisheed. He states also, that he was wholly ignorant the bills were provided for by the bond and mortgage, and it appears that he had no notice of it, until the 12th July, 1841.

On the 27th September, 1837, Levy made an assignment of his effects, for the benefit of his creditors, including the bills in question, to Judge Gilchrist, who brought suit on them on the fifteenth day of April, 1840, against the executors of Stoney, and at January Term, 1841, recovered a judgment. There was no opposition to this recovery, and it seems to have been understood between the counsel and the parties, that the liability of Mr. Stoney on the bills was to be tried on the bill before referred to, filed by the defendants, executors of Stoney, against Levy and the Josephs & Co., and that the judgment at law was only intended to protect the bills against the operation of the statute of limitations. Judge Gilchrist had no notice that the bills were provided for by the bond and mortgage, until the 12th of July, 1841, which was after the time limited in them for the payment of the debts.

As to the claim of Phelps, Dodge & Co. They had no notice of the bond and mortgage, or that their demand was secured by them, until the fall of 1839, and as soon as they were informed, they, through their attorney, Mr. Yeadon, tendered their acceptance to John Magrath and Ker Boyce, who had succeeded Hamilton as President of the Bank of Charleston, and had been substituted trustee of the bond and mortgage. But they, as well as P. G. Stoney, one of the executors, thought it was unnecessary, as they were sufficiently protected by the bond and mortgage, and therefore the acceptance was not made in form.

As to the claim of the complainant, as the administrator of Dalcour. The *bona fides* of this demand is not contradicted,

but it is not provided for in the bond and mortgage. But it is insisted, notwithstanding, that the mortgaged assets ought to be brought into the account of the general assets of the estate, and distributed amongst all the creditors, rateably.

Before entering upon the consideration of the various questions to which these circumstances have given rise, it is proper to state, that all the creditors before the court are simple contract creditors, unless the bond and mortgage give to the demands of the creditors provided for by them, the dignity and rank of specialty debts; and that there was no evidence that any measures whatever were taken by Mr. Stoney in his lifetime, or his executors after his death, or by the trustees, to give notice to any of the preferred creditors, unless it be the Bank of Charleston, and the Merchants Bank of Cheraw, and that the information of all the others was obtained accidentally. I think it was said at the bar, that Hamilton took possession of the bond and mortgage, when they were executed, and kept them in his desk at his family residence, until he resigned the office of President of the Bank, and assigned the trust to Boyce, and that they were afterwards kept at the Bank.

I propose now to consider, first, the claim of the complainant, Tennant, that the mortgaged property should be brought into the account of the general assets of the estate, and with them to be distributed equally amongst all the creditors.

The grounds relied on, are—1. That none of the creditors intended to be preferred can avail themselves of the protection of the bond and mortgage, because none of them have accepted the terms, by signing and sealing in the manner provided for in the mortgage. 2. That on the contrary, Judge Gilchrist, the assignee of Levy, has violated the condition of the mortgage, by bringing a suit against the executors of Stoney, and obtaining a judgment for the amount due to him. 3. That the Bank of Charleston has violated the condition of the mortgage, and forfeited all claim to its protection, by charging Mr. Stoney, in the settlement of their accounts, with interest at seven per cent., damages in the name of exchange, costs of protest and postage, and taking a new note, payable at an earlier day, and receiving a large sum before the time appointed for the payment. And so of the Merchants Bank of Cheraw, which charged him with damages, costs of protest and postage, and took a new note for the amount, in direct violation of the condition of the mortgage. 4. That the proceeds of the sales of the mortgaged property

being in Court, they must be regarded as equitable assets, and are distributable, according to the uniform rule of the Court, rateably amongst all the creditors.

As before remarked, none of the creditors have accepted in the terms prescribed in the mortgage, and that in equity is not indispensable. The creditor's election may be presumed, from his acting in conformity with one or the other of the alternatives offered. A substantial is substituted for a formal election. Thus, if one of the preferred creditors here, knowing that he had been protected by the mortgage, had forborne to sue, or demand payment for his debts, until the time limited for the payment, he will be presumed to have accepted, although he had not signed and sealed the mortgage; but if, on the contrary, some of the creditors had demanded immediate payment, or sued for their debts, knowing that they were protected by the mortgage, that would have been an abandonment of their rights under it. 1 Swan. Rep. 396. *Dillon vs. Parker*, note. But here no time is limited within which the creditors shall come in and elect; and the rule on that subject clearly is, that unless they had renounced the right, directly or indirectly, they are entitled to come in and accept, notwithstanding any given lapse of time, unless it should operate an injury to other persons, or place them in a worse condition than they would have been in, if they had accepted as soon as the provisions of the mortgage were known to them; and it is very clear, that no one will be put in a worse condition, by permitting these creditors to come in and accept now, than they would have been in if they had accepted at the execution of the mortgage. It is necessary, too, that the party should know that he had the right to elect, and the effect it would have upon his interest. Election, from its very nature, supposes that the party had all the knowledge necessary to enable him to determine which alternative would be most for his benefit. These rules are clearly laid down in *Brice vs. Brice*, 2 Molloy, 21, reported in 12 Cond. Eng. Ch. Rep. 325. There the complainant filed a bill for an account of the estate of Edward Brice, and for liberty to elect to take under his will, or in opposition to it. He had proved the will, and acted under it for more than ten years; but there was evidence that he was ignorant of his right to claim in opposition to the will, and he was permitted to make his election. These creditors have the right to come in even now, and accept the terms of the mortgage, unless they have forfeited it by their acts.

In the application of these rules, I will begin with the case of Phelps, Dodge & Co., and it is enough to say, that they tendered their acceptance on the instant that it came to their knowledge that they were protected by the mortgage, nor have they done any act indicating their intention not to accept.

The commencement of the suit, and obtaining a judgment against the executors for the amount due to Levy, is relied on as evidence that he had elected not to accept; but neither he nor his assignee had any knowledge that his debt was provided for in the mortgage, until after judgment was obtained. It was said that Levy was invited to attend a meeting of the creditors of Stoney, and he might have known it if he would; but when he was told by the trustees, that his right to the three bills of exchange which he held would be contested, he might well conclude that there was no intention to secure their payment. This was followed by a bill filed by Stoney in his life time, to avoid their payment, which was revived by his executors after his death; and surely there was nothing better calculated to drive him from any further inquiry, as to the existence or contents of the bond and mortgage.

Nor do I think that the Bank of Charleston is concluded from accepting, by any act which it has done. The evidence shews that the Bank agreed, upon solemn deliberation, to accept the terms proposed, and the acts complained of were done in good faith, and with the intention of carrying their resolution into effect. The addition of the seven per cent. interest, instead of six, up to the date of the mortgage, the exchange, costs of protest and postage, was the result of the construction of the terms proposed in the mortgage by the officers of the Bank, with the assent of Mr. Stoney. The acceptance of the Bank of the payment of a large sum by Mr. Stoney, on account of its debt, is relied on as a fraud on the other preferred creditors; and it is insisted that as to them, it avoids the security intended for the Bank, in the bond and mortgage. There is no doubt that when a debtor, by the terms of his composition with his creditors, professes to put them all on a footing of equality, and by a secret agreement gives an advantage to one over the others, the agreement would be void; as where a debtor, professing to assign all his effects to pay his creditors rateably, keeps back a part of his effects, for the benefit of one, or as a bribe to induce him to accept, it would be void, as to the others. But here the obligation of Mr. Stoney, on the bond, was to pay all these

creditors in full, and he mortgaged, not all his effects, but certain specific property, for the payment; and it was his duty, as well as his interest, to pay off the debts as fast as he was able: and, certainly, there was nothing in the bond, or the mortgage, which required him to distribute every dollar he might be able to pay, rateably, amongst them all, as the means were not derived from the mortgaged property. The payment to the Bank did no injury to the other creditors. On the contrary, it operated as a positive benefit, by extinguishing, to that amount, the demands upon the funds out of which they were to be paid.

The Merchants' Bank of Cheraw stands on the same, or rather more favorable grounds than the Bank of Charleston, and is of course entitled to share in the distribution of the fund. The excess of interest charged by the Bank of Charleston, and the exchange, costs of protest and postage charged by both, must be deducted from their demands.

I shall now notice the fourth and last proposition in this branch of the case. In the administration of assets, that are purely equitable, this court is governed by a rule peculiar to itself, founded upon the principle that equality is equity; and it distributes them equally amongst all the creditors, without reference to the dignity or rank of their demands: but in administering legal assets, the court distributes them according to the strict rule of law. Now, legal assets, as distinguished from equitable, are such as come, for example, into the hands of an executor, to be disposed of in the due course of administration; whilst on the other hand, equitable assets are those which can only be come at and applied to the payment of debts, through the instrumentality of the Court of Equity. The court, however, recognizes and enforces, in the same manner that a law court would, if it had jurisdiction, all antecedent liens on the property. 1 Story's Eq. 519, 520–1.

The proposition that the mortgaged property constitutes merely equitable assets, is attempted to be maintained, on the ground that a deed to third persons for the benefit of creditors, can be only enforced in equity against either the trustees or the debtor. If the bond and mortgage are worth any thing at all, they give a lien on the specific property, and that is strictly enforced in this court. In the case of assets in the hands of an executor, subject to the payment of the debts, the law furnishes a rule for distribution: and the debtor may, if he will, exercise

the same authority in directing the distribution, even in opposition to the rule of law, which will be enforced here.

The argument goes even further, and insists that the bond and mortgage are altogether void, because voluntary merely; and the cases referred to by the counsel, of *Widgery vs. Haskell*, 5 Mass. Rep. 151, and *Seaving vs. Brinkerhoff*, 5 Johnson's Ch. Rep. 331, are authority for the rule, that an assignment made for the benefit of creditors without their knowledge, and without their assenting to it, or without any consideration, or one which is grossly inadequate, is void as to the creditors: but that is not this case. Here the creditors were bound, by the terms of the mortgage, to release a part of their demands, and give time for the payment, and they have accepted the terms; and that does not preclude them from satisfaction out of the general assets, if the mortgaged property should prove insufficient to pay all. And if we take a practical common sense view of the transaction, it will be seen that the bond and mortgage were intended as a security for the payment of pre-existing demands, in consideration of getting time, and a small deduction from the legal demands; a contract entered into with perfect good faith, and no doubt in the full confidence of all the parties, that Mr. Stoney's ample means would, in the time given, enable him to pay them and all his other creditors.

Another question of some importance has arisen between the preferred and general creditors of Mr. Stoney. It is supposed that the mortgaged assets will not be sufficient to pay the preferred debts. These, it will be recollected, were, in their original form, simple contracts; but it is insisted that the bond and mortgage raised them to the rank of specialty debts, and that in the distribution of the general assets, they are entitled to priority over the simple contract debts. It has been frequently held in our courts, that penal bonds, conditioned for the performance of official, or semi-official duties, such as sheriff's bonds and bonds of guardians and administrators, were entitled to rank as specialties in the distribution of assets, to the extent of the damages incured by a breach of the condition; and the reasoning on which the courts proceed is, that the penalty constituted the debt, to be discharged by the performance of the condition. These bonds, it will be observed, are intended as a security for liabilities that might be thereafter incurred, and not for an ascertained demand, and are indeed the foundation of the parties' right to sue. Here the bond is conditioned to pay pre-

existing debts, in their nature simple contracts, and imposes no new obligation; and so far from operating as an extinguishment of them, is a recognition of the liability of the obligor to pay them, in the form in which they stood. If Mr. Stoney had been unable or refused to give the security contemplated in the condition of the bond, what would have been the remedy? Concede that this court could have compelled the trustees to sue the bond at law, and they had received the money, to what purpose would they have applied it, but to the payment of the debts due to the creditors? And they are simple contracts. If we look through the bond and mortgage, and read them together, it is obvious that the object of Mr. Stoney was to gain time, and a small reduction of the amount of his liabilities; and on the part of the creditors, to obtain security for their demands; and it was never yet heard, that a mortgage to secure a pre-existing debt, although it would operate as a charge upon the property mortgaged, would extinguish the original debt, or change its character: and it is against the principles on which the court proceeds in the distribution of assets, to give preference to creditors, unless they come within the strict rules of law. I am therefore of opinion, that with respect to the balances that may remain due to the preferred creditors, after the proceeds of the mortgaged property, they are only entitled to participate rateably with the other creditors, in the distribution of the general assets.

Mrs. Stoney, the widow of the testator, claims to be entitled to dower in the real estates mortgaged, to be paid out of the proceeds of the sales. This comes before the court on a petition filed after the sales had actually been made under the order of the court; and she concedes, that she is concluded from asserting her right of dower in the lands themselves, in the hands of the purchaser, as she was a party to that proceeding, and had not interposed her demand for dower, but now claims to be indemnified out of the proceeds: and the question is, whether she is estopped by the order of the sale.

There is no question, that at law a party to a suit is estopped by any order or judgment of the court affecting the subject matter of the suit; and that rule obtains also in this court, when there has been a final disposition of the subject of controversy; but here the substitute of the proceeds of the sales of the lands is in court, and the very object of this proceeding is to ascertain who is entitled to it, and there is no reason why Mrs. Stoney's

claim ought not to be as much favored as that of the creditors. Dower is so much favored in law, that no power can divest the widow of it, without her consent expressed or implied, from her omission or neglect to prosecute it. Has she now come too late? I think not. In proceeding on what is usually called a creditor's bill, it is the familiar practice of the court to allow creditors who have not come in and proved their demands within the time limited by the order of the court, to come in at any time before the funds are distributed, on very slight grounds of excuse for not conforming to the order, and in some instances, perhaps, without any excuse at all. Now, I can very well suppose that Mrs. Stoney preferred to take her dower in the form of money, instead of the lands, in specie, or what is more probable, that she supposed, in ignorance, perhaps, of the amount of the debts, and the value of the estates, that so large an estate would pay all the debts, and leave an ample provision for her; and unquestionably that would have been the result, if the estates had been sold but a few years before. It was the unprecedented depreciation in the value of property, which brought loss to the creditors, and ruin to the family of Stoney.

Mrs. Stoney and her children claim a demand against the estate for seventeen thousand, two hundred and twelve dollars, and fifty-two cents, on account of a fund confided to the testator, by her father, for their use. It is founded on the following writing: "Charleston, 26th December, 1826. Received of Capt. Peter Gaillard, Thomas Ashby's bond, on which there is principal and interest, due on the 1st January 1827, of eighteen thousand, nine hundred and forty-five dollars, in trust for his daughter, Mrs. Elizabeth Stoney, and her children, and on which a balance of fifteen hundred dollars is to be refunded to him, after the first of January next." Signed, "John Stoney." And from an account written below, it appears that after deducting the payments made to Gaillard by Stoney, the above balance of seventeen thousand, two hundred and twelve dollars and fifty cents, remained due on the bond. Whether Mr. Stoney ever received the money from Ashby, or what became of the bond, is not known.

The only objection to this claim is, that this contract cannot be set up as a trust. Contracts are always construed according to the intention of the parties, to be collected from the terms used. Now, it is apparent that Gaillard did not intend to give the money secured by the bond, to Mr. Stoney, and it is equally

clear that he intended it for the use of Mrs. Stoney and her children; and it is impossible to give it that effect, unless we suppose that, as far as she is concerned, he intended it for her sole and separate use, because if it be construed a gift to her, it would operate as a gift to her husband. Her children are equally entitled with herself, and with respect to their right, there is no question. The trust for them is direct, and there is nothing in the relation between them and their father to oppose to their claim. I am, therefore, of opinion, that the principal sum, with the interest from the time the bond became due, must be paid to Mrs. Stoney and her children, in equal portions, out of the general assets of the estate, rateably with other simple contract creditors.

I will now proceed to the consideration of various other questions, arising out the administration of the testator's estate by his executors, which come up in the form of exceptions to the master's report on their account.

A large portion of the general assets of the estate has been applied by the executors to the payment of simple contract debts in full, and the creditors now before the court complain that that was a misapplication of them. Clearly, that was a mal-administration for which the executors are responsible.

They complain, too, of another act of mal-administration, arising out of the following circumstances. The testator, it appears, was in the habit of accepting bills of exchange drawn on him by the house of Dudley and Stuyvesant, of New-York, and to secure him against any liabilities he might incur on that account, they mortgaged to him certain real estates in New-York, but the testator neglected to have the mortgage recorded, within the time prescribed by the laws of New-York, and Dudley and Stuyvesant afterwards mortgaged the same property, with other property to a large amount, to secure the payment of a large sum of money, and that having been recorded, was entitled to precedence over the mortgage to the testator; and the executors state in their answer, that the testator entered into a contract to purchase in the junior mortgage, including the other property mortgaged, at a stipulated price, but died before the contract was consummated, and believing that it would benefit the estate of their testator, and regarding themselves as bound by his contract, they paid the money, and took an assignment of the mortgage. They add, that they have expended large sums of money in suits at law and in equity in New-York, in prosecuting their

claim under these mortgages. It appears that the mortgaged estates have not been sold, and it is not known what will be realized from them. It is thought, however, that there will, in all probability, be a loss on the sales, and the creditors insist that the payment of the money for the junior mortgage was a misapplication of the funds of the estate. The executors are unquestionably entitled to be credited with any sums of money *necessarily expended* in prosecuting their claims under the mortgage to their testator, because it was their duty so to do, and the money disbursed on that account is a part of the expenses of administration; and if, as they state in their answer, their testator had entered into a binding contract with the holder of the junior mortgage, they were bound to perform it to the extent of the means in their hands, if it worked no injustice to other creditors. The answers do not state any thing about the form or manner of the contract, nor is there any thing found in the evidence reported by the master, which throws any light on the subject. It may be that the contract was binding on the testator, but from what is said of it in the answer, I am led to suppose that it was a mere treaty, which the testator, if he had lived, would have carried into effect, but had not the form or substance of a binding, legal contract. If that be so, the application of the funds of the estate to that object, was an act of mal-administration, for which the executors are responsible. The act was not one which the law required them to do, and they had no right to speculate upon the chance that it would benefit the estate. As before stated, it does not appear how the fact was. It is a matter of some consequence, and as it will be necessary to refer the matter of account back to the master, I shall direct him to take evidence on the subject.

The testator, and defendant John Magrath, were the executors of the late John Williamson, and the master reports, that at the time of the death of the testator, he had funds in his hands belonging to that estate to the amount of something over ten thousand dollars, and that has been paid by the defendants, out of the general assets of their testator. That was clearly a simple contract debt, and the executors are only entitled to be credited with what would have been a rateable proportion in the distribution of the assets amongst the simple contract creditors.

The testator, in his life time, paid to the Bank of Charleston, on account of the principal, about thirteen thousand dollars, and the master has recommended that the Bank should not be

allowed to come in, until the other prefered creditors shall have received out of the proceeds of the mortgaged assets a sum equivalent to that paid to the Bank, upon the principle of a *pro rata* distribution; and the Bank excepts to this, on the ground that the payments were not made out of the mortgaged property, and, therefore, cannot impair the rights of the Bank to a full *pro rata* share of the mortgaged property, on the balance due to them.

This exception must prevail. There is no question, that if a debtor make a general assignment of his effects, any secret agreement which he might make with one of them, to induce him to come in and accept, or any act which he might do to the prejudice of the others, or which might be inconsistent with perfect fairnes, would be void. But that is not this case. Here the assignment, or rather mortgage, is not of the debtor's assets generally, but of certain specific property to secure certain creditors; as between them, their rights are restricted to the particular property, and I cannot perceive that there is any unfairness, or injustice done to the others, in the debtor's paying one or more of the creditors in part, or in full, out of other assets. On the contrary, it is a positive benefit, by diminishing the amount with which the mortgaged property was charged.

The Bank of Charleston also excepts to the report, on the ground that the master has credited the defendants with one thousand, one hundred and thirty-nine dollars, and ninety-eight cents, paid by them for City assessments on the property in New York. If, as I suppose, the property mortgaged by Dudley and Stuyvesant to Stoney, remained in their possession and use, they were bound to pay the taxes, but they became insolvent, and did not, and probably were unable to, pay the assessment. Taxes and assessments here ride over all other claims to property, and, I suppose, in New York, and it would have been criminal in the executors to have stood by and seen the property sold for the assessments. All doubt about it will be removed, if we bring the matter nearer home, and suppose that the property was situated in Charleston. No one would question that the executors would have been justifiable in paying the City assessments on property mortgaged to their testator, if the mortgagor did not, or was unable to, pay them. The effect of neglecting to do it, would be to lose the security which the property gave for the payment of the debt. The defendants are entitled to be credited with the amount paid by them on account of the assessments on the lots

mortgaged to their testator, but not with what they may have paid on those acquired by their contract with other mortgagees.

The Bank of Charleston further excepts to the master's report because he has rejected a claim set up by them for five hundred and twenty-six dollars and nine cents, paid by them on the same assessments of the property in New York, at the request of the executors. The same rule must prevail in this case as in the last preceding exception. The Bank is entitled to be reimbursed the amount paid on account of the assessments on the property mortgaged to the testator. This, and the last exception, strike me as being directly opposed to each other.

The Bank also excepts to the report, because the master has charged against it two hundred and sixty-three dollars and twenty-one cents, with the interest, for the goal fees, on negroes purchased by the Bank, at the sale of the mortgaged estates. It appears, from the evidence, that the negroes were sold on Monday and Tuesday, the 29th and 30th of March 1842, and a number were purchased by the Bank. The Bank was ready and willing to comply with the terms of the sale, on the instant they were bid off, but the negroes were not delivered until the Tuesday following. In the interim between the sale and delivery, the goal fees, (for the negroes were confined there for safe keeping,) amounted to the sum stated in the exception; and the master states, as a reason that they were not sooner delivered, was because it was impossible to prepare the necessary papers sooner, and one witness, a broker, testified that the purchaser of negroes is usually charged with their keeping in the work-house, from the contract of sale until their delivery.

The evidence does not establish any usage, as to the matter in hand. If the purchaser neglect to comply with the terms of the sale, or if after he has complied with them, he suffer them to remain in the work-house or goal, he must pay the charges, and that, I suppose, is the usage to which Mr. Carter refers. But I should not be disposed to adopt any usage so repugnant to common sense and common justice, as this appears to me to be. The purchaser was entitled to the possession of the negroes the instant they were bid off, if he was ready to comply with the terms of the sale, and if the delivery was delayed for the convenience of the seller, or on account of his inability to do what was necessary to the delivery, it was no fault of the purchaser. This charge must, therefore, be put down to the expenses of the sales, and paid out of the proceeds.

Cooper and Hunt claim to be paid out of the proceeds of the sales of the mortgaged negroes, the amount of an account for shoes furnished by them for the use of the negroes mortgaged, whilst they were in the possession of the executors, and at their request, and it has been rejected in the master's report. This is properly the debt of the executors, and at law they alone would be liable. There are, however, numerous cases in which parties who have furnished the means of subsistence, and for the preservation of trust estates, have been held entitled to be paid out of the fund, when the trustee was insolvent and unable to pay. That rule would, under the circumstances indicated, have applied here. But there is no proof, and there was no evidence offered, of the insolvency of the executors.

The counsel of the parties will be at liberty to move for all the orders necessary to carry this decree into effect.

From this decree the several parties to the suit appealed, that is to say:—

From so much of the decree as declared that the Bank of Charleston, the Merchants Bank of Cheraw, Phelps, Dodge & Co., and J. C. Levy, are entitled to satisfaction out of the proceeds of the lands and negroes included in the indenture of 16th June, 1837, to the exclusion of or in preference to other creditors, the complainant appealed, and submitted the following, among other reasons, to shew that the decree should in this particular be reversed.

1. That said deed is inoperative at law, and the parties must therefore come into equity for relief, if they would have any benefit from it.

2. But equity favors equality, and assets are in this court distributed *pro rata;* nor can any creditor have a preference, unless by virtue of a lien, and equity will not set up a lien which is ineffectual at law, to improve the condition of one creditor at the expense of another creditor of equal merit.

3. That to the said deed no creditors were parties, and therefore it was subject to be revoked as long as nothing was done by the creditors that might serve as a consideration moving from them. But in fact no consideration to support the said deed moved from the creditors, and they retained all their rights upon the original causes of action, and so the deed continued to be solely the deed of Mr. Stoney, and to be revocable by him, and was in fact revoked by his death.

4. That the said deed was conditional, and the creditors who

would take under it, must shew that they have all strictly complied with its terms. But the said creditors have failed to shew a compliance, and on the contrary it has been shewn that the conditions of the said deed were broken by every one of the persons who now claim the benefit of it.

The Bank of Charleston appealed from the decree, and moved that the same may be modified in the particulars and for the reasons following, that is to say—

1. That the bond and mortgage of Mr. Stoney, referred to in his Honor's decree, was voluntary, and inchoate as a lien on his estate, and could neither bind him, nor vest any rights in the creditors mentioned in the schedule annexed to the bond, until the mortgage had been tendered to them by him for their acceptance, and actually accepted by them, in such manner as to render the terms and conditions therein contained, binding and obligatory upon them. That in point of fact, the bond and mortgage were intended, originally, for the benefit and protection of the Bank of Charleston only, the application and negotiation for indulgence, which resulted in the execution of the bond and mortgage, by Mr. Stoney, having been made and conducted by him, solely with that institution, and the debts for which indulgence was stipulated, and security offered, being all of them such as belonged to that Bank, or for which it might be eventually liable, or of which, if it were necessary, it might acquire the control; the terms of the bond and mortgage, moreover, being obligatory and binding on the Bank, originally and independently of the subsequent settlement with Mr. Stoney, by virtue of the execution of the mortgage by its President, with the privity and by the authority of the board of directors. And although it would have been competent to Mr. Stoney, in his life time, to have extended the contract to the other creditors mentioned in the schedule, by tendering the mortgage to them for execution, or acceptance of its terms, yet it was entirely within his option to do so, or not, as he might deem advisable or expedient; and no creditor had the right, by a tender or expression of willingness to do so, to become a party to the mortgage, by executing the same, or otherwise to entitle himself to the benefit of it, until it was tendered to him by Mr. Stoney; nor had the trustees in his life time, or they or the executors after his death, any power or authority to extend the benefit of the contract to any creditor to whom Mr. Stoney had not tendered it in his life time. Wherefore, it is submitted there is error in so much of the de-

cree as admits the assignee of J. C. Levy, and Phelps, Dodge & Co., to a participation in the proceeds of sale of the mortgaged property, inasmuch as the mortgage was never tendered to them by Mr. Stoney in his life time, nor could their offer to accept the same avail to give them any title to the security proposed by it, especially after his death; and the decree ought, therefore, in this respect, to be reformed.

2. That independently of the general character of the bond and mortgage, as voluntary instruments, and except as to those creditors to whom the mortgage was actually tendered, and by them accepted, a mere authority to the trustees, and revocable at his pleasure, the bond and mortgage, upon their face, exclude both the assignee of J. C. Levy, whose debt was disputed and denied, and Phelps, Dodge & Co., whose names are not even mentioned in either instrument; so that in no point of view can they be regarded as either parties or privies to these instruments, or entitled to any benefit under them.

3. That if Phelps, Dodge & Co. ever had a right to avail themselves of the benefit of the bond and mortgage, by their acceptance of the terms prescribed, independently of the assent of Mr. Stoney thereto, and without a tender by him, yet such right was lost by their not accepting before his death, by which event the rights of his creditors, and their liens upon and interest in his estate, became fixed. Nor will their want of notice avail to give a right to accept after his death; especially as the very want of notice, whilst it proves *laches* on their part, at the same time excludes the idea of any *contract* or of any *consideration*, upon which such right could be founded. And it is, moreover, respectfully submitted, that the commencement of a suit against the executors of Mr. Stoney, by Phelps, Dodge & Co. upon their original cause of action, after notice of the bond and mortgage, was a waiver of any claim under those instruments, nor could such claim be revived by an abandonment of the suit.

4. That for the same reasons, the assignee of Levy is excluded from any rights under the bond and mortgage, both by his non-acceptance during the life time of Mr. Stoney, and by his assignee's actually recovering judgment against the executors of Mr. Stoney, after his death, upon the original cause of action.

5. That the bank of Charleston is entitled to rank as a bond creditor, as to any residue of its demand which may not be satisfied out of the mortgaged property; it being as much a part of the *contract*, upon which the bank surrendered the bills of ex-

change held by them, and accepted the terms imposed by Mr. Stoney—that the debt should be secured by specialty, as that it should be specifically protected by the mortgage. Wherefore, it is respectfully submitted, that there is error in so much of the decree as declares the bank of Charleston a simple contract creditor only, for the said residue; and that, in this respect, the decree should be also reformed.

6. That there is further error in so much of the decree as declares that Mrs. Stoney is entitled to her dower, to be assessed and paid out of the fund in court, it being respectfully submitted, that dower is a specific charge upon, or more properly an estate in, the land in which it is claimed; and that if the right to dower out of the specific land has been released, or waived, or even lost by neglect, it is gone forever, and cannot be set up as a charge upon the estate. Wherefore, it is submitted that the decree in this respect, also, should be reformed; and it is insisted, that at least the amount which may be assessed for dower, should be set off against the balance due by the executors upon the account of their administration of the estate.

7. That there is no sufficient evidence to charge the estate of Mr. Stoney with the amount of Thomas Ashby's bond, referred to in the decree, and especially no evidence that he ever received any part of the balance of seventeen thousand, two hundred and twelve dollars and fifty cents, reported to be due upon it. That, moreover, there is nothing in the terms of the receipt given by Mr. Stoney, which is the only evidence of any trust, on which a trust can be raised *for the sole and separate use* of Mrs. Stoney; and, therefore, as to so much of the money due on the bond as she was entitled to, if collected by Mr. Stoney, it became his *jure mariti*, and if not collected by him, then his estate cannot be liable at all. Wherefore, it is submitted that there is error in so much of the decree as establishes the amount due upon the said bond as a charge upon the estate, and that the same should be reformed.

8. That the claim of Cooper & Hunt cannot be established as a charge upon the estate, except upon proof, not only that the executors are insolvent, but also that they are in advance to the estate; wherefore, there is also error in so much of the decree as declares that they will be entitled to payment upon proof of the insolvency of the executors, and the same ought to be reformed.

Phelps, Dodge & Co. appealed, on the following grounds:

1. That the claim of the bank of Charleston, under the trust bond and mortgage from Mr. Stoney, should not have been allowed, because the said bank not only never accepted the terms of the said bond and mortgage, but violated the terms and provisions thereof, in several particulars. 1st. By surrendering their original drafts and taking a new note from Mr. Stoney, for a larger amount and at a shorter term of credit, than stipulated in the said bond and mortgage. 2d. By not confining the settlement with Mr. Stoney to the face of the original draft, but requiring from him a large sum of money for premium of exchange, protests and postages, and including the same in the principal of the new note above mentioned. 3d. By charging interest at the rate of seven, instead of six *per cent.*, and including the same in the principal of the note.

2. That the claim of the bank of Cheraw, under the said bond and mortgage, should not have been allowed, because the said bank not only never accepted the terms of the said bond and mortgage, but violated the terms and provisions thereof. 1st. By surrendering their original drafts, and taking from Mr. Stoney a new note. 2d. By not confining their settlement with Mr. Stoney to the face of the original drafts, but taking from him a large sum of money for premium of exchange, protests and postages.

The assignee of Levy appealed, on the grounds:

1. That he is entitled to the full benefit of the bond and mortgage, stated in the decree, for the whole amount of the bills of exchange held by him, rateably and proportionally with the other debts secured by the said bond and mortgage.

2. That if it be contended or deemed, that the said bills of exchange are not entitled to the security of the said bond and mortgage, on the ground that their terms were not in time accepted by the holder, and that the want of information is not a sufficient excuse for the omission, then these defendants submit and contend, that the bank of Charleston, through their Presidents, James Hamilton and Kerr Boyce, and the said John Magrath, the trustees of these defendants, have committed a breach of trust against these defendants, in altogether neglecting and omitting to give, in time, notice to these defendants of the execution of these securities. And these defendants submit and contend, that the said bank of Charleston and John Magrath are answerable and liable to these defendants for the said breach of trust, and that the court will order and decree them, the said

bank of Charleston and John Magrath, to make up and pay to these defendants, as between co-defendants, whatever they, these defendants, may lose by the said breach of trust.

3. That the bank of Charleston violated the conditions of the said bond and mortgage, and are not entitled to the benefit of them.

7. That if the bank of Charleston are held entitled to the benefit of the said bond and mortgage, then they, as trustees of the other creditors under the said bond and mortgage, must either bring into the common fund the moneys which they have received on account of their debt from Mr. Stoney, since the execution of the bond and mortgage, and independently of them, or the said bank must be postponed on the funds arising under the mortgage, until the other creditors secured by it are equalized with them.

Mrs. Stoney and her children appealed from so much of the decree as declares that the bank of Charleston, Phelps, Dodge & Co., the Merchants bank of Cheraw, and J. C. Levy, are entitled to have the property embraced in the mortgage deed of the 16th June, 1837, applied to the payment of their respective demands, in preference to those of other creditors; and they relied upon the following grounds, viz:

1. That none of the said parties signed and sealed the said deed, or made themselves parties thereto, by acting under it and conforming to the conditions required to be performed by those for whose benefit it was intended.

2. That it is only as a contract, to which Mr. Stoney was a party on one side, and they were parties on the other side, that the said deed can be regarded as giving them any right to be preferred to other creditors; and as to Phelps, Dodge & Co., and Levy, they certainly could not have been parties to an instrument, of the very existence of which they had no notice until after the death of Mr. Stoney, the other contracting party.

3. That as to Levy's claim, it ought not to be admitted as a demand against the estate of Mr. Stoney at all, because the evidence shews that it was founded on a conspiracy between Dudley & Stuyvesant and Josephs & Co., to defraud Mr. Stoney.

'Cooper & Hunt appealed from so much of the decree as affirmed that they are not entitled to have their demand paid out of the estate, without proving the insolvency of the executors, on the following ground, viz:

That their demand being for necessary supplies, furnished for the negroes of the estate, for which, if the executors had paid, they might have refunded themselves out of the estate, this court will overlook the intervention of the executors, and make the payment immediately to the party ultimately entitled to receive it, and the solvency or insolvency of the executors can make no difference.

The executors of Stoney gave notice of appeal, as follows:

1. The executors appeal from so much of the decree as gives a specific lien to any one creditor, and claim that all the assets of the estate should be rateably distributed.

2. Should the decree be sustained, in relation to the payment to the executors of John Williamson, and sundry other simple contract creditors, the executors will ask leave that an order may be made, authorizing them to make the executors of Williamson, and all others who have been overpaid, parties to these proceedings, and that they may be decreed to refund all over their rateable share of the estate, under the final decree.

The Merchants bank of Cheraw appealed, on the following grounds:

1. Because the bank of Charleston having, with other creditors, entered into an arrangement with Mr. Stoney in his life time, could not in good faith vary the same to the prejudice of creditors; and, therefore, that for all moneys received by the bank of Charleston, the said bank should come into an account.

2. Because, for the surplus, after the proceeds of the sale of the mortgaged property are exhausted, the creditors whose claims are included in the bond and mortgage are entitled to rank as specialty, and not as simple contract creditors.

The executors and executrix of Stoney appealed, on the following grounds:

1. That under the circumstances of the case, in the payment of the debts denominated simple contracts, the executors are not liable, as in a case of mal-administration.

2. Because the funds belonging to the estate of John Williamson were in the joint possession of the executors of Williamson, and vesting absolutely in the survivor, formed no part of the estate of Mr. Stoney.

3. Because the bank of Charleston having agreed with Mr. Stoney, and having taken special security for his performance of it, could not vary that contract to the prejudice of other creditors;

and, therefore, the report of the master, recommending that the bank of Charleston should account for the $13,000 paid by Mr. Stoney, should have been sustained.

4. Because the claims of Mr. Hunt and Mr. Cooper were charges against the estate, and should have been defrayed from the funds in the hands of the master, and should not have been decreed a charge against the executors.

5. That the expenses of the negroes from the day of sale should be paid by the purchaser, and that no exception should be made in favor of the bank of Charleston.

Petigru, for complainant, cited 2 Fonb. Eq. 396; 2 Atk. 290; Francis' Maxims, 13; 4 John. Ch. 633; 1 Camp. 148; 3 Meriv. 7; 5 Cond. Eng. Ch. 1; 13 Ib. 121; 8 Ib. 96; 4 Mass. R. 144; 1 Leon, 194; Rob. on Fraud. Convey. 429; 1 Ch. Ca. 249; 5 John. Ch. 332; Co. Lit. 204; Doug. 684; 2 J. R. 207; P. L. 408; 3 Kent, 115; 1 Dick. 375; 1 McC. Ch. 434; 2 John. Ch. 576; 2 M. & R. 503; 3 Bro. Ch. 639; 1 Hopk. 373.

Yeadon, for Phelps, Dodge & Co. cited 1 Story Eq. 522; 1 McC. Ch. 466; 8 Pick. 113; 8 Cond. Eng. Ch. 97; 15 Ves. 52; 14 J. R. 409; 12 Ib. 536; 1 Vern. 261; 1 Story Eq. 370.

A. G. Magrath, for Bank of Cheraw, cited Story on Cont. 76, 77; 4 Mason, 214; 11 Wend. 250; 4 John. Ch. 429; Ang. on Ass. 186; 3 Esp. 228; 2 Camp. 383; 1 McC. 441–2; Ib. 168; 3 B. & C. 248; 10 Eng. C. L. R. 67; 11 Wheat. 78; 4 John. Ch. 529; 2 Ves. & B. 306; 1 Anst. 111; 2 Rose, 79; 2 Ves. & B. 416.

Bailey, for Bank of Charleston, cited 1 Bail. Eq. 172; 2 McC. Ch. 56; 2 Cru. Dig. 344–7; 1 Story Eq. 287; Ib. 520, 522; 8 Eng. Cond. Ch. 99; 2 Story Eq. 439, 440; 15 Ves. 52; P. L. 494; 2 McC. Ch. 382; 3 Hill, 145; Bail. Eq. 159, 283, 311; 2 Tread. 770.

Mazyck, for Mrs. Stoney and children and Cooper and Hunt, cited 1 Dick. 375; 1 Wheat. Selwyn (ed. 1839) 446–7; 2 Watts, 451; 2 Whart. 167; 5 Eng. Cond. Ch. 7; 6 Ves. 666; 18 Ves. 84; 14 John. R. 404; 2 Hill, Ch. 250.

King, for assignee of Levy, cited 1 McC. Ch. 466; P. L. 67, 68; 1 Story Eq. 408 *et seq.*; 12 John. R. 536, 554, 559; 4 Cowen, 603; 5 Pet. 264; 1 Vern. 260; 1 Hill, 242; 2 Story Eq. 439; 1 Hill Ch. 414, 430; 2 Hill Ch. 443; 1 McC. Ch. 406; 3 John. Ch. 261; 14 Pet. 20, 32; 1 Story Eq. 226; Rice Eq.

315, 325; Dud. Ch. 55; 2 Sch. & Lef. 689, 709, 718; 2 McC. Ch. 470.

Hunt, for the executors of Stoney.

Curia, per JOHNSTON, CH. Perhaps the plainest view may be obtained of the principal questions involved in this appeal, by taking our position at once amidst the circumstances existing at the death of Mr. Stoney. He died in possession of a large estate, consisting partly of property which he had conveyed away by the deed of the 16th of June, 1837, and partly of other property, of which the title still remained in himself; and he was largely indebted, the principal debt consisting of a bond, in the penalty of 400,000 dollars, the rest being simple contracts.

The whole of the property has been sold; the proceeds of it are in this court; the different creditors and claimants have been called in, at the instance of the plaintiff, who is a general and simple contract creditor of the deceased; and the question is, how shall the fund be distributed among them?

The simple contract creditors insist upon a *pro rata* distribution; those interested in the bond and deed contend for a preference.

If the deed be regarded as an ordinary conveyance, and the bond as an ordinary obligation, and if there were no connexion between them, the principles of the decision would be very clear. The property covered by the deed would constitute no part of Mr. Stoney's estate, but would belong to the grantees; and its proceeds must be awarded to him. The estate of Mr. Stoney would be restricted to the property of which the title remained in him. Out of this his debts must be satisfied, in the order prescribed by the statute; and, of course, the bond would be preferred over the simple contracts.

But this is not exactly the character or position of these instruments. The bond purports to have been taken by Hamilton and Magrath, the obligees, as trustees of certain simple contract creditors of Mr. Stoney, whose names and demands are exhibited in a schedule annexed to and referred to in it; and its penalty is suspended, upon a condition, that he should pay them, with certain abatements, within a specified time, which he has failed to do. The deed purports to have been executed to the same trustees, as a security to the bond, and to advance the interests of the *cestuis que trust*, the creditors mentioned in the bond schedule. The first and natural impression from these

circumstances would be, that the proceeds of the property covered by the conveyance should be passed through the grantees to their *cestuis que trust*, and that after being credited upon their demands, and upon the bond by which they are secured, the residue of the bond should stand, as a specialty demand, against the general assets of the obligor. And to this same conclusion I have come, after an attentive consideration of all that has been advanced by counsel, in an argument of unusual extent, and uncommon ingenuity, discrimination, and learning.

The question is as to the validity and operation of the instruments referred to, and what effect is to be allowed them in the distribution of the funds in the possession of the court; and the objections to their operating in the manner contended for by the creditors interested in them, are rested on the rights of Mr. Stoney, and the other creditors, which are supposed to be thereby infringed.

I suppose it is hardly necessary to observe, that whatever would conclude Mr. Stoney himself, must be equally conclusive on his personal representatives and distributees; and that although they, and not he, are the parties before the court, urging the objections, the case must be considered as if he were the actual party in their place. Nor need I say, that as to the validity of the instruments, the objecting creditors must be concluded with Mr. Stoney, except in the single instance where their execution might operate as a fraud upon them; and that, as to the influence of these papers, in the distribution of the fund, their right of objection must be restricted to such equities as the rules of this court recognize in the administration of funds in like cases.

I proceed, now, to consider the objections urged by counsel.

They may be summed up thus:

That, irrespective of the terms exacted by the instruments from the creditors intended to be secured, no consideration proceeded to Mr. Stoney, either from the trustees or creditors; wherefore the papers are to be regarded as purely voluntary: and, as such, neither of legal obligation, nor enforcible in equity.

That the creditors did not bind themselves to the terms, either by becoming parties or by assenting, so as to impart a consideration, and entitle themselves to enforce the instruments.

That the latter are ineffectual in law, not only as being voluntary, but incomplete.

And that the rules of this court forbid it to give them any effect calculated to disturb that equality among creditors which is so much favored here.

There is no such condition expressed on the face of these papers, as that they shall not begin to operate until the creditors, respectively, shall become parties, or assent; much less is a condition or intention expressed, (as seems to have been done in *Atherton vs. Worth*, 1 Dick. 375, one of the cases quoted,) that they shall not take effect unless all the creditors shall do so. Therefore, I shall consider them as proceeding from Mr. Stoney, with his free consent, that they shall operate,—but that they shall operate only upon the terms expressed in them; and that they are good for those intended to be benefitted by them, so far as the law allows them to avail themselves of their benefits; with this single proviso, that if they claim the benefits they must abide by the terms.

And, in the first place, I am of opinion that it was not necessary that the creditors intended to be secured, should be parties or assenting at the execution of the instruments. As observed by Chief Justice Marshall, in *Brooks vs. Marbury*, (11 Wheat. R. 97,) "deeds of trust are often made for the benefit of persons who are absent, and even for persons who are not in being;" and the interests of all such would be defeated, if their concurrence were deemed a pre-requisite to the operation of the deeds. Accordingly, he follows what I have quoted by the position, that "whether the deeds are for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they are made, has ever been required as preliminary to the vesting of the legal estate in the trustee." In the same case, it was held that a subsequent assent in terms, or by substantial acts, was a sufficient acceptance.

In this branch of the discussion, I am assuming, of course, that the instruments are voluntary, as proceeding from and executed in fulfilment of no contract between the *cestuis que trust* and Mr. Stoney. It is impossible to put a deed, made with the motive of securing creditors, upon precisely the same footing with one creating a trust for pure volunteers. But taking them as such, the case of *Ellison vs. Ellison*, (6 Ves. 656,) sustains the position, that wherever the instrument effectually constitutes a trust, even for volunteers, they may enforce it. Lord Eldon observes, (Ib. 662,) "I had no doubt, that from the moment of executing the first deed, supposing it not to have been for a wife

and children, but for pure volunteers, those volunteers might have filed a bill in equity, on the ground of their interests in the instrument, making the trustees and the author of the deed parties. I take the distinction to be, that if you want the assistance of the court, to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*."

The same doctrine was held by the same great Chancellor, in *Pulvertoft vs. Pulvertoft*, (18 Ves. 84.) He says "the distinction is settled, that in the case of a contract merely voluntary, (I do not speak of valuable or meritorious consideration,) this court will do nothing, But, if it does not rest in voluntary agreement, but an actual trust is created, the court does take jurisdiction."

The case of *Walwyn vs. Coutts*, (5 Cond. Eng. Ch. 7,) has been referred to for a contrary doctrine. The grounds upon which the order was made in that case are not disclosed by the note of it which has been reported.

The difficulty, in subsequent cases, has been to discover upon what principle, consistent with his own decisions in *Ellison vs. Ellison* and *Pulvertoft vs. Pulvertoft*,—the authority of which has been constantly acknowledged—Lord Eldon could have rested his judgment. Sir Launcelot Shadwell, in commenting upon it in *Garrard vs. Lauderdale*, (3 Sim. 1, 5 Cond. Eng. Ch. 1,) supposes that the principle of the case is, that where a debtor, for his own convenience, makes a disposition between himself and a third person, constituting him trustee as between themselves for the payment of his debts, and this without concert with or notice to his creditors, he may countermand it. Lord Brougham, before whom the last mentioned case afterwards came, (2 Rus. and Mylne, 451, 13 Cond. Eng. Ch. 121,) says of the instrument in *Walwyn vs. Coutts*, that it was not so much a conveyance, vesting a trust in A, for the benefit of the creditors of the grantor, but rather an arrangement made by a debtor for his own personal convenience and accommodation, (for the payment of his own debts, in an order prescribed by himself,) over which he retains power and control.

Upon these views the authority of *Walwyn vs. Coutts* was sustained in *Garrard vs. Lauderdale*; and upon the same principle the latter case was also itself decided. It will be seen at once, that the application of the principle depends upon the construction of the instrument, and the intention with which it was

executed. If it appear that the trustee was not intended to be the trustee of the creditors, but of the grantor, his mere agent, and that the conveyance was executed simply with a view to enable him to perform the acts directed, these cases say the deed is revocable; though it is not clear that it could be revoked after the transaction has come to the knowledge of the creditors, and against their wish, expressed before the revocation.

This is the interpretation put upon these cases, by Sir C. Pepys, in *Bill vs. Cureton*, (8 Cond. Eng. Ch. 103,) who remarks that "the distinction between them and the prior cases, is somewhat refined;" "but it is obvious that the distinction has good sense for its foundation, and that the rule, as established by them, is adopted to promote the views and intentions of the parties."

I have thus brought together the two decisions of Lord Eldon, in which the rule is firmly laid down on the one hand, and the cases, one of them decided by himself, which have been supposed to oppose it on the other, and I have shewn that the rule was not intended to be shaken by these cases.

I have purposely abstained from a reference to other cases in support of the rule; reserving, for that purpose, an extract from the judgment of the master of the rolls, in *Bill vs. Cureton*, already mentioned, which will not only shew the strength of its authority, but the fact that it was never intended to be drawn in question. "That a voluntary settlement," says he, "where the trust is actually created, is binding upon the settlor, has been so long, and is so fully established, that no attempt to raise the question would probably have been now made, were it not that the modern cases of *Walwyn vs. Coutts*, and *Garrard vs. Lauderdale*, have been supposed to be inconsistent with that doctrine.

"The doctrine itself has never been disputed, and has been the subject of repeated decisions, from the cases of *Villers vs. Beaumont*, (1 Vern. 100,) in the year 1682, and of *Brookbank vs. Brookbank*, (1 Eq. C. Ab. 168,) in 1691, down to the modern cases of *Ellison vs. Ellison* and *Pulvertoft vs. Pulvertoft*. It must, indeed, have been coeval with the statute of the 27 Eliz. inasmuch as the second section of that Act declares that voluntary conveyances shall be void only as against purchasers for valuable consideration; assuming, therefore, that as against the authors of such settlements, they were good. If, therefore, the cases of *Walwyn vs. Coutts* and *Garrard vs. Lauderdale*, were

inconsistent with this doctrine, there would be no doubt on which side the weight of authority would be found. But, in fact, those decisions were not intended to interfere with the general doctrine, and the grounds upon which they were founded are perfectly consistent with all the preceding cases. It cannot be supposed that Lord Eldon, who decided *Ellison vs. Ellison* and *Pulvertoft vs. Pulvertoft*, and several similar cases, intended to overturn the doctrine upon which they proceeded, in his decision in *Walwyn vs. Coutts*; and the Vice Chancellor, in *Garrard vs. Lauderdale*, expressly draws the distinction, and leaves that doctrine untouched. These two cases, indeed, so far from deciding that a *cestui que trust* becoming entitled under a voluntary settlement, had not a good title against the settlor, proceeded upon this—that the character of trustee and *cestui que trust* never existed between the creditor and the trustee of the trust deeds; but that the settlor himself was the only *cestui que trust*, and that, therefore, he was entitled to direct the application of his own trust fund. Whether such views of the relative situation of the creditor and the trustee were correct, or not, is immaterial for the present purpose. The grounds upon which the judges who decided those cases professed to proceed, are sufficient to prevent their decisions from being considered as authorities against the former well established doctrine."

I might refer to innumerable other authorities, English and American, in support of the rule, but I have already dwelt too long upon this point.

It is not necessary to contend that such instruments are not revocable. I suppose they would be, if, after notice to the *cestuis que trust*, they disputed, or refused to accept and be bound by any terms imposed on them. But, in point of fact, those executed in this instance were never revoked; nor does it appear that Mr. Stoney ever repented his act, or made a different disposition. On the contrary, he constantly recognized their validity, and the interests of his creditors under them, by settlements and payments of interest, in which he was imitated by his executors after his death.

But suppose *Walwyn vs. Coutts* were authority for the position, that voluntary trusts for the payment of debts, to which the creditors are not parties, nor assenting, are not only revocable, but null. That can only be so, as that case has been explained, where the creditors were not intended to be parties, or assenting. But the instruments here, on their face, shew an

entirely different intention; and, to take notice of nothing else, the very fact that terms are proposed to the creditors on the face of these instruments, goes far to shew that the securities were intended for their acceptance.

I have no doubt, therefore, that this case can, by no possibility, fall within the principle of the cases relied on. The creditors had an interest here, as soon as the papers were executed by Mr. Stoney and the trustees; such an interest, according to numberless cases, as entitles them to accept now, if they have not done so before; never having dissented, and the instruments (in which no time is set for their accepting,) never having been in fact revoked—and the fund still remaining for distribution. See 14 Peters's R. 20, 32; 4 J. C. R. 529; 10 Com. L. R. 64; 1 Vern. 260–1.

Heretofore, I have examined the transaction as if the creditors were not actual parties, or assenting; as if it were questionable, in some degree, whether the instruments were executed upon consultation with them. But on their face there is enough to conclude Mr. Stoney on all these points. The bond recites that "the parties to whom the above bound John Stoney is so indebted, have *agreed*," "that the said John Magrath and James Hamilton be appointed trustees, for and in behalf of the said creditors, to take of and from the said John Stoney good and sufficient security for the payment of the said debts," and then follows the stipulation, secured by a penalty, for their payment. Then ensues the deed, in which, after reciting the terms upon which the creditors are to be paid, and the bond taken by the trustees to secure their payment, the real estate and slaves are conveyed to Hamilton and Magrath, "for better securing to the said John Magrath and James Hamilton, trustees *for the said creditors*, the parties of the third part. the payment of the said bond, according to the condition thereof." Could Mr. Stoney have denied the fact, thus stated, above his own signature, that these trustees were appointed by the creditors to take the bond and conveyance from him? Certainly not.

It is true the creditors might have denied it, and were not bound by the terms of the trust until they accepted, but the relation of trustee and *cestui que trust* was completely and conclusively established, under the hands and seals of both the grantor and the trustees, in their favor, and whenever they accepted they were bound by the terms.

Independently of all this, the evidence shews that Mr. Stoney

was not acting for his own benefit, and apart from the creditors. The fact that a single creditor was engaged in the treaty which led to the execution of the securities, is sufficient, of itself, to shew that Mr. Stoney was not proceeding of his own head; and whether such creditor acted for himself alone, or for others also, can make no other difference than this, that if he acted for others he cannot exclude them from the benefits acquired. Now, the evidence shews that the terms of this arrangement were proposed to the Bank of Charleston; that it was entered into with their approbation after deliberate consideration; that a settlement was made in reference to it, although, in some respects, inaccurate, (upon which point we concur with the Chancellor;) that interest has been paid under it; and can it be doubted, that the creditor thus acting has accepted, and is bound? The same remark applies to the Bank of Cheraw.

As respects Phelps, Dodge & Co., I have already expressed the opinion, that they might come in now, if they had not already accepted. They have done nothing inconsistent with the terms imposed on the creditors. Their bringing suit was no infringement of the terms, that they were to wait to a certain time for their money, and if it would otherwise have been so, it was done in ignorance of their rights, and should not prejudice them. As to the assignee of Levy, he must come in upon principles already announced, and we have determined, in another suit, that he comes in for the whole of his demand.

I am sorry that there still remain several points, the consideration of which must necessarily protract an opinion already too prolix.

It is said that the bond and deed are ineffectual at law. It is argued that no suit could be maintained on the former, by the gentleman who has succeeded General Hamilton in the Presidency of the Bank of Charleston, and who, as successor, is substituted for him as trustee, by virtue of a provision in the deed. The precise objection is, that suit could not be brought in the joint name of this substitute and Mr. Magrath, the other trustee. No doubt of this, but the provision referred to contemplates merely a transmission of the trusts, and in no manner affects the legal obligation of the bond, which may still be enforced in the name of the obligees, or the survivor of them, or under our own Act, in the name of the assignee of both.

Then it was argued, that the deed is inoperative at law, for incompleteness; that it purports to be a deed *tripartite*, and al-

though executed by Mr. Stoney and the trustees, the first and second parties, it was not executed by the creditors, who were to be the third party.

The deed was delivered, being as completely executed, as between the grantor and grantees, as they could execute it. As between these parties, the conveyance was complete; and it must operate as a conveyance, unless the accession of the third party, by signing and sealing, was a prerequisite to its operating as such. I have already said that no such condition is required in terms upon the face of the paper. Still, the necessity for its execution by the creditors might be implied. This must depend upon what was exacted from them by the terms of the deed; as if, for instance, something were required of them essential to the completeness of the conveyance. But the only thing expected from these creditors, as appears from the instrument, was their assent, in a binding form, to certain indulgencies and abatements on their demands, a matter which, in no sense, concerned the validity of the grant, but only affected the terms of the trust, and restricted them in the enforcement of their interests under it. They were in no manner the owners of the property to be conveyed, nor necessary parties in its conveyance. Now if, as all the authorities shew, the assent of the creditors as effectually imposes its terms upon them as if they had sealed it, what is to prevent its operating upon the fact of the actual assent given, at least by the Bank of Charleston, at its execution?

Having thus before us a trust completely constituted,—so constituted as to create a responsibility on the part of the trustees to their *cestui que trust*, for its execution, which responsibility entitles the trustees, for their own indemnity, to enforce it against the author of it, and the trust having been partly executed, and consisting in instruments of legal validity, we feel no hesitation in declaring that the *cestuis que trust* are entitled to the benefits of those instruments, according to their legal force and effect, and that to that extent they are conclusively available against Mr. Stoney, and his estate, in the hands of his executors.

His general creditors can raise no objection to this. To the validity and original operation of the instruments, as I have said, they can object only on the score of fraud; and there is no fraud here. The character of the transaction has been somewhat misapprehended in the argument. It does not purport to have been a general assignment or composition, but merely a security given to certain creditors, limited to certain portions of the debtor's es-

tate, upon terms advantageous to him, and no otherwise disadvantageous to his general creditors, than as all liens and special securities must necessarily be; and to regard such arrangements as obnoxious to the stigma of fraud must, as I think is satisfactorily argued in one of our own cases, (*Niolon vs. Douglas*, 2 Hill's Ch. 443,) cut up all securities, and destroy that freedom which is essential to commerce.

But the general creditors raise another objection, not directly striking at the validity of the instruments, but the effect to be given them by this court, in the distribution of the funds before us.

It is said that the preferred creditors are here demanding an enforcement of the instruments, and this will be allowed only upon terms of equality. It must be remembered, however, that these creditors are here *resisting* an attempt either to set aside the provision made in their favor, or to reduce their rights under it to a scale below the legal rank of their securities. Property having been sold belonging to their trustee, by legal conveyance, and an estate being about to be distributed, upon which their trustee holds a bond, they have been called in to exhibit their claims upon the funds; and they come in not to invoke the active interposition of equity, or to ask that a different or more extensive operation should be given to the instruments under which they claim, than the law gives them, but to claim their benefit, according to their legal rank and operation. Being brought into court, they, in the person of their trustee, insist upon their legal rights, and those only, which are vested in him, and which, if they were not in court, he would be bound, in the faithful discharge of his duty, to demand and enforce.

Can there be any doubt, that in the distribution of the assets of a deceased debtor, a bond debt, whether held by a trustee or any other person, is to be paid, under our statute, before simple contracts?

Then as to the property covered by the deed; is there any doubt that the grantee is entitled to the avails of it? In what I have heretofore said, I have not thought it necessary to draw any distinction between the different species of property,—realty and personalty—embraced in the deed, nor to advert to the fact, that the deed was not intended as an absolute conveyance, but as a security. There is no doubt that the instrument vested the title of the personalty in the grantee. Then, as to the lands, some doubt has been intimated, whether the deed, substantially

a mortgage, comes exactly within the purview of the Act of 1791. This doubt, I think, is not well founded. But without deeming it necessary to decide that point, and assuming that that Act applies, so as to reserve the title to the grantor, and reduce the conveyance to a mere lien; still it was one enforceable at law. The grantee was under no necessity to come here to enforce it, but might, upon obtaining judgment upon his bond, have disposed of the fee under his judgment, if no other judgment intervened; and if a judgment intervened, he might have disposed of the fee under his mortgage, by pursuing the directions of the statute in such case. Shall this court dispose of property thus liable; and shall he who was entitled to these remedies, when he comes to ask that he shall not be prejudiced by the act of the court, be turned away with a declaration that there is a rule in the forum forbidding it to reinstate him in the legal rights of which it has deprived him?

This court, in the distribution of funds, constantly recognizes liens. Professor Story, (1 Story's Eq. 522, ch. 9, sec. 553,) after observing that, in the course of the administration of assets, courts of equity follow the same rules in regard to legal assets, which are adopted by courts of law, and give the same priority to the different classes of creditors which is enjoyed at law, says, "in like manner, courts of equity recognize and enforce all antecedent liens, charges and claims, *in rem*, existing upon the property, according to their priorities; whether they are of a legal or equitable nature, and whether the assets are legal or equitable."

It was faintly urged, that the whole of the funds in hand were to be administered as equitable assets. There are no equitable assets before us in this case, nor any attempt to bring into the fund for distribution, by the intervention of equity, any subject matter not already constituting part of the fund, by legal operation, without the aid of this court. If the assets were equitable, however, and not legal, we have just seen that the lien of the mortgage must be allowed.

As I have said, at the outset, so far as the mortgaged property may extend, it must be applied in extinguishment of the bond, and the demands secured by it. Then, if any portion of those demands remain unsatisfied, the bond, as a legal obligation, is a good demand, according to its rank, against the assets in the hands of the executors, for that balance. A law court—every court—must look to its form, in assigning it its rank as against

the assets; and being a bond, the statute points out the order in which it shall be paid. The Chancellor supposes that the demands secured, and not the bond by which they are secured, must be looked to, for the purpose of ascertaining the order of payment, after the security of the mortgage shall have been exhausted; and that as the bond does not extinguish the demands, to which it is collateral, these alone, as they form the real claim, so they must give rank and character to the claim, as against the assets. But upon this point we differ from the Chancellor. It is difficult to conceive why we should give efficacy to one of the securities, (the mortgage,) so far as it extends, to sustain the interests of the creditors for whose benefit it was executed, and yet deny its proper legal rank and efficacy to the other security, (the bond) when proposed as a further means of sustaining the same interests. If it is a security, it must be allowed to operate as one; and it cannot operate as a security unless it be allowed the rank of a specialty—which is its proper legal rank—against the assets. If it be not allowed this operation, it is no security at all; it is a nullity, and no bond.

Before we part from the claims of these creditors, it may be as well to say, that we concur with the Chancellor in so much of his decree as strikes from the demands of the Bank of Charleston, and the Bank of Cheraw, the excess of interest, and the exchange, costs of protest and postage, charged in their settlement with Mr. Stoney. If these had been paid by Mr. Stoney, it is not perceived that either he or his creditors could have complained of it, although varying from the terms of the securities given to the preferred creditors. But they were merely included in the new notes given upon the settlement, and which remain yet to be paid; and, therefore, the demands of these creditors must be reduced, so as to conform to the terms of the securities upon which they insist.

There is another point proper to be noticed here. We approve the Chancellor's decision, that those among the preferred creditors who received partial payments from Mr. Stoney himself, are not bound to bring them into account, as a condition of receiving further satisfaction of their demands, either from the special fund arising from the mortgaged property, or from the general assets; nor are they, on account of such partial payments, to be postponed until the others are put upon an equality; and nothing need be added to the Chancellor's reason-

ing on these subjects. But as to payments made them, either out of the mortgaged fund, or the general assets, since the death of Mr. Stoney, the rule must be different. The preferred creditors are entitled, *pro rata*, to the benefits of their common securites; and, if it becomes necessary, the accounts must be so cast as to give them these benefits; and, (to dispose of the whole subject,) so, also, as to do no injustice to the general simple contract creditors, who are entitled to the benefit of the general assets, after the demands of the preferred creditors are satisfied.

We concur in the Chancellor's decision, in relation to Mrs. Stoney's dower, and for the satisfactory reason he has given. Whether the amount to be allowed her for dower should be set off against any balance which may be due by her as executrix, upon the account of the administration of her husband's estate, need not be determined until a balance of that character shall be ascertained against her; and as the accounts will go back to the master, the question is reserved until the necessity for its decision shall arise. The point may be made on the reference.

We also concur, generally, in the decision of the Chancellor in relation to the claim of Mrs. Stoney and her children, founded upon the receipt given for Ashby's bond. The view he has taken of the nature of Mrs. Stoney's interest in this trust, does not appear to us, however, to be quite accurate; and the inaccuracy may affect the claim, so far as she is concerned. Where a conveyance is made to the husband of a married woman, for her sole and separate use, the husband is constituted her trustee, and for her sole and separate use—confining the trust to the nature of the interest expressly intended to be given her. Where, however, the conveyance to the husband is simply for the use of, or in trust for, the wife, and not for her sole use, the husband is trustee for the wife, according to the quantity of interest given her, and no more. It is an interest which survives to the wife, upon the death of the husband; but during the coverture, the husband is entitled to the usufruct, in her right. This distinction can in no otherwise affect the decision of the Chancellor, however, than as respects the interest of so much of the trust fund, during Mr. Stoney's life, as accrued upon Mrs. Stoney's share. In casting the accounts, this must be taken notice of, if insisted on.

Again, we concur with the Chancellor with respect to the expenses of the negroes between their sale and delivery to the purchasers; and also with respect to the demand brought in for

shoes; with this qualification, that it would not be sufficient to establish the insolvency of the executors. The claimants must, also, shew that they are either in advance with the estate, or at least not in arrears with it; in other words, that the accounts between the executors and the estate stand in such a position, that the executors could, if they had paid the demand, rightfully claim to be reimbursed out of the trust fund.

With regard to the grounds of appeal taken by the executors, they are all substantially disposed of, so far as they have been explained to this court, except that one which asks that the surviving executor of John Williamson be made a party. He is a party, in the person of the defendant, Magrath; and when the accounts go back to the master, the executors will have an opportunity to raise an account against him, or to present such grounds for the modification of the accounts in the matters complained of, and not already adjudicated, as they may deem for their interests.

It is ordered, that the decree appealed from be modified according to the foregoing opinion; that the cause be remanded to the Circuit Court, and the accounts recommitted to the master.

HARPER and DUNKIN, CC. concurred.