

TENNESSEE
CHANCERY REPORTS

REPORTS OF CASES

ARGUED IN THE COURT OF CHANCERY

OF THE

STATE OF TENNESSEE

AND DECIDED BY THE

HON. WILLIAM F. COOPER, CHANCELLOR

OF THE

SEVENTH CHANCERY DISTRICT

AT

NASHVILLE

VOL. II.

ST. LOUIS
G. I. JONES AND COMPANY
1877

under legal process, or by the deed of the husband, the wife is recognized as having a present, subsisting, and continuing interest in the maintenance and preservation of the benefits of their possession, *and that she has such a right in the land*, connected with the right of possession, that, when that right is violated, she is entitled to claim the protection of the courts." Such a right, if not an estate in an absolute sense, is one for all practical purposes.

Whatever we may call it, it is something which cannot be alienated without the "joint consent" of husband and wife, "evidenced by conveyance as required by law for married women." The consent must be "joint," and evidenced, not by probate and privy examination, but by "conveyance," an actual grant by the wife as well as the husband. If the conveyance of the husband alone is void as to the wife's right, her assent to that conveyance will not give it vitality. There must be a joint conveyance by both, showing on its face that they undertake to convey, and do convey, their "right, title, estate, or interest" in the land. And there can be, of course, no estoppel on either by any other form of deed. *Pratt v. Burr*, 5 Biss. 38. The demurrer raises only the question of estoppel by the deed. Whether there might be an estoppel by facts coupled with the deed is not raised, and need not be considered.

The demurrer is not well taken, and must be overruled.

F. J. PARKER vs. L. R. FREEMAN and others.

April Term, 1876.

FRAUDULENT ASSIGNMENT—RELATIVE RIGHTS OF CREDITORS OF GRANTOR AND GRANTEE.—The creditors of a fraudulent grantor have no equity as against the innocent creditors of the fraudulent grantee which entitles them to priority of satisfaction out of personal property fraudulently conveyed, where such creditors of the grantee have acquired the first lien; it is a race of diligence, in which the parties are entitled to stand on their legal rights.

—, for complainant.

Heims, for defendants.

THE CHANCELLOR:—Bill filed April 12, 1875, and states the following facts: About May, 1874, the defendant John J. Parker became indebted to his brother, the complainant, for the board of himself and family for four months, and for a small sum of money loaned. In 1873 the said John J. Parker, for the purpose of hindering and delaying his creditors, made a pretended sale of all his household and kitchen furniture to the defendant E. J. Frisbie, "and executed a bill of sale therefor," which was acknowledged and registered. The pretended consideration was an indebtedness of John J. Parker to Frisbie of \$540, which was about the value of the property, whereas said Parker did not owe Frisbie anything, or, if anything, only a small sum long since paid. In February, 1875, Frisbie set up a saloon and restaurant in Nashville, the defendants Freeman & Orchard furnishing the goods for the same. On the 9th of April, 1875, the defendant Freeman sued out an attachment upon this debt against the estate of Frisbie, upon the ground that Frisbie was about fraudulently to dispose of his property, and the attachment was levied on the furniture conveyed by Parker to Frisbie. Frisbie afterwards confessed judgment for the debt sued on, and the officer was proceeding to sell the property attached, to satisfy the judgment, when he was stayed by the injunction in this case. The bill charges "that said proceedings before the magistrate were gotten up by collusion between the said Frisbie and Freeman, and he (complainant) is advised that the same are void." There is a further charge that Freeman & Orchard knew the fraudulent character of the conveyance from Parker to Frisbie.

These latter charges of collusion and knowledge are denied by the defendants Freeman & Orchard in their answer, and again by Freeman in his deposition. The only testimony introduced by the complainant consists of his own deposition, and he does thereby undertake to bring home knowledge of the fraud to the defendants. His evidence, standing alone, is insufficient to outweigh the denials of the

answer and of Freeman in his deposition. The bill concedes that the claim of the defendants Freeman & Orchard against Frisbie is for goods furnished, and the complainant proves his own claim. The only difference between the case made by the bill and by the answer of Freeman & Orchard, considering the charge of collusion and knowledge as not proved, consists in this—that the conveyance from John J. Parker to Frisbie was a mortgage, not a sale, and that the defendants abandoned their attachment and were proceeding to sell the property by execution under the judgment confessed when stayed by the injunction. These differences are immaterial. For the legal title of the furniture would be in Frisbie, whether the conveyance was a sale or mortgage, and could be levied on by execution and sold, the purchaser, if it be a mortgage, taking subject to the equity of redemption. It is the equity of redemption of the mortgagor which cannot be sold by execution. *Wilson v. Carver*, 4 Hayw. 90. So, whether the lien of the defendants was acquired by attachment or execution levy could be of no consequence, there being no essential distinction in this regard between the lien of an attachment and execution. It has been expressly decided that the lien created by the levy of an attachment has the same effect, both at law and in equity, as an execution lien. *Hervey v. Champion*, 11 Humph. 569.

In this view the case before us shows that the complainant, as a creditor of John J. Parker, is seeking to subject to the satisfaction of his debt, by the lien created by the filing of his bill, the furniture in question, as the property of John J. Parker, while the defendants Freeman & Orchard, as judgment creditors of Frisbie, are seeking to subject the same furniture, as the property of Frisbie, to the satisfaction of their judgment by the prior lien created by the levy of their execution, the conveyance from Parker to Frisbie, whether sale or mortgage, having been made to hinder and delay Parker's creditors, but without any knowledge of the fact by Freeman & Orchard. The question is

narrowed down to this: Have the creditors of a fraudulent grantor any equity as against the innocent creditors of the fraudulent grantee which gives them a prior right of satisfaction out of the property fraudulently conveyed, where the creditors of the grantee, without knowledge of the facts, have acquired a lien by virtue of the levy of an execution before any step taken or lien obtained by the creditors of the grantor?

The law is that a fraudulent conveyance of property is good between the parties, and as to all the world except the creditors of the grantor. The grantee has a valid title, with all the usual rights incident thereto, until the creditors of the grantor, by asserting their right in due course of law, defeat it. The grantee may, consequently, in the meantime, make a disposition of the property to an innocent third person for value, and innocent third persons may, by proper legal proceedings against the grantee, acquire liens upon the property. For, were it otherwise, the policy of the law, which is to treat the *res* as the property of the grantee, would be thwarted. Accordingly it has been held by our supreme court that the law only authorizes the creditor of the grantor to proceed against the property in the hands of the fraudulent vendee; and, therefore, if the property has been destroyed by time or accident, or is sold and delivered to an innocent person for a valuable consideration, the creditor's remedy is gone. *Simpson v. Simpson*, 7 Humph. 275; *Tubb v. Williams*, 7 Humph. 367; *Richards v. Ewing*, 11 Humph. 327. And an innocent purchaser's rights, as assignee of a mortgage, are superior to those of a prior judgment creditor of the mortgagor. *Danbury v. Robinson*, 1 McCart. 213. So, also, it has been held that a sale under execution against the grantee will pass a good title as against the debtor. *Robinson v. Monjoy*, 2 Halst. 173. And that, after an actual seizure by the creditors of the grantee, the property cannot be reclaimed by an officer acting under an execution against the grantor. *Gibbs v. Chase*, 10 Mass. 125. So, *e converso*, a seizure by creditors of the

grantor excludes the creditors of the grantee. *Booth v. Bunce*, 24 N. Y. 592. The principle of these decisions is that the creditors of the grantor and grantee have no priority of rights, and no equity as against each other; that they stand upon the same level, and it becomes a race of diligence between them. *Qui prior est in tempore potior est in jure*.

In this view the prior levy of the execution of the defendants Freeman & Orchard on the furniture, as the property of Frisbie, gave them a lien of which equity will not deprive them at the suit of the complainant as a creditor of the grantor, whose right can only date from the subsequent filing of the bill. The bill must, therefore, be dismissed, with costs.

NOTE.—Affirmed on appeal.

WILLIAM CHEATHAM and others vs. LAURA HUFF and others.

April Term, 1876.

INFANT FEME COVERT—FUNDS IN COURT.—If a wife who has funds in this court be not of full age, she is incapable of giving consent to its disposition, and the court will not take her examination, nor suffer her to waive her equity, but will either settle the fund on her or preserve it until she comes of age; and there is no authority for the payment of such money to her husband upon the ground that he could more profitably use it in trade, or for any other reason.

Ed. Mulloy, for petitioners.

THE CHANCELLOR:—In this cause there is a fund in court belonging to Laura Menefee, the wife of William Menefee, being her distributive share of her father's estate, and amounting to between \$350 and \$400. Laura Menefee is an infant about eighteen years of age. She and her husband joined in a petition to have these funds paid to them, not mentioning the infancy of the wife, and an order was made directing her privy examination to be taken as to

what disposition she desired to be made of the funds. Upon privy examination she expressed a wish that the funds should be paid directly to her; but the master, who acted as commissioner, very properly brought out the fact that she was only eighteen years of age. I was of opinion, on this state of facts, that no application could be entertained by the husband and wife for the payment of the money to either of them, which would in effect be paying it to the husband, but that an application of the wife by her next friend was necessary. Thereupon a petition in the name of the wife, by a solicitor of this court, as her next friend, and sworn to by him, was presented, stating the intermarriage of the petitioner with her husband in September, 1875, that they are poor, that the husband is a sober, industrious, and frugal man, engaged in the restaurant or coffee-stand business, at the market-house, and needs this fund in his business, and she asks that the fund be paid to him.

This application raises a question of grave importance, which comes before me for the first time, as to what disposition should be made by the court of funds under its control belonging to a married woman who is also an infant. I have taken advantage of the occasion to look into the subject, and arrive at conclusions based upon general principles, and which ought to control the action of the court, not merely in this case, but in all similar cases.

The provisions of statute law regulating the disposition of funds of an infant *feme* under the control of the court are embodied in the Code, §§ 4053, 4054.

Sec. 4053. "The proceeds of the real or personal property of an infant can only be paid to a guardian who has given bond, with good security, as such, to the satisfaction of the court."

Sec. 4054. "If the infant is also a *feme covert*, the funds can only be paid out upon the order of the court directing how and to whom the same shall be paid."

The latter section seems to recognize the rule that marriage terminates the usual guardianship (*Mendes v. Mendes*,