Elizabeth Stoney vs. The Bank of Charleston.

Where a bill was filed by the creditors of a testator against his executrix, who was also his widow, praying that the real estate of the testater might be sold to pay his debts; and, under the order of the court, the land was sold for the payment of the testator's debts, the widow making no claim of dower; *Held*, that the widow was barred by the proceedings, from afterwards claiming dower from the purchaser.

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

The Chancellor. The complainant, in her bill, demands dower in certain real estates, whereof her husband, John Stoney, died seized and possessed.

The defendant pleads in bar to this demand, that the said John Stoney, by his last will and testament, nominated the said complainant and two of his sons the executors thereof, all of whom qualified. That in November, 1840, one Stephen Catley Tennant, administrator with the will annexed of one Francis Dalcour, of the island of Cuba, filed his bill in this court against the complainant and the other executors of the said John Stoney, and divers other persons having interests in his estate, in which he prayed an account of all the real and personal estates whereof the said John Stoney died seized and possessed, and that the same might be decreed to be sold to pay certain demands by the said Stephen Catley Tennant against the said John Stoney; that to this bill the complainant filed her answer, in which there is no claim or demand for dower or thirds in the said real estates; and that such proceedings were had in the said cause, that on the 10th of July, 1841, an order was made that the estates, real and personal, of the said John Stoney, in the State of South Carolina, including, of course, the lands in which the complainant now demands dower, should be sold, on certain terms therein prescribed, without any reservation of the complainant's right of dower; and that in pursuance of the said order, the said real estates were sold by one of the masters of this court, and purchased by the defendant, without any reservation of the right of dower. Such is the substance of the plea. The claim of dower is much favored, but it cannot be permitted to ride over other well settled rules of law. A wife may be barred of dower, by accepting a legacy or jointure in lieu thereof. It may be barred by the statute of limitations, and like all other

rights, it may be waived, if the party claiming neglects to maintain or assert it when an opportunity occurs, and the occasion requires that it should be asserted. In *M'Dowall vs. M'Dowall*, 1 Bail. Eq. 330, Chancellor Harper says that "when the question is *de re judicata*, the true rule is, that what the party has once had an opportunity of litigating in the course of a judicial proceeding, he shall not draw into question again; but that whatever might have been properly put in issue, shall be concluded to have been put in issue and determined," unless the party was under some disadvantage, or was prevented from making the defence by surprise or accident, circumstances in themselves forming a distinct ground of equity jurisdiction. Such is the doctrine of all the authorities, and the necessity of adhering strictly to the rule is enforced by the consideration, that if it were otherwise, there never could be an end to litigation. If a party defendant might, by carelessness or wilfulness, omit to make an appropriate defence, and thus entitle himself to an action against the plaintiff, the same thing might again be played off in the second suit, and so on *ad infinitum*. The bill filed by Tennant against the complainant and the others, prayed expressly that the estates, real and personal, might be sold to pay debts. The complainant then had an opportunity of asserting her right to dower, and having neglected it, she is concluded by the rule. It is but just to the purchaser, who might, and would reasonably conclude, that the rights of all the parties to the proceeding under which the sale had been made, had been adjusted. It is ordered and decreed, that complainant's bill be dismissed.

The complainant appealed, on the following grounds:

1. That the complainant's claim of dower out of the lands of her husband, was not in issue, and could not properly have been put in issue, in the suit mentioned in the defendant's plea in bar, and in which the order was made for the sale of the estates, real and personal, of the testator John Stoney.

2. That the decretal order under which the sale was made, at which the defendant purchased the lands in question, directed, "that the estate, real and personal, of the testator, John Stoney, be sold by the master," and the complainant's right of dower in the lands whereof her husband was seized during the coverture, was no part of his estate, but a right or interest in her, distinct from his estate, and was, therefore, not embraced in the said decretal order.

3. That the complainant's right of dower in the lands purchased by the defendant, is not barred or concluded by any thing in the plea contained, nor by any thing which has occurred before or since the death of the said John Stoney.

Mazyck, for the appellant.
The Attorney General, contra.

Per Curiam. We concur in the decree of the circuit court. The appeal is, therefore, dismissed.

B. F. Hunt, assignee, vs. William C. Smith et al.

The court has no power, by interlocutory order, to grant an injunction to stay proceedings at law, either before or after judgment, without requiring the applicant to give bond and security or deposit the money.

On the 26th February, 1845, at Georgetown, B. F. Hunt presented a petition to his Honor, Chancellor Johnson, praying an order to the commissioner to sign a writ of injunction, to the following effect.

"The petition of B. F. Hunt, assignee of Charles T. Brown, sheweth that, on 2d February, 1832, this honorable court granted an injunction against Peter Cuttino and W. S. Smith, administrators of Savage Smith, restraining them from proceeding at law on the bond of the petitioner given to the commissioner of this court, until the further order of the court. A suit was then brought, in the name of the commissioner in equity. For the time being, proceedings were, accordingly, suspended. Since then, the said Cuttino and Smith died, and William C. Smith has administered *de bonis non*, and now represents the estate of Savage Smith, and a new suit has been commenced in the name of the present commissioner, so that the same suit in the same right has been again commenced, and the order

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are to be at liberty to file a cross bill for the purpose of a sale and foreclosure of the mortgaged premises.

In the Matter of the Petition of Anthony H. Ryder, an Infant, &c.

A widow who has a life estate in property devised to her, (while her husband is alive,) cannot be compelled by this court to break into it or to apply the same towards the support of an infant child who will be entitled in remainder. Nor will the court order it out of such, his future estate.

Jan. 2. 1844.

Tenant for life. Parent and child. Infant. Maintenance and support.

Margaret Haff, by will, gave a life estate in all her real and personal property unto her daughter Sarah Ann, the then wife of William J. Ryder, the same to be for her own use and benefit, exclusive of her then present or any future husband; and, after her decease, the real and personal property itself was to go to her children absolutely. The estate was protected by a trustee.

The husband of this Sarah Ann, namely, William J. Ryder, died; and she married Daniel Richards. Among her children, at the time of such second marriage, was Anthony H. Ryder, an infant, over the age of fourteen years. He now presented a petition, by his next friend, setting forth the will of his grand-mother, Margaret Haff; the death of his father; his mother's second marriage; difficulties between him and his mother and step-father; that he had left their roof in consequence; and that, although her life estate netted about two thousand dollars a year and he had entered a lawyer's office as a student and required a reasonable support, yet, his mother had entirely neglected him of late. And he insisted, in his petition, that she was bound, by the law of the land, to maintain and support him decently and to educate him in a manner suitable to her condition in life and means, more especially as

The executors of John Stoney vs. J. L. and S. Joseph & Co., J. C. Levy, et al.

Where an agent, in possession of bills belonging to his principal, is entitled to hold them as against his principal under a lien for balances due him, he is not entitled to enforce them against the acceptor to a greater extent than his principal could have enforced them.

A., a merchant, residing in New York, exchanged his own notes for three bills of exchange drawn on B. a merchant, residing in Charleston, which were afterwards accepted by B. The notes were sold by the purchaser at a small discount, but A. having proved insolvent before they become due only paid on them a small sum not amounting to one third of the principal. *Held*, that A. was entitled to recover from B. the acceptor in Charleston, the full amount of the bills.

Before JOHNSON, CH. *at Charleston, February*, 1844.

In March, 1837, S. N. Bishop, of New York, drew three several bills of exchange, amounting together to the sum of $41,620, on the complainant's testator, residing in this place, in favor of Dudley & Stuyvesant, merchants, also of New York, for their accommodation, and to enable them to raise money there.

Dudley & Stuyvesant indorsed these bills, and exchanged them with the defendants, the Josephs & Co., also of New York, for their promissory notes of the same amount, and sold them in New York. The Josephs & Co. forwarded the bills to defendant J. C. Levy, their agent here, for collection. They were presented by him to Stoney, complainants's testator, who accepted them, unconditionally. At the time these bills were drawn, and first negotiated, the houses of the Josephs & Co. and Dudley & Stuyvesant, were both in very embarrassed circumstances, and the whole object was to enable Dudley & Stuyvesant to raise money to meet pressing demands. They sold the notes obtained from the Josephs & Co. for about $33,000. Not long after, both of these houses utterly failed and made assignments of their effects, for the benefit of creditors.

The Josephs & Co. state in their answer and tender proof, that they have paid on account of these notes about $12,000. What has become of the rest is not known. In 1837, Stoney filed a bill in this court to restrain the negotiation of the bills, and to have them delivered up, on the ground, that they were drawn without consideration. That bill abated by his death, in 1838. This bill is filed by his executors for the same purposes,

and further to enjoin the defendants from prosecuting any action at law against them for the recovery of the amount of the bills.

In the mean time, Levy had also failed, and made an assignment of his effects, of which the bills in question constituted a part, to the defendant Robert B. Gilchrist, for the benefit of his creditors. Levy claimed to be entitled to retain these bills as his own, on account of a general balance due him from Josephs & Co., for money advanced, and liability incurred for them, and the claim is admitted by them.

As the grounds of relief prayed for, it is stated in the bill, that at the time the bills of exchange were indorsed by Dudley & Stuyvesant, and delivered to the Josephs & Co. it was well understood between them that "the notes which were given for the consideration should be fully met, paid, and satisfied, at such time or times as the same should become due, and that no manner of obligation, or responsibility, should be placed on the said Dudly & Stuyvesant, or any person or persons representing them, to provide for, or be accountable or responsible to the subsequent holders of the said bills, for the payment thereof." That Stoney accepted the bills for the accomodation of Dudley & Stuyvesant, without any other motive or obligation than to aid them in their mercantile engagements; and the complainants insist that the Josephs & Co. "were bound to have paid, as the full consideration of the said bills of exchange, the notes given by them to Dudley & Stuyvesant, or by the full payment and satisfaction of the said notes when they were in the hands of Dudley & Stuyvesant, to have released them from all responsibility, and all obligation to provide for the payment of the same, or else to have delivered to Dudley & Stuyvesant, or the said John Stoney, the said bills of exchange," &c. But failed to do either, and shortly after were involved in utter insolvency. And the bill charges that the defendant Levy paid nothing to the Josephs & Co. for the bills, and that he knew, or had reason to believe, that they obtained the bills from Dudley & Stuyvesant, on the terms and consideration herein before set forth, and that they were forwarded to him by the Josephs & Co. to collect or raise money on them, for and on their account. Such, in substance, are the allegations and charges in the bill.

The Josephs & Co. admit in their answer, that they received from Dudley & Stuyvesant the bills of exchange mentioned in complainants's bill of complaint, and that they gave them, in exchange, their (Joseph & Co's.) own notes, (several in number,)

amounting in the whole, with interest and exchange charged, to the sum of the bills, and that it was understood that they were to pay the notes when they became due; but deny that there was any special agreement to restrain the negotiation of the bills which they received. They admit that the defendant Levy was their agent here, and that they forwarded the bills to him for collection, and that they were compelled to stop payment, and they state that at the time of their failure they were indebted to Levy in the sum of $205,219 93-100, upon a balance of account for purchases made, money advanced and responsibility incurred for them, and they insist that Levy had a legal and equitable right to retain the bills, as creditor in possession. They deny that they ever communicated to Levy the circumstances under which the bills were indorsed to them, or the consideration paid. They admit their own insolvency, and the insolvency of Dudley & Stuyvesant. They state that they have paid three of the notes given by them to Dudley & Stuyvesant, in exchange for the bills, and that Dudley & Stuyvesant, as they were informed and believe, had negotiated and put the others into circulation. They are ignorant whether they have been paid or not; and they state, that upon a settlement of accounts between them and Dudley & Stuyvesant, in which they were charged with the amounts of all their liabilities to them, and with all the paper which they were bound to pay, or for which Dudley & Stuyvesant were liable, a balance of $80,067 77-100 was found against Dudley & Stuyvesant. They insist that this would be a good set off against any demands which Dudley & Stuyvesant might have against them on account of their liability to them on the notes given in exchange for the bills.

The defendant Levy admits in his answer, that he was the agent of the Josephs & Co., and that they remitted to him, in the ordinary course of their business, the bills of exchange mentioned in the bill of complaint, indorsed by them, and that they were accepted by Stoney, on the 15th March, 1837, and he states, that at the time the Josephs & Co. failed they were indebted to him in the sum of $205,219 13-100, for monies advanced, purchases made, and liabilities incurred for them. He denies, unequivocally, all knowledge of the circumstances under which the bills were exchanged by Dudley & Stuyvesant, for the notes of the Josephs & Co., or of any special agreement in relation thereto, or the consideration on which the exchange was made, and

he insists that he has a right to retain the bills on account of the balance due him by the Josephs & Co.

I have been thus particular in referring to the pleadings, because it was attempted in the argument to deduce from the circumstances in evidence, that the Josephs & Co. practiced usury in the contract, by which they obtained the bills from Dudley & Stuyvesant in exchange for their notes, and hence it was concluded that the bills were wholly void. Of this defence, it would be sufficient to remark, that the fact of usury is not put in issue by the pleadings, nor is there any other than the general allegation of fraud, unless the failure of the Josephs & Co. to perform the special agreement set out in the bill, can be so regarded. It may be as well, however, to state the circumstances under which this charge was made, that the complainants may avail themselves of them, if there is any thing in them.

The evidence is, that at the time this exchange took place, the Josephs & Co. were in very straitened circumstances, and their credit was so much suspected, that their paper could not be negotiated at a less discount than three, or three and a half per cent. per month on its face. What the estimate of the credit of Bishop, who drew the bills, was, does not distinctly appear, but all the circumstances go to shew, that the credit of Dudley & Stuyvesant was very doubtful, and known to the Josephs & Co., and the probability is, that the principal value of the bills consisted in the confidence that Stoney, who was supposed to be abundantly solvent, would accept them, which he might, or might not do, as according to the statements in the bill of complaint he had no interest in the matter, but accepted them for the accommodation of, and to assist Dudley & Stuyvesant in their business. The Josephs & Co. say, in their answer, that the principal sums of the notes which they gave in exchange for the bills, amounted to $39,747 93, and that this sum, and the interest charged, and the difference in exchange, amounted to the principal sum of all the bills of exchange, and I suppose that to be correct. If this be true, there was, as between Dudley & Stuyvesant and the Josephs & Co. an exchange of credit, on terms of perfect equality, and I do not see how usury could be predicated on that. The ground principally relied on is, that the bills were worth more in the market than the notes, but I do not see any thing in the evidence to warrant that inference. Stoney, on whom the bills were drawn, the only person concerned who was supposed to be solvent, had not, and might not,

as before remarked, have accepted them, and without that, it is not improbable that the notes would have been worth more. As it is, Dudley and Stuyvesant realized about $33,000, by the sale of the notes, and whether the bills ever will be worth that amount is yet to be ascertained. If not, in the absence of all proof that there was any intention to evade the statute against usury, it may turn out that Dudley & Stuyvesant have profited by the exchange. So much for the usury.

I recur now to the case made by the pleadings, and it may be remarked at once, that there is no evidence to support the special agreement set out in the bill, that the Josephs & Co. undertook to pay their notes at maturity, or to cancel and deliver the bills to Dudley & Stuyvesant. The complainants's case rests, therefore, entirely on the allegation that the bills were made without consideration, or rather that the consideration has wholly failed, and that is met, on the part of Levy, by the allegation that he is the purchaser or holder, for valuable consideration, without notice. This is assumed as a necessary deduction from the facts, that at the time the Josephs & Co. failed, they were indebted to Levy in a much greater sum, and he was in possession of the bills, and the cases of the Bank of the State of South Carolina, and the Bank of Charleston, against the Josephs & Co. decided in the Law Court of Appeals, at February Term, 1840, establish clearly that, as between the Josephs & Co. and their creditors, Levy had the right to retain these identical bills, as creditor in possession; but that does not conclude the present question. The rule of the Law merchant, which protects the holder of a bill for valuable consideration without notice, against the equities between the drawer, the indorser, and the acceptor, was designed to facilitate commerce by protecting those who had parted with their money to obtain bills of exchange and other mercantile securities, by means of which a great portion of the commerce of the world is carried on, against the frauds that might otherwise be practiced upon them; but Levy's case is not embraced by the principle. He paid no money for the bills; they were sent to him by the Josephs & Co., to collect on their account. Levy, in his answer, says that he was employed by the Josephs & Co. in the business of purchasing foreign and domestic exchange, and in collecting bills of exchange and promissory notes remitted to him by them, and that these bills were remitted by them to him to procure the means of making such purchases. And although, as between them and himself, he had

the right to retain the proceeds, when collected, on account of the balance due him, yet, as between Stoney and himself, he stood in the relation of a mere agent of the Josephs & Co., and is not, therefore, entitled to stand on higer ground than they would if they were the only parties. The rights of the agent cannot be greater than the principal. It would have been otherwise, if they had remitted the bills in payment of what they owed Levy, or as security for what he might afterwards advance for them. Judge Story, in his Treatise on Bills of Exchange, page 208, says that, as between the original parties, it is a good defence to an action on a bill, that it was without consideration, or that the consideration had failed, and that the same rule applies to any derivative title under them, by any person who acts merely as their agent, or has given no value for the bill. In *Collins vs. Martin*, 1 Bo. and Pul. 648, it was held, that where the holder gave no value for the bill, he is in privity with the first holder, and will be affected by any thing which would affect the first holder. See, also, *Darnell vs. Williams*, 2 Starkie's Rep. 166. It is otherwise, where the bills are deposited with an agent, as collateral security for advances made. For in that case, per Lord Ellenborough, in *Bosanquet vs. Dudman*, 1 Starkie's Rep. 1, the agent holds them for value. The question of consideration must, therefore, be resolved according to the rights of Stoney, or rather the rights of Dudley & Stuyvesant, who made the contract, and who received the consideration, if there was any, and the Josephs & Co. As between them, the case may be thus stated. The Josephs & Co. gave their notes to Dudley & Stuyvesant, for $39,747 93, who sold and indorsed them for about $33,000, and put them into circulation. The Josephs & Co. have paid on account of them, $12,000, and no more, and they admit, in their answer, that they are insolvent, and unable to pay the balance. Dudley & Stuyvesant are also insolvent, and the probability is that they never will be paid by either. Their legal liabilities to the holders are precisely the same—the Josephs & Co., as makers, and Dudley & Stuyvesant as indorsers. Dudley & Stuyvesant gave the bills in question to the Josephs & Co. in exchange for the notes, and regarding, as I have done, the Josephs & Co. as still the holders of the bills, the question is, whether Dudley & Stuyvesant would be bound to pay the bills, unless they are indemnified against their liability as indorsers of the notes. At law, I suppose they would, because the liability of the Josephs & Co. as makers of the notes,

to the holders, would be a sufficient consideration for the bills; but when it is seen, that it is now nearly seven years since the notes became due, and they are not paid—that the Josephs & Co. are insolvent, according to their own admission—that they have made an assignment of all their effects, without providing for the payment of the notes, and that from the whole tenor of their answer, the payment of them does not enter into their calculations—does it comport with equity and good conscience, to charge Dudley & Stuyvesant with the payment of the bills without being relieved from their legal liability as indorsers of the notes, or indemnified against it? I think not. It may be said, that Dudley & Stuyvesant raised $33,000, by the sale of the notes, and that, therefore, they ought to account for that amount. But it will be recollected, that they are liable, not only for that sum, as indorsers of the notes, but for their full amount. It will be seen that it gives no claim to the Josephs & Co. against them. I am, therefore of opinion, that the Josephs, and consequently Levy, are entitled to no more than they paid on account of the notes.

The only question which remains to be considered is, whether Stoney is entitled to the same protection that Dudley & Stuyvesant would be if they were the parties to be charged; or, to put the question hypothetically, whether the acceptor of a bill can protect himself by the equities which exist between the drawer and drawee, and especially when the acceptance is a mere accommodation to the drawer.

The cases before referred to, would seem to be decisive of this question; but I may add the authority of Ch. on Bills, 69, where it is said, amongst other things, that the want or failure of consideration may be set up as a defence, not only between the original parties, but also against a holder claiming by endorsement after the note has become due, or taking it with a knowledge of fraud, or other *equitable circumstances*, entitling the makers to avail themselves of the defence. The case of *Rees vs. Marquis of Headfort*, 2 Campb. 574, is an illustration of the rule. That was an action by the indorsee against the acceptor of the bill. The drawer had received no consideration for the bill, but was tricked out of it, and Lord Ellenborough held, that this made it incumbent on the plaintiff to shew what consideration he gave for the bill, and not being able to do so, he was nonsuited.

I am, therefore, of opinion, and it is so decreed, that the de-

fendant, Jacob C. Levy, is only entitled to be paid the amount which the Josephs & Co. have actually paid on account of the notes which they gave in exchange for the bills, with interest on the money paid. I shall make no order for the payment of the amount here. That will be provided for in the judgment of the court in the case of *Tennant, administrator*, with the will annexed, of *Francis Dalcour vs. The executors of Stoney*, in which is involved the marshalling of the assets of Stoney amongst his creditors.

From this decree the defendants, Robert B. Gilchrist and Jacob C. Levy, appealed, on the grounds.

1. That the bills of exchange, referred to in the decree, and held by the defendant, Robert B. Gilchrist, in trust for creditors, are founded on a good and valuable consideration, and he is entitled to exact and receive full payment of them, from any of the parties, drawing, accepting or indorsing the said bills.

2. That the said Jacob C. Levy was, for good and valuable consideration, a *bona fide* holder of these bills, without notice of any equities in any manner affecting the said bills, and was entitled to exact and receive full payment of them from any of the parties to the said bills, at the time that he transferred them, in trust for his creditors, to his co-defendant, Robert B. Gilchrist; and the said Robert B. Gilchrist, who was also, at the the time of the said transfer, without notice of any equity in any manner affecting the said bills, is, as such trustee, entitled to exact and receive the full payment of the said bills from the estate of the complainants's testator.

3. That no equities exist, to impair or bar the right of the defendant, Robert B. Gilchrist, from recovering the full amount of these bills, and the decree should have sustained and enforced that right.

Petigru and King, for the appellants, cited 1 McM. 431; 3 Wend. 62, 65; 7 Johns. Ch. 79; Bail. Eq. 505–7; 10 Wend. 113; 15 Peters, 377; 1 Stark. R. 1.

Hant and Magrath, contra, cited 2 Ves. sr. 445; 2 Vern. 122; Ch. on Bills, (ed. 1836) 119; 1 Russ. 296; 3 Bro. Ch. R. 477; 2 Swanst. 189; 3 Atk. 755; 1 Story Equity, 197; 2 Ves. 155; Ch. on Bills, 81, 87, 91, 336; 1 Esp. N. P. 261; 2 Stark. 304; 2 D. & R. 256; 8 Taunt. 114; 9 B. & C. 208; 8 Cowen, 669; 24 Wend. 231; 15 Johns. R. 44; 2 Johns. Cases, 60; 13 Johns. R. 40; 16 Ib. 367; 5 Johns. Ch. 134; 1 Ib. 536; 7

Wend. 256; 10 Wheat. 367; 1 Bing. N. C. 151; Story Confl. Laws, 201–2; 8 Paige Ch. 550.

Curia, per JOHNSTON, CH. The defendants do not insist, as they might by pleading have done, upon the conclusiveness of the judgment obtained at law upon the bills accepted by Mr. Stoney; which is very proper on their part, the judgment having been taken subject to the equitable relief sought in this cause.

We are, therefore, to enquire whether Levy, (now represented by his assignee) is entitled to the bills as against the estate of Mr. Stoney, the acceptor.

It appears that Levy acquired possession of them, as the agent of Josephs & Co., and not as purchaser in the regular course of trade; and although, as agent, he is entitled to hold them as against Josephs & Co. under a lien for balances due him by his principals, which is all that is decided in the *Bank vs. Levy*, 1 McM. 431, that does not entitle him to enforce them against the acceptor to a greater extent than is warranted by the rights of his principals.

Coming to their possession in the manner mentioned, the familiar law is, that he holds them subject to all the equitable defences which could have been urged against Josephs & Co. had they still been theirs.

The true question, therefore, in the case is, whether the bill now filed could have been sustained against Josephs & Co. and we think it could not.

The circumstances of the case negative the idea of either usury or fraud in the acquisition of the bills by Josephs & Co.

As to usury, the Chancellor has shewn that this was not a case of loan, but of an exchange of paper; and he has also shewn the *bona fides* or equality of the exchange made, by remarks which it is unnecessary to repeat. It may be proper to add, however, that the evidence shews that the exchange was even more advantageous to Dudley & Stuyvesant than the Chancellor apprehended, for it appears that they sold the Josephs's notes for $37,000, instead of $33,000, as he supposed.

The ground upon which the Chancellor restricts the rights of Josephs & Co. under the bills is, that they have, in fact, paid no more for them than the amount which they paid on their notes to those to whom Dudley & Stuyvesant passed them away.

Our opinion is, that this is a mistaken view of the matter. They gave, as the consideration of the bills, their own notes,

the marketable value of which was at least $37,000, and which realized that amount to those from whom they bought the bills; and which, in the estimation of the Chancellor himself, was the full value of the bills when they bought them.

But without resorting to any other consideration—supposing the exchange to have been *bona fide*—it is immaterial whether they have ever paid a dollar on the notes. They made themselves liable to pay, and if they have not paid, the loss is not to Mr. Stoney, but to the holder of the notes. A binding promise is a sufficient consideration in the purchase of bills, as well as in the purchase of any other commodity; and if these parties have not discharged the obligation they incurred, they are, nevertheless, still liable to it.

It is ordered that the bill be dismissed.

The whole court concurred.

Ferris Pell and wife et al. vs. executors of H. S. Ball et al.

The distinction between judicial and administrative orders considered.

A decree of the circuit court declaring that the court had no power to sell a party's land, against his consent, for partition, *held* to be an administrative order, and subject to the control of the circuit court.

The circuit court has the power to modify or rescind an administrative order, and it makes no difference by what judge the court is represented—whether the judge who made the former order or another.

The jurisdiction of the Court of Chancery to sell lands for the purpose of partition, against the consent of a party, is not confined to the case of intestates' estates.

An appeal, it seems, does not suspend a decree.

In pursuance of the decree of Chancellor Dunkin, made in this cause on the 17th July, 1843, (see Speers Eq. 520,) a writ of partition was issued by the complainants on the 24th January, 1844, to divide the land and negroes of Hugh Swinton Ball,

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are to be at liberty to file a cross bill for the purpose of a sale and foreclosure of the mortgaged premises.

In the Matter of the Petition of Anthony H. Ryder, an Infant, &c.

A widow who has a life estate in property devised to her, (while her husband is alive,) cannot be compelled by this court to break into it or to apply the same towards the support of an infant child who will be entitled in remainder. Nor will the court order it out of such, his future estate.

Jan. 2. 1844.

Tenant for life. Parent and child. Infant. Maintenance and support.

Margaret Haff, by will, gave a life estate in all her real and personal property unto her daughter Sarah Ann, the then wife of William J. Ryder, the same to be for her own use and benefit, exclusive of her then present or any future husband; and, after her decease, the real and personal property itself was to go to her children absolutely. The estate was protected by a trustee.

The husband of this Sarah Ann, namely, William J. Ryder, died; and she married Daniel Richards. Among her children, at the time of such second marriage, was Anthony H. Ryder, an infant, over the age of fourteen years. He now presented a petition, by his next friend, setting forth the will of his grand-mother, Margaret Haff; the death of his father; his mother's second marriage; difficulties between him and his mother and step-father; that he had left their roof in consequence; and that, although her life estate netted about two thousand dollars a year and he had entered a lawyer's office as a student and required a reasonable support, yet, his mother had entirely neglected him of late. And he insisted, in his petition, that she was bound, by the law of the land, to maintain and support him decently and to educate him in a manner suitable to her condition in life and means, more especially as