No. 14422

Supreme Court of Illinois

Bay et al

---

vs.

Cook

71641

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 89

Bay
25
Ill. 363

Chase, Storrs & Munson,

Attorneys and Counselors at Law,

102 Washington Street,

HIRAM M. CHASE,
EMERY A. STORRS,
HENRY S. MUNSON.

Chicago, Jan. 26th 1863

Lorenzo Leland Esq
Clerk Supreme Court
Ottawa, Ills,

The bearer of this note is Mr Edgar T Bay. one of the Pltffs in Emerson Bay &c vs Cook. I enclose herewith a letter from Judge Walker and pursuant to his opinion therein expressed I desire to have him sign the bond and thus make a literal compliance with the statute. That done please issue writ of Error &c & enclose to me for service

Yours &c

E. A. Storrs

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

BAY, ET AL., *vs.* COOK. } No. 89.

DEFENDANT'S BRIEF AND POINTS.

On the 12th March, 1850, Daniel T. Wood having been appointed deputy sheriff of Cook county, by defendant in error, with Henry B. Bay, the ancestor of Edgar T. Bay and others, as his sureties, gave a bond indemnifying Cook against the acts or defaults of Wood as deputy in penalty of $10,000.

May 1, 1851, H. B. Bay purchased the lands in controversy from Joseph Smith, paid for them with his own means, but took the title in the name of his infant son, Edgar T. Bay.

Nov. 21, 1851, a suit was commenced on the bond, process served on Bay same day, which resulted in a judgment in the Cook Circuit Court, May 30th, 1857, for $10,000 next to be satisfied on payment of $5.382.17 damages and costs. June 12, 1857, execution sued out and delivered to sheriff July 23, 1857. On application of the said Bay this judgment was set aside, and execution returned by order of court. That order was an error brought, set aside by the Supreme Court, April term, 1859, its opinion not being filed until the April term, 1860.

March ~~May~~ 10, 1860, (p. 80,) H. B. Bay died, leaving Edgar T. Bay, his son and sole heir, testate, making him his devisee, and devising the property in controversy to his son, and appointing John S. Bay his executor, who qualified and

took out letters the 6th day of February, 1861. April 15, 1861, Cook's claim on the judgment allowed against the estate at $6,648.50, and on the 18th May, 1861, the bill in this case filed.

On the 30th January, 1860, five days after date of will, H. B. Bay sells to John S. Bay one-third part of two dregding machines, and other property, for $50. The machines (p. 52, 8 Int.) worth $3,000.

The first question is, was Isaac Cook a creditor of Henry B. Bay at the date of deed, May, 1851?

In *Chouteau* v. *Jones, et al.*, 11 Ill., 318, this court said, "The relation of debtor and creditor between principal and surety, so as to entitle the latter to avoid a voluntary conveyance, made by the former, commences at the date of the obligation by which the surety becomes bound, and not from the time he makes payment."

Howe v. *Ward*, 4 *Greenleaf*, 195.
Thompson v. *Thompson*, 19 *Maine*, 244.
Carlisle v. *Rich*, 8 *New H.*, 44.

The case of *Howe* v. *Ward* is a parallel case to the present one.
See also 5 *Cow.*, 67, 18 *Wend.*, 383, *and* 8 *Cow.*, 429.

Then was the conveyance fraudulent as to Cook.

1. He was a creditor.

2. This conveyance of this property to his child, or this settlement of it upon him, is not shown by the defendant to be such an one as the courts would protect.

The *onus* is upon the defence to show in the language of *Story Eq.*, 347, 8, that the circumstances of the indebtment and conveyance repel any possible imputation of fraud, as when conveyance is of small property, by a person of great wealth, and his debts bear a very small proportion to his actual means.

The rule as laid down in *Read* v. *Livingstone*, 3 J. Chy. R., 481. is the true rule. See in this connection 18 W., 399.

Hutchinson v. *Kelly, et. al.*, 1 Robinson, Va., Rep. 135, is a strong and strictly parallel case.

Sexton v. *Wheaton*, 8 Wheat., 243, C. J. Marshall says: "In construing this statute the courts have considered every conveyance not made on consideration deemed *valuable* in law, as void against previous creditors."

The next question is, was the aid of a court of equity to set aside this conveyance properly invoked.

In 11 Ill., 31, *McDowell* v. *Cochran*, it is held that ordinarily a creditor must exhaust his legal remedies before calling to his aid the powers of a court of chancery. But insolvent estates are an exception, as execution cannot issue against an administrator.

The same rule is adopted in *Chouteau* v. *Jones*, 11 Ill. 319.

In this case we took out execution in June 1857. That execution was stayed by the circuit court, and the judgment set aside. The case then came to this court, and the order setting aside the judgment was reversed in April, 1859. The opinion was not promulgated till April, 1860, after the death of Bay, so that we had no opportunity to take out another execution against him, and could only do as was done in *Chouteau* v. *Jones*, get judgment as the administrator, and then file our bill.

The counsel has entirely mistaken the nature of this bill. There was a resulting trust in favor of H. B. Bay, upon which the judgment of May, 1857 was a lien, or the deed was fraudulent as to him. Either way Cook had a right to have this land applied in payment of his debt in judgment. The case in 17 Ill., 286, *Wightman* v. *Hatch*, is in point, referring to the case of *Miller* v. *Davidson*, 3 Gil., 518.

We had obtained judgment, and issued execution within a year, so that it became a lien upon whatever estate H. B. Bay had in the land. We were stayed by Bay's ~~appellee,~~ (p. 75 of Record,) from enforcing this judgment until after his death. Had he been living, we certainly could have filed this bill without taking out execution, and his death can make no difference in that respect.

Application

As to the personal property it is not possible that a sale made to a brother for $50, of property worth $1,000, after judgment recovered, can be sustained against that judgment. The counsel insists that this was worth only $500, and was subject to incumbrances, but the evidence shows that the incumbrances were debts due by the firm, which, in law, are no incumbrances, if the party is a bona fide purchaser, and can only become such by instituting proceedings to set aside the sale as fraudulent, and which the party expressly says he was under no obligations to pay, and did not agree to pay. These debts if incumbrances at all were in the same sense that this judgment was. The creditor has a right to apply the property of his debtor to the payment of his debt. The whole thing is a palpable attempt to avoid this claim by a pretended sale to his brother, for a mere nominal consideration, of property worth a large amount.

W. T. BURGESS,
For Defendant.

89

Cook
ads
Bay

Defts Brief

Filed May 8. 1863
L Leclaire Clk

In the Supreme court of the State of Illinois
Edgar Y. Bay
John S. Bay vs
Isaac Cook.

89- } Error to Superior court of Chicago

This Grand Division

The Defts. in error comes and moves to quash the Supersedeas allowed in this case

Because the bond filed is not a compliance with the statute either in amount of penalty or in the conditions thereof

& the power of Attorney filed does not authorize the execution of the bond given

for other reasons.

W. G. Bruyn
for Defts

89

Bay et al

vs

Cook

Motion to quash

Supersedeas –

Filed April 21. 1863
L. Leland
Clerk

Bryant for Deft

89

IN THE

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION,

April Term, A. D. 1863.

JOHN S. BAY and others,
Plaintiffs in Error,

vs.

ISAAC COOK,
Defendant in Error.

Error to Superior Court of Chicago.

ABSTRACT OF RECORD.

Filed Apr. 21-1863
Lo. Leland
Clerk

CHICAGO:
PRINTED BY BEACH & BARNARD, NO. 14 SOUTH CLARK STREET.
1863.

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ABSTRACT OF RECORD.

R. p. 1. **Placita.**

2 **Bill of Complaint.**

In Superior Court of Chicago. Filed, May 18, 1861. Isaac Cook complainant, *vs.* Edgar T. Bay, Daniel T. Wood, Lorin G. Butler, Martin Dodge, P. H. Bigelow, and John S. Bay, executor of the last will and testament of Henry B. Bay, deceased.

The Bill alleges

1. That the complainant, on the 12th day of March, 1850, then being sheriff of the county of Cook, and having appointed Daniel T. Wood, his deputy, the said Wood, and John McFall, L. G Butler, Martin Dodge, Peter H. Bigelow, H. B. Bay, and J. E. Hamilton, made, executed, and delivlivered to complainant, a certain bond, bearing date on that day, in the penalty of $10,000, conditioned for the faithful performance, by the said Daniel T. Wood, of his duties as such deputy sheriff, and that the complainant should be saved harmless from all costs and damages, on account of, or by reason of any or all acts of said deputy, as such deputy, or by color of his said office.

2, 3 2. That on the 21st day of November, 1851, the complainant sued out of the Circuit Court of Cook county, a writ of summons in an action of debt, against the said Wood and the sureties on his bond, returnable to said Court on the 1st Monday of December then next, which was served, &c.

3 3. That on the same day complainant filed his declaration against said defendants, counting therein upon the said bond, and assigning various breaches thereof.

3 4. That afterwards, on the 30th day of May, 1857, complainant recovered judgment in said Circuit Court, against the said Wood, Henry B. Bay, Butler, Dodge, and Bigelow, impleaded with said Hamilton, survivors of said McFall, his debt of $10,000 and costs, with an order that an execution issue therefor, to be returned satisfied on the payment of $5,382.17 damages for breaches, &c.

3 5. That afterwards, and on the 12th day of June, complainant, in order to obtain satisfaction of his said judgment, caused an execution to be issued, &c., for collection of said sum assessed as damages, &c., with interest thereon from April 13, 1857, and costs; which execution came to the hands of said sheriff on the 23d day of July, 1857, and which execution was returned by said sheriff on the 20th Nov., 1857, by order of Court; which order has since been set aside by the Supreme Court of the State of Illinois.

4 6. That the said judgment remains in full force, &c., and that there is now justly due thereon to the complainant the said sum of $5,382.17, and costs of suit, and interest thereon from April 13, 1857.

4 7. That after the making of said bond, and before May 1, 1851, the said Henry B. Bay purchased from one Joseph Smith, with his own money and means, certain lands situate in Cook county, described as the west half of lot number 5, block number 81, in the School Section Addition to Chicago, and having paid for the same on that day, became, and was entitled to a deed therefor; but the said Henry B. Bay, fraudulently, and with the purpose and intent to hinder, delay, and defraud his creditors, caused the conveyance of said land to be made by said Joseph Smith, to his son, Edgar T. Bay, then, and now, an infant, and in whom the title to said lands is still vested.

4 8. That said Edgar T. Bay had no funds with which to purchase said real estate, and that the conveyance was made to him in fraud of the creditors of said Henry B. Bay.

5 9. That afterwards, in 1860, Henry B. Bay died, having made and published his last will and testament, by which, among other things, he devised the said lands, with two dwelling houses situated thereon, to his son, Edgar T. Bay, and appointed John S. Bay executor, &c.; that said will has been duly admitted to probate in the County Court of Cook county, and letters testamentary issued thereon to said John S. Bay.

5 10. That the said Henry B. Bay, with his own money and means, built and erected the said houses, on the said piece of land, and occupied the same, and received the rents, issues, and profits thereof.

5 11. That on the 15th day of April, 1861, complainant appeared before the County Court of Cook county, setting in probate, with a claim against the estate of Henry B. Bay, for the amount due on said judgment, that being the day appointed by said executor for the adjustment and settlement of said claim; and said claim was allowed by said Court, to the amount of $6,648.58, and placed in the fourth class, to be paid in due course of administration.

5 12. That said John S. Bay, as such executor, pretends and claims that he has filed a full and perfect inventory of the estate, both real and personal, of said Henry B. Bay, but has omitted therefrom said real estate; and if said inventory is correct, there is not sufficient to pay complainant's claim.

6 13. That complainant is entitled to have said real estate sold to satisfy said judgment; but in consequence of fraudulent conveyancing thereof, such sale cannot be made without aid of this Court.

6 14. That complainant is remediless at law, &c., and that defendants may be required to answer bill without oath.

Prayer for relief.

6 15. That complainant's judgment may be declared to be a lien on said real estate, and the same directed to be sold to satisfy the same.

6 16. That the conveyance from the said Joseph Smith, to the said Edgar T. Bay, may be declared to be and to have been, fraudulent, as to complainant, and the said Edgar T. Bay to have received the same in trust for said Henry B. Bay and complainant, and that upon the sale of said premises, said Edgar T. Bay be required, either in person or by commissioners to be appointed by Court, to vest in the purchaser at such sale, a legal and perfect title to the same.

6 17. That a guardian, *ad litem*, be appointed for said Edgar T. Bay.

6 18. **Prayer** for such other relief, &c.

6 19. **Prayer** for process.

7 8 **Precipe** for summons to sheriff, Cook and Will county.

9 10 **Summons** and return of service.

11 12 **Alias Summons** and return service.

13 **Affidavit** that Butler and Bigelow cannot be found.

14 **Order** giving John B. Bay time to plead to bill.

15 **Demurrer** of John S. Bay, and Edgar T. Bay by his guardian, to bill of complaint, on following grounds:

1. That complainant has not made a case entitling him to the relief prayed for.

2. It is not alleged in said bill that complainant has exhausted his legal remedies for the collection of said debt, by issuing execution, and having same returned unsatisfied, or that the defendants to said bill, other than said Henry B. Bay, are, or were, insolvent.

3. That it does not appear in, and by, said bill, that the liability for which complainant recovered judgment, existed at time of conveyance.

4. That said defendants, Wood, Butler, Bigelow, and Dodge, are unnecessary, made parties.

5. That it is not averred in said bill that Henry B. Bay was insolvent at the date of said deed to Edgar T. Bay.

17 **Notice** to Bigelow and Butler to answer, or bill would be taken as confessed.

17 18 **Proof** of publication of notice.

19 **Order** of default of Bigelow and Butler, and that, as to them, bill be taken as confessed.

20 **Order** giving complainant leave to amend bill; made, March 8, 1862.

21 **Amended bill,** filed, March 8, 1862; as follows:

1. That on or about the 30th January, 1860, Henry B. Bay was the owner of an undivided third interest of two dredging machines, then lying in Chicago harbor, and called respectively, the Red Bird, and Black Hawk, the other two-thirds being at that time owned by Augustus Parsons, subject to incumbrances he had placed upon his two thirds.

2. That for the purpose of defrauding his creditors, the said Henry B. Bay conspired with said John S. Bay, and made a bill of sale to him of one-third of said dredges, for the consideration of fifty dollars, as appears by bill of sale annexed, &c.

3. That said one-third of said dredges was worth, at least, the sum of $3,000, and that fifty dollars was so grossly inadequate a consideration, as to be evidence of fraud.

22 4. That said sale was, and is, fraudulent, as to complainant; that the same should be set aside, the one-third should be sold and applied on complainant's judgment.

22 5. **Prayer** that sale be set aside, dredge sold, &c.

23 **Bill of sale** mentioned in amendment.

24 **Order** that defendants answer amended bill.

25 **Notice** to examine Joseph Smith, on April 3d, 1862—served, March 13.

26 **Notice** to examine Benj. F. Skinner on the part of complainant, on the 26th June—served June 2, 1862.

26 **Joseph Smith's Deposition.**

1. Knew Henry B. Bay in his life time. He died at
27 Bloomington, February, 1861.

27 2. Smith and Henry B. Bay purchased of John J. Palmer, real estate described in deed, made exhibit, and divided the property therein described between them severally. Smith deeded to Bay the east half, and Bay conveyed to Smith west half.

3. Afterwards, Smith sold the west half to Henry B. Bay, for one-half the consideration in furniture, and the sta-

ble and lease of the New York House; the furniture, stable and lease of the New York House, at that time, were owned by Benjamin F. Skinner and Henry B. Bay.

28 4. The said west half was conveyed to Edgar T. Bay by order of Henry B. Bay; and at the time of the conveyance there was no improvements on the west half of said lot. The trade was made with Bay at the time of the conveyance to Edgar T. Bay.

28 **Benjamin H. Skinner's Deposition.**

1. Knew Henry B. Bay in his life time, and in the year 1850 was in the hotel business with him in Chicago. Bay had one-half interest in the stock and business, which was of the value of about $3,500.

28 2. Bay sold or traded this interest, as he understood, to Joseph Smith, for a lot on Monroe street, opposite the Gas Works. Bay took possession of the property, and built some houses on it.

30 **Certificate** of Ira Scott, Master, before whom examination was taken.

31 **Deed** from John S. Palmer and wife, to Joseph Smith and Henry B. Bay, dated October 4, 1848, duly recorded, of premises referred to on examination of Joseph Smith, and marked Exhibit (1).

33 **Separate Answer of John S. Bay, Ex'r, and John S. Bay.**

1. Admits that complainant was sheriff; Wood appointed deputy; the execution of the bond; issuance of summons, and service; filing declaration; its return by order of Court; and the amount due on the judgment, as alleged in bill.

2. Alleges, that on the —— day of ——, 1862, respondent, in connection with other respondents, sued out of the Supreme Court of the State of Illinois, a writ of error, to review judgment, &c., which is still pending, and undetermined.

3. That said judgment is excessive, enormous, and entirely inequitable, as against said Henry B. Bay, and was obtained without his knowledge, and in fraud of his rights, and without his having had a day in Court.

4. That immediately after the commencement of said suit, E. C. Larned, and S. S. Hayes, were employed by said Wood to defend the same; that said Bay was informed
34 by said Wood, in the year 1855, that said suit had been dismissed, and that he, Wood, had received a letter from his attorneys to that effect; and that Bay never received any notice to the contrary, until 1857, when called upon by the sheriff.

34 5. That said Wood was not indebted to said Cook in any sum of money whatever; that the bond, upon which suit was brought, was given to protect, and save harmless, said Cook, from any default, &c., of said Wood as deputy sheriff, and that a large part, and nearly all the defaults complained of against said Wood, was in the non-payment of money received by said Wood as collector of taxes, for which acts, this respondent alleges said bondmen were not liable.

24 6. That said J. E. Hamilton was, at the time of the commencement of this suit, ever since, and now is, a resident of said city of Chicago, and entirely solvent.

35 7. Denies fraud in conveyance to Edgar T. Bay.

35 7. Admits purchase of one-third of dredges, but denies fraud; and alleges that at the time of the purchase, said dredging machines were heavily incumbered, and that there

were liens and incumbrances on the one-third interest, to the amount of $1,300 or $1,400, and that respondent bought, subject thereto, and paid full and adequate consideration therefor.

36 9. Admits that complainant appeared in Cook County Court, setting in probate, and had his claim allowed, which was put in fourth class; that respondent, as executor, filed his inventory, &c., omitting real estate; and that the complainant contested the correctness of said inventory, and examined said respondent in said Probate Court, and that inventory was sustained.

10. Denies confederating, &c.

37 **Separate answer of Daniel T. Wood.**

1. Admits the complainant was sheriff; that respondent was appointed deputy; the execution of bond, and recovery of judgment, as alleged in bill.

2. Alleges sueing out writ of error, as in answer of Bay, stated.

38 3. That the judgment is excessive, and unjust, as stated in answer of Bay; that case at law was dismissed, of which respondent advised Henry B. Bay, and that respondent never heard anything further about the case until after judgment.

39 4. That respondent had a good defence on the merits.

29 5. That the bond sued upon was given to secure said complainant against the defaults of this respondent, as deputy sheriff; and that the defaults complained of by said Cook in his declaration, were the collection of the sum of $308.20, and five dollars costs, on an execution in favor of William
39 B. Clapp, and against Joseph Johnston, and his failure to

pay over the same, and the collection by this respondent and failure to pay over a large sum of taxes.

39 6. That the only lists of taxes on which he ever made any collection, while acting as such deputy sheriff, were those of the years 1848 and 1849; that shortly after his appointment, a Mr. Pendry, who was acting for said Cook as collector of taxes, presented a list of tax receipts, some signed and some not signed, accompanied by a list of them, with a receipt at the bottom for respondent to sign, advising this respondent that he was to collect and pay over the amount; and that it was to be credited to him.

7. That this respondent, in attempting to collect said taxes, found that many of them had been paid to Cook and his deputies, and at the request of Cook he collected all he could on said tax receipts, and paid over every dollar, so collected by him, to complainant.

8. That subsequently, and some time in the year 1850, the Board of Supervisors of Cook county, called upon said Cook for a statement of said tax lists, and appointed a committee to investigate the matter. That Cook then desired of this respondent, that he should go before that committee and end the whole matter by swearing that all taxes which had not been collected, were not collectable; that the parties could not all be found, which was true; and that such as could be found were not able to pay, which was untrue, in part; and this respondent refused to do so, but went before the committee and showed to them what taxes this respondent could not collect, and swore to the same, the tax receipts for which were either left with said committee or taken by said Cook; and this respondent has seen nothing of them since.

40 9. That subsequently the said Cook made oath that the balance of the taxes not collected, was not collectable, and thereupon the committee reported in accordance with such

showing of this respondent, and such testimony of said Cook, from the tax lists of 1848, was, $473.99.
And the balance of tax list, being insolvent, ... $512.96.
The tax list of 1849, collected,..... $1,436.77.
Uncollected and insolvent..... $1,196.60.

That the collector reported treasury receipts for the amounts collected, except commissions, bills, &c., and recommended that the clerk issue proper receipts to the collector, which was done; and thus ended the whole matter, and this respondent's connection with the tax collecting—excepting that this respondent often tried to get said Cook to pay him for his services in collecting what he did collect, and which is credited to him in the list.

10. That he never received a dollar on said tax receipt which he did not pay over, not even retaining his commissions and charges for collections.

40 11. That respondent paid over every dollar by him collected or received upon the execution against said Johnston, upon the order and direction of said Cook, except his fees; and that respondent never collected any money on account, for said Cook, which he failed to pay over; that at the time of the rendition of said judgment, this respondent was not indebted to said Cook in any sum of money whatever, but that said Cook was largely indebted to him for services, and has neglected and refused to pay the same.

40 12. That this respondent took said appointment at the earnest solicitation of said Cook, and under his representation that it would be worth at least $1,000 per year; and that said Cook is indebted to this respondent for his services in the sum of at least $600.

41 13 That J. E. Hamilton now is, and ever since com-

mencement of suit on bond has been, a resident of Chicago, and abundantly solvent.

41 14. Denies confederating, &c.

42 **Demurrer to bill.**

1. That it does not appear but that complainant has a complete and adequate remedy at law.

2. That it does not appear that complainant has exhausted his legal remedies.

3. That complainant has not sued out execution.

43 **Replication.**

44 **Answer** of guardian *ad litem* for infant defendant, Edgar T. Bay.

45 **Stipulation,** admitting that upon a citation issued from the Cook County Court, upon the complaint of Isaac Cook, against said John S. Bay, the said John S. Bay testified—

1. I am executor of the estate of Henry B. Bay, deceased, and am his brother. I was not engaged in any business at the time of his death. He was—if in any business at all at the time of his death—in the dredging business.

2. He had been in company with Augustus Parsons, but was not at the time of his death.

3. Henry B. Bay died on the tenth day of March, A. D. 1860. I was then carrying on a farm.

46 4. My brother owned one-third of two dredging machines. I first came up to see about his estate in May, 1860, and

found it in a bad condition. I found a lot of property, of which the appraisement bill, filed in this Court, will give the list. I did not find the dredging machines; he had sold them to me the 30th January, 1860, by this bill of sale. (Bill annexed.)

46 5. I don't recollect when I took possession of the dredging machines—whether it was before or after his death. I paid the fifty dollars, mentioned as the consideration in the bill of sale, to him when I bought them; that was all I paid him. The reason I did not take possession of them immediately was, that I was not here. I was in Bloomington. The bill of sale was drawn up in Chicago, by Mr. Marsh. I kept the bill of sale in my pocket after it was drawn. I bought
47 the dredges with the incumbrances that were on them. The demands against the dredges were held by parties who had worked upon it. We figured up the incumbrances, and over $1,300, and under $1,400. There was no bargain made about my paying the incumbrances. All the bargain I made is in the writing—the bill of sale. We might have talked about the machines being liable to the debts—nothing more than talk about it. There was no agreement that I should pay them. There were incumbrances on them. I cannot tell what they were without referring to the books.

On his **Cross Examination** by his own counsel, Mr. Marsh, he testified—

1. That previous to the purchase of this property, I consulted with Mr. Marsh about the purchase, and he advised me that I purchased subject to all debts of Parsons & Bay, and Parsons, Bay & Co., against the dredges. The interest of Parsons was mortgage; the mortgages were recorded, as I understood, about two months after I purchased. I informed the parties in possession of my purchase.

2. I knew of existence of claims against the concern of

Parsons & Bay, and Parsons, Bay & Co. Mr. Marsh told me that the mortgages were a prior lien, which were to be paid first; then the debts of Parsons & Bay, and Parsons, Pay & Co. would be an incumbrance.

48 3. At the time I purchased, I knew that Parsons did not pay up promptly. He was not at that time in good circumstances, and owed the firm of Parsons & Bay a large amount. I knew that he was insolvent at that time, and have never collected anything of his indebtedness to Parsons & Bay.

48 4. I have collected of the accounts sold me by my brother about forty-seven dollars.

48 5. Before I filed inventory, I ascertained there was no title in H. B. Bay to the property on Monroe street.

48 6. I have endeavored to dispose of my interest in the dredging machines to dredging men, and have been unable to do so. I think the whole accounts were worth about $150.00.

In reply to the Court, the said John S. Bay further testified—

I did not consider my brothers interest in the whole thing worth anything. I did not make as much as I expected to make. It was a *bona fide* sale.

49 **Bill of Sale**

From *Henry B. Bay* to *John S. Bay*, of interest in dredges, &c.; consideration, $50.00. Dated January 30th, 1860.

51 **Deposition** of Harry Fox, taken before Ira Scott, Master in Chancery, taken Oct. 2, 1862, showing—

1. I knew the dredges, Red Bird and Black Hawk, and have known them ever since 1856, and have been engaged in the dredging business.

2. The two machines, to a person engaged in the dredging business, were worth in January, 1860, I should think, $3,000.

On his **Cross Examination** he testified—

That in January, 1860, the Black Hawk was in good order, and the Red Bird in tolerable good order; and that in January, 1860, he would have paid for one-third interest in the dredging machines, $500, provided he could have got a clear title, if the other two-thirds had been incumbered to the amount of their value.

On his **Re-Direct Examination** he testified—

53 That the reason that he made that difference in the value, that he did not think the one-third would be worth as much as if I had the control of the whole thing. The reason is, that if I owned the whole amount, I could control the whole, and if I owned one-third, other parties would hold the balance of power.

54 **Decree.** Entered October 10th, A. D. 1862.

1. Recitals of all previous proceedings.

56 2. That the conveyance of the said lands and premises, from said Joseph Smith to said Edgar T. Bay, was, and is, fraudulent, as to the complainant; and that the said Edgar T. Bay took the legal title to the same under said conveyance, in trust for the said Henry B. Bay and his creditors, and now holds the same upon such trust; and that the same is liable to be, and should be sold for the payment of said judgment.

56 3. That the sale of one-third part of said dredging machines, by said Henry B. Bay to said John S. Bay, was, and is, fraudulent, as to said complainant, and as to him set aside and declared a nullity.

4. That the defendants, Daniel T. Wood, Martin Dodge, Peter H. Bigelow, and Lorin G. Butler, and the said John S. Bay, as such executor as aforesaid, in due course of administration, to pay to the said complainant the sum of $7,117.91, with interest thereon from rendition of judgment, and costs to be taxed.

57 5. That said John S. Bay, within five days of service of certified copy decree on him, appear before Ira Scott, Master in Chancery, and assign, transfer, and deliver over to him, under oath, the said one-third of said dredging machines.

57 6. That said Ira Scott be appointed special commissioner to sell said real estate and one-third interest in said dredging machines; that in default of paying amount decreed, he proceed to sell said property, after giving notice, &c., and that proceeds be applied on amount of decree, &c.; and that at such sale any of the parties to the suit be at liberty to bid.

57 58 7. That upon such sale, the Master make, execute, and deliver to the purchaser or purchasers thereof, a deed or deeds of the premises so sold; and that the said Edgar T. Bay and John S. Bay, as such executor, join in such conveyance; and that in default, Ira Scott be appointed special commissioner, &c., for that purpose.

58 8. That said John S. Bay and Edgar T. Bay, and all persons claiming under them, upon production to them of the Master's deed and order confirming sale, surrender peaceable possession of said property.

58 9. That said Master make report of his proceedings.

58 **Certificate of Evidence.**

60 **Bond,** Daniel T. Wood *et. al.*, to Isaac Cook; dated, March 12th, A. D. 1860.

61 **Certificate** of Clerk.

62 **Deed** from Joseph Smith to Edgar T. Bay, dated August 20th, 1850, of property described in bill and offered in proof, and recorded in Cook county, March 20th, 1851, in book 40 of Deeds, at pages 378 and 379.

63 **Judgment,** record of Cook County Circuit Court, *Cook* vs. *Wood et. al.*, including—

1. **Placita.**

64 2. **Summons.**

65 3. **Amended** declaration alleges, the execution of the bond, &c., and assigns as breaches of the bond, 1. That Wood, as deputy sheriff, on the 1st day of August, A. D.
66 1851, collected an execution, in favor of William B. Clapp, against Joseph Johnston, for $308.20 and $5.00 costs, which he neglected to pay over; 2. In failing to pay over taxes collected, &c.

70 4. **Demurrer** to narr.

71 5. **Pleas.**

73 6. **Judgment** entered May 30th, 1857, default.

74 7. **Motion** to set judgment aside.

75 8. **Execution,** and return thereon by sheriff; returned by order of Court.

75 9. **Order** setting aside judgment, and default, November 9, 1857.

76 10. **Order** for judgment, &c., from Supreme Court, April 19, 1859.

ASSIGNMENT OF ERRORS.

1. That there was no breach of the bond, nor liability thereon, by Henry B. Bay, at the time of the conveyance to Edgar T. Bay.

2. A Court of Equity had no jurisdiction of the case, no execution having been returned unsatisfied.

3. The decree is against law and evidence.

E. A. STORRS,

Counsel for Pl'ffs in Error.

STATE OF ILLINOIS,
SUPREME COURT. } ss. The People of the State of Illinois,

To the Sheriff of Cook — County, GREETING:

Because, In the record and proceedings, and also in the rendition of the judgment of a plea which was in the Superior — Court of Chicago, Cook County, before the Judge thereof, between Isaac Cook Complainant & Edgar T. Bay, Daniel T. Wood, Loren G. Butler, Martin Dodge, P. H. Bigelow, ~~plaintiff, and~~ John D. Bay as executor of the last Will & Testament of Henry B. Bay deceased & Uriah R. Hawley guardian ad litem of Edgar T. Bay & John S. Bay defendants, it is said that manifest error hath intervened, to the injury of the said Edgar T. Bay & John S. Bay

as we are informed by their — complaint ~~herein~~ the record and proceedings of which said judgment we have caused to be brought into our Supreme Court of the State of Illinois, at Ottawa, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law: Therefore, We Command You, That by good and lawful men of your County, you give notice to the said

Isaac Cook

that he — be and appear before the Justices of our said Supreme Court, at the next term of said Court, to be holden at Ottawa, in said State, on the first Tuesday after the third Monday in April next, to hear the record and proceedings aforesaid, and the errors assigned, if he shall see fit; and further to do and receive what said Court shall order in this behalf; and have you then there the names of those by whom you shall give the said

Isaac Cook

notice, together with this writ.

Witness, The Hon. John D. Caton, Chief Justice of our said Court, and the Seal thereof, at Ottawa, this 11th day of February in the year of our Lord One Thousand Eight Hundred and Sixty-three.

L. Leland
Clerk of the Supreme Court.

I hereby enter the appearance of Isaac Cook Deft

W. T. Burgess(?)
Atty

89

John S. Bay et al.

No. vs.

Isaac Cook

SCIRE FACIAS.

FILED April 21st A. D. 1863

L. Leland Clerk.

and afterwards to wit: on the day and year the last above mentioned. The said defendant in court by Mr. J. Burgess his counsel, filed a written brief in support of said motion which said brief is as words & figures following to wit:

The object of the statute is undoubtedly to provide security and it is additional to what the party already has. and when the statute has used as explicit language as it has in this case it is not open to construction - The amount of property to be delivered under a decree is not the amount of the decree or judgment, and if the real estate cannot be transferred but subject to the incumbrances and is of value sufficient to pay the decree then the security in the bond cannot be damnified for he is entitled to have it applied in satisfaction of the decree -

I dont deny but that the construction placed on this statute by the court below & claimed by me may work hardship - and I shall be satisfied with any ruling the court may make on it but there is the law, if it needs amendment or repeals hardly -

16 Wheaton 133

The case in 12 How. 327, was a mortgage upon real estate and shows the real estate had been sold but not for enough to pay the mortgage debt. New proceedings were instituted to compel the application of the laws by a sale thereof to the payment of the debt because some of the parties having formal interests were not before the court the circuit court dismissed the bill. This order of dismissal was reversed and the case sent back to the Circuit Court & rendered a decree of foreclosure and directed a sale for the amount found due $63,000 The defendant prayed an appeal & the Sup. Court held that the amount of the decree controlled the amount of the penalty in the bonds.

The Counsel says the statute does not fix the amount. Its language is "which bond shall be in a reasonable sum sufficient to cover the amount of the judgment appealed from and all costs" There are two things here to be taken into the estimate of the reasonableness of the sum. one is fixed the amount of the judgment. the other is uncertain & that the court settles upon

a view of the whole case, but that amount is in addition to the amount of the judgment. ——

that is for the legislature not for this court by straining & forced construction to do away with such hardships.
The record shows the personal property to be worth $1000 & I have a standing offer for the property at $1500
The condition of the bond is so explicit in the statute it must be evident that the condition him is not a compliance with it Then has become now a law question of general interest & as his Hon. J. M. Wilson refuses an appeal where he endorse a bond like the one offered it is important to have the point authoritatively settled —
It is with that view that I now press it

W. T. Burgess

Whereas at the November
Term A. D 1852 of the Superior
Court of Chicago in the State
of Illinois, in a Suit in Eq
Chancery side thereof in
which Isaac Cook was
Complainant & Edgar S. Bay
& John S. Bay impleaded
with David S. Wood &
others were Defendants
a final decree was ren-
dered by said Court from
which the said Edgar S. Bay
& John S. Bay are about to
sue out a Writ of Error
to the Supreme Court of
said State & obtain a
Supersedeas upon the filing
of a proper bond.

Now Know all Men
by these presents that I
the said John S. Bay of
the City of Bloomington
in said State do hereby
make Constitute & appoint
Joshua Lellarsh of the
City of Chicago in said
State, my true & lawful

attorney for me & in my name place & stead to execute such deed in such capacity & upon such conditions & in such form as my said attorney shall think proper

Hereby ratifying & confirming all acts my said attorney may lawfully do in the premises.

Witness my hand & seal at said City of Bloomington This 22 day of November A D 1862

John S Bay

State of Illinois } SS
McLean County }

I John N Larrimore a Notary Public in and for said County do hereby certify that John S Bay whose name appears to the above Power of Atty came before me this day and acknowledged the signing of the same for the purposes therein stated

Given under my hand and official seal this 22d day of November A D 1862

John N Larrimore
Notary Public

Know all men by these presents. that We John S Bay. and ~~Edgar T Bay by his Guardian ad litem Uriah R Hawley~~ and Joshua L. Marsh of the County of Cook and State of Illinois are held and firmly bound unto Isaac Cook also of the same County and State in the penal sum of One thousand five hundred dollars. lawful money of the United States for the payment of which well and truly to be made we bind Ourselves our heirs Executors and Administrators jointly severally and firmly by these presents.

Witness Our hands & seals. this first day of December AD 1862.

The Condition of the above obligation is such that whereas the said Isaac Cook did on the tenth day of October AD 1862. in the Superior Court of Chicago and of the October Term thereof obtain a decree against the above bounden John S Bay and Edgar T Bay impleaded with Daniel Wood and others in and by which said decree a certain Conveyance of real Estate described in the Bill of Complaint made and executed by Joseph Smith

to Edgar T Bay was declared fraudulent
and void and the same was set aside
And a certain sale of two dredging
machines, made by Henry B Bay to the
said John S Bay was declared
fraudulent and void as to said Isaac
Cook and the same was set aside
from which said decree the said
John S Bay and Edgar T Bay have
prayed a writ of Error to said Superior
Court of Chicago And the Hon P H Walker
One of the justices of said Supreme
Court of Illinois, has ordered that said
writ of Error be made a supersedeas
on said plaintiffs in Error filing their
certain bond in the penalty of—
Fifteen hundred dollars with Forh-
man H. Marsh as Security Conditioned
according to law

Now therefore if the said John S
Bay and Edgar T Bay shall duly
prosecute their said writ of Error
with Effect, And moreover pay the
Amount of the judgment or decree
Costs interest and damages rendered
& to be rendered against them or
Either of them in case the said decree
shall be affirmed in said Supreme

Cent shall be affixed then the above obligation to be void otherwise to remain in full force and virtue

John S. Bay (Seal)
by Joshua L Marsh
his atty in fact
Joshua L Marsh (Seal)
Edgar T. Bay (Seal)

L. Leland witness for
Edgar T. Bay Feby. 11th
1863

State of Illinois }
Cook County } ss
City of Chicago }

I. Jesse B Thomas a Notary Public in and for said city in said County and State, do hereby certify that Joshua L Marsh who is personally known to me to be the same person whose name is subscribed to the ~~annexed~~ foregoing bond as attorney in fact for John S Bay, and also in his own right, appeared before me this day in person, and acknowledged that he had signed sealed and delivered the said bond as his free act and deed, and that he had also signed sealed and delivered the same as such attorney in fact as the free act and deed of the said John S Bay for the uses and purposes therein expressed

Given under my hand and Notarial seal this first day of December A.D. 62

Jesse B Thomas
Notary Public

89

John S. [illegible] & Edgar S. Bayless

vs

Isaac Cook

Bond & Power of Atty

Filed December 4th 1862
L. Leland
Clerk

Filed Feby. 11. 1863.
L. Leland Clk.

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN S. BAY ET AL.,
PLAINTIFFS IN ERROR,
vs.
ISAAC COOK,
DEFENDANT IN ERROR.

No. 89.

POINTS AND AUTHORITIES

FOR

PLAINTIFFS IN ERROR.

I.

The judgment upon which the bill of complaint was filed was not warranted by law; the breaches assigned in the declaration being a failure to pay over taxes collected by Wood, and the bond being conditioned merely for the faithful performance of his duties as deputy sheriff. Although the offices of sheriff and collector of taxes are vested by the statute in one and the same individual, they are nevertheless entirely distinct and independent of each other, imposing dif-

ferent obligations, demanding the performance of entirely distinct and different duties, and attended with different liabilities.

People vs. *Edwards*, 9 California, 286.
Moore vs. *Foote*, 32 Miss., 469.
Ames vs. *Johnson*, 3 Har. & McHen., 216.
Waters vs. *The State*, 1 Gill, 302.
Crumpler vs. *The Governor*, 1 Dev., 52.
The Governor vs. *Barr*, 1 Dev., 65.
The Governor vs. *Mattock*, 1 Dev., 213.
Jones vs. *Montfort*, 3 Dev. & Batt., 73.
See also printed argument on file in No. 71, on the present docket.

II.

There are no equities in the bill; and herein

1.—It affirmatively appears from the bill, that the conveyance sought to be avoided was made by Joseph Smith to Edgar T. Bay, the son of Henry B. Bay, and that the consideration was paid by the latter. The presumption therefore is, that it was an advancement.

Vanzant vs. *Davies*, 6 Ohio State, 54.
Creed vs. *The Lancaster Bank*, 1 Ohio State.
Story's Eq. Jurisp., sec. 1202.

2.—There is, therefore, in such a case, no presumption of a resulting trust in favor of the donor, but, on the contrary, that it was induced by natural love and affection, as such, founded upon a good consideration. And a creditor of the donor, in order to impeach the validity of the conveyance, must show some circumstances of fraud.

Doyle vs. *Sleeper*, 1 Dana, 531.
Baker vs. *Dobyns*, 4 Dana, 220.
Guthrie vs. *Gardner*, 19 Wend., 414.

3.—A conveyance of this character is not *per se* fraudulent and void as to existing creditors. It does not come within the statute, unless made by one in embarrassed or insolvent circumstances.

Cadargan v. *Kennett*, Cowp., 432.
Law vs *Smith*, 4 Ind., 61.
Clayton vs. *Brown*, 17 Georgia, 220.
Walker vs. *Burrows*, 1 Atk.. 93.
Lush vs. *Wilkinson*, 5 Vesey, 384.
Smith vs. *Reaves*, 7 Ired. (Law,) 343.
Smith vs. *Tell*, 3 Eng., 474.
Wilson vs. *Howser*, 12 Penn. State, 116.
Mateer vs. *Hissim*, 3 Penn., 160.
Thompson vs. *Dougherty*, 12 S. & R., 448.
Verplanck vs. *Story*, 12 Johns., 536.

4.—Inasmuch therefore as in a case like the present, the presumption is not that a trust resulted in favor of the donor, but that the donor intended the conveyance as an advancement, proceeding from natural love and affection, and therefore founded upon a good consideration, this presumption can only be rebutted by alleging other facts and circumstances, showing a fraudulent purpose, such as the embarrassed or insolvent condition of the donor at the time. No such allegations are made in the bill, and, therefore, no case of a resulting trust is shown. This is the equity upon which the defendant in error claimed relief, and he has exhibited no case establishing any such equities in his favor.

5.—By the third section of our statute of frauds and perjuries, all sales and conveyances made upon a *good* consideration, and *bona fide*, are excepted from the operation of the statute. Natural love and affection is a *good* consideration, and will support the deed unless it be shown to have been made in bad faith, and in which the vendee must be shown to have participated.

Ewing vs. *Gray*, 12 Ind., 64.

6.—A general allegation of fraud in a bill is not sufficient. Facts must be stated, which will justify such a conclusion.

Blondheim vs. *Moore*, 11 Met., 383.
Bodine vs. *Edwards*, 10 Paige, 504.
Small vs. *Boudinot*, 1 Stockt. Ch., 391.
Kinder vs. *Macy*, 7 Cal., 207.
Moore vs. *Green*, 19 How., 72.
Cockrell vs. *Gurley*, 26 Ala., 405.
Bryan vs. *Spruill*, 4 Jones' Eq., 27.

7.—It does not appear that the complainant has exhausted his legal remedies.

It is alleged that the execution was issued March 12th, 1857, returned November 21, 1857, by order of Court, and that Henry B. Bay died in September, 1860. It is not alleged that any levy was ever made, nor that the execution was returned unsatisfied.

Wiggins vs. *Armstrong*, 2 John. Ch., 144.
Moran vs. *Dawes*, 1 Hopk. Ch., 365.
Brinkerhoff vs. *Brown*, 1 John. Ch., 670.
Beck vs. *Burdett*, 1 Paige, 305.
McDermott vs. *Strong*, 4 John. Ch., 689.
Stone vs. *Manning*, 2 Scam., 534.

8.—The case of *McDowell* vs. *Cochrane*, 11 Ill., 30, cited by defendants in error, is not in point. That case simply decides that the death of the debtor will give a Court of Equity jurisdiction in cases of asserted fraud, where it appears that the estate was insolvent. It was alleged by the bill in that case, that there was not, at the time of the death of the original defendant, *any personal or other property belonging to the estate*, and the Court held that, as execution could not issue against the administrator, and as the complainant could not obtain payment by due course of administration, the estate being insolvent, *therefore* his only remedy was in equity.

9.—There is no allegation in the bill of complaint in this case, that the estate of Henry B. Bay was, at the time of his death, or at the time bill was filed, insolvent, nor does it appear but that there was sufficient real and personal property belonging to the estate to pay this judgment. It does not appear, therefore, but that this judgment would have been paid in due course of administration, nor but that the legal remedies were complete and adequate.

10.—The allegation in the bill of complaint that John S. Bay, as executor, "*pretends and claims* that he has filed a full and perfect inventory of the estate, both real and personal, of Henry B. Bay, but has omitted therefrom said real estate; *and if said inventory is correct, there is not sufficient to pay said complainant's claim*," is not a sufficient allegation of the insolvency of the estate, nor of the fact that there is not sufficient real and personal property to pay the judgment.

State Bank vs. *Ellis*, 30 Ala., 479.
Quarles vs. *Girgsby*, 31 Ala., 172.
Pharis vs. *McLeachman*, 20 Ala., 662.
McGuire vs. *Shelby*, 20 Ala., 456.

To this allegation of the bill the following specific objections are are made:

a. Whether there are sufficient assets in the hands of the executor, depends upon the character and value of the property held by him. This is not shown by the bill, and before a creditor would be permitted to attack an advancement made by a father to his infant son, he should be compelled to produce the best proof that could be afforded, of the fact that there were not sufficient assets to pay his judgment, to wit: a sale by the executor in the manner pointed out by law. This principle would be enforced in all cases save where it appeared from facts and circumstances set out in the bill, that the rights of the creditor would be jeoparded by the delay. Nothing of that kind is shown here, nor are any reasons given by the complainant, why he should not be compelled to await the due course of administration, and thus exhaust his legal remedies.

b. But even if it be assumed that the assets in the hands of the executor are insufficient to pay *in full* the complainant's judgment, he should still be compelled to exhaust all the property which could be reached by ordinary legal measures, before attacking this conveyance. For if courts of equity would permit a creditor to enforce the collection of his judgment against property in the hands of infant children, they would require, at the same time, that the contribution which property thus held should make for that purpose, should be as light as possible; and, to that end, that all the other property of the deceased debtor should be first exhausted.

c. There is no allegation that there is not *in fact* sufficient real and personal property belonging to the estate of Henry B. Bay to pay this judgment, but simply that the executor *claims* and *pretends* that he has filed a full and perfect inventory, &c. The claim and pretence of the executor that he has filed a perfect inventory, &c., is not an allegation of the *fact*, nor could it be binding upon, nor evidence against, Edgar T. Bay.

d. But the allegation that there is not sufficient to pay the complainant's claim, is, by the very language of the bill, made dependent upon the correctness of the inventory. The bill is "*If said inventory is correct*, there is not sufficient to pay complainant's claim." There is no allegation that it is correct, and therefore the allegation does not amount to even an *argumentative* denial of the sufficiency of legal assets.

e. But the complainant insists that the inventory was *incorrect*, because it did not include the real estate conveyed to Henry B.

Bay. The inventory is conclusive upon no one, and creditors would have a right to contest its correctness, and would be entitled to the benefits of all the property of the deceased debtor, whether included in the inventory or not.

11.—The complainant in this case has been guilty of the grossest laches. The judgment upon which this bill was filed was entered May 30th, 1857. Execution was issued July 23, 1857, and returned without any levy or attempt at collection having been made, Nov. 20, 1857. No execution was ever afterwards issued. Henry B. Bay died in September, 1860, nearly three years after the return of execution, and no reasons are given why, during that time, the judgment was not collected, or at least an attempt made. It does not appear but that all the parties to the judgment were entirely solvent. A Court of Equity will not relieve a party against the consequences of his own negligence, and will exact from creditors the exercise of due diligence in the prosecution of their legal remedies. In order to avoid the operation of this rule, facts and circumstances must be stated in the bill, affording sufficient reasons for the delay. None such appear here.

Dickerman vs. *Burgess*, 20 Ill., 276.
Gored vs. *Gored*, 3 Story's C. C., 536.
Story's Eq. Jurisp., vol. 2, p. 735.
Lemis vs. *Baird*, 3 McLean, 82.
Smith vs. *Clay*, 3 Bro. Ch., 640.
Chalmondilly v. *Clinton*, 2 Jac. & Walk. 141.
Wagner vs. *Baird*, 7 How., 258.
Piatt vs. *Vattier*, 9 Pet., 405.
Bowman vs. *Wathen*, 1 How., 189.
Fraser vs. *Hext*, 2 Strobh Eq., 253.
Jackson vs *King*, 12 Gratt., 499.
Davis vs. *Cotten*, 2 Jones' Eq., 435.
**Storms* vs. *Ruggles*, 1 Clark Ch. (N.Y.) 148.
Child vs. *Brace*, 4 Paige, 309.
Law vs. *Smith*, 4 Ind., 61.

12.—This is not a bill *in aid of execution*, for at the time the bill was filed, no execution was in the hands of the sheriff, and no levy had ever been made. The judgment was not a lien upon the real estate, the fee being in Edgar T. Bay. The exhaustion of legal remedies is dispensed with only in those cases where a creditor, by judgment or execution, has acquired a lien upon the property sought to be reached, and asks the aid of a Court of Equity to remove

fraudulent obstructions to its enforcement. No lien ever having been acquired in this case, it does not fall within the rule laid down in *Beck* v. *Burdett*, 1 Paige, 305.

13.—The same may be said also of the personal property sought to be reached by the bill. The dredges were in the possession of Henry B. Bay until a short time previous to his death, and no reason is given why levy was not then made upon them.

14.—The legal remedies can be said to be incomplete and inadequate only in those cases where the *judgment* cannot be collected by process of law. In the case of a judgment against several defendants, a creditor should not be permitted to impeach the family settlements made by such debtor, merely upon showing that the judgment could not otherwise be collected of him. It shonld appear that it could not be collected of *any* of the defendants, else it is not shown that there is not a complete remedy at law. This bill is therefore defective in not alleging the insolvency of the other defendants in the judgment.

15.—Especially should this rule be enforced, where the judgment is against one as surety. Nothing appears from the face of this bill to show that the judgment might not have been, and might not still be, collected of Wood, the principal in the bond, and in equity the complainant should first be compelled to exhaust the property of the principal, and his legal remedies against him, or show some reason why he has not done so, before he could be permitted to set aside a provision made by the surety for his children. This is the rule declared in *Law* v. *Smith*, 4 Ind., 61.

III.

The decree is not warranted by the proofs in the case; and herein, first, *as to the real estate.*

1.—The rule is now well established that a voluntary settlement in favor of a wife or children, is not to be impeached by subsequent credi-

tors on the ground of its being voluntary, but fraud in fact must, in such cases, be affirmatively shown.

Sexton vs. *Wheaton*, 8 Wheaton, 229.
Salmon vs. *Bennett*, 1 Conn., 525.
Ward vs. *Hollins*, 14 Met., 158.
Bank vs. *Ballard*, 12 Rich law (S.C.), 259.
Bullitt vs. *Taylor*, 34 Miss., 708.
Hone vs. *Volcano, &c.*, 13 Cal., 62.
Nicholas vs. *Ward*, 1 Head, 323.
Enders vs. *Williams*, 1 Met., 346.
Todd vs. *Hartley*, 2 Met., 206.
Watson vs. *Wilson*, 1 Grant's cases, 74.
Cole vs. *Varner*, 31 Ala., 244.
Williams vs. *Banks*, 11 Met., 198.
Ingrew vs. *Phillips*, 3 Strobh, 565.
Swayze vs. *Doe*, 13 S. and M., 317.
Martin vs, *Oliver*, 9 Humph., 561.
Pepper vs. *Carter*, 11 Mis., 540.
Starr vs. *Strong*, 2 Sand. Ch., 139.
Hanson vs. *Buckner*, 4 Dana, 251.
Bennett vs. *Bedford Bank*, 11 Mass., 421.
1 *Am. Lead. Cases*, 67 *et seq*, and cases cited.

2.—At the time the conveyance was made to Edgar T. Bay, the defendant in error was not a creditor of Henry B. Bay. There had then been no breach of the condition of the bond executed to the plaintiff in error.

McLaughlin v. *B'k of Potomac*, 7 How., 229.
King vs. *Thompson*, 9 Pet., 220
Heighe vs. *Farmers' Bank*, 5 Har. & Johns., 68.
Seward vs. *Jackson*, 8 Cowen, 436.
Hancock vs. *Entwistle*, 3 Durn. & E., 435.
1 Johns. Cases, 73.
Lansing v. *Prendergrast*, 9 Johns. Rep. 127.
Van Wyck vs. *Seward*, 6 Paige, 66.
S. C. affirmed, 18 Wend. 375.

3.—The case of *Choteau* vs. *Jones*, 11 Ill., 300, referred to by defendants, does not establish any different rule as applicable to this case. The question there arose between the *surety and the principal*, and the Court say, "The relation of debtor and creditor *between*

principal and surety, so as to entitle the latter to avoid a voluntary conveyance made by the former, commences at the date of the obligation by which the surety becomes bound, and not from the time he makes payment." That this is a mere equitable rule, founded upon the peculiar relations which subsist between principal and surety, and which do not, as between the obligee in the bond, and the surety, is evident from the fact that, at law, the surety is not treated as the creditor of the principal, even after condition broken, but only upon actual payment. The case does not declare that the surety is in fact, and to all intents and purposes, a creditor of the principal before condition broken, but that he shall simply be entitled to all the benefits of that position, in order to avoid a voluntary conveyance made by the latter.

4.—Nor are the cases *Howe* vs. *Ward*, 4 Greenl., 195, and *Carlisle* vs. *Rich*, 8 New Hamp., 44, cited by the Court in Choteau *vs.* Jones, applicable to this case. In *Howe* vs. *Ward*, the question arose between *two sureties*, and the conveyance sought to be set aside was executed *after the death of the principal*. In *Carlisle* vs. *Rich*, the principal in the bond had absconded before the alleged fraudulent conveyance was executed.

5.—In all cases of this character, where the Courts have held that the relation of debtor and creditor existed before condition broken, they have done so from equitable considerations proceeding from the peculiar relations of the parties to each other, or from some other attendant circumstances. As between principal and surety, it is founded partly on the confidential relations which exist between them, and partly from the fact that, as the breach is dependent entirely upon the act of the principal himself, he should not be permitted to take advantage of his own wrong, by insisting that the conveyance which he had made was antecedent the breach of his own obligation consequent upon a failure to discharge his own duties. In such case, the presumption would be strong that the conveyance was made for the express purpose of protecting himself against his future conduct. The relation of debtor and creditor exists therefore not from the mere date of the obligation, but from the relation of the parties, and the stronger presumption of fraud, to which they give rise.

6.—With reference to this particular question, and regarded with reference to the equities of the case, the position of the securities on

the sheriff's bond is very different from that held by the securities on the bond given by the deputy. In the former case, the authorities to whom the bond is delivered, have no control over the principal, nor means of regulating his conduct, so as to prevent a breach, but the securities have; and may withdraw from the bond under certain circumstances. In the latter case, the principal in the bond is under the immediate supervision of the obligee, whose duty it is to see that its condition is not forfeited, and that the deputy faithfully discharge the duties of his office. None of the reasons therefore which would warrant a Court in holding that the surety, as between principal and surety, or one surety as against another, was to be considered as a creditor from the date of the instrument, for the purpose of avoiding a fraudulent conveyance, can be applicable to this case, and the defendant in error must be regarded as a subsequent creditor.

It devolved therefore upon the complainant in this bill to establish, as a matter of fact, that the conveyance to Edgar T. Bay was made with the intent and purpose to hinder, delay, and defraud creditors. So far from that fact being established, the contrary is shown by all the proofs in the case.

1.—*The facts.*

Henry B. Bay exchanged with Joseph Smith, his one-half interest in the stock, business and furniture of the New York House, in the city of Chicago, for two lots on Monroe street; the deed he directed to be made to his son, Edgar T. Bay, which was accordingly done. This was in August, 1850, but a few months after the execution of the bond to defendant in error, and before any breach thereof. This is, in substance, all the proof in the case upon this point.

2.—The debt upon which this judgment was obtained not then being in existence, there can be no presumption of fraud predicated upon it.

3.—It is not shown that Henry B. Bay owed a dollar at the time, or that he was ever contingently liable save on this bond. It cannot be said that the conveyance was made with the intent to hinder, delay, and defraud existing creditors, because it is not shown that there were any creditors to be defrauded.

4.—It is not shown that he ever contracted any debts whatever *subsequent* to the conveyance. It cannot be said, therefore, that it was made with a view to *future* debts, for none such are shown. The liability upon the bond was not of that character, as the debt thus arising was not of his own contracting, and the liability was created by no act of his.

5.—It does not appear but that he had abundant means left, after making this provision for his son.

6.—It cannot be said that he intended, by the conveyance to Edgar T. Bay, to protect himself against his contingent liability on the bond, for these reasons:

a. Associated with him, as sureties upon that bond, were five others, men of reputed wealth and responsibility, in the city of Chicago.

b. The condition of the bond was simply that Wood should faithfully discharge the duties of *deputy sheriff*, and he had no reason to believe that he was to be held liable for his acts as the agent of the defendant in error *in the collection of taxes*.

c. The full amount of damages which it is claimed the defendant in error sustained by reason of Wood's defaults, as deputy sheriff, was only about *one hundred and forty dollars*, and this is all that the securities agreed to indemnify Wood against, and is the full measure of their liability to him.

d. It cannot be presumed that Bay anticipated, a breach of the condition of the bond; the employment of Wood as tax collector; his liability for his defaults *as such;* the insolvency of his co-sureties on the bond, or that he would alone be proceeded against; the judgment against him for those defaults arising from the misapprehension of his attorneys in a case where he had no reason to consider himself, and where he was not, in fact liable. And, therefore, it cannot be said that he intended to protect himself against events which he had no reason to anticipate. Hence a fraudulent motive is inconsistent with the act, and all the attendant circumstances.

7.—The legal presumption that this conveyance was made purely and simply as an advancement to his son, is consistent with the position

of Henry B. Bay, at the time, and is supported by all the facts proved in the case.

a. The transaction was open and notorious in its character; there was no concealment, nor any attempt at concealment, and the deed was properly recorded.

b. The property exchanged for the land was perishable in its nature, and growing less and less valuable every year. The property purchased had a prospective value, dependent upon the future prosperity of the city of Chicago, which was then a mere conjecture. This small investment might, therefore, in the future, afford a sufficient revenue for his son's education, and a means of starting him in life upon his reaching his majority.

c. Such motives are consistent with our experience; with the act and all its surrounding circumstances; with the natural love and affection which the father bears for his son; with the desire to provide for his future, which that natural love and affection inspires, and with the presumption of the law.

8.—The proof does not show that the estate of Henry B. Bay was insolvent; nor but that the judgment might have been collected of him during his life time; nor the insolvency of any of the other sureties upon the bond, nor any reasons for the delay.

9.—There is no proof whatever that Edgar T. Bay had any knowledge of his father's contingent liability upon the bond executed to the defendant in error, or that he, in any way, participated in any purpose which his father might have entertained. The deed to him having been made upon a good consideration, can be invaliditated only by showing fraud in both parties.

AS TO THE PERSONAL PROPERTY.

The personal property sought to be reached by the bill consists of an one-third interest in two steam dredges, purchased by the plaintiff in error, John S. Bay, of Henry B. Bay, in the year 1860, for the consideration of fifty dollars. It is charged that this consideration was so grossly inadequate as to be evidence of fraud in both parties, therein

1.—The consideration was not inadequate. It appears from the proof by the defendant that an one-third interest in the dredges, *unincumbered*, would not be worth over $500. The dredges were incumbered to the amount of $1,300 or $1,400. One-third of the latter sum, which would be the proportion that John S. Bay would have to bear, would be $466.66, which, deducted from the unincumbered value, $500, would leave the value of the interest which he purchased $33.34, *a much less sum than he paid.* The consideration was not inadequate, but excessive.

2.—The fact that these incumbrances are not mentioned nor provided for in the bill of sale, is of no importance, as it is shown that John S. Bay purchased, with a knowledge of these incumbrances, and with reference to them; under the advice of his counsel that they were liens upon the dredges.

The decree is, therefore, it is respectfully submitted, unwarranted by law; and without evidence to support it.

EMERY A. STORRS,
Counsel for Pl'ff. in Error.

Supreme Court Illinois
April Term 1863

Edgar T. Bayerle
Plff. in Error
vs
Same Same
Deft in Error

Plff Points

89

Filed May 6th 1863
L. Leland
Clerk

1863

Supreme Court of Illinois
Third Grand Division

John S Bay & others
Plaintiffs in Error.
vs.
Isaac Cook
Defendants in Error

Error ~~from~~ to Superior Court of Chicago

Abstract of Record.

Page 1. Placita

" 2. Bill of Complaint
In Superior Court of Chicago.
Filed May 18. 1861. Isaac Cook Complainant vs. Edgar T Bay. Daniel T Wood. Lorin G. Butler. Martin Dodge R H Bigelow and John S Bay Executor of the last will and testament of Henry D. Bay deceased.-

The Bill alleges
1. That the complainant on the 12th day of March 1850 then being Sheriff of the County of Cook. and having appointed Daniel T Wood his deputy

the said Wood and John McFall S. G. Butler. Martin Dodge. Peter N Bregelow. H B Bay and J. E Hamilton made Executed and delivered to Complainant a certain bond bearing date on that day in the penalty of $10000. Conditioned for the faithful performance by the said Bernard Wood of his duties as such deputy sheriff, and that the Complainant should be saved harmless from all costs and damages. On account of or by reason of any or all acts of said deputy as such deputy or by color of his said office

Rq 2 & 3. 2. That on the 21 day of November 1851. the Complainant sued out of the Circuit Court of Cook Co. a writ of summons in an action of debt against the said Wood and the sureties on his bond. returnable to said Court on the 1. Monday of December then next, which was served. &c.

Rq 3. 3. That on the same day Complainant filed his declaration against

Said defendants Counting thereon upon the said bond. and assigning various breaches thereof

Page 3.

4. That afterwards on the 30. day of May 1854. Complainant recovered judgment in said Circuit Court against the said Wood. Henry B Bay. Butler Dodge and Bigelow upon said writ and Hamilton Surviving of said McFall his debt of $10000-1 Costs with an order that an execution issue therefor to be returned satisfied on the payment of $3382. 17 damages for breaches &c.

" "

5. That afterwards and on the 12th day of June Complainant in order to obtain satisfaction of his said judgment caused an execution to be issued for collection of said sum assessed as damages &c. with interest thereon from April 13. 1854. + Costs, which execution came to the hands of said Sheff on the 23. day of July 1854. and which execution was returned by said Sheriff on the 20th day of 1854

by order of Court, which order has since been set aside by the Supreme Court of the State of Illinois

Page 4.

6. That the said judgment still remains in full force and that there is now justly due thereon to the Complainant the said sum of $5382.14 and Costs of Suit & interest thereon from April 13. 1857.

" "

7. That after the making of the said bond and before May 1. 1851. the said Henry B Bay purchased from one Joseph Smith with his own money and means. Certain lands situate in Cook County described as the west half of lot number 5. in Block number 81 in the School Section Addition to Chicago and having paid for the same on that day became and was entitled to a deed therefor. but the said Henry B Bay fraudulently. and with the purpose & intent to hinder delay & defraud his Creditors Caused the Conveyance of said land to

be made by said Joseph Smith to his son Edgar T Bay. then and now an infant & in whom the title to said lands is still vested

Page 4.

8. That said Edgar T Bay had no funds with which to purchase said real Estate & that the Conveyance was made to him in fraud of the creditors of said Henry B Bay

Page 5.

9. That afterwards in 1860. Henry B Bay died having made and published his last will and testament by which among other things he devised the said lands ~~&c~~ with two dwelling houses situated thereon to his son Edgar T Bay. and appointed John S Bay Executor. That said will has been duly admitted to probate in the County Court of Cook County & letters testamentary issued thereon to said John S Bay.

" "

10. That the said Henry B Bay with his own money and means built and erected the said houses

On the said price of land. & occupied the same. And received the rents. issues and profits thereof

Page 5.

11. That on the 15th day of June 1861. Complainant appeared before the County Court of Cook Considering in Probate with a claim against the Estate of said Henry P. Bay for the Court the on said judgment that being the day appointed by said Executor for the adjustment and settlement of said Claims & and said claim was allowed by said Court to the Amount of $6648.58 And placed in the fourth class to be paid in due Course of administration

" "

12. That said John D. Bay as such Executor pretends & claims that he has filed a full and perfect inventory of the Estate both real and personal. of said Henry P. Bay but has Omitted therefrom said real Estate & if said inventory is Correct there is not sufficient to pay Complainants Claim

13. That Complainant is entitled to have said real Estate sold to satisfy said judgment. But in Consequence of fraudulent Conveyance thereof. Said Sale Cannot be made without aid of this Court.

" "

14. That Complainant is remediless at law &c. And that defendants may be required to Answer this without oath.

Prayer for relief

" "

15. That Complainants judgment may be declared to be a lien on said real Estate and the same directed to be sold to satisfy the same

" "

16. That the Conveyance from the said Joseph Smith to the said Edgar T Bay may be declared to be & to have been fraudulent as to Complainant and the said Edgar T Bay to have received the same in trust for said Henry B Bay and Complainant and that upon the sale of said premises said Edgar T Bay be required either in person

or by Commissioners to be Appointed by Court. to vest in the purchaser at such Sale. a legal and perfect title to the same

Page 6.

14. That a Guardian Ad litem be appointed for said Edgar T Bay.

" "

18. Prayer for such other relief &c

" " 19. Prayer for Process.

Page 7 & 8.

Precipe for Summons to Shff. Cook & Will Co.

" 9 & 10. Summons & Return of Service

" 11 & 12. Alias Summons & return Service

" 13. Affidavit that Butler & Ryerson cannot be ~~found~~ found.

" 14. Order. giving John B Bay time to plead to bill

" 15. Demurrer of John B Bay & Edgar T Bay by his Guardian to Bill of Complaint - On following grounds

1. That Complainant has not made a Case entitling him to the relief prayed for.

2. His not Alleged in said Bill that Complainit has exhausted his legal remedies for the Collection of said debt by issuing Executions &c. having Same returned unsatisfied, or that the defendants to said bill or any Thereof said Henry B Bay are or were insolvent

3. That it does not appear in said bill that the liability for which Complainant received payment Existed at time of Conveyance &c.

4. That said defendants Wood Butler. Peyton & Dodge are unnecessary & improper parties

5. That it is not averred in said bill that Henry B Bay was insolvent at the date of said deed to Edgt T Bay.

Page 14. Order to Peyton & Butler to Answer or bill would be taken as Confessed

" 17 & 18. Proof of publication of notice

" 19. Order of dismissal of Peyton & Butler and that as to them bill be taken as Confessed.

Order. giving Complainant leave to amend bill. Made March 8. 1862.

" 21. Amended Bill. Filed March 8. 1862. as follows.

1. That on or about the 30.th January 1860. Henry B Bay was the owner of an undivided third interest of two dredging Machines then lying in Chicago Harbor. and called respectively the Red Bird and Black Hawk. the other two thirds being at that time owned by Augustus Parsons subject to incumbrances he had placed upon his two thirds

2. That for the purpose of defending his Contract the said Henry B Bay Conspired with said John B Bay and made a bill of sale to him of one third of said dredges for the Consideration of fifty dollars. as appears by bill of sale annexed &c.

3. That said one third of said dredges was worth at that the

sum of $30000. And that fifty dollars was so grossly inadequate a consideration as to be Evidence of fraud

Page 22 H. That said sale was fraudulent as to Complainant. that the same should be set aside & that the one third should be sold and applied on Complainants judgment

" " 5. Prays that sale be set aside, deeds held &c.

" 23. Bill of sale mentioned in Amendment

" 24. Order that defendants answer Amended Bill

" 25. Notice to examine Joseph Smith on April 3. 1862.- Served. Mch 13.

" 26. Notice to examine Benj. F. Skinner on part of Complainant on the 26. June - Served June 12. 1862.

" 26. Joseph Smiths Deposition

" 27 1. Knew Henry B Bay in his life time - he died at Bloomington February 1861.

2. Smith and Henry B Bay purchased of John T Palmer real Estate described in deed made Exhibit A and divided the property therein described between them severally. Smith elected to Buy the East half and Bay Conveyed to Smith west half.

3. Afterwards Smith sold the west half to Henry B Bay. for one half the Consideration in furniture and ~~and~~ ~~half in~~ the Stable and lease of the New York House: the furniture Stable and lease of the New York house at the time were owned by Benjamin F Skinner and Henry B Bay.

Page 28. 4. The said west half was Conveyed to Edgar T Bay. by order of Henry B Bay. and at the time of the Conveyance there were no improvements on the west half of said lot. The lease was made with Bay at the time of the Conveyance to Edgar T Bay.

Page 28. **Benjamin N. Skinners deposition**

1. Knew Henry B Bay in his life time and in the year 1850 was in the Hotel business with him in Chicago Bay had one half interest in the Stock and business, which was of the value of about $3500 —

" 29. 2. Bay sold or traded this interest as he understood to Joseph Smith for a lot on Monroe Street opposite the Gas Works. — Bay took possession of the property and built some houses on it

Page 30. Certificate of the Deputy Master before whom examination was taken

" 31. Deed from. John S Palmer trustee to Joseph Smith and Henry B Bay. dated October 11. 1848- duly recorded. offered in examination of Joseph Smith and marked Exhibit (1)

" 33 Separate Answer of John S Bay Cross John S Bay -

1. Admits that Complt was Sheriff. Record appointed duply: the execution of the bond.: issuance of Summons. Service: filing declaration: recovery of Judgment: issuance of execution: its return &order of Court, and the Amount due on the judgment as alleged in Bill

2. Alleges that on the day of 1862. respondents in connection with other respondents sued out of the Supreme Court of the state of Illinois a writ of Error to review judgment &c. which is still pending and undetermined

3. That said judgment is excessive Erroneous and Entirely inequitable as against said Hump. & Bay. and was obtained without his knowledge and in fraud of his rights and without his having had a day in Court.

4. That immediately after the Commencement of said Suit. E.C. Hamblets & S. Hays were employed by said Wood to defend the same & that said Wood (Bay) was informed by said

Pag 3rd

Wood. in the year 1855 that said suit had been dismissed. And that the Wood had received a letter from his Attorneys to that Effect. And that Bay never received any notice to be Contrary unto 1857 when called upon by the Sheriff

" "

5 That said Wood was not indebted to said Cook in any sum of money whatever That the bond upon which suit was brot was given to protect and save harmless said Cook from any default of said Wood as deputy sheriff and that a large part ~~of the~~ twenty all the defaults complained of against said Wood was in the non payment of money received by said Wood as Collector of taxes for which acts this respondent alleges said bondsmen were not liable

Pag 3rd

6. That the said T. C Hamilton was at the time of the Commencement of this Suit Ever Since has been now is a resident of said City of Chicago and Entirely Solvent.

Page 35

7- Denies fraud in conveyance to Elgin Bay.

" " 8. Admits purchase of one third of dredge but denies fraud, and alleges that at the time of the purchase said dredging machines were heavily incumbered, & that there were liens and incumbrances on the one third interest to the Amt of $1300.00 or $1400 and that respondent bought subject thereto and paid full and adequate Consideration therefor

Page 36.

9. Admits that complainant appeared in Cook County Court sitting in probate and had his claim allowed which was put in fourth Class that respondent as executor filed his inventory &c omitting real Estate and that the Complainant Contested the Correctness of said inventory & ex Amined said respondent in said probate Court and that inventory was sustained

" "

10. Denies confederating &c.

Page 37. Separate answer of Daniel T Poole.

1. Admits that Complt was shff; that respondent was appointed deputy; the execution of bond & recovery of Judgment as alleged in bill

2. Alleg. suing out writ of Error as in answer of Bay stated

" 38 3. That Judgment is excessive & unjust as stated in Answer of Bay; that case at law was dismissed of which Respdt advised Henry B Bay, and that respondent never heard any thing further about the case until after judgment.

" 39 4. That respondent had a good defense on the merits

" " 5 That the bond sued upon was given to secure said Complainant against the defaults of this respondent as deputy sheriff And that the defaults complained of by said Cook in his declaration were the Colection of the sum of $308.20 And five dollars costs on an execution

Page 39

in favor of Wm Bleloupp & Capt Joseph Johnston. And his failure to pay over the same and the Collection by this respondent and failure to pay over a large sum of taxes

" "

6. That the only lists of taxes on which he ever made any Collections while acting as such deputy sheriff were those of the years 1848 and 1849.

That shortly after his appointment a Mr Pendry who was acting for said Cook as Collector of taxes presented a list of tax receipts some signed and some not signed, accompanied by a list of them with a receipt at the bottom for respondent to sign advising this respondent that he was to Collect and pay over the Amount And that it was to be credited to him

" "

7. That this respondent in attempting to Collect said taxes found that many of them had been paid to Cook this deputies And that at the request of Cook he Collected all he could on said tax receipts

And paid over Every dollar so Collected by him to Complainant

8. That subsequently and some time in this year 1850, the Board of Supervisors of Cook County called upon said Cook for a settlement of said tax lists, and appointed a Committee to investigate the matter That Cook then desired of this respondent that he should go before that Committee and end the whole matter by swearing that all taxes which had not been Collected were not Collectable that the parties Could not all be found which was true and that such as Could be found were not able to pay which was untrue in part. And this respondent refused to do so but went before the Committee and showed to them what taxes this respondent Could not Collect and swore to the same the tax receipts for which were either left with said Committee or taken by Cook. And this respondent has seen nothing of them since

9. That subsequently the said Cook made Oath that the balance of the taxes not Collected was not Collectable and thereupon the Committee reported in accordance with such showing of this respondent and such testimony of said Cook from the tax lists of 1848 was. $ 413.99.

And the balance of tax list being insolvent $ 512.96.

The tax list of 1849 Collected $ 436.47

Uncollected Insolvent $ 196.60.

That the Collector reported Treasury receipts for the Amounts Collected except Commissions, Interest and recommended that the Clerk issue proper receipts to the Collector which was done, And this ended the whole matter except this respondents Connection with the tax Collections Excepting that this respondent after tried to get said Cook to pay him for his services in Collecting what he did Collect which is credited to him in the list

10. That he never received a dollar

On said last receipts which he did not pay over, notwithstanding his Commissions And Charges for Collection

Page 10.

11 That respondent paid over every dollar by him Collected or received upon the execution against said Johnson upon the Order and direction of said Cook except his fees. And that respondent never Collected any money On Account for said Cook which he failed to pay over: that at the time of the rendition of said judgment this respondent was not indebted to said Cook in any sum of money whatever, but that said Cook was largely indebted to him for services And has neglected And refused to pay the same.

" "

12. That this respondent to obtain said appointment at the earnest solicitation of said Cook And under his representation that it would be worth at least $1000. per year, And that said Cook is indebted to this respondent for his services in the sum of at least $600 ——

13. That T C Hamilton now is and continuously Commencement of suit continued has been, a resident of Chicago & a bona fide voter.

" "

14. Denies Confederating &c.

" H2. Demurrer to bill. –

1. That it does not appear by the bill Complainant has a Complete & adequate remedy at law

2. That it does not appear that Complainant has exhausted his legal remedies

3. That Complainant has not used due diligence

" H3. ~~– Answer of Guardian ad litem for Infant Defendant Edgar T Bay.~~

Replication

" H4. Answer of Guardian ad litem for Infant defendant Edgar T Bay.

" H5. Stipulation – Admitting that upon a certain writ issued from the Cook County Cont. upon the Complaint of Isaac Cook against said John S Bay the

Said John S Bay testified

1. I am executor of the Estate of Henry B Bay deceased and am his brother. I was not Engaged in any business at the time of his death - He was if in any business at all at the time of his death in the dredging business

2. He had been in company with Augustus Parsons but was not at the time of his death

3. Henry B Bay died on the tenth day of March AD 1860. I was then Camping on a farm.

Pg 116 4. My Brother owned one third of two dredging machines. I first came up to see about his Estate in May 1860. And found it in a bad Condition. I found a lot of property ~~in wh~~ of which the Appraisement bill filed in this Court will give the list. I did not find the dredging machines he had sold them to me the 30th January 1860 by this bill of sale (bill annexed)

Page 46.

5. I dont recollect when I took possession of the dredging machines whether it was before or after his death. I paid the fifty dollars mentioned in the Consideration in the bill of sale when I brought them that was all I paid him. The reason I did not take possession of them immediately was that I was not here. I was in Bloomington The Bill of sale was drawn up in Chicago by the Clerk. I kept the bill of sale in my pocket after it was drawn. - I bought the dredges

Page 47.

with the incumbrances that were on them - The demands against the dredge was held by parties who had worked upon it. The figured up the incumbrances and over $1300, and under $1400 - There was no bargain made about my paying the incumbrances. - All the bargain I made was in the writing, the bill of sale. We might have talked about the machines being liable to the debts, nothing more than that about it. There was no —

agreement that I should pay them
There were incumbrances on them
I cant tell what they were without
referring to the books.

On his Cross Examination by his own
Counsel Mr Marsh he testified

1. That previous to the purchase of
this property I consulted with
Mr. Marsh about the purchase.
And he advised me that I purchased
subject to all debts of Parsons Bay
and Parsons Bay & Co. against the
dredges. The interest of Parsons was
mortgaged, the mortgages were
recorded as I understood; About
two months after I purchased.
I informed the parties in possession
of my purchase.

2. I knew of Existence of Claims against
the Concern of Parsons Bay and
Parsons Bay & Co: Mr Marsh told
me that the mortgages were a
prior lien which were to be paid
first then the debts of Parsons
and Bay. And Parsons Bay & Co
would be an incumbrance

Page 48

3. At the time I purchased. I knew that Parsons did not pay up promptly He was not at that time in good Circumstances. And owed the firm of Parsons and Bay. a large Amount. I Knew that he was insolvent at that time, and have never Collected any thing of his indebtedness to Parsons & Bay.

" " 4 I have Collected of the accounts sold me by my brother about forty seven dollars.

" " 5. Before I filed inventory I ascertained there was no title in Mr B Bay. to the property on Monroe Street.

" " 6 I have Endeavored to dispose of my interest in the dredging machines to dredging men & have been unable to do so - I think the whole accounts were worth about $ 150.00.

In reply to the Cont. the said John S Bay further testified

I did not Consider my brothers interest

in the whole thing worth anything
I did not make as much as I expected
to make. It was a bona fide sale.

Page 49. Bill of sale From Henry B Bay to John D Bay
of interest in dredges &c. - Consideration $50.00
Dated January 20th 1860.

" 51. Deposition of Henry Fox taken before
Ira Scott Master in Chancery. taken Oct. 2. 1862.
Showing

" 52. 1. I know the dredges Red Bird and
Black Hawk. and have known them
ever since 1856. and have been Engaged
in the dredging business

2. The two machines to a person Engaged in
the dredging business were worth in
January. 1860. $3000.

On his Cross Examination he testified

That in January 1860 the Black Hawk
was in Good order. And the Red Bird in
tolerably Good order. And that in
January 1860. he would have paid
for one third interest in the dredging

machines $500. provided he could have got a Chattle of the others but they had been encumbered to the Amount of their value

On his Redirect Examination he testified

Page 53 That the reason that he made that differ Ence in the value. That he did not think the One third would be worth as much as if That the Control of the whole thing. The reason is That if Owned the whole Amount. He could Control the whole. And if Owned One third other parties would hold the balance of power.

Page 54. Decree - Entered October. 10th A.D 1862.

1. Recitals of all Previous proceedings

" 56. 2. That the Conveyance of the said lands and premises from said Joseph Smith to said Edgar T Bay was fraudulent as to the Complainant And that the said Edgar T. Bay took the legal title to the same under said Conveyance in trust for the said Henry B Bay and his Creditors. And now holds the same upon

and Trust: And that the same shall be and Stand be sold, for the payment of said Judgment.

Page 56.

3. That the sale of the one third part of said dredging Machines by said Henry B. Bay to said John S. Bay was and is fraudulent as to said Complainant and as to him set aside and declared Nullity

" "

4. That the defendants Daniel T. Wood, Martin Hodge, Peter H. Bigelow and Soren G. Butler and the said John S. Bay as such Executor As aforesaid in due Course of administration pay to the said Complainant the Sum of $2411.99. with interest thereon from rendition of Judgment & Costs, so taxed.

" 54.

5. That said John S. Bay within five days after Service of certified Copy decree as here appear before Ira Scott Master in Chancery and Assign transfer and deliver over to him under Oath the said One third of said dredging Machines

" " 6 That said Ira Scott be appointed

Special Commissioner to sell said real Estate and One third interest in said dredging Machines: that in default of paying amount decreed he proceed to sell said property after giving notice &c. And that proceeds be applied on amount of decree &c. that at such sale any of the parties to the suit be at liberty to bid

Page. 57. 58. 7. That upon such sale the Master make Execute and deliver to the purchaser or purchasers thereof a deed, or deeds of the premises so sold and that the said Edgar T. Bay exr John S. Bay as such Executor join in such Conveyance. And that in default Ira Scott be appointed Special Commissioner &c for that purpose

" 58. 8. That said John S. Bay exr Edgar T. Bay exr all persons claiming under them upon production to them of the Master's deed or deeds conforming thereto be under peaceable possession of said property

" " 9. That said Master make report of his proceedings

Page 58. Certificate of Evidence

" 60. Bond. Daniel Wood Etal to Isaac Cook Dated March 4th 1851.

" 61. Certificate of Clerk.

" 62. Deed from Joseph Smith to Edgar Bap. Dated August 20th 1850. of property described in Bill. Offered in Proof and Recorded in Cook County March 7th 1851. in Book No. of Deeds at Page 318 & 319

" 63. Judgment Record of Cook County Circuit Court. Cook vs. Woodcock including

1. Placita.

64 2. Summons.

" 65 3. Amended Declaration Alleges. The Execution of the bond &c. And assigns as breaches of the bond 1. That Wood as deputy Sheriff on the 1. day of August A.D. 1851. Collected

66 an execution in favor of William Blelapps against Joseph Johnston for $308.20 & $5.00 Costs which he neglected to pay over. 2. In failing to pay over Lucas Collected &c.

70 " Demurrer to Declaration.

Page 71. 5. Pleas.

" 73 6. Judgment Entered May 30th 1854. On default

" 74 7. Motion to Set Judgment aside

" 75 8. Execution & returns thereon by Sheriff returned by order of Court.

" " 9. Order Setting Aside judgment & default. November 9. 1854.

" 76. 10. Order for Judgment to go from Supreme Court April 19. 1859.

" 78 11. Judgment on Order February 1st 1859

" 79 12. Certificate of Clerk Circuit Court.

Records from Cook County Court

Page 80 1. Letters of Administration, issued to John B Bay. Feb 6. 1861.

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" 83. 3 Will of Henry B Bay.

" 85 11. Inventory of Estate of Henry B Bay

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" 91. 8. Bond ~~to~~ Woodstal to Cook
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Assignment of Errors.

1. That there was no breach of the bond nor liability thereon by Henry B Bay at the time of the conveyance to Edgar T Bay

2. A Court of Equity had no jurisdiction of the case, no executors having been returned unsatisfied

3. The decree is against law & evidence.

E A Storrs
Counsel for Pffs in Error

Supreme Court of Illinois
Third Grand Division

U.S. Bay Club
Plff's in Error
vs.
Isaac C. O'R.
Deft in Error

Abstract of Record.

Bay
for
Park

SUPREME COURT.

APRIL TERM, 1863.

COOK
ADS.
BAY *et al.*

REPLY TO PLAINTIFF'S ARGUMENT.

The 1st point that the judgment stated, in the bill of complaint, was not warranted by law. I reply, that, whether so or not, the parties are concluded by it until reversed.

See remarks of J. Bronson, in 18 Wen., p. 380.

2d. The presumption of advancement does not prevail when fraud appears in the transaction.

In 6 Ohio State Rep., p. 54, the Court says: "Now let it be conceded that he absconded from New Jersey to escape his creditors there, and that he caused the conveyance to be made to his infant son for the fraudulent purpose alleged, yet no trust results in his favor, or in favor of any one, *except his creditors*, or subsequent bona fide purchasers, without notice." So by this case there is a trust in favor of his creditors.

1 Ohio State, 1—9, Court says: It is only when existing creditors are injured by it, or when there is a fraudulent intent as to subsequent creditor, that a gift of property can be objected to. And they hold, whether a gift, or an advancement, or a trust, depends entirely upon the surrounding circumstances.

See the cases cited in 1 Leading Cases in Equity, p. 280.

1 Dana, 532. Two facts were established against the children. 1st. The indebtedness of the donor, their father, at the date of the conveyances to them. 2d. The payment of his own money for the lots. The first is proved by the judgment in the case upon which the bill was filed, and the second was inferred in that case, but is proved in the case at bar. "This Court cannot, *in the absence of any evidence to that effect*, presume that the infants had money of their own, and if they had, the fact was susceptible of proof, and would probably have been

proved." When it may be satisfactorily inferred that the conveyance was made to the child, not for the honest and benevolent purpose of making a proper advancement, but for the dishonest purpose of securing property to the father's use, by a colorable subterfuge, the Chancellor should treat the estate as the father's, on the principle of a presumed trust.

In the case at bar, Bay was engaged at this time, as the counsel said, in his oral argument, in keeping a one-horse tavern; he sells out his entire interest in that, all that he had in the world, at that time, so far as the evidence goes, and converts it into this land.

4 Dana, 253. *Baker* v. *Dobyns.* "Without detailing more of the testimony we would remark, that if a party be indebted at the time of a voluntary conveyance to a child or grand-child, such conveyance is presumed to be fraudulent, *as a conclusion of law as to those debts.* And the presumption of law as to prior debts, does not depend upon the amount of the debts, the intentions or circumstances of the party conveying, or the amount of property conveyed. The law will not permit inquiry to be made into these matters, or give to them any weight or influence. They might tend to embarrass the creditor, and involve his debt in doubt and uncertainty. The law, therefore, wisely cut off all inquiry, and treated all voluntary conveyances and *settlements*, founded upon no other consideration than that of natural affection or blood, as nullities, whenever they stand in the way of *pre-existent debts.* But subsequent creditors would be required to go so far in showing indebtedness on the part of the donor as would raise a reasonable presumption of a fraudulent intent. *Read* v. *Livingston*, 3 J. Ch. Rep. 500."

I do not ask for better authority sustaining my position in this case. Cook was a creditor of Bay at the time this conveyance or settlement was made, and by this case it is a *conclusion of law* that it is *fraudulent* as to him.

Guthrie v. *Gardner*, 19 Wend. 416. The testimony in this case is of the same character as in the one at bar. And the Court says: "To hold this an *advancement* under the circumstances, would open a way through which the grossest frauds might be practised upon creditors with impunity."

Cadargan v. *Kennett*, 1 Cowp. 432. In this case the Court, commenting upon the various circumstances from which fraud can be inferred even as against a bona fide purchaser, say: "A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance is an *argument of fraud.*

In the same book, page 705, *Doe* v. *Routledge*, we find Lord Mansfield using this language, in a case of settlement upon children: "One great circumstance that should always be attended to in these transactions is, whether the person was *indebted* at the time he made the settlement; if he was, *it was a strong badge of fraud.*"

17 Georgia, 220, Is more upon the question of the proper instructions to be given to a jury in trying a case of this kind, to submit to them the question of fraudulent intent. And when the Court cited 3 Johnson, Ch. Rep., 497, 501, to sustain his position that, the mere fact that a man was indebted at time would not render his gift *ipso facto* void, he was simply mistaken.

1 Atkyns 93. *Walker* v. *Burrows.* "Now here is no proof. *Burrows*, the father, was indebted at the time or soon after, so as to collect from thence the intention to be fraudulent, in order to defeat creditors; for, as Mr. Attorney General said, if he had been indebted at that time, it would have run on so as to take in all subsequent creditors. When a man has died indebted, who, in his life-time, made a voluntary settlement, upon application to this Court to make it subject to his debts as real assets, the Court have always denied it, unless you shew he was *indebted at the time of the conveyance.*"

Very satisfactory for me. I have shown that.

Lush v. *Wilkinson*, 5 Vesey, 384. Was a bill filed by a *subsequent creditor*, to set aside a settlement as fraudulent, and the Court say, he should show that the party settling was indebted at the time.

Smith v. *Yell*, 3 Eng., 474. "The fact of an existing indebtedness does not render a voluntary conveyance absolutely fraudulent or void in law, as against the creditors whose debts were previously contracted, if there was no intention on the part of the grantor to delay or defraud his creditors." In applying this rule the Court says: "The gift in question cannot be regarded as a fraud *per se*, as it is *shown* by the testimony that the father retained property sufficient, at the time, to pay this debt, and there is no evidence that his intention was to delay or defraud his creditors."

But that is not the case at bar. There is no proof here that, beyond this gift to his son, he retained $5,000 worth of property, or even any property.

"The correct distinction seems to be, that in cases where the father does not retain a sufficiency to meet all demands existing against him, the gift is *per se*, fraudulent; but when he does

so retain sufficient to satisfy all his just debts, it is not itself a fraud, but requires proof *aliunde* to establish it."

Wilson v. *Howser*, 12 Penn. State Rep., 116. Is simply upon proper instructions to give a jury, upon all the facts, and refers to

Mateer v. *Hissim*, wherein the Court say: "A deed ought not to be set aside on account of a debt so small that the grantor, at the time, and all his life, had property to pay five times its amount, and left such property, at his death, expressly subject to that debt." That is not the case here, for what little property this man had, in view of the enforcement of this very claim, just before he dies, he makes a sale to his brother, fraudulent as to all his creditors.

Thompson v. *Dougherty*, 12 S. & R., 448. "It is an obvious consequence, that if a man who is indebted conveys away his estate, and defeats the existing debts, this is fraudulent."

This case sustains in full what I claim. That Bay, being indebted at the time, a conveyance of three thousand dollars' worth of property is a fraud upon the face of it, as to his then creditors.

Verplanck v. *Story*, 12 Johns., 536. Is not a case of creditors at all. It was a contest between a subsequent *purchaser* and the voluntary grantees.

I do not think that these cases sustain the proposition under which they are cited, that, a voluntary conveyance is not fraudulent, *per se*, as to existing creditors, unless made by one in unembarrassed or insolvent circumstances.

As to the allegations in this bill, they are sufficient, for they charge the facts that, being indebted on this bond, he fraudulently, with intent to hinder and delay Cook, caused this land, which he had paid for with his own money, to be conveyed to his son. Now the evidence to sustain or rebut this fraud is quite another matter. That need not be set out in the bill.

Blondheim v. *Moore*, 11 Md., 365. Is merely whether an injunction shall be allowed upon the bill charging facts upon information only.

Boine v. *Edwards*, 10 Paige, 504. What the charges in the bill were does not clearly appear, but I infer it was only that the daughters held it in trust, but how was not charged. In that State there is no such thing as resulting trusts. The charge that it was held in trust could not be proved by showing debt contracted, etc., "as that would not raise a trust in his favor." But that is not the charge in the case at bar.

Small v. *Bondinot*, 1 Stockton, 391. "A general charge of fraud is not sufficient. The party alleging it must state the facts which constitute the fraud."

Well, we have stated the facts, the character, consideration and motives for the conveyance, and the indebtedness of the party, and entire want of means of the grantee.

Kinder v. *Macy*, 7 Cal. 207. The same remark applies to this case.

Moore v. *Green*, 19 How. 72. This case is not very fully reported, and the same remark may be made.

Cockrell v. *Gurly*, 26 Alabama, 405. Turns entirely upon the manner of setting out title to property derived under judicial proceedings in another State.

Bryan v. *Spruill*, 4 Jones, Eq. 27. Here the bill merely charged the deed was made "with a view to defraud" the plaintiffs; but in the case at bar much more than that is charged.

Upon the question as to whether the complainant had exhausted his legal remedies, the cases and reasons already assigned by me cover the ground.

The bill shows a judgment recovered in May, 1857, and an execution issued within the year, and so it became a lien on the equitable estate of Bay in this land. The return of the execution, by order of the court, could not prejudice the complainant particularly, as that order was reversed by this Court. He then had a right to file a bill to remove this fraudulent incumbrance. But the counsel cities a number of authorities.

Wiggins v. *Armstrong*, 2 J. Chy. R. 144, which is, merely, that a creditor before judgment cannot file a bill.

Beck v. *Burdett*, 1 Paige, 305, the same rule is laid down that has been recognized by this Court.

But in this case, supposing an execution to be unnecessary, the defendant was dead, and we could not issue one.

When we had obtained judgment, and by issuing execution it had become a lien, we had a right to follow that lien up; and whether there was property to pay it or not, other than this was entirely immaterial. It is not for the debtor, or those claiming under him as volunteers, to dictate the property we shall take. If there is other property, let them convert it into money and pay the debt, so that the allegation in reference to the insolvency

of the estate, was not necessary to be made, or if made, not necessary to be proved.

In Alabama, executions may go against the administrator, and be levied on the property of the deceased, so expressly held in 31 Alabama, 172, and that case showed in the bill itself that there were slaves on which the party might have levied such an execution.

The counsel cites no authority to support the position that we must exhaust every other legal or equitable mode of obtaining payment of our debt, before we can attack a fraudulent conveyance to a child.

We now come to the charge of *Laches*. This is raised here for the first time in the case. Special demurrers are filed below, but that is not assigned as a reason in any of them, nor is it stated in the answer, nor does it appear by the proof how any of these defendants have been or can be injured by what delay there may have been in fact; but there really has been no laches.

May 30, 1857. Judgment recovered.

June 12, 1857. Execution issued.

July 23, 1857. Delivered to sheriff.

Nov. 20, 1857. Execution returned by order of court, and Nov. 9, 1857, Judgment set aside.

The case was then pending in that court until Feb. 17, 1859, when judgment was rendered upon the pleadings left in the case.

The case came to this Court at April term, 1859; was decided in September, 1859, but no opinion filed until April or May, 1860. The case is reported among the cases decided in 1860. Until the opinion of the Court was filed, we did not know what the order of the Court was, as the memorandum in the case was merely "reversed and remanded," entered September, 1859. [Note here, in January, 1860, before we could get out execution, the personal property is slipped into the hands of his brother.] When we could get out execution, the defendant was dead. On further examination, the Court will see that we filed our claim in the Probate Court, in February, 1861, and the letters testamentary were not issued until March, 1861. In fact, we had been at work nearly six months in the Probate Court, to force these parties to take out these letters.

And now, in the face of all these, the counsel charges us

with laches, and cites twenty cases or more for law upon the subject. I shall not wade through them, for we could not file a bill until an executor had qualified. We did that March, 1861, and we proved our claim in April, 1861, and filed this bill May, 1861. If that is not prompt enough to suit him, the delay since then must be very excruciating.

At the time of the conveyance to Edgar T. Bay, Cook was a creditor to Henry B. Bay, and so the case has been held by this Court, and the best adjudged cases in this country. There is no evidence as to the particular time when the defaults happened upon which this recovery was had, and in the nature of things it is impossible to prove them, unless it should be held that there was no default until Wood refused to pay over when called on. The appointment of Wood necessarily expired in Nov., 1850, with Cook's expiration of office, and the County taxes should have been paid over, by law, in June, 1850. S., 44; p. 443, R. S., and by the laws of Special Ses., 1849, p. 47, S., 9, the Sheriff had until the first Monday of July to make his final settlement with the State. It is fair, then, to presume that, whatever defaults had occurred, occurred before the 20th August, 1850, the date of this conveyance.

But let us see what the cases to which the counsel refers really hold.

King v. *Thompson*, 9 Pet., 220. The property conveyed was worth $2,500, the grantor worth $60,000, his debts about $14,000, and endorsements $20,000, and his credit high in the community. By the depreciation of property he became insolvent, and there was an expenditure of $4,000, by the donee, on the property. Held that it was not an unreasonable settlement to make, and further, the bill in that case was filed by the donees to obtain the benefit of the gift.

King v. *Thompson*, 9 Pet., 229. Was an issue out of Chancery to try the question of fraud before a jury, and the jury proved the transaction fraudulent, and the Court says: "A contingent debt, likely to become absolute, and which afterwards does become absolute, is, both on principle and precedent, enough to furnish a motive to make a fraudulent conveyance, to hinder or avoid its eventual payment. And this may be presumed to have been done here, provided circumstances exist indicative of fraud." "But all the attendant facts here are scrutinized, and the inference of fraud seems to have been fairly deduced from the whole." The evidence in the case is not shown, but the charges in the bill are substantially the same as in the case at bar.

5 Har. & Johns., 68. Merely holds that when a surety pays a debt for his principal he may stand in the place of the cred-

itor to set aside, on a bill filed by himself, a conveyance by the principal, designed to hinder and delay the collection of the debt by the original creditor.

Hancock v. *Entwistle*, 3 D. & E., 435. Merely holds that, until a surety pays the debt of his principal, he cannot prove it under a commission of bankruptcy.

Frost v. *Carter*, 1 Johns. Cases, 73. Is to the same effect.

Lansing v. *Pendergast*, 9 J. R., 127. Is to the same effect.

Van Wyck v. *Seward*, 6 Paige, 66. After commenting upon the circumstances, the Court says, p. 67: "It is *sufficient for them*" (the grantees) "*to show* that the disposition which W. Seward made of his property, among his children, in April, 1818, *was a fair and reasonable* family settlement, with reference to his and their situation, and that he retained still in his hands the complainant's two bonds, which were enough to pay all his debts, in ANY POSSIBLE *contingency*."

Again, "Where a parent makes a voluntary gift or conveyance of his property, without any valuable consideration, and for the purpose of defrauding creditors, equity may well follow it into the hands of the donee for the benefit of creditors, *although* such *donee* was not *privy* to such intended fraud.

What I ask is, that the grantee here shall show that this was a fair and reasonable family settlement, with reference to his and their situation, leaving enough to pay all his debts, in any contingency. If he had any other property it was easy for them to show it, and impossible, almost, for us to show he had no other. The partner in business with Bay testifies that he sold his entire interest in the business for this real estate. How absurd to talk about a father settling upon his child, as a *fair* settlement, all his active capital in business. The very statement of it condemns it, as such.

The case of *Chouteau* v. *Jones* settles the rule which governs in this case. The surety relies upon the property of the principal as a fund, out of which eventually the debt shall be paid, and, in favor of mere volunteers, the surety shall not be disappointed; so as between the obligee and the makers of the bond, he takes the sureties upon their promise to pay if the principal does not. The very object he has, in taking them, is that; and if they did not give him that assurance he would not have trusted the principal. Upon the face of the transaction he distrusts the principal, and says, I will not trust him without your guaranty, and your ability to pay is all that makes your guaranty worth anything. If you are not able to pay I will

not trust you or him. Now shall the very thing which the obligee relies upon be swept away in favor of a mere volunteer?

It is a singular idea to advance, that a different rule may prevail as between sureties, from that between the obligee and the sureties, when the liability of any of the sureties depends upon the non-payment, by the principal, of the debt. And when, as in 5 H. & J., 68, it is held that the surety may be subrogated to the obligee, and follow up his rights to set aside conveyances fraudulent as to him.

The very object in taking bonds with sureties is, that the obligee may trust the principal. He refuses to do it without. He trusts him upon the faith of this assurance, and then the counsel insists that we ought not to have relied upon it, but kept watch and ward the same as though we had no surety. The principal is in the hand of his bail, and they must see that he complies with the conditions of his bond, or they are liable as for their own neglect. Any other rule, either in law or equity, would render entirely nugatory such bonds.

The facts in this case show, that in August, 1850, H. B. Bay went out of the business he was then engaged in, converting all the property he had in that business into the lands in controversy, and taking the title in his son's name, then a mere infant; that this deed was not recorded until March 20, 1851. That he afterwards put buildings on these premises, the value of which does not appear. At the date of this deed, it is a fair inference, that Wood's default had occurred, and the liability of the sureties fixed. The bond is a joint and several one upon its face.

Now I say, that it is a fair presumption that this conveyance was made to defraud Cook.

The debt was then *fundamentally*, as Roberts, on Fraud, expresses it, in existence.

It is not necessary for us to show other creditors; our own debt is large enough, any way.

It is shown that when he died he owed, with an insolvent man, Parsons, about $1,400, and, to avoid its payment, just before he died conveyed all the property he then had, for $50. Ruling passion strong in death.

If he had abundant means left, that was for the defense to show, in order to show the fair and reasonable character of the settlement.

There is no proof of the wealth or responsibility of the co-

sureties; and from the number of them on the bond, the inference is the other way. In any event, each and all of them are liable, and if they are responsible, there can be no difficulty in the defense collecting their share from them. We took a joint and several bond to avoid any question of the kind.

So far as his liability for taxes collected by his principal, this case proceeded below, and must proceed here, upon the ground that he is so liable, as a judgment has been rendered. Should that judgment be reversed, then other proceedings must be instituted to set aside these proceedings; but this Court is merely an appellate Court, and hears this case as it was heard below.

It is simply absurd to say that a man can take all his active capital in business, and settle it upon his son as a fair settlement.

The deed was not recorded until March, 1851, after Cook and Wood were both out of office. Now see the plain finger mark of fraud. In August, 1860, Bay was in good circumstances; he had about $3,500 in his business; he sells that out for land, puts the deed in his pocket, keeps it there until March, 1861. The indebtedness had occurred before that time—say it occurred after the deed was made—yet Cook had a right to presume, until that deed was recorded, or actual notice of it brought home to him, that Bay had taken the title in his own name. It is as to him the same as though the title was in H. B. Bay, until such notice or recording of the deed. Now, why was this deed withheld from the record for seven months?

This investment of all a man has, to give his son an education and start him in the world, is very praiseworthy as an act of pure generosity; but the law requires that a man shall be just before he is generous.

The proof shows Bay's estate insolvent; all the property inventoried amounts to $115, by his appraisement. The debts due by Parsons & Bay are shown to be $1,400, and one debt $6,500.

I have shown that from November, 1851, to April, 1860, after the death of Bay, we could not collect this debt of any one.

Edgar T. Bay was then an infant of tender years. If this conveyance was a fraud, and he knew it and participated in it, and accepted the deed knowingly, he would be liable to indictment. He is not yet of age to accept this deed. He may, when he comes of age, repudiate it. The Court presumes he accepts it, because it is for his benefit. Now, to require us to show

that a child just able to run alone knew enough to, and did actually participate in, his father's fraud, is on a par with other assumptions in this case. There is neither law nor sense in it.

THE PERSONAL PROPERTY.

As I have already shown, this could not be reached by execution, and was not mentioned, and so far as the personal representation was concerned, could not be made liable to the payment of debts, and, in this particular instance, was claimed by the executor in his own right.

Now, the proof shows that Parsons & Bay owed about $1,400 debts, and that Parsons was insolvent. Bay then sells to his brother this property worth $1,000 for $50, and to give a color to the transaction, his lawyer, Mr. Marsh, tells him, what he must have known was not law, that the debts of Parsons & Bay were incumbrances on this property. The Court will see that the witness talks about *incumbrances*, but he means the ordinary debts; and in one place in the testimony a full stop is put by the copyist where the sentence is continuous, and the sense requires it should be so. If these debts were incumbrances in fact, and the party so understood them, they amounted to $300 more than the property was worth, and the party gives $50 more. So that it shows what I claim, that this talk about these debts being incumbrances was a mere sham, to give some sort of color to the transaction, all parties knowing that they were not, and John S. Bay not being liable for their payment, nor expecting to pay them.

If his counsel did in fact advise that these were liens, the party must have expected to pay them; and yet he pays $50 for what he must know was worthless to him.

Advice of counsel don't make law, and unless it is reasonable, cannot avoid the imputation of fraud. The effect would be to give this man for $50, property that will sell to-day for $1,500; for he is under no kind of obligation to pay one dollar of those debts. The counsel may say there is no evidence that this property will sell for $1,500. I will agree to take the property and apply that amount on the claim.

W. T. BURGESS,

For Defendant.

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Cook
ads
Baynon

Defts Brief –

Filed May 15. 1863
L Leland
Clk

Supreme Court of Illinois.

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

BAY, ET AL., vs. COOK. } No. 89.

DEFENDANT'S BRIEF AND POINTS.

On the 12th March, 1850, Daniel T. Wood having been appointed deputy sheriff of Cook county, by defendant in error, with Henry B. Bay, the ancestor of Edgar T. Bay and others, as his sureties, gave a bond indemnifying Cook against the acts or defaults of Wood as deputy in penalty of $10,000.

May 1, 1851, H. B. Bay purchased the lands in controversy from Joseph Smith, paid for them with his own means, but took the title in the name of his infant son, Edgar T. Bay.

Nov. 21, 1851, a suit was commenced on the bond, process served on Bay same day, which resulted in a judgment in the Cook Circuit Court, May 30th, 1857, for $10,000 next to be satisfied on payment of $5.382.17 damages and costs. June 12, 1857, execution sued out and delivered to sheriff July 23, 1857. On application of the said Bay this judgment was set aside, and execution returned by order of court. That order was an error brought, set aside by the Supreme Court, April term, 1859, its opinion not being filed until the April term, 1860.

March ~~May~~ 10, 1860, (p. 80,) H. B. Bay died, leaving Edgar T. Bay, his son and sole heir, testate, making him his devisee, and devising the property in controversy to his son, and appointing John S. Bay his executor, who qualified and

took out letters the 6th day of February, 1861. April 15, 1861, Cook's claim on the judgment allowed against the estate at $6,648.50, and on the 18th May, 1861, the bill in this case filed.

On the 30th January, 1860, five days after date of will, H. B. Bay sells to John S. Bay one-third part of two dregding machines, and other property, for $50. The machines (p. 52, 8 Int.) worth $3,000.

The first question is, was Isaac Cook a creditor of Henry B. Bay at the date of deed, May, 1851?

In *Chouteau* v. *Jones, et al.*, 11 Ill., 318, this court said, "The relation of debtor and creditor between principal and surety, so as to entitle the latter to avoid a voluntary conveyance, made by the former, commences at the date of the obligation by which the surety becomes bound, and not from the time he makes payment."

Howe v. *Ward*, 4 *Greenleaf*, 195.
Thompson v. *Thompson*, 19 *Maine*, 244.
Carlisle v. *Rich*, 8 *New H.*, 44.

The case of *Howe* v. *Ward* is a parallel case to the present one.
See also 5 *Cow.*, 67, 18 *Wend.*, 383, *and* 8 *Cow.*, 429.

Then was the conveyance fraudulent as to Cook.

1. He was a creditor.

2. This conveyance of this property to his child, or this settlement of it upon him, is not shown by the defendant to be such an one as the courts would protect.

The *onus* is upon the defence to show in the language of *Story Eq.*, 347, 8, that the circumstances of the indebtment and conveyance repel any possible imputation of fraud, as when conveyance is of small property, by a person of great wealth, and his debts bear a very small proportion to his actual means.

The rule as laid down in *Read* v. *Livingstone*, 3 J. Chy. R., 481. is the true rule. See in this connection 18 W., 399.

Hutchinson v. *Kelly, et. al.*, 1 Robinson, Va., Rep. 135, is a strong and strictly parallel case.

Sexton v. *Wheaton*, 8 Wheat., 243, C. J. Marshall says: "In construing this statute the courts have considered every conveyance not made on consideration deemed *valuable* in law, as void against previous creditors."

The next question is, was the aid of a court of equity to set aside this conveyance properly invoked.

In 11 Ill., 31, *McDowell* v. *Cochran*, it is held that ordinarily a creditor must exhaust his legal remedies before calling to his aid the powers of a court of chancery. But insolvent estates are an exception, as execution cannot issue against an administrator.

The same rule is adopted in *Chouteau* v. *Jones*, 11 Ill. 319.

In this case we took out execution in June 1857. That execution was stayed by the circuit court, and the judgment set aside. The case then came to this court, and the order setting aside the judgment was reversed in April, 1859. The opinion was not promulgated till April, 1860, after the death of Bay, so that we had no opportunity to take out another execution against him, and could only do as was done in *Chouteau* v. *Jones*, get judgment as the administrator, and then file our bill.

The counsel has entirely mistaken the nature of this bill. There was a resulting trust in favor of H. B. Bay, upon which the judgment of May, 1857 was a lien, or the deed was fraudulent as to him. Either way Cook had a right to have this land applied in payment of his debt in judgment. The case in 17 Ill., 286, *Wightman* v. *Hatch*, is in point, referring to the case of *Miller* v. *Davidson*, 3 Gil., 518.

We had obtained judgment, and issued execution within a year, so that it became a lien upon whatever estate H. B. Bay had in the land. We were stayed by Bay's ~~appellee~~ application, (p. 75 of Record,) from enforcing this judgment until after his death. Had he been living, we certainly could have filed this bill without taking out execution, and his death can make no difference in that respect.

As to the personal property it is not possible that a sale made to a brother for $50, of property worth $1,000, after judgment recovered, can be sustained against that judgment. The counsel insists that this was worth only $500, and was subject to incumbrances, but the evidence shows that the incumbrances were debts due by the firm, which, in law, are no incumbrances, if the party is a bona fide purchaser, and can only become such by instituting proceedings to set aside the sale as fraudulent, and which the party expressly says he was under no obligations to pay, and did not agree to pay. These debts if incumbrances at all were in the same sense that this judgment was. The creditor has a right to apply the property of his debtor to the payment of his debt. The whole thing is a palpable attempt to avoid this claim by a pretended sale to his brother, for a mere nominal consideration, of property worth a large amount.

W. T. BURGESS,
For Defendant.

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Cook

ad

Bay

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Filed May 8. 1863

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Clk

Supreme Court of Illinois
Third Grand Division

~~John S Bay Executor &c~~
John S Bay. Uriah R Hawley
Guardian Ad litem for infant
defendants Edgar T Bay and
Edgar T Bay, impleaded with
Daniel T Wood & others
Plaintiffs in Error
vs.
Isaac Cook. Deft in Error

Points for Plaintiff in Error

1.

The Conveyance of the real Estate described
in the bill of complaint by Joseph Smith
to Edgar T Bay. was not fraudulent as to
the defendant in Error - He was not a
Creditor of Henry T. Bay at the time that
Conveyance was made - There had at that
time been no Levies of the Executions
by Wood, with Bay as one of the Securities

2.

The Judgment was not a lien on the land
held by Edgar T Bay - No Execution had
even been issued, and no steps taken to

Enforce the Collection of the judgment at law

3.

No Execution had ever been returned unsatisfied. And therefore as to the Creditors Chancery would have no jurisdiction

4.

The proof shows that a full and adequate consideration was paid for the deeds

5.

The validity of the sale of the land and deeds has once been judicially determined by the Cook County Court sitting in Probate. and that is final

6.

The Court erred in overruling the demurrer to the bill - It does not appear in the bill but that the legal remedies were complete & adequate

7.

The decree is against law & Evidence

E. A. Storrs
Counsel for Peffer Bros

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Supreme Court of Illinois

Third Grand Division

John. S. Berry et al
Plff in Err
vs.
Isaac. Cook
Deft in Err

Points for Plff in Err

14422

Supreme Court of Illinois,

THIRD GRAND DIVISION.

APRIL TERM, A. D. 1863.

JOHN S. BAY, ET AL, PLAINTIFFS IN ERROR,
vs.
ISAAC COOK, DEFENDANT IN ERROR.
No. 89.

POINTS AND AUTHORITIES FOR PLAINTIFFS IN ERROR.

I.

The judgment upon which the bill of complaint was filed was not warranted by law, the breaches assigned in the declaration being a failure to pay over taxes collected by Wood, and the condition of the bond being merely for the faithful performance of his duties as deputy sheriff.

People v. *Edwards*, 9 *California*, 286.
Moore v. *Foote*, 32 *Miss.*, 469.
Ames v. *Johnson*, 3 *Har. & McHen.*, 216.
Waters v. *The State*, 1 *Gill.*, 302.
Crumpler v. *The Governor*, 1 *Dev.*, 52.
The Governor v. *Barr*, 1 *Dev.*, 65.
The Governor v. *Mattock*, 1 *Dev.*, 213.
Jones v. *Montfort*, 3 *Dev. & Batt.*, 73.

See also the argument on this point filed in case No. 71, on the present docket.

II.

There are no equities in the bill, and herein

A.—The conveyance Joseph Smith to Edgar T. Bay was in the nature of a voluntary conveyance, in order to avoid which, it should appear from the bill itself, that Henry B Bay was insolvent or in debt. Neither fact is alleged.

Salmon v. *Bennett*, 1 *Conn.*, 525.

B.—The bill does not show that the complainant had exhausted his legal remedies. The judgment was not a lien upon the real estate in the hands of Edgar T. Bay; no levy had ever been made ; the execution was returned by order of the court, after which no execution was ever issued, and no steps taken to collect the judgment. No circumstances are alleged in the bill, showing that as to the personal property, the legal remedies were inadequate, or that they had been exhausted.

Wiggins v. *Armstrong*, 2 *John Ch.*, 144.
Moran v. *Dawes*, 1 *Hopk Ch.*, 365.
Brinkerhoff v. *Brown*, 4 *John Ch.*, 670.
Beck v. *Burdett*, 1 *Paige*, 305.

C.—It does not appear by the bill that the other defendants in the judgment are insolvent, nor but that the judgment might be collected of them by the ordinary legal remedies.

III.

The decree is not warranted by the proofs in the case.

A.—The defendant in error was not a creditor of Henry B. Bay at the time the conveyance of the real estate was made to Edgar T. Bay. There had at that time been no breach of the bond upon which Henry B. Bay was security, and there was consequently no liability from him to Cook at that time. There can be no presumption in the case of a conveyance of property made to one party where the means are furnished by another, that the party thus paying the consideration, did so with a fraudulent purpose, when at the time there are no creditors to be defrauded. Such a conveyance is not void as to subsequent creditors.

Van Wick v. *Seward*, 18 *Wend.*, 376.
Bodine, et al., v. *Edwards*, 10 *Paige*, 504.
Sexton v. *Wheaton*, 8 *Wheat.*, 229.
1 *American Leading cases*, 33 *to* 69.

B.—It appears from the proofs taken in the case, that the dredges were heavily encumbered, at the time of the purchase of the interest of Henry B. Bay, therein, by John S. Bay; that the purchase was made with a knowledge of, and with reference to these liens, and it is no where shown that the consideration paid was, under the circumstances, inadequate, for it is not shown that after paying and discharging those incumbrances, the interest of Henry B. Bay would be worth anything whatever.

C.—Inadequacy of consideration is simply evidence *tending* to show fraudulent intent. In this case the presumption is overcome by the attendant circumstances.

IV.

The proceedings instituted and had by the defendant in error, in the Cook County Court, were a bar to any further proceedings. The entire case was there passed upon and adjudicated.

EMERY A. STORRS,
Attorney for Pl'ff. in Error.

89

Bay to Cook

Bluff Point

Filed Apl 29, 1863

S Selden
Clk

Supreme Court of Illinois
Third Grand Division
April Term. A.D. 1863.

John S. Bay et al
Pltffs in Error
vs.
Isaac Cook.
Defts in Error.

No. 89

Suggestions
for
Plaintiffs in Error on motion to set aside Supersedeas

This was a suit in Chancery commenced in the Superior Court of Chicago, wherein the defendants in Error filed a creditors bill upon a judgment obtained by him. On the bond of Daniel T. Wood. his Deputy Sheriff against said Wood and Henry B Bay and others Sureties on the bond. for the sum of about $40.00—
The plaintiff in Error is the Executors of Henry B Bay and it was alleged in the bill that he had purchased from Henry B Bay in his life time certain personal property with intent to hinder

delay and defraud Creditors. The value of this property as shown by the proofs in the case was less than $500 -

It was also alleged in the bill that Henry B. Bay in his lifetime made a purchase of certain real Estate and procured the Conveyance to be made to his infant Son Edgar H. Bay.

A decree was entered in the cause setting aside the Sale of the personal property to John D. Bay and declaring the real Estate subject to the lien of the judgments &c. No personal decree was entered against either of the Bays. further than this

The main question made upon this motion is as to the sufficiency of the bond given upon the Supersedeas. Upon granting the Supersedeas the attention of His Honor Judge Walker was especially directed to the Statute and he claimed that the penalty of the bond complies with all the requirements of the Statute

The penalty of the bond is $1500 - The Statute requires of the party bringing an appeal that he shall

fix a bond. And the Character of the bond is also provided for

1. It shall be with sufficient Security
2. In a reasonable Sum: Sufficient to cover the amount of the judgment appealed from
3. Conditioned for the payment of the judgment Costs interest and damages in case the judgment shall be affirmed and also for the due prosecution of said Appeal.

There is no objection made as to the sufficiency of the Security. But it is contended that the penalty of the bond is not in a sufficient sum. How it would be impossible to secure in cases of Appeals from decrees a literal Compliance with the Statute For the Statute requires a reasonable Sum sufficient to cover the judgment. and no allusion whatever is made to a decree. But the right to an Appeal Clearly cannot be denied in such Cases, and Sometimes therefore in the Construction of this Statute must be given by way of implication

If therefore a literal Compliance with the exact language of the Statute be exacted. the right of Appeal from decrees in Chancery is denied altogether. Thatno Such Construction is the proper one is evident from the phraseology of the Section, under discussion. The language is not that the bond shall be in any particular form, nor that any particular language shall be used in The requirement is General in its Character. The Generic nature, of the bond, Notspeak is given, and its Specific nature is left to be determined by the case itself. Thus after speaking of the bond and the Securities the Act proceeds." which bond shall be in a reasonable Sum. Sufficient to Cover the Amount of the judgment appealed from & all Costs" &c How what Sum is reasonable, and the Amount Sufficient to Cover the judgment &c, must necessarily be left in the case of an Appeal to the judgment of the Circuit Court. And in the Case of a Supersedeas to the discretion of the judge to whom the application is made. It may well be that in an appeal from a judgment at Law, no Sum would

be regarded as sufficient which did not cover the judgment appealed from & the costs, and it also may well be that this Court would hold a bond in any less sum insufficient, but which they would do so would clearly be for the reason, that the sum after bond was not reasonable, and that the amount of the penalty was in that particular case insufficient to afford to the Appellee adequate security

And this is precisely the point for which I contend, that this motion should be determined, by the circumstances of the ~~case~~ judgment of this Court as to whether the penalty affords in this particular case adequate security

Take the case of a judgment at law. Can it be contended that where a judgment had been obtained against a party for ten thousand dollars, Eight thousand dollars of which had been paid, that in the Court of Error & making the Supersedeas that the only sum for the bond which would be reasonable and sufficient to afford security to the plaintiff would be two thousand dollars? Yet this is

precisely the Conclusion which this Court is here asked to adopt.

It will be observed that the Statute no where requires that the bond shall be in a sum equal to the amount of the judgment and Costs. nor is it required that it shall be of the same Amount nor indeed of any Amount except that it shall be both reasonable & sufficient. By the express language of this Section therefore, the Amount of the bond is left as a question of discretion to Either the Encumbent or the judge granting the Supersedeas. He first is the Amount. It is expressly required to do so. The Statute does not fix it, And the only restriction which the statute annexes to the Exercise of this power is that the sum shall be reasonable and the amount sufficient

Now from such language, what Conclusions Are we to draw as to the intent and purpose of the statute, for that is what the Courts seek in Construing the statute to Effectuate. Simply this; that in all cases of Appeal there Shall be Security given sufficient

to make the Appellee whole in case the judgment appealed from should be affirmed, and Bond and protection against all loss by reason of the delay in its collection.

The object of the statute is merely to afford security. And nothing further than if under the language of this section of the Statute, a decree is to be embraced, the security should simply be in a reasonable sum. and in an amount sufficient to cover it - Whether the sum is reasonable, and the amount sufficient must depend of course upon the character of the decree. If it should be for the delivery of certain property. the court would determine the amount of the bond upon reference to the value of the property to be delivered. And so in this case, There is no personal decree against either Edgar T Bay or John L Bay. but simply that the real estate held by the one. and the personal property held by the other shall be sold and applied towards the payment of the Complainants judgment against Daniel Woods. So far as the real estate is concerned, both the

bill and the decree. are liens upon it. It could not be transferred so as to affect in any way whatever. the Complainants rights - It could not be carried away, or stolen, The only loss which the Complainant could in any way suffer by reason of the delay would be. from depreciation in value,

As to the personal property. the testimony of the Witness Fox, shows that the Defendants interest might to be reached by the bill is not worth $500. (abstract page 17). And the penalty of the bond is $1500- abundantly sufficient to secure the plaintiff against any loss that can accrue to him. by reason of the Supersedeas. The injustice which would result from the rule as insisted upon by the Complainant in Error is so manifest. that. it would afford strong reasons. for holding otherwise

A creditors bill might be filed upon a judgment for $2000- against a party who was claimed to be in the possession of property belonging to the judgment debtor, but worth not over $10000- If such party should

feel aggrieved by a decree against him vesting that property alone. It might and ordinarily would operate as a complete denial of justice to him to have that he should be compelled to give a bond in the sum of $20000 - in order to rid himself of a decree which as against himself amounted only to $1000 - Would not in such a case a bond of $2000 - executed by such a defendant cover the amount of the decree? The complainant in such a case would have full liberty to proceed to the collection of his judgment against the judgment debtor and could only be delayed to the extent of reaching the property sought to be reached. One construction would seem to the party against whom the appeal was brought, full and adequate protection. And at the same time seem to the party feeling himself aggrieved the right to an appeal. The other which would allow the appellee no more adequate security, would at the same time in many cases practically deny the right of appeal altogether

In such a case as this. where there is no personal decree against the appellant, the Amount of the judgment or decree Cannot be held to be the Amount of the judgment against the debtor, and this is not the judgment or decree which the bond is intended to cover.

The case referred to by Counsel in 16 Howard proceeds upon a statute widely unlike the one under Consideration.

As to the Condition of the bond

This upon examination will be found to be in exact compliance with the provisions of the statute

As to the defects noted in the bond and power of Attorney, they are merely Clerical in character and do not vitiate the bond, nor release the parties from their liability under it. This would be so under the Condition of the bond which is executed by both the parties plff in Error, & Errors have been assigned by them. The name

of Edgar T Bay who is an infant
is attached to the bond and this
was done at the instance of Mr
Justice Walker., Although attached
after the bond was first filed he
is nevertheless now a party to it &
Same person was not asked until
his Signature had been obtained

The importance of the matters
questions here discussed is a matter
apparent: and I trust be considered
as a sufficient excuse for the length
of these Suggestions.

E A Storrs
Plaintiff in Error

Supreme Court Illinois

John D. Bayerton

Defft in Error

vs.

Isaac Cook.

Deftn Error

Suggestions on Motion

by

Plaintiff in Error

No 89

delivered the opinion of the court.

Mr. Justice Wayne. This was a bill in chancery in the superior Court of Chicago, by Isaac Cook, complainant, against the defendants, Edgar F. Bay and others, seeking to subject certain property of Bay, to the execution on a judgment obtained by Cook against Henry B. Bay ~~the father of Edgar~~ deceased, on the 30th May 1857, and the others named in the bill.

The facts of the case are briefly these. Cook was Sheriff of Cook County in 1850, and appointed Daniel F. Wood, one of the ~~defendants~~ plaintiffs in error, his deputy, who, on the twelfth of March 1850 executed his bond in the penalty of ten thousand dollars with Henry B. Bay, and the others, his sureties conditioned that Wood, as such deputy, should faithfully discharge all the duties required of him as deputy Sheriff, and save Cook harmless on account of any and all acts of the deputy or by color of his office.

An action was brought on that bond, in the Cook circuit Court, in which, the breach assigned, was, that Wood, as deputy, had collected a large amount of taxes, for State and county which he had failed to account and pay over. A judgment by default was entered against Wood and Bay and the other sureties, for the debt, to be discharged by the payment of the damages, which were assessed at five thousand three hundred and eighty two 17/100 Dollars.

On the 12th of June 1857, an execution was issued on this judgment - which came to the hands of the Sheriff July 23d, and returned by the Sheriff Nov. 20th by order of the circuit court, which order was set aside by this court.

2

After the making the bond, and before May 1. 1857, Henry B. Bay purchased from Joseph Smith, with his own money and means, certain land in Cook County described as the west half of Lot 5, in Block 81, in the School Section addition to Chicago, and paid for the premises on that day, and was entitled to a deed therefor, but at his request, the conveyance was made by Smith, to his son, Edgar J. Bay, then under the age of twenty one years, an infant, in whom the title became vested.

Henry B. Bay ~~soon after~~ ~~...~~ and died, ~~with devising this lot which~~ entered into possession of the lot and erected two houses upon it, and before his death, made a will by which he devised the ~~...~~ premises ~~...~~ to his son Edgar, and appointed John S. Bay, his brother, his executor.

This executor ~~ob~~ proved the will and obtained letters testamentary, and filed an inventory in which he did not insert this lot and premises as a part of the estate.

3 Cook's claim was allowed by the Court of Probate, to $6648.58, and placed in the fourth class to be paid in due course of administration.

It appears also, ~~that before his death~~ Henry B. Bay was the one third owner of two steam dredging machines, which, shortly before his death, he conveyed, by bill of sale, to John S. Bay, for the sum of fifty dollars, and also all his interest, of every kind, in several firms of which he had been a partner. These dredging machines were not included in the inventory, the executor, claiming them as his own.

The judgment against Henry B. Bay, as one of the sureties of Wood, was unsatisfied, and no execution had issued upon it, except the one

mentioned.

This was the position of the matter, when the defendant in error, filed a bill in chancery against the defendants in the judgment, and against Edgar T. Bay and John L. Bay the executors of Henry B. Bay, to subject their lot and premises and the interest in the resting executions to the payment of the judgment.

The court decreed according to the prayer of the bill, upon which decree the plaintiffs have sued out a writ of error, and have assigned for error, 1, That there was no breach of the bond nor liability thereon, by Henry B. Bay, at the time of the conveyance to Edgar T. Bay; 2, A court of equity had no jurisdiction of the case, no execution having been returned unsatisfied; 3, The decree is against law and evidence.

The first point made by the plaintiffs in error under this assignment of errors, is, that the judgment upon which the bill of complaint was filed, was not warranted by law, the breach assigned in the declaration being a failure to pay over taxes collected by Wood, and the bond being conditioned for the faithful performance of his duties as deputy sheriff.

We do not suppose, if a judgment is in full force

nor follow the Counsel on either side into the
wide field of Argumentation they have so
diligently explored, but confine ourselves
with the Consideration of what we deem the
important points of the controversy.

~~though erroneous, or voidable by reason of~~ ~~error~~ and rendered by a court of competent jurisdiction, ~~that it is valid~~ and no fraud in obtaining it is alleged, that its validity can be enquired into in a court of Chancery. However erroneous it may be, it must have full force, until it is reversed. But this court has settled the character of the proceedings on the bond, and have decided that the breach was well assigned, and that the sureties of the deputy sheriff must answer for his default in ~~the~~ failing to pay over the taxes he had collected in virtue of his office. ~~Ray~~ Wood et al. v. Cook, ante. 271.

The second point made by the plaintiff in error, is, that there are no equities in the bill, and this ~~is~~ is discussed under fifteen subdivisions, and one of them, the tenth, is further subdivided into five different propositions. We shall not examine them all separately, * to fly leaf.

It is ~~assumed~~ urged by the plaintiff in error, that as it affirmatively appears from the bill, that the conveyance 345/22
345/22 sought to be ~~avoided~~ avoided, was made by Smith to ~~E~~ the son of Henry B. Bay, and that the consideration was paid by the father, that the presumption is, that it was by way of

advancement to the son.

Admit the principle, it is ~~it~~ but a presumption, subject to be rebutted by circumstances, or by evidence showing a different intention. ~~[illegible]~~ This is the doctrine of the cases cited by counsel, and of all other cases which have come under our notice. It is a question of intention, each case to be determined by the reasonable presumption arising from all the facts and circumstances connected with it.

Thompson, Ch. J., in the case of Jackson vs. Matsdorf, 11 Johns. 95, said the question had often been agitated in chancery, whether, when a parent purchased land in the name of his child it should be deemed a trust for the father, or an advancement for the child. When the child is under age it has generally been considered an advancement; ~~Though Lord Hardwicke in the case of Stileman vs. Ashdown 2 Atkins 477 [illegible] thought the case [illegible]~~ Christopher

It is always competent to meet and repel the presumption by proof of circumstances showing it was not ~~to~~ intended as an advancement. Proseus vs. McIntyre, 5 Barb., 424. ~~[illegible]~~ When paid is

established, that presumption is, effectually repelled. ~~A~~

~~A (X)~~ A gift of property, real or personal, made by a parent to a child is a valid gift, where no creditors intervene, and who, by the gift, are subjected to no loss. But such a transaction, to be viewed favorably by the courts, must be clear of any imputation of fraud, and far from the suspicion of a design to injure creditors. A parent may give to his child so much of his estate as he pleases, provided he retains enough to answer all subsisting demands against himself. Whether such gifts are valid or not, and made without the intention to injure creditors, is wholly a matter of inference from the facts.

~~On this assignment~~ There is no suggestion in this case, that ~~any person~~ the infant son, possessed any money or means which could be appropriated to the purchase and payment of this property, or that the money was received from him, directly or indirectly. On the contrary the proof is, that his father in August, 1856, became a partner in ~~the New York House a public~~ called the New York House, house in Chicago, to the extent of one-half of the stock, business and fixtures, which he exchanged with Smith for this lot, directing title to make the deed to his son. ~~The deed on the face shows that the consideration of the deed was~~

Should this, on the facts proved, be deemed an advancement?

Sermon 11

The deed bears date August 20, 1850. What the value of the interest in the New York house was, or what the lots were worth, is not known, but it is known that the interest in this public house, was all the available means Bay then possessed. The deficit of the deputy is shown to have consisted in omitting to settle up with the State for the taxes collected, which should have been settled for at the ensuing July term of that year. It is not an unreasonable or violent presumption that Bay, being one of the sureties, had an eye to the manner in which the deputy was depositing himself, and was apprized of this defalcation at any rate he knew he was on the bond, and knew there was a possibility he might one day be brought to [illegible] on it. Sureties, on official bonds, as a general fact, do not regard the morality of an act, with as much consideration, as they would, perhaps, if they were principals, but rather believe they are justified in resorting to almost any device to escape responsibility. The most usual one is, by, in common parlance, "putting their property out of their hands," at least such portions of it as are liable to execution. Would it be unbecoming to believe that this idea of safety from the bond, though

Smith, flash'd across the mind of Bay? He never had the legal title to the lot, and it could not be expected, therefore, that he owned it, if it ~~is~~ was in his infant son, he might console himself with the prospect of a future home, ~~[illegible]~~ unannoyed by creditors, and untouched by ~~[illegible]~~ events. ~~[illegible]~~ In this confidence and hope he erected houses on the lot, in one of which he dwelt, and dying devised the whole property being all he had to this son, who it is ~~[illegible]~~ claimed, ~~[illegible]~~ is owned it under the deed from Smith. Can any rational man believe under the circumstances thus briefly stated, that

9 Bay intended this property ~~for~~ as an advancement to his son, when he gave all he had to buy it, that it was all he had when he died, and that he made a formal devise of it to the son? If Bay intended it as an advancement why devise it, the title being in the son? Can it be doubted that the legal title was thus placed in the son for the purposes we have stated? Does a father give all his property to a son by way of advancement?

Again, dwelling houses were erected on the lot by the father. When they were erected is not in proof, nor their cost. If they were built, after May 30. 1857, the expenditure of the money for them, ~~would~~ be in fraud of the complainant,

when judgment was then in force.

~~But then is not the question~~

But the question is, Was not Bay insolvent, at the time of this conveyance? In other words, had he property in his possession of value sufficient to meet his obligations? This is not pretended, it is only claimed that there was no judgments existing against him when he purchased the lot and paid for it. But here was a pressing obligation of ten thousand dollars, against him, with a condition it is true and that condition broken at the time he purchased and paid for the lot. In foro conscientiæ he was the debtor of the defendant in error. In being a question of intention, we have no hesitation in affirming from the facts and circumstances that Bay did not make this conveyance of all his property to advance his infant son, but ~~intended~~ had the deed made to his son, that he, himself, in the character of natural guardian, his wife & children might continue in the undisturbed enjoyment of the property, and ~~he~~ thus protect himself against a recovery on the bond the condition of which was then broken. The

spectre of this bond, had a controlling influence over him - the condition has been broken; and he did not know how soon, all he prospered, might be swept from him, as a consequence thereof. As a question of intention, therefore, we cannot doubt, the ~~proper~~ proofs from the facts and circumstances, that it was not as an advancement, the title to the lot was taken to his infant son, but to shield it from his own ~~existing~~ then responsibilities, then existing.

An advancement to a child, may, properly, be regarded in the same light as a voluntary settlement of property upon him by the father. The difference, is only in the form, but for that, this transaction would be termed a voluntary settlement. In such case, it is not necessary the father, making the settlement should be actually indebted at the time he makes it, to render it fraudulent; for if he does it with a view to his being indebted at a future time, it is equally fraudulent, and will be set aside. This principle is distinctly announced by Lord Chancellor Hardwicke, in Stileman vs. Ashdown, 2 Atkyns, 480, in Fitzer vs. Fitzer, et al. id., 512, and such is the reasoning, in the case of Taylor vs. Jones, id., 600. The deed from Smith to the son, was, to all intents and purposes, a deed from the father to him. Also

a serious question pertaining itself in this case. The bond executed by Henry B. Bay was for the faithful performance of the duties of a public office - it was an official bond for the security of the State in the due execution of official duties, is it the policy of the law, that persons who shall voluntarily assume such obligations and whose tendency has proven the proper ordeal that they shall be permitted, the next day, to divest themselves of all the property, which enabled them to pass the ordeal, by a voluntary settlement of it upon a favorite child, a wife, or other party, for the consideration alone of love and affection? Where would be the security of the State, should such settlements be countenanced and encouraged? In such cases, it would seem right and just that courts should hold such contingent liabilities, as equivalent to an actual judgment. We think the facts show a fraudulent intent in Bay Rad, to make this settlement upon his son, and it being voluntary and without a valuable consideration must be under the circumstances not as an encumbrance but regarded as in fraud of the bond he had executed.

Spence

As to the objection that the allegation of fraud is not sufficiently specific, that is answered by the facts of the case. They are few and simple, and are so clearly stated, as to enable the parties charged to understand the character of the acts in which the fraud is alleged to consist.

It is further objected that the bill contains no allegation that the Execution which issued in June 1857 was levied, nor returned, that it was returned unsatisfied.

13 The case of M Donald vs. Cockrane, 11 Ill., 30, disposes of this objection. There it was held, that though, ordinarily an execution must issue on a judgment and be returned unsatisfied before a resort to a court of equity to reach real estate in which the judgment debtor has not such an interest, as might be sold on execution, yet in proceedings against intestate estates which are wholly trusts, a resort to equity may be had without this preliminary, as our statute does not permit an execution to be issued upon a judgment against an administrator. The fact of insolvency is sufficiently averred in the bill, by the reference to the inventory filed, which amounts to one hundred and fifteen dollars only.

Under all the circumstances, we are bound to consider and to hold that of this real estate the infant Edgar T. Bay held the title in trust for the benefit of the defendant in error who was a subsisting creditor of Henry B. Bay who purchased and paid for it, he holding Bay's conditional obligation for ten thousand dollars a breach of which had occurred, at the time of the purchase and payment; and also

14 upon the ground of public policy, that it cannot be permitted a surety in an official bond so to advance a loan, or make a voluntary settlement upon him of all his estate ~~[illegible]~~ as to defeat the bond.

In regard to the interest of Henry B. Bay in the dredging machines, it appears he sold them in 1860, ~~without delivering them to his brother John L. Bay~~ for the small sum of fifty dollars, a short time only before his death to his brother John L. Bay whom he appointed his executor. The machines were never delivered to John L. Bay, nor was there any agreement in the bill of sale that the possession should remain with the vendor. This

renders the sale void for fraud. That fraud is apparent in the price paid ~~for the sale transfer~~ under the circumstances of the vendor. He was heavily in debt, the property for machines were valued at three thousand dollars and were in good working order when sold. The one third interest, was maliciously estimated. Fox who worked them and knew all about them ~~knew~~ says he would have paid five hundred dollars for one third interest, even if the other two thirds were incumbered to the amount of their value.

15

There is no satisfactory proof that Bays third was incumbered in any way. No mortgage is shown, and no claims were proved, we are therefore to consider it as free from incumbrance and worth at the lowest calculation five hundred dollars. A sale of it under the circumstances and for the price given appears and the proportion of the property not passing to the vendee, constitutes, in both respects, a fraud, and leaves the property subject to the claims of creditors.

We concur with the opinion Court in the cause, and affirm it in all its parts.

Decree affirmed.

113

John L. Bay
et al.
vs
Isaac Cook

Opinion by
Breese J.

O.E.

Records Book
13. 1/2 19-24.