Lee *v.* Munroe and Thornton. (*a*)

Declarations of agent.

The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make such declaration.[1]

This was an appeal from the decree of the Circuit Court for the district of Columbia, in a suit in chancery, brought by Lee against Thomas Munroe, superintendent of the city of Washington, and William Thornton, the survivor of the late board of commissioners for that city. The object of the bill was to obtain a discount of $3000 upon a judgment, which Munroe, as superintendent, had obtained against Lee upon his bond. The ground upon which this set-off was claimed, was this:

Morris & Nicholson were indebted to Lee in that sum, by promissory notes, and offered payment in certain city lots, the title whereof was in the commissioners of the city. Morris & Nicholson having paid money in advance to the commissioners, were, as they supposed, entitled to demand from them the conveyance of the lots in question, under existing contracts between the commissioners and themselves. Whereupon, Lee applied to the commissioners, to know of them whether they would convey the lots to him, upon the order of Morris & Nicholson. This they promised to do, and made an entry of it in their journal. Lee then agreed with Morris & Nicholson to receive the lots in payment, and upon receiving their order to the commissioners to convey them to him, gave up to Morris & Nicholson their notes for $3000, which were the *evidence of the debt. On presenting this order to the commissioners, they refused to convey the lots, unless he would pay them the purchase-money due thereon to them from Morris & Nicholson, alleging that the balance was against Morris & Nicholson in their account with the commissioners. Morris & Nicholson shortly afterwards became insolvent.

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C. Lee, for the appellant.—This case cannot be distinguished from that of a mortgagee, who knowing another person is about to lend money upon the mortgaged premises, informs him that his mortgage is satisfied. If it be not, he shall be postponed to the second mortgagee. *Ibbottson* v. *Rhodes*, 2 Vern. 554; *Mocatta* v. *Murgatroyd*, 1 P. Wms. 394; *Levy* v. *United States Bank*, 4 Dall. 234.

The commissioners were acting within the scope of their authority. It was their business to keep the accounts with Morris & Nicholson, and to know the balance; it was also their business to convey the lots. It is immaterial, what was the real state of accounts at the time. They acted at their peril. The question is, who shall bear the loss? Not he who was in no fault, but he whose duty it was to know the truth, and who by his negligence has brought this loss upon the plaintiff.

Jones, contrà.—This case does not depend upon the principle of first and second mortgagee. The bill does not seek relief personally against the superintendent, or the surviving commissioner, but is intended to charge

(*a*) February 4th, 1813. Absent, Johnson and Todd, Justices.

[1] Whiteside *v.* United States, 93 U. S. 247; Hawkins *v.* United States, 96 Id. 691.

the public with this loss. The commissioners were public officers; they had no interest in the business. It was a simple mistake of a fact on their part, which cannot bind the United States. It is an attempt to set off unliquidated damages incurred by these public officers, against a public debt.

February 26, 1813. LIVINGSTON, J., delivered the opinion of the court as follows:—*This is a bill seeking relief against public officers, [*368 nominally, but against the United States, in fact, for a mistake of the former in a representation made by them to the appellant, by which it is alleged, that he has sustained a loss, for the redress of which, in damages, this suit is brought. It has been contended in this case, that the defendants having, in their public character as commissioners of the city of Washington, misinformed the plaintiff as to the state of the accounts between them and Morris & Nicholson, and thereby induced him to relinquish a demand which he had against the latter, he is now entitled to have discounted from a judgment, which they have obtained against him for the use of the United States, a sum equal to the principal and interest of the debt which he lost by the confidence which he placed in them; and this is supposed to be like the case of a party, who being about to lend money on real estate, applies to one who holds a prior mortgage, to ascertain whether he has any incumbrance on it. There is no doubt, in such a case, that if the person making the application discloses that he is about lending money on the estate, he will be preferred to the first mortgagee, should the latter deny his having a mortgage, or assert that it is satisfied; and it seems agreeable to the dictates of reason and good conscience, that his claim should be postponed to that of a person whose confidence was inspired by the misrepresentation of one, who was acting for himself, and every way competent to inform him of the truth.

But in all the cases which have been decided on this principle, the fraud, for such it is supposed to be, has been practised by a party who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct, therefore, ought to be conclusive on him, when the rights of third persons come in question. It is, however, not known to the court, that the same rule of decision has been extended, so as to affect the interests of principals, and particularly of the public, in consequence of similar mistakes made by an agent, nor is it reasonable, that such extension should take place, unless it most manifestly appear, that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make the declaration or representation which is relied on as the ground of relief.

In the present case, the defendants were employed and authorized by the public to *sell, and make contracts for the sale of, certain [*369 lands lying within this district. In pursuance of these powers, they had made contracts with Morris & Nicholson, who having advanced a considerable sum of money, were in the habit of directing the defendants, from time to time, to convey certain of the lots which they had contracted for, to the persons named in such orders. The commissioners, supposing that Morris & Nicholson had not yet received titles to land, equal in value to the sum which they had advanced, told the plaintiff, that if he would obtain an order from them for certain lots, they should be conveyed to him. But in a day or two after, they discovered that Morris & Nicholson had already

received deeds for lots to the whole amount of the sum which they had advanced, and give notice of this fact to the plaintiff, offering however to convey to him the lots in question, on his paying for them at the rate expressed in their contract with Morris & Nicholson.

The court will not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners, or whether he lost his remedy against Morris & Nicholson (of which very serious doubts may well be entertained), but a majority of the judges are of opinion, that the communication made by the commissioners to the plaintiff, was altogether gratuitous, and that not being within the sphere of their official duties, the United States cannot be injured by it, and that the defendants could not, without rendering themselves personally liable to the public, have made a title to the plaintiff, after a discovery of the mistake which they had made, but on the terms proposed by them; or in other words, that the United States could not, by any declaration of the commissioners, proceeding from a mistake, lose the lien which was secured to them by the contract with Morris & Nicholson, for the stipulated price of this property.

If the commissioners acted fraudulently, which is not pretended, they may be personally liable in damages to the plaintiff; but if it were a mistake, and such it is represented to be, the court has already said, that the interests of the United States cannot, and ought not to be affected by it. Were it otherwise, an officer entrusted with the sales of public lands, or empowered to make contracts for such sales, might, by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very *valuable and large tracts of real estate, and even produce alien- *370] ations of them, without any consideration whatever being received, It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself. It is the opinion of this court that the decree of the circuit court be affirmed.

Decree affirmed.

Herbert and others *v.* Wren and wife, and others. (*a*)

Dower.

Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially, where partition, discovery or account is prayed; and in cases of sale, where the parties are willing that a sum in gross should be given in lieu of dower.[1]

If a devise of land, in Virginia, to the widow, appear, from circumstances, to be intended in lieu of dower, she must make her election, and cannot take both.[2]

If a wife join her husband in a lease for years, she is still entitled to dower in the rent.

A court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria, in a suit in chancery, brought by Richard Wren and Susanna, his

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(*a*) February 15th, 1813. Present, all the judges, except Justice Todd.

[1] Powell *v.* Manufacturing Co., 3 Mason 347; Badgley *v.* Bruce, 4 Paige 98.

[2] See Duncan *v.* Duncan, 2 Yeates 302; Hamilton *v.* Buckwalter, Id. 389; United States *v.* Duncan, 4 McLean 99; Savage *v.* Burnham, 17 N. Y. 561; Tobias *v.* Ketchum, 32 Id. 319; Vernon *v.* Vernon, 53 Id. 351.