

*FINLEY, Appellant, v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE
BANK OF THE UNITED STATES, Respondents.

Parties to foreclosure.

Although, in general, all incumbrancers must be made parties to a bill of foreclosure, yet where a decree of foreclosure and sale was made and executed, at the suit of a subsequent mortgagee, and with the consent of the mortgagor, it not appearing to the court that there were any prior incumbrancers, the proceedings will not be set aside, upon the application of the mortgagor, in order to let in a prior mortgagee, who ought regularly to have been made a party, unless it be necessary to prevent irremediable mischief.

Quære? Whether such a practice be admissible in any case?

But in such a case, the prior incumbrancers are not bound by the decree in a suit to which they are not made parties; and the purchasers under the sale take subject to the prior liens.¹

APPEAL from the Circuit Court of Kentucky.

February 24th, 1826. This cause was argued by *Bibb*, for the appellant; (a) and by *Webster*, for the respondents.

February 25th. MARSHALL, Ch. J., delivered the opinion of the court.—
*This is a bill in chancery brought by the Bank of the United States against James Finley, to obtain a decree for the sale of property [*305 mortgaged for the security of a debt due to the bank.

The mortgage deed was executed on the 28th of September 1822, and contains a recital of debts due to the bank, to the amount of \$6240, on account of which a note was executed on that day to the bank, for that sum, payable sixty days after date. At the November term of the circuit court of the United States for the district of Kentucky, the bill was filed, stating the consent of the mortgagor to an immediate sale of the mortgaged property, although the day of payment was not arrived; and on the same day, an answer was filed, consenting to a decree for the sale. A decree was immediately entered, by consent of parties, directing the marshal to sell the property. The court then proceeds to direct the marshal, after deducting the expenses of sale, his commission and the costs, to pay to the bank the sum of \$6240, with interest from the date of the note. The sale was made in pursuance of the decree, and the report thereof was returned to the court by the marshal. At the succeeding term, William Coleman filed his petition, stating, among other things, that he held a prior mortgage on the same lands, and praying that he might be made a party defendant to the suit. His petition was rejected, and he prayed an appeal to this court, which *has been dismissed as irregularly granted. After dismissing this [*306 petition, the circuit court pronounced a decree affirming the sale made by the marshal, and directing the credit to which Finley should be entitled for the money paid out of its proceeds to the bank. This decree also con-

(a) He cited the following authorities, to show that all incumbrancers, or persons having an interest existing at the commencement of the suit, must be made parties to a bill of foreclosure, or they will not be bound by the decree. *Haines v. Beach*, 3 Johns. Ch. 459, 466. *Ensworth v. Lambert*, 4 Id. 605; *M'Gown v. Yerks*, 6 Id. 450; and the authorities collected in those cases.

¹ *Rankin v. Scott*, 12 Wheat. 179; *Vanderkemp v. Shelton*, 11 Paige 28; *Peabody v. Roberts*, 47 Barb. 91.

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siders the debt due to the bank as amounting to \$6240, with interest from the date of the note.

The mortgage to Coleman is filed, and appears to be dated three days anterior to that made to the bank. A suit to obtain a sale of the premises was instituted in the state court, in March 1823, and was depending when the final decree was pronounced at the suit of the bank. After the final decree had been pronounced, Finley filed a petition, praying that the sale and decree might be set aside, alleging, among other reasons therefor, that Coleman, the prior mortgagee, had not been made a party, although the existence of his mortgage was known to the bank. The prayer of the petition was rejected, and Finley has appealed to this court. The counsel for the plaintiff in error insists, that this decree ought to be reversed, because it was pronounced in a case in which proper parties were not before the court.

It cannot be doubted, that Coleman ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the court, no decree ought to have been pronounced in the cause, until he was introduced into it. But this fact was kept out of view, until *the decree *307] was pronounced, the sale made, the money paid to the creditor, and the report of his proceedings returned by the marshal. If the manner in which the sale was made, and the money directed to be paid, be unusual and exceptionable, it was done by consent, and the error is not imputable to the court. The only question presented to the judges by this petition, was, whether a decree, completely executed by a sale of the property, and payment of the purchase-money, should be set aside, and the suit reinstated, for the purpose of introducing a party who ought regularly to have been an original defendant, but who was not shown, by any proceedings in the cause, to be concerned in interest, until the decree was made and executed. There would certainly be great inconvenience in such a practice; and if it be admissible in any case, on which the court gives no opinion, it must be where the mischief resulting from a rejection of the petition would be irre-mediabale. This is not shown to be a case of that description. Coleman's mortgage cannot be affected by this decree; his rights cannot be extinguished by it. His suit in the state court will proceed as if this decree had never been pronounced. The purchasers under the decree of the circuit court take the land subject to prior incumbrances, and have, probably, taken this incumbrance into consideration in the price given for the land. But be this as it may, they do not complain, or object to their purchase, in consequence of the cloud hanging over the title. Coleman's rights cannot *be affected; and if Finley has suffered, by selling his land subject to *308] a lien, it is an injury which he has knowingly brought upon himself. This is not, then, a case for such an extraordinary measure as opening a decree made by consent, after it has been carried into execution, on the petition of the party who has given that consent. We do not think the decree is erroneous, because the prior mortgagee was not made a defendant, that fact not having appeared to the court, until the decree was completely executed.

But in the disposition of the money produced by the sale, a small mistake appears to have been made. There were some previous debts due from Finley to the bank, amounting to \$6240, which appear to have been absorbed in the note given for that sum on the 28th of September 1822, payable sixty

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days after date, to secure the payment of which the mortgage deed was executed. If this note carried interest from its date, that fact does not appear, and cannot be presumed. The mortgage deed does not purport to secure the payment of such interest. Yet the decree of the circuit court subjects the mortgaged property to its payment. This error ought to be corrected, and may yet be corrected in the circuit court. It does not affect the sale. In all other respects, the decree is to be affirmed.

DECREE.—This cause came on to be argued, &c.: On consideration whereof, this court is of opinion, that there is no error in the decree for the sale of the mortgaged premises in the bill *mentioned, the same being [*309 made by consent; nor in the final decree confirming the report of the marshal, except so far as it directs that the note in the deed of mortgage mentioned should carry interest from its date, whereas, interest should be computed from the day on which the said note was made payable, which was sixty days after its date. The said decree, therefore, is erroneous so far as respects the computation of interest before the said note became payable, and is so far reversed, and is, in all other respects, affirmed. And the cause is remanded to the said circuit court, that the said decree may be reformed so far as it is herein declared to be erroneous: And the parties are to pay their own costs.

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Statute of limitations.

An acknowledgment of a debt which will take a case out of the statute of limitations, must be unqualified and unconditional.¹

If it be connected with circumstances, which, in any manner, affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown.

Thus, where an action was brought, on a promise in writing to deliver a quantity of powder, and the original *assumpsit* being satisfactorily proved, the defendant relied upon the statute of limitations; *and one witness deposed, that the defendant told him, that the plaintiff need [*310 not have sued him; for if he had come forward and settled certain claims which defendant had against him, the defendant would have given him his powder: to another witness, defendant said, that he should be ready to deliver the powder, whenever the plaintiff settled a suit, which Dr. E. had brought against him, &c.: *Held*, that those declarations did not amount to an unqualified and unconditional acknowledgment of the debt, but that the plaintiff ought to have proved a performance, or a readiness to perform the condition on which the new promise was made.²

Error to the Circuit Court for the District of Columbia.³

February 7th, 1826. This cause was argued by *Swann*, for the plaintiff, citing *Swan v. Sovell*, 2 B. & Ald. 759; *Leaper v. Tatton*, 16 East 420; 1 Salk. 29; *Shuby v. Champlin*, 4 Johns. 461: and by *Jones and Key*, for the defendant, citing *Clementson v. Williams*, 8 Cranch 72; *Bush v. Barnard*, 8 Johns. 407.

¹ *Thompson v. Peter*, 12 Wheat. 565; *Bell v. Morison*, 1 Pet. 351; *Kampshall v. Goodman*, 6 McLean 189; *Georgia Ins. Co. v. Ellicott*, Taney's Dec. 130.

² *Read v. Wilkinson*, 2 W. C. C. 514; *Lons-*

dale v. Brown, 3 Id. 404; *Kampshall v. Goodman*, 6 McLean 189; *Ex parte Cornwall*, 9 Bl. C. C. 114.

³ See 2 Cr. C. C. 252.