a bar to any future litigation, upon the accounts for which they are given.

Again, it is objected, that the award directs an act to be done by strangers. This objection grows out of the direction in the award, that "the late firm of C. W. Karthaus & Co. pay, &c." Whatever might be the force of this objection, if it were true in point of fact, we cannot so regard
*231] it. So far as *appears upon the record, the late firm or house of C. W. Karthaus & Co., and C. W. Karthaus, are one and the same person; or more properly speaking, it does not appear that there is any other person *in esse*, belonging to that firm, than C. W. Karthaus himself. If there be any other person *in esse*, of the late house of C. W. Karthaus & Co., it cannot be truly affirmed, that he, and the house of which he was a partner, are strangers to each other. But we cannot, consistently with the rules of law, presume or intend there is any other; indeed, in support of the award, it may reasonably be intended there is not, as the party objecting was cognisant of the fact, and might have shown it, if true, but has not. The direction that the late firm of C. W. Karthaus & Co. shall pay, unquestionably includes C. W. Karthaus; and no other person appearing to exist, it is equivalent to a direction that he shall pay. This reason is applicable to the last ground assumed by the counsel for the plaintiff in error, for a reversal of judgment; namely, that the replication is insufficient, because, in assigning a breach, it only alleges C. W. Karthaus had not paid. As no other was, or could be, bound by the submission and award, to pay, and he was bound; it was a sufficient assignment of a breach of the condition of his bond, to allege that he had not paid the money awarded in favor of the plaintiffs. Upon the whole, it is the opinion of this court, that there is no error in the judgment of the circuit court, and the same is affirmed, with costs and damages.

Judgment affirmed.

---

*232] *Junius K. Horsburg, devisee of James Henderson, Appellant, *v.* Martin Baker and Hannah his wife, Francis Clark, Robert Boyce and Peter Mason, for himself, and as guardian to Susannah R. Hamlett.

Equity.—Forfeiture.—Discovery.

A court of chancery is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law.[1] p. 236.

After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is obtained, and the plaintiff has no motive for reviving it. p. 236.

A bill had been filed originally for discovery, and afterwards became a bill for relief; the relief prayed for, was a forfeiture; which might be enforced at law; under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismissal should have been without prejudice to the legal rights of the parties, as absolute dismissal might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. p. 236.

Appeal, from the Circuit Court for the District of Kentucky. The facts and the pleadings in the case, are fully stated in the opinion of the court.

---

[1] Steedman *v.* Cooke, 13 S. & R. 172; Funk *v.* Haldeman, 53 Penn. St. 229; Railroad Co. *v.* Railroad Co., 57 Id. 65

Horsburg v. Baker.

The cause was argued by *Wickliffe*, on the part of the appellants—no counsel appearing for the appellees. The following points were stated in the argument, by Mr. Wickliffe.

1. The loan made in 1784, and as further evidenced by the deed of confirmation of 1787, was valid, as between the parties to it; and as Baker and wife are proved, in 1813, to be in possession of the negroes, and of a copy, or the original deed of 1781 is admitted, they are estopped from asserting any title to said slaves, which they may have had prior to that deed.

2. The deed of 1787, having been duly recorded in the proper office, on the 4th of July 1787, was notice to all the world; and the subsequent removal of the slaves out of the state of Virginia, without the knowledge and consent of Horsburg, did not destroy the legal effect of that deed, nor convert the loan into an absolute title, in Baker and wife.

3. Baker and wife cannot rely upon the lapse of time, or the length of possession, to defeat the right of Horsburg, and those claiming under them.

4. The court, in this cause, had jurisdiction upon two grounds; the one, arising from the nature of the contract, and its subject-matter; the other, from the peculiar circumstances of the case, the difficulty of proving and identifying the slave Charlotte and her increase, without the aid of a discovery on oath; and the repeated attempts by the defendants, and the just *fears of the complainant, that the negroes would be secreted, [*233 and removed out of the jurisdiction of the court.

When courts of chancery take jurisdiction upon the ground of discovery, or upon any other ground, they will retain the cause for the purpose of granting full relief. By the act of assembly of Virginia, of 1758, a parol gift of slaves was void. 1 Wash. 330, 331. The parties to a trust of real or personal property, may resort to a court of equity to avail themselves of its benefits. 1 Madd. Ch. 446. Between the *cestui que trust*, and his trustee, the statutes of limitation, or lapse of time, are no bar. 1 Madd. 453; 2 Ves. 680.

Baker and wife were trustees of the slave and her issue, for the persons entitled to the reversion of them, under the deed of Alexander Horsburg; and they were not authorized to dispose of them; and the sale made by them, while the suit was pending, was void as to the *cestui que trust*. 2 Johns. Ch. 441; 4 Ibid. 136. As to jurisdiction in this cause, and it being a case for relief in chancery: 3 Ves. 71. Slaves, the property of the wife, vest in the husband, without being reduced into possession: 1 A. K. Marsh. 517.

Marshall, Ch. J., delivered the opinion of the court.—In the year 1813, James Henderson and his wife filed their bill in the court of the United States for the seventh circuit and district of Kentucky, stating, that Alexander Horsburg, the former husband of the plaintiff, did, by deed, bearing date the 25th day of April, in the year 1787, confirm to Martin Baker and Hannah his wife, for their lives, and the life of the survivor, then residing in the county of Halifax, in Virginia, a negro girl, named Charlotte, previously loaned to them (which deed was recorded), reserving to himself and his heirs, the reversion of the said slave, and her increase; and prohibiting any

alienation of them, under the penalty of forfeiting the loan. This deed was recorded on the 4th day or July 1787, in the court of hustings for the town of Petersburg; the town in which the said Horsburg resided. The bill further states, that the said Alexander Horsburg departed this life in the year 1798, having first made his last will in writing, whereby he bequeathed the residue of his estate to his wife, who afterwards intermarried with the plaintiff, James Henderson. The bill proceeds to state, that Martin Baker and wife have removed to Kentucky, with the slave Charlotte and her increase; whom they profess to hold as their absolute property; and that
*234] the plaintiffs fear, that they will be secreted or conveyed *out of the state, to places unknown. The plaintiffs further allege, that they are unable to prove the identity of the said slaves, and pray that the said Baker and wife may be compelled to discover their number and names; and may be decreed to give security for their forthcoming, when the life-estate should determine. The court awarded an injunction, to restrain the defendants from removing Charlotte and her issue out of the state.

In May 1814, the plaintiff, James Henderson, filed an amended and supplemental bill, stating the death of his wife, and praying that the suit might be continued in his name. The bill also states, that Baker and wife had sold Charlotte and her increase to Francis Clarke and Robert Boyce; who intend removing out of the state, and concealing them. It prays, that the slaves may be rendered to the plaintiff, and that Clarke and Boyce may be restrained from removing them. The court extended the injunction to the other defendants. The defendants, Baker and wife, file their answer denying the loan; and insisting that certain friends of the defendant, Hannah, subscribed the sum of 43*l.* which was placed in the hands of Alexander Horsburg, to purchase the slave Charlotte for her. They insist on their title, but give a full description of all the descendants of Charlotte. The defendants, Clarke and Boyce, also deny the right of the complainant.

In 1817, the plaintiff again amended his bill, and charged, that Baker and wife had brought the deed from Horsburg with them into Kentucky, as their title to Charlotte.

In November 1819, Junius K. Horsburg appeared, by his attorney, and leave was given him to file a bill of revival. The bill is filed by the said Horsburg, as the administrator and devisee of James Henderson, and as the heir and only child of Mrs. Henderson, the wife of the said James, and the former wife and devisee of Alexander Horsburg. The bill recites the proceedings in the cause; exhibits the will of James Henderson, and his letters of administration, and charges the sale to Boyce and Clark, since the institution of this suit, who purchased at a low price, with the intention of removing the slaves beyond the jurisdiction of the court.

In answer to this bill, Baker and wife say, that, in the year 1773, Thomas Simmons and others, named in the answer, contributed 43*l.* for the purpose of purchasing a negro girl, for the said Hannah, which sum was placed in the hands of Alexander Horsburg, as their agent, with instructions to convey the said negro to the defendants, for their lives, and to their children, after
*235] the death of the survivor. They believe *this plan was adopted, for the purpose of protecting the property thus given by her friends, from the creditors of her husband. Under these instructions, Charlotte was purchased, and delivered to them. In the year 1787, after the defendants had

been in peaceable possession of Charlotte, about fourteen years; the said Horsburg, without any previous communication of any sort, sent to them, then residing in Halifax, about 120 miles from Petersburg, the deed; a copy whereof is annexed to their answer. They also say, that on the same day, the said Horsburg executed another writing, obliging himself to convey Charlotte and her increase, after the death of the defendants, to their children; to which they refer, as being filed in the office of the circuit court for the county of Garrard. They also refer to a letter, written by the said Horsburg, which they say was given up, to be filed in the cause.

In May 1824, leave was given to file an amended bill, and the cause was sent to the rules for further proceedings. The amended bill charges, that Clarke and Boyce purchased, not only pending the suit, but with knowledge in fact thereof; that they purchased the said slaves for a trifle, less than half their value, in consequence of an agreement to take upon themselves the risks of the title.

The deposition of John T. Mason states, that the deponent, as counsel for the original plaintiff, called on the defendants, Baker and wife; who, after some time, admitted that they claim Charlotte and her offspring, under a deed, from Alexander Horsburg, which they showed him. It is a copy, or the original, of the deed filed in the cause. They also showed the witness several other papers and letters in relation to the subject, and particularly two letters from Alexander Horsburg, which he believes to be the same, or to the same purport, with those filed in the cause.

The copy of the deed of 1787, recorded in the court for the town of Petersburg, is filed, together with the will of Alexander Horsburg, and of James Henderson; but neither the subsequent deed, stated in the answer of Baker and wife to have been executed by Alexander Horsburg, for the purpose of securing Charlotte and her offspring, to the children of Baker and wife, nor the letters from Horsburg, are found on the record.

The last amended bill was taken for confessed, and the cause set down for hearing. The court directed the bill to be dismissed.

Baker and wife being alive, the plaintiff could have no pretence to recover the slaves claimed by the amended bill, except under the clause of forfeiture for alienation, which the deed contains. *As a court of chancery is not the proper tribunal for enforcing forfeitures, no decree [*236 for the purpose of effecting that object, ought to have been made. But the plaintiff had a right to apply to the court of chancery for a discovery, in order to enable him to proceed at law, either immediately, or on the death of Martin Baker and his wife; and also, for an injunction, to restrain the tenants for life from removing the slaves out of the country. The decree dismissing the bill, entirely defeats both these objects. The bill, therefore, ought not to have been dismissed, unless the plaintiff had failed to show any title which might be litigated in a court of law. The court will not, in this case, decide upon the title; but is of the opinion, that it authorizes the plaintiff to come into a court of chancery to pray for a discovery; and as there was reason to fear, that the property would be removed, to obtain security for its forthcoming, if the title should be determined in his favor. This bill was, in its origin, merely a bill of discovery, and *quia timet.* Before the answer was filed, the original defendants are alleged to have sold the slaves, and by that act, to have forfeited their life-estate The amended bill, there-

fore, prays a decree for the slaves themselves. After this bill was filed, the defendants, Baker and wife, answer; and make the discovery with respect to the descendants of Charlotte. In this state of the cause, the plaintiff dies, and his administrator and devisee files a bill in the nature of a bill of revivor. After answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived. 1 Madd. 217; 1 Dick. 133; 10 Ves. 31. Its object is obtained, and the plaintiff has no motive for reviving it. But such a bill ought not to be dismissed. 1 Madd. 217; 1 Atk. 286.

The court might properly order, that no further proceedings be had in the case. Had this bill, then, been merely a bill of discovery, at the death of the original plaintiff, it ought not to have been sustained in the name of his devisee; because the discovery was made. But it had then become a bill for relief. The relief, however, prayed, is for a forfeiture, which might have been enforced at law. The present plaintiff was in possession of all the evidence which was necessary to support his action at law, and was not driven into a court of chancery for the purpose of obtaining its aid. In such circumstances, it was proper to dismiss the bill, so far as it sought relief on the ground of forfeiture; but it ought to have been dismissed, without prejudice to the legal rights of the plaintiff; an absolute dismissal may be considered as a decree against the title.

*237] The decree, therefore, is to be reversed, and the cause *remanded, with directions to dismiss the bill, so far as it asks relief, without prejudice. The injunction may be continued in the discretion of the court, till the plaintiff has time to institute a suit at law.

This cause came on, &c.: On consideration whereof, this court is of opinion, that after the discovery sought by the original bill was obtained, the suit ought not to have been revived, nor ought the bill, in the nature of a bill of revivor, to have been entertained, because the relief sought by that bill, was solely to enforce a forfeiture, to which the plaintiff's title, if he has any, is complete at law. It was therefore proper to refuse the relief for which that bill prayed; but as a general decree for a dismissal on the merits, may be considered as a decree against the title, on which the court ought not to have decided, and the bill ought to have been dismissed, without prejudice. It is, therefore, the opinion of this court, that there is error in so much of the decree of the circuit court, as dismissed the bill of the plaintiff generally; and that the said decree ought to be reversed, and the cause remanded to the circuit court, with directions to dismiss so much of the plaintiff's bill, as prays relief on the ground of forfeiture; and to continue the injunction, at the discretion of the court.