

King v. Thompson.

the sales may all be good, but as one moiety thereof was not paid at the time of the judgment, it does not judicially appear, that, even at that time, they had funds out of which the United States were entitled to judgments. If the remaining moiety of the notes has been since paid, the United States will then have a legal claim thereon for their debts. For this reason, the judgment of the district court must be reversed; and the cause sent back for further proceedings.

In regard to the bill of exceptions, as the cause was, by consent, not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the district court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause, as if it were not in the record. It would not, however, of itself, constitute any ground for a reversal of the judgment. But we are of opinion, that the evidence was properly admissible as proof positive to the syndics of the debts due to the United States; and if the fact was material, to enable the court to render suitable judgment on the statement of the parties, it is not easy to perceive, why it should have been objectionable. Without this evidence, there seems to be enough in the record, to show that the syndics had full notice of the debts due to the United States. They do not even set up in their answers, any want of notice, as a defence. But in the present state of the case, this matter is the less important, because they now have the most ample notice of the debts due to the United States; and these will, at all events, be payable out of the residue of the sales, when it is received.

With the question of costs, this court has nothing to do; and as the judgment is reversed for another cause, it becomes immaterial to be considered.

THIS cause came on to be heard, on the transcript of the record *203] *from the district court of the United States for the eastern district of Louisiana, and was argued by counsel: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said district court in this cause be and the same is hereby reversed, and the cause is remanded to the said district court for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.(a)

*204] *GEORGE KING'S HEIRS, RAPHAEL SEMMES and others, Appellants,
v. JOSIAH THOMPSON and ELIZABETH his wife.

Fraudulent conveyances.—Equitable lien.

A few days after the marriage of J. Thompson with the daughter of George King, in 1812, the latter, residing in Georgetown, in the district of Columbia, and having a large active capital, and a large real estate there, proposed to grant to J. T. a house and lot in Georgetown, then much out of repair, and untenable, provided he would repair the same, so as to make it a comfortable residence; and saying, that he intended the property for his daughter; this proposition was accepted by J. T., who repaired the property, expending upwards of \$4000 on the same; and he, with his wife, resided on it about four years. Before his removal from it, a correspondence

(a) This case was decided on the 21st of February 1834.

King v. Thompson.

on the subject of the conveyance of the property to J. T., or to J. T. and his wife, took place, which ended in propositions to convey the property, on certain terms, beneficial to J. T. and wife, in pursuance of, and intended to be in execution of, the original offer of G. K. to J. T., made immediately after the marriage; no conveyance was made. J. T. and wife removed from Georgetown, and G. K. collected and paid to J. T. the rents of the property, for sometime after their removal; G. K. died in 1820, insolvent; his debts amounted to \$36,000, and his whole estate, both real and personal, when sold, did not pay thirty-nine per cent, of his debts; the property claimed by J. T. and wife, in this case, was sold for \$1600, by a trustee, under a decree in chancery, obtained by the creditors of G. K., but the sale had not been ratified.

From the occupancy of the property, and the amount of money expended in improving it, it was certain, that there was an understanding G. K. and J. T., that the property, in some manner, should be possessed and enjoyed by J. T. and his wife; the evidence, however, showed, that G. K. did not intend to vest it absolutely in J. T., but that the value of it, before the improvements, should, in some form, be secured to the wife of J. T. Whatever uncertainty may have existed as to the terms of the contract, J. T. acted under it, in taking possession of the property, and expending a large sum of money on it.

J. T. and wife filed a bill against the heirs of G. K., and the trustee of the creditors of G. K., claiming a conveyance of the property, and for general relief. In no point of view, could such a contract as that in this case be considered voluntary; there was not only a good consideration, that of natural affection, but a valuable one; to constitute a valuable consideration, it is not necessary that money should be paid; but if, as in this case, it be expended on the faith of the contract, it constitutes a valuable consideration.

In testing the validity of the transaction of 1812, the subsequent fall of property in Georgetown, or the failure of King, cannot be taken into view; the inquiry must be limited to his circumstances at that time. It is not shown, that the persons for whom he was bound, as indorser, were then unable to pay the respective sums for which he was responsible; [*205 and it would be improper to consider those sums as debts due by King; he was responsible for their payment, on certain contingencies; but the fact that his credit remained unimpaired, for several years after the contract, shows, that neither his credit, nor the credit of those for whom he was indorser, was considered doubtful. In this state of facts, King was in a condition to dispose of the house and lot, not worth more than \$2500, on the terms stated.

The terms of the contract not being sufficiently established by the evidence, the court decreed, that the property should be sold, and the proceeds of the sale should be first applied to the payment of the money expended by Thompson in making improvements on the property; and the balance, if any, paid over for the benefit of the creditors of George King—Thompson not to be charged with rent of the premises, while he occupied them, nor with the rent collected and paid to him, after he removed.

Thompson v. King, 3 Cr. C. C. 662, reversed.

APPEAL from the Circuit Court of the District of Columbia, and county of Washington. The appellees, Josiah Thompson and wife, on the 14th of June 1826, filed a bill on the equity side of the circuit court, alleging that George King, in October 1812, a few days after the marriage of Josiah Thompson with Elizabeth, the daughter of the said George King, proposed to grant to the said Thompson and wife, a house and lot of ground in Georgetown, if Thompson would repair and make it comfortable for a residence; at the same time, informing Thompson, he intended the property for his daughter Betsey. The bill alleged, that this offer was accepted by Thompson, and that he made repairs to a large amount, and that he occupied the property, after it was repaired, until 1816, when he removed to the western country. At the time of this gift, the bill alleged, that George King was in good credit, and in prosperous circumstances; it being believed, he had a large capital, and that he owned a valuable real estate, which, after the payment of his debts, not large in amount, would enable him to provide handsomely for his children.

In 1816, before Josiah Thompson removed from Georgetown, a cor-

King v. Thompson.

respondence took place between him and George King, which was annexed to the bill ; and which was referred to as evidence of the contract, under which Josiah Thompson took possession of and improved the property.

*The first letter was from George King to the complainant, Josiah *206] Thompson, and was dated—

“Georgetown, 17th of April 1816.

“ Mr. Josiah Thompson :

“ Sir :—I am informed that you are in suspense in regard to the property you now live on, and I think it a duty incumbent on me to let you know the terms I mean to let my daughter Betsey have it. I hold myself ready, and hold myself bound, to give a deed to a trustee, who shall hold it in trust for her and yourself during your lives ; and then, after the death of you both, to revert to her lawful heirs, her children, if any she has, if not to my heirs ; but you may say I wrong you in this way, by not letting you know before now, that I did not mean to deed to you, instead of keeping it for her, and on that account you have put more improvements than you would have done, had you have been informed before. You may now sell the property, and all you can get over three thousand dollars for it, you can do as you like with ; but that sum must be kept sacred for the use of your wife, in the hands of trustees, for her support, in case she might ever need it, the use of which, as the income, will be at your disposal during your own and her life, and then to her heirs as before ; and other terms than this it will be useless for you to look for, without you find two just fathers that shall say I ought to do otherways ; and, after hearing their reasons on the subject, perhaps, I may alter my opinion. Yours, with due esteem,

GEORGE KING.”

In reply to this letter, after remonstrating against making the conveyance of the property in trust, the complainant, under date of the 26th of April 1816, made three proposals to George King.

“ 1. Let the property be valued as to its worth at the time it was put into my possession, and I will pay the amount over to you, which you may then hold for my wife, or give it to whom you please ; for, when I married her, I was not influenced by any pecuniary motive, and as she has never *207] given *me reason to regret my choice, I surely will not allow a consideration like the present to create the smallest uneasiness. 2. Let the improvements be estimated ; pay me the amount, and then I will relinquish all claim, and you will be at liberty to dispose of it as you may deem proper. 3. Execute a deed to your daughter at once in fee-simple, and I will, for her benefit and advantage, cheerfully give in all that I have expended ; this will at once be making her the guardian of her own property, and, if it should please God to call me first, will be to her a support. Thus, my dear sir, you will find, that I am not disposed to dispute about the original value of the property ; for, though I consider it as certainly the property of my wife from the delivery of it into my possession, as any subsequent act could make it, and from the manner I was allowed and encouraged to go on with the improvements ; yet I am willing at any moment to bind myself to abide by either of the above proposals.”

To these propositions, George King, on the 29th of April 1816, replied :
“ I make no hesitation in complying with your first proposal, for it is just

King v. Thompson.

what I proposed in my first to you, and I will do it another way, giving you your choice, viz., I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then all below that I will deed to Betsey, provided she will never deed it, nor otherways dispose of it, during her life, only by will, which she shall always be at liberty to make, when and how she pleases.

GEO. KING."

The bill proceeded to state, that the complainant, Josiah Thompson, was satisfied with the proposition contained in the letter of the 29th of April 1816, and that at the removal of the complainant from Georgetown, he rented the property, and constituted George King his agent to collect the rents of the same, which duties he continued to perform, without advancing at any time a claim to the same. On the death of George King, the legal title to the property descended to his heirs, no conveyance having been made of it *to the complainants; and the bill prayed for a decree, [*208 that the heirs of George King convey the said legal title to the complainants, in fulfillment of the agreement of George King; and in the event that the same, for any reason, could not be done, that the said property stand charged to the amount of the repairs and improvements put on it by the complainants; and for other and further relief, &c.

After the decease of George King in 1830, largely in debt, to the amount of \$36,000, and insolvent, his whole real and personal estate not being sufficient to pay his debts, in fact not more than thirty-nine per cent. of his just debts; his whole real estate was sold by Raphael Semmes, appointed trustee by the court of chancery for that purpose, at the instance of George King's creditors; and among the rest the property now in controversy was sold for \$1660 to John W. Baker. John W. Baker deposited \$1190.18, part of this purchase-money, in the Mechanics' Bank of Georgetown, in 1826 and 1827, to remain until the termination of this suit; the first deposit was made on the 26th of July 1826, after the filing of this bill.

In the suit instituted by the creditors of George King, to compel a sale of his real estate for the payment of his debts, all the heirs of George King were made parties, and among the rest, the said Thompson and wife. The sale to Baker never was ratified, in consequence of this suit instituted by Thompson and wife. The heirs of George King (his estate being insolvent) feeling no interest in the suit, filed their answers to the bill of Thompson and wife, neither admitting nor denying the facts alleged, submitting themselves to the judgment of the court.

Raphael Semmes, the trustee for George King's creditors, on petition, and by leave of the court, was made a defendant; and allowed to contest the claim set up by Thompson and wife, as was also Charles King, one of the principal creditors. They denied the pretended contract and gift set up in the bill; denied the improvements charged to have been made on the property; averred the indebtedness of George King, at the time of the pretended gift, to a large amount, and the continuance of such indebtedness to the same creditors up to the time of his death; and the unlawfulness and fraud in law of such gift, if any *could be proved; and the insufficiency of George King's whole estate, real and personal, to pay his [*209 just debts; and claimed the proceeds of said house and lot, for said creditors of King.

King v. Thompson.

Charles King, as a creditor, also filed a bill against Josiah Thompson and wife, charging in substance the same facts ; to which bill, Thompson and wife responded, re-asserting in substance the matters alleged in the original bill. They admitted, in this answer, that they were married on the 6th of October 1812, and that the alleged gift of the house and lot was made after the marriage.

Evidence was taken by the complainants and the respondents, which is fully stated in the opinion of this court ; and on the 5th of April 1832, the circuit court, all the parties having been heard together, pronounced a decree directing a conveyance in fee of the property, claimed in the bill, to Josiah Thompson ; from which decree, this appeal was taken.

The case was argued by *Dunlop* and *Key*, for the appellants ; and by *Coze*, for the appellees.

For the appellants, it was contended, that the decree of the circuit court was erroneous, and ought to be reversed :

1. Because the letters of George King do not import any contract, binding him or his heirs to convey the property in fee to Thompson, nor does Thompson's bill pray such conveyance. Because the letters and proof in the cause, show no contract concluded, or ascertained with such certainty, as to warrant a decree for specific execution.

2. If there was a contract of gift, it was made after marriage, without any valuable consideration, was voluntary, and cannot be enforced even against George King's heirs. The said gift was fraudulent and void.

3. Because George King was indebted, at the time of the alleged gift, and so continued up to the time of his death ; and his creditors, at the time of the gift, represented by Semmes the trustee, are yet unpaid, and the said King's estate insolvent.

4. The improvements made by Thompson gave him no lien on the property, nor any claim to a conveyance to himself in fee. If made, they constituted a personal claim against George *King, more than set off by *210] the enjoyment and occupation of the house and lot for many years, and by Payne's debt, paid for Thompson by George King's estate.

Dunlop, for the appellants, contended :—1. That there was no contract of gift proved, or none such as Thompson's bill and the decree below enforced. The decree is for a deed, in fee, to Thompson himself. The letters (and they are the only evidence of the alleged gift) do not show any engagement on the part of George King to convey to Thompson. The letters show a resolute determination on the part of King, not to deed to Thompson ; but to give, what he meant to give, to Thompson's wife, the daughter of King. The letters show the parties to be still in treaty about the terms. The letter of the 29th of April, 1816, contained an alternative offer ; and if Thompson assented, which of the alternatives did he choose ? It is clear, that no definite contract was concluded—none so specific, that a court of equity could decree its performance. Moreover, the court has decreed neither of the alternatives, but a thing entirely different, and never in the contemplation of the contracting parties.

But if the contract was sufficiently proved, it was founded on the consideration of love and affection only, was voluntary, and cannot be enforced

King v. Thompson.

even against the other heirs of George King. The other heirs of George King have the legal title, and having equal equity with the complainants, Thompson and wife, no court of equity would disturb them. As between the parties, a court of equity will not interfere to set aside a fair voluntary conveyance. But it is a clearly settled rule, that chancery will not decree a specific performance of a mere voluntary covenant, without consideration, to make a conveyance; and this the court is here asked to do. *Black v. Cord*, 2 Har. & Gill 100; 1 Madd. Chan. 414-15; *Osgood v. Strode*, 2 P. Wms. 242; Francis's Maxims 14, ch. 15.

It is said, that the contract was ante-nuptial, and that marriage is a valuable consideration. There is no proof of this fact, and the *onus* of proof is on Thompson and wife. But if there was any ante-nuptial promise, it was by parol, and therefore, void. It could not be valid, unless reduced to writing before *marriage. *Reade v. Livingston*, 3 Johns. Ch. 488-9; and the cases there cited. The proof, however, is, and so Thompson and wife in their own bill say, that the promise was post-nuptial.

It is also urged, that the improvements and repairs constituted a valuable consideration. In the first place, the repairs were injudicious, extravagant, and not such as George King had authorized. They could, so far as they were lawful and authorized, only amount to a personal claim on George King. At all events, these repairs could be no consideration for the original value of the property, that is to say, for the value of the property before the improvements were put upon it. The repairs did not inure to the use of King; and Thompson and wife have had the benefit of them, in the occupation of the property for many years. The bill itself does not ask for a conveyance on the ground of repairs, but goes solely upon the contract of gift by the father to the daughter. If repairs could give a title, a parent in debt might, on this pretence, and in defiance of creditors, settle all his estate on his children.

2. If there was a gift, and it could be enforced in equity against King's heirs, it is void against creditors. George King was largely indebted, at the time of the pretended gift. Many of those who were creditors at the time continue to be creditors to this day, and are now resisting Thompson's claim. As against them, the contract is absolutely fraudulent and void. Indebtedness at the time is not only a badge of fraud, but as to such creditor, continuing to be a creditor, *per se*, avoids the contract or conveyance. The evidence is clear, that the creditors now before the court were many of them creditors at the time of the gift. *Reade v. Livingston*, 3 Johns. Ch. 497; *Sexton v. Wheaton*, 8 Wheat. 241-4, *et seq.*; *Lessee of Ridgeway v. Underwood*, 4 W. C. C. 129; *Ridgeway v. Ogden*, *Ibid.* 139. If the indebtedness of King was only evidence of fraud, and not conclusive to avoid the deed, the record shows him to have been so much involved, at the time of the gift, as to lead a court of equity to set it aside for fraud. It cannot be said to *have been a fair transaction. He did not leave enough undisposed of, to pay his creditors at the time. Subsequent creditors, under such circumstances, could impeach it for fraud, and *à fortiori*, creditors at the time. *Hinde v. Longworth*, 11 Wheat. 199.

Coæ, for the appellees.—The original bill asks either a conveyance in

King v. Thompson.

fee, in execution of the agreement between George King and Josiah Thompson; or that the value or cost of the improvements shall be decreed to be a lien upon the property on which they were made. The cost of the improvements was larger in amount than the property would now bring, and thus the result of either decision would be the same. The precise form in which the relief sought in the circuit court by Thompson and wife shall be given, is, therefore, altogether immaterial.

The appellants, in their first petition, assert that the letters of George King do not import a contract binding him or his heirs to convey the property in fee to Thompson and wife; nor does the bill ask for such a conveyance. They say, the letters and proof in the case show no contract, concluded or ascertained, with sufficient certainty, to warrant a decree for specific execution. The appellants are not authorized to select parts of the evidence, and allege for error, that they, when taken alone, do not sustain the decree. Whether the conveyance be directed to be made to Thompson, or to him and his wife, is not a matter for the appellants. It is a sufficient answer to their claim, that it can properly be made to either or both. This court is competent to rectify the decree in favor of those entitled.

As to the ground, that no proof is shown for a specific performance; it is answered, that the averments and proof are sufficiently distinct. 1. As to the property embraced in the arrangements. 2. As to the nature of the estate to be created. 3. As to the consideration. The only doubt is as to the respective interests of Thompson and his wife; this, as has been said, is not a matter in which the appellants have any interest. The heirs of George King have not appealed; the pleadings show this.

*213] The appellants' second ground for reversal is, that if there *was a contract or gift, it was after marriage; and without any consideration; and was voluntary, and cannot be enforced against George King's heirs. That the gift was fraudulent and void. This exception is given in a questionable form. It does not assert, that the gift was gratuitous, or that it was purely voluntary. But if it did, there is no rule in equity that such a gift cannot be enforced in equity. To the word "voluntary," different significations are given by courts of equity. This case may not be called a gift. It was a contract executed, in everything but a conveyance, and this equity will enforce. Although it sometimes comprehends all conveyances without any pecuniary consideration, or valuable consideration; yet when it is used to indicate that species of conveyance which equity will not aid or enforce, it means that conveyance which has no meritorious consideration, either good or valuable. Equity is remedial only to those who come in upon an actual consideration. But there are precedents of relief where it is a provision for children. Fonbl. b. 1, c. 5, § 2, p. 348-9; also note to Sugd. on Powers 275-6; *Hardham v. Roberts*, 1 Vern. 132; *Thompson v. Attfield*, Ibid. 40; *Colman v. Sarrell*, 1 Ves. jr. 50; *Minturn v. Seymour*, 4 Johns. Ch. 497, 500; *McCall v. McCall*, 3 Day 402; *Hinde's Lessee v. Longworth*, 11 Wheat. 213.

But the consideration in this case stands on a higher footing than that of being simply meritorious; the contract was mutual and executory. The consideration was actually paid by Thompson; he laid out large sums in valuable improvements, and owing to the depreciation of the property, these sums cannot be reimbursed. To make a consideration valuable, there need

King v. Thompson.

be no pecuniary benefit passing to the vendor. Anything injurious or detrimental to the other party, is equally operative in making the contract binding. Roberts on Frauds 15. Such a contract, on such a consideration, carried into actual execution by Thompson, by the expenditure of his money, by taking possession, and continuing in possession from 1813 to 1835, cannot now be disturbed.

It is assigned as a reason for reversing the decree of the circuit court, that the gift was fraudulent and void. *The meaning of this is, that the gift is void, because it is fraudulent. But in the pleadings there [*214 is no allegation of fraud. This is a necessary averment, and is uniformly required. 6 Har. & Johns. 24. There is no ground assigned upon which the conclusion of fraud can be based. It has been settled by this court, that a deed, though voluntary, is not, in general, void as against subsequent creditors. *Sexton v. Wheaton*, 8 Wheat. 229. The only creditor who has intervened, is Charles King, and he was not a creditor at or near the time of this contract. In no part of the record does any ground appear on which he could impeach the validity of the proceeding. The whole proceedings in his suit to enforce payment out of the real estate, were insufficient and informal. No administration account appears to have been settled; no deficiency of real estate has been established. There is no allegation than any other creditors are interested. One creditor cannot, on his own behalf solely, proceed against the real estate of a deceased debtor. 4 Simons 37.

The last point insisted upon by the appellees is, that the expenditures by Thompson constituted no lien on the property. There is no fraud imputed to Thompson and wife. Their conduct is unimpeached and unimpeachable; they acted fairly; their possession was notorious; taxes were charged to them in the assessments of the property, and the money for the repairs was advanced in good faith. This, then, is a far stronger case than that of *Harding v. Handy*, 11 Wheat. 103. In that case, the court allowed the property to which a title had been obtained by improper means, to stand as security for the repayment of the expenditures, &c. In this case, the form of the decree, save as to costs and expenses, is immaterial. It is admitted on all hands, that the property cannot reimburse the expenditures for improvements. If the appellants will pay the expenses of a reference to a master and a sale, the appellees are content with a decree to receive merely the debt actually due.

Key, in reply, insisted on the insolvency of George King *at the time of the proposition to Josiah Thompson. The evidence showed [*215 that debts due to the banks in the district of Columbia, and indorsements on notes, existed at the time, which were not paid during his life, and created the great deficiency in his estate, which is not now denied. The proceedings of the plaintiffs in error, were to subject the whole real estate of George King to the payment of his debts; there being a deficiency of personal assets. The first proceeding by the appellees in their original bill, was to obtain from the heirs of George King, a specific performance of an alleged contract. Their bill was not framed on the ground that it was a contract for a valuable consideration.

He denied, that if there were no creditors of George King unpaid, there

King v. Thompson.

was any contract proved which would be sustained by a court of equity, and which was binding on the heirs of George King.

McLEAN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of Columbia. The defendants here, who were the complainants in the circuit court, filed their bill, stating, that in the year 1812, they were married; and that the wife of the complainant is the daughter of George King, who at that time lived in Georgetown, and was extensively engaged in a profitable mercantile business. That his credit was high, and complainants believe he was possessed of a large active capital; and, in addition, had a large real estate, consisting of houses and lots in Georgetown. That it was universally believed, he would have a large surplus property, after paying his debts, which would enable him to provide handsomely for his children. That a few days after the marriage, George King proposed to grant to the complainant, Thompson, a house and lot on Cecil alley, in Georgetown, which was very much out of repair, and almost untenable, provided he would repair the same so as to make it a comfortable residence; and that the said King at the same time stated, he intended the property for the wife of the complainant. The complainant accepted the property, and expended upwards of \$4000 in making repairs of the house, and other *improvements on the lot. That *216] he occupied it as a residence about four years, and then removed to the western country. Before his removal, a correspondence took place between him and the said King in relation to the title; and the complainant made King his agent to collect the rent, &c. The complainant further states, that the said King died intestate; leaving, in addition to the wife of the complainant, certain children who are made defendants; and a decree for a legal title is prayed, or if that cannot be decreed, that the property may stand charged to the amount of the repairs and improvements.

George King died in the year 1820, insolvent. His debts amounted to \$36,000, and his whole estate, both real and personal, when sold, did not pay more than thirty-nine per cent. of his just debts. The property claimed by the complainant was sold for \$1660, by a trustee, under a decree of chancery, obtained by the creditors of George King, but the sale has not been ratified. Raphael Semmes, the trustee of George King's creditors, and Charles King, one of the principal creditors, filed their answers to the bill of the complainant, in which they deny that the improvements were made on the property, as set forth in the bill, and insist, that George King, at the time of the pretended gift, was embarrassed and unable to pay his debts; and they insist, that the right set up by the complainants is fraudulent and void as against creditors. There are some irregularities in the record which it is not material to notice, as these statements show the points to which the evidence applies.

The first inquiry is, whether a contract was made between the complainant and George King for the property in question? It is insisted, by the complainant's counsel, that the correspondence between the parties, which is contained in the record, establishes the contract. The first is a letter from George King to the complainant, dated 17th April 1816. In this letter, King says, "that in order to remove any suspense in regard to the property on which the complainant then lived, that he held himself bound

King v. Thompson.

to give a deed to a trustee, who shall hold it in trust for the complainant and his wife, during their lives," &c. *This letter is answered by the complainant, 26th April 1816, in which he declines the terms proposed, [*217 and suggests the following: 1. Let the property be valued at the time it was put into his possession, and that he would pay the amount over to King, &c. 2. That the improvements should be estimated, and King, on paying the amount, should receive a relinquishment of all the right of the complainant. 3. That a deed should be executed for the property to the wife of the complainant. On the 29th of April 1816, King replies, "I make no hesitation in complying with your first proposal, for it is just what I proposed in my first to you, and I will do it another way, giving you your choice, viz., I will deed the dwelling-house and all above it to you, and about twenty feet below it; and then all below that I will deed to Betsey," the wife of the complainant, "provided she will never deed it, or dispose of it, except by will, which she shall always be at liberty to make, when and how she pleases." On the 14th of August 1819, King writes to the complainant, "Mr. Kennedy has left your house, since the first of July last, and I have not been able to get a tenant since. Houses are very dull here now; rents have fallen very much," &c. And on the 23d of March 1831, George King, son it is presumed of George King, deceased, writes to complainant, "I am sorry to inform you that Mr. Jacob Payne has laid an attachment on your property in Georgetown," &c., referring to the property in controversy.

This is all the evidence to show a contract, except what might be presumed from the occupancy and improvement of the house and lot. Specific propositions were made by each party, in regard to the title of the property but it does not satisfactorily appear, that either was finally accepted. The complainant, in the first place, objects to the conveyance of the property to a trustee, for the benefit of his wife; and he proposes to pay to King the value of the property at the time it was put into his possession, which sum, at the pleasure of the donor, might be invested for the benefit of complainant's wife. To this, King replies, that he *has no hesitation in [*218 accepting the proposal, but he accompanies this acceptance with a proposition to deed the dwelling-house, with a certain part of the lot, to the complainant, and the residue of the lot to his wife. Whether this last proposition, or the one made by the complainant, and assented to by King, formed the contract, is uncertain, or indeed, whether any definite agreement was finally made. From the occupancy of the property and the amount of money expended in improving it, there can be no doubt, that there was an understanding between the parties, that the property, in some manner, should be possessed and owned by the complainant. The evidence, however, shows, that King did not intend to vest the property absolutely in the complainant; but that the value of it, before the improvements, should, in some form, be secured to the complainant's wife.

This court are now called on to decree a specific execution of this contract; and what are its terms? Shall the title be vested in fee in the complainant, without condition? or shall a part of the property be vested in trust for the benefit of his wife? or, shall the title be vested in the complainant, on his paying into the hands of trustees, for the benefit of his wife, the value of the property when he first received it? The evidence does not afford a satisfactory answer to any one of these inquiries. It is

King v. Thompson.

impossible, therefore, for the court to decree a title as prayed for in the bill, as the evidence fails to establish the specific terms of the contract.

But it is insisted, that this arrangement or contract, if proved, was void as against the heirs of King, and especially, as against his creditors; on account of the indebtedness of King at the time, and his subsequent insolvency. Although a contract is not proved with sufficient certainty, as to its conditions, to authorize a specific execution of it, yet there can be no doubt, there was an agreement between the parties, which induced the complainant to enter into the possession of the property, and to expend large sums of money upon it, as if it were his own; and when he left it and removed to the western country, it was rented as his property, and George *219] King acted as the agent of the complainant. And *the property seems to have been considered as belonging to the complainant, by the heirs of George King. Whatever uncertainty may exist, as to the terms of the contract, there can be no question, that the complainant acted under it, in taking possession of the property, and expending a large sum of money in its improvement. In no point of view, could such a contract be considered voluntary. There was not only a good consideration, that of natural affection; but a valuable one. To constitute a valuable consideration, it is not necessary that money should be paid: but if, as in this case, it be expended on the property, on the faith of the contract, it constitutes a valuable consideration.

The debts of George King for the years 1812, 1813 and 1814, amounted to about \$13,000 or \$14,000, of which \$11,000 were due to the Bank of Columbia. And the average amount of his debts, from 1812, until his death, was about the sum of \$13,000. In 1812, and for some years afterwards, George King was supposed to be rich. For his house on High street, he refused \$12,800. The whole amount of his property was estimated at \$60,000 or more. He was indorser on accommodation notes for about \$20,000, at the above period. At this time, the property claimed by the complainant was not worth more than \$2000 or \$2500. Its value was increased three or four times this sum by the improvements. In 1827, it appears, by an exhibit of the debts due by the estate of George King, including interest, that they amounted to the sum of \$36,418.10. But many of these debts seem to have been contracted subsequent to the time that the property in question was placed in the possession of the complainant. It appears also, the property of which King died possessed, did not pay forty per cent. of the debts due by the estate. And that he retained the greater part, if not the whole of his real estate, except the lot claimed by the complainant, until his decease. But it seems, from the prices fixed upon this property in 1813, and those for which it was sold, that there must have been a great deterioration in the value of it. Under the above circumstances, it is insisted by the appellants, that the contract with the complainant, by George King, for the above property, was fraudulent.

*220] It has already been observed, that the money expended in the improvement of this property, constituted a valuable consideration. The contract, therefore, if proved, so as to entitle the complainant to a decree for a specific execution, could not be avoided, on the ground that there was no consideration. At the time this property was received by the complainant, King was supposed to be rich. His property was esti-

King v. Thompson.

mated at \$60,000; his debts did not exceed \$13,000 or \$14,000, and his indorsements were about \$20,000. That his credit stood high, is shown by his indorsements, and the standing accommodation given to him in the banks. So high did he stand as a man of property and business, that it was deemed a valuable object to obtain his services as director in one of the Georgetown banks. There seems to have been no diminution of his credit or means, for several years after the transaction with the complainant. In testing the validity of that transaction, the subsequent fall of property or failure of King, cannot be taken into view. The inquiry must be limited to his circumstances at the time. Was King, when this property was received by the complainant, in a failing or embarrassed condition?

It is not shown, that, at this time, the persons for whom he was bound as indorser, were unable to pay the respective sums for which he was responsible; and it would be improper to consider these sums as debts due by King. He was responsible for their payment, on certain contingencies; but the fact that his credit remained unimpaired for several years after the contract with the complainant, shows that neither his credit nor the credit those for whom he was indorser, was considered doubtful. In this state of facts, King surely was in a condition to dispose of a house and lot, not worth more than \$2500, on the terms stated in the bill.

There appears to have been no fraudulent intent in the case; no disposition to defeat the claims of present creditors, or to cover the property from future demands. It seems to have been a *bonâ fide* transaction; and one which neither a court of law nor of equity could refuse to sanction. And if the terms of the contract were established, so that this court could decree a specific execution of it, they would pronounce such a decree. *But [*221 as a specific performance cannot be decreed, the inquiry remains, whether the complainant has a lien on the property for the money he expended in improving it.

The counsel for the appellant do not controvert the right of the complainant to a just remuneration for the valuable improvements he made; but they insist, that he must exhibit his claim as a general creditor of the estate of George King; and that from such claim there should be deducted a reasonable rent for the time the property was in his possession. This claim for improvements by the complainant, is founded upon the most equitable considerations. At the instance of George King, his father-in-law, the complainant entered into the possession of this property; and under a full belief that it would be secured to him as his own, he was induced to expend a large sum of money in making permanent and valuable improvements. These improvements, some of the witnesses say, have increased the value of this property to three times the amount which it was worth before they were made. From this, it appears, the money was not injudiciously expended; and the question arises, whether this expenditure, under the circumstances of this case, does not create a lien upon the property.

If King were living, he could not object to this lien. Can his creditors object to it? By enforcing it, can their interests be injuriously affected? It may be said, that the deterioration of property in Georgetown, has been such as to reduce the value of this property to a less sum than was expended in making the improvements. This cannot change the principle that must govern the case. If the money has been judiciously expended, under such

King v. Thompson.

circumstances as to entitle the complainant to a lien, the court must give effect to it. It is an equitable mortgage, and in a court of chancery, is as binding on the parties as if a mortgage in form, had been duly executed.

Suppose, George King, for the purpose of improving this property, had borrowed from the complainant \$4000, and had executed a mortgage on the same property, to secure the payment of the money. Could the creditors of King complain of the lien of the mortgage? It is clear, they could not.

*222] And is it not equally clear that they have no ground to complain *of the equitable mortgage? If there be any difference in the force of the liens thus created, it must be in favor of the equitable lien. In the first case supposed, the money was loaned at a fixed rate of interest, and the property was looked to as securing the payment. But in the second case, the money was expended under a belief that the property belonged to the individual, and that the amount expended increased so much the value of his estate; and in many cases, a failure to obtain the property under such circumstances, would cause an injury which a return of the money expended would not repair. It would be most unjust, to leave the complainant, as a creditor, to receive a dividend on the distribution of the estate of King.

Ought the complainant be held accountable for rents, while he occupied the premises; or which he may have subsequently received from his tenants? The rents received by the complainant, after his removal to the west, independent of other facts in the case, go to show that he was not considered as the tenant of King. Indeed, there can be no doubt, that the complainant considered the property as his own; and it was so treated by George King, for he collected the rents as the agent of the complainant, and accounted to him for them. It would, therefore, be unjust now to compel him to pay rents which, with the concurrence of all parties, were paid to him at the time they accrued, as his own. And, in addition to this, the interest on the money expended, would, perhaps, be equal to the whole amount of the rents.

As the circuit court decreed a conveyance of this property to the complainant, that decree must be reversed; and the cause remanded to that court, with instructions to cause the property to be sold, after due notice, on such terms as they shall deem most advantageous to the estate of George King; and the proceeds of the sale, first to be applied to the payment of the money expended by the complainant in making improvements on the property, and the balance, if any, to be paid over for the benefit of the creditors of the estate of King.

This cause came on to be heard, on the transcript of the record *223] *from the circuit court of the United States for the district of Columbia, holden in and for the county of Washington, and was argued by counsel: On consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein, according to law and justice, and in conformity to the opinion of this court.