

\*BANK OF GEORGIA, Appellants, v. JAMES HIGGINBOTTOM, Administrator of WILLIAM S. GILLETT, and others.

*Cautionary judgment.*

G., the executor of his father, who had devised his estate to G. and his other children, sold the estate, and became himself the purchaser thereof; and in order to secure the portions of the other devisees, who were minors, confessed a judgment, June 1st, 1819, on a promissory note, in favor of two persons, without their knowledge, in a sum supposed to be sufficient to be a full security for the amount of the portions of the minors. The judgment was kept in full operation, by executions regularly issued upon it, so as, under the laws of South Carolina, to bind the property of G.; he was then engaged in mercantile pursuits, and had other property than that so purchased by him; G. afterwards became insolvent, and the claims of the devisees of his father under the judgment, were contested by his creditors, as fraudulent—the plaintiffs in the judgment having no knowledge of it, when it was confessed, the amount of the sum due to the co-devisees not having been ascertained, when it was confessed, no declaration of trust having been executed by the plaintiffs, and false representations of his situation having been made by G., after the judgment, whereby his creditors were induced to give him time on a judgment confessed to them subsequently.

The judgment of June 1st, 1819, was held to be valid, and the plaintiffs in that judgment entitled to the proceeds of the sales of the estate of G., for the satisfaction of the amount actually due to the co-devisees by G.

APPEAL from the Circuit Court of South Carolina. The appellants, on the 4th of April 1827, filed their bill in the circuit court of the United States for the district of South Carolina, to set aside a judgment, or postpone the effect of the same, which had been confessed by William S. Gillett, in the Barnwell district court of the state of South Carolina, for the sum of \$30,000.

The judgment was founded on a promissory note made by William S. Gillett, in favor of James Higginbottom and William Provost, for \$30,000, dated the 1st of June 1819, and payable on demand. The judgment was confessed on the 1st of June, as of the fourth Monday of March 1819. William S. Gillett was the acting executor of the last will and testament of his father, Doctor Elijah Gillett, by which a specific portion of the estate was devised to him, and other parts of the estate \*were given to the children of the testator. By the terms of the will, the executors had [\*49 power to sell such part of the estate devised, as it might be beneficial or expedient so to dispose of. William S. Gillett was also, at the time of the confession of the judgment, the guardian of his infant brothers and sisters, the devisees of his father of all the estate not especially devised to him. In December 1818, the personal estate of the testator, Elijah Gillett, was appraised at \$56,475, and on the 22d day of March, William S. Gillett, after having selected or taken by lot a portion of the estate to which he considered himself entitled, sold, at public auction, a large number of the negroes, and all the personal estate of the testator. The proceeds of the sale exceeded \$40,000, and William S. Gillett was the principal purchaser at the sale.

The judgment for \$30,000 was confessed for the use and benefit of the younger children of Elijah Gillett, the testator, all, at that time, minors; was for about the sum which was supposed to be in the hands of their guardian, after the sale; and was alleged to have been given in trust to the said Higginbottom and Provost, to secure to them their interest in the estate of their father.

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At the time of the confession of this judgment of the 1st day of June 1819, William S. Gillett was largely indebted to the complainants, and concerned in a mercantile house in Savannah, the affairs of which, a witness stated, he did not seem to consider very prosperous; he did not represent the house to be bankrupt, or likely to become so; but, on the contrary, he then and long afterwards, appeared confident that the affairs of the house would wind up satisfactorily. On the 21st of October 1821, William S. Gillett confessed a judgment in the circuit court of the United States for the South Carolina district, for the sum of \$7849, in favor of the Bank of Georgia, under an agreement that time should be given to pay the amount thereof, viz., one, two, three and four years.

The bill stated, that the debt due on that judgment being unpaid, the complainants, to have satisfaction thereof, lately sued out a *fiery facias* against William S. Gillett on it, under which a sufficient sum was made to \*50] pay the debt due on the \*same; but the proceeds of the said execution were claimed under the judgment in favor of Higginbottom and Provost, for the payment and satisfaction of the same. The bill prayed for general relief, &c.

It appeared in evidence, that on the 12th day of April 1825, James Higginbottom and William Provost, the plaintiffs in the judgment of June 1st, 1819, at the request of Robert, Isaac and William Scarborough, who had been named as co-executors of the will of Doctor Gillett, assigned over under their respective hands and seals, to them, the judgment of June 1st, 1819, to the use and benefit of the testator's younger children, for the purpose of securing and assuring to them, respectively, their interest in the testator's estate.

In answer to an interrogatory propounded to him on behalf of the complainants, the counsel who prepared the confession of the judgment of June 1st, 1819, stated, "the judgment confessed by William S. Gillett to Higginbottom and Provost was prepared by me, as a security for the parts or portions of the younger children of Doctor Elijah Gillett, deceased, of the estate of their father; and I think, that, at the time, I wrote or sketched off a draft of a declaration of the trust upon which the judgment was given, to be signed by Higginbottom and Provost, neither of whom were present. I do not recollect to have seen this paper, after it was executed; although I may have seen it. Indeed, I always believed, that I had seen it, till I came to tax my recollection, for the purpose of answering this interrogatory. My impression has always been, that such a paper was executed, and I have now no doubt but that it was. I recollect perfectly, that Gillett expressed a determination not to confess the judgment, unless a declaration of its object was signed by the nominal plaintiffs."

The plaintiffs in the judgment of the 1st of June 1819, issued a *fiery facias*, to October term 1819, of the Barnwell district court, which was entered in the sheriff's office, on the 19th of July 1819; an *alias fiery facias* was lodged in the sheriff's office, on the 3d of February 1824; and a *pluries fiery facias* was "lodged to bind," in the sheriff's office, on the 31st of December 1824.

The accounts of William S. Gillett, as the executor of his father, were \*51] audited, and a balance found due by him to the estate, including interest to July 11th, 1831, of \$48 961.92. \*After appropriating to the

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payment of the balance due by the executor on the judgment to Higginbottom and Provost, all the proceeds of the sales under the judgment of the Bank of Georgia, there would be a deficit, to make up the amount due by William S. Gillett to his co-devisees and legatees, of \$14,138.66.

On the 25th of June 1825, the circuit court, by a decree, held that the declaration of trust contained in the assignment of the judgment of the 1st of June 1819, executed by Higginbottom and Provost, under which the minor children of Doctor Elijah Gillett claimed precedence, "was a sufficient declaration in writing; and that a regard to the interest of the minors, sanctioned the court in sustaining the judgment for any amount that should be justly due to them." Afterwards, on the 22d of July 1832, the circuit court gave a decree in favor of the defendants in that court, and the complainants entered this appeal.

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

*Key*, for the appellants, contended, that the evidence in the case shows that the judgment in favor of Higginbottom and Provost, was confessed on a promissory note for \$30,000; that that note was given on no consideration, and was never delivered, but was only signed by Gillett as a foundation for the judgment; that neither of the parties, the payees of the note and the plaintiffs in the judgment, nor the *cestuis que trust*, knew of the note or judgment, or assented to it, till several years afterwards; and that there was no written declaration of the trust, connected in any manner with said note or judgment; that nothing was due from said Gillett, at that time, to his brothers and sisters, and that he was then largely indebted to the complainants.

The appellants claim a reversal of the decree of the court below, on the following grounds: 1. That the promissory note, on which the judgment was confessed, is without consideration, and the judgment founded upon it, being a voluntary judgment, must be declared void, or postponed to the demands of *bonâ fide* creditors. \*2. That if a judgment may be taken to cover a future debt, the intent should appear on the face of [\*52 the proceeding; or, at all events, be evidence by contemporary written declarations, in a solemn and authentic manner. But in this case, the judgment is assumed as a security for a debt to third persons, not named in the proceedings, growing out of transactions foreign from any allegations in the pleadings, and unconnected with the purposes for which it is now used, except by parol evidence. 3. That the sanction for such a security for confidential and favorite creditors will be attended with great inconvenience, by putting it in the power of the debtor, and irresponsible persons owing no duty to the supposed *cestuis que trust*, to make the judgment good or bad, and more or less, at their pleasure; to introduce all the mischief of secret liens, to the injury of *bonâ fide* creditors; and to corrupt the character, and destroy the certainty, of judicial records.

The facts in this case show a judgment-creditor in 1825, with an execution (his judgment in South Carolina obtained in 1821) stopped by the claim of another creditor with a judgment in 1819. He cannot be thus stopped:

1. Because the plaintiffs in the prior judgment have lost their priority

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by *laches*. They never proceed with their judgment further than to issue executions (*feri facias*), and leave them in the sheriff's office "to bind." For this he cited, Roberts on Frauds 198-205, 571-2; 11 Johns. 110; 17 Ibid. 174. It is thus, if the judgment of 1819 was fair.

2. But it was not fair, because it was intended to benefit the defendant in the judgment, by keeping his property in his possession, protected by this lien. This object for the confession of the judgment, is shown in Patterson's deposition.

3. Again, the judgment is fraudulent, because there was nothing due to the plaintiffs. The judgment, and the note on which it was founded, it is admitted, were for account of no debt due to plaintiffs, but for some trust to others. The judgment is absolute. No condition, no release, no such \*53] trust can be listened to. It must appear on the record of \*the judgment, and can be shown nowhere else. Parol evidence is inadmissible, to show an absolute judgment to be a conditional one; except (which is not pretended here) in a case where there was a mistake or a fraud.

4. Again, it cannot be shown, because the security, whatever it be—a judgment or deed—must contain within itself the terms and conditions of the transfer, and a possession corresponding therewith. This is the doctrine of *Hamilton v. Russell*, 1 Cranch 309 (though doubted in 3 Cowen); *United States v. Hooe*, 3 Cranch 73. Here, there is neither. The trust is attempted to be shown by parol evidence, not connected with the instrument of transfer; and the possession of the property ought to have been divested by an execution levied. *Conard v. Atlantic Insurance Company*, 1 Pet. 386.

5. But, if it could be shown elsewhere, here it is shown nowhere. There was never any written declaration of this trust. That adopted as such by the court below, is not such; it is a mere assignment of the judgment. And again, it was secret, and kept in the plaintiff's pocket.

6. But take it as a sufficient declaration, and this trust is found to have all the marks of fraud in *Twyne's Case*, and collected in page 42 of Hammond's Chancery Digest. It is *secret*; it is for *all* the debtor's property; it is for future debts; and the purpose is concealed by an absolute judgment to other persons, for a different consideration. The possession, use and expenditure of the property is left in the defendant, by never levying executions. It was made without application of the pretended creditor, and without his knowledge; and is for *all* his property, when less than half would have been sufficient.

*Preston*, for the appellees, stated, that the question before the court was, as to the priority of lien of two judgments. If, in the judgment, there were any technical defects, the party who could show such defects, might avail himself of them in a court of law. There can be no doubt, but that if the judgment of June 1st, 1819, in favor of Higginbottom and Provost can inure to the benefit of those for whom it was confessed, the legatees of \*54] \*Doctor Gillett, it will be supported. The court will look at the equities of the parties; and if one is higher than, or even equal to, the other, the priority of the first judgment will be suffered to prevail.

It must be remarked by the court, that if the exceptions taken to the first judgment will apply; they are equally, if not more, applicable to the second. The second judgment was confessed in 1821, and no proceedings took place

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upon it until 1827. This was two years after the time given on it had expired, and six years after it had been rendered. There is no evidence of any declaration in writing, that this judgment was given on a trust to secure the bank for a debt, the whole of which was not due, and for the payment of which the plaintiffs had given time; and yet the complainants seek to impugn the prior judgment, upon principles which will operate more forcibly against their own. While the whole amount of the judgment for \$30,000 was actually due, at the time it was confessed; the notes of the defendant in the judgment, in favor of the complainants were running in the bank; and changes were made in them, by substituting other parties to them.

Suppose, the judgment on which the appellants rely to be good, how does that under which the appellees claim the fund in controversy stand? A *bonâ fide* debt is shown to be due to them; and thus, there was a valuable consideration for the judgment; and it was also a *bonâ fide* consideration. The devisees of Doctor Gillett were the *bonâ fide* plaintiffs in the judgment, and nothing of a character to affect the integrity of the proceeding is alleged against them or the trustees. The record shows that the sales of Doctor Gillett's property were made by the executor, who was also guardian of the minor co-devisees, and that thereby the debt from him to them was incurred. The minors were entitled to have the amount due to them secured; and this could best be done by a judgment, known to be for the purpose of security. By the laws of South Carolina, executors do not give security, and this made the proceeding which was adopted yet more proper, necessary and obligatory.

It is said, that Higginbottom and Provost had no interest in \*the fund intended to be secured, and that, therefore, the confession of [\*55 the judgment was a fraud and a nullity. The parties are in a court of equity; and the court will make the plaintiffs trustees for the minors, and, if necessary, will compel them to act for them.

It has been argued on the part of the appellants, that although the judgment may have been valid, when confessed, the security it gave has been lost by the *laches* of the parties to it. A practical evidence of the law of South Carolina, as to the effect of judgments, is afforded by the conduct of the appellants. They wait six years, before they proceed on their judgment. The most usual practice in South Carolina, in securing debts, is by judgment. This course of proceeding has been recognised for thirty years in that state, by the judicial tribunals there, as well for prospective as for existing debts. This has been established by the uniform decisions of the courts of the state. *Greenwood v. Naylor*, 1 McCord 414, decided in 1820; 1 Bay 295; 3 Desauss. 543; 4 McCord 336. An execution binds, until length of time furnishes presumption of satisfaction. Even a dormant execution is a perpetual lien. This is too well established by the courts of South Carolina, to be brought into doubt. *State v. Laval*, 4 McCord 342. In the case before the court, the executions have been regularly kept in operation.

It is said, that this case is like an absolute deed of assignment, without possession being given of the property assigned. That there was a secret trust, and this invalidates the judgment. It is a radical error, to suppose there is no difference between an absolute deed, and an absolute judgment. Judgments are always absolute, yet they convey no right of property, but only give a lien; which is carried into beneficial action by an execution.

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Judgments give a right to sell the property of the defendant, but not possession of the defendant's property. The possession of the property of the defendant by him, is not adverse to the plaintiff's right to proceed against it. The right of possession is necessarily in the defendant, until a levy; and then the question of possession is between him and the sheriff, not the plaintiff in the execution. \*The lodging an execution with the sheriff "to bind," is notice to all the world that the lien of the judgment is asserted.

The doctrine of the appellant's counsel does not apply to a case of this kind; and the cases in 1 Cranch 315, 3 Ibid. 88, when examined, do not sustain the claims made upon them. So too, as to the case in 9 Johns. 337. The operation of judgment is not to prevent delay; for the plaintiff in any other judgment may proceed, when he pleases, and sell the property of the defendant, and take the surplus, after satisfying the prior judgment.

It is said, there was a secret trust; and that there should have been a declaration in writing, to show the purposes of the judgment. In the case before the court, there was a valid purpose to be effected by the judgment in favor of Higginbottom and Provost, and their names were used to give it full operation. There is no just imputation that there was a secret trust for the defendant; nor was there any necessity for a declaration in writing, if one was not given at the time the judgment was confessed, which may be inferred from the evidence. If there had been an understanding that the property should remain with the plaintiffs for a particular time, a written declaration to this effect might have been necessary. But this was not so, and all the objects of the parties were accomplished by lodging the execution with the sheriff, "to bind."

In South Carolina, there has been established by the judicial decisions of the courts, an equity, which fully operates in this case. Where a party, as a member of a family, is called on to account, a lien is held to exist on all the property of a testator in his hands, for the amount due to those interested in this trust. It has been established by the evidence, that Higginbottom and Provost were trustees for the minors; that the minors are creditors for a *bonâ fide* and valuable consideration; and if so, they are the oldest *bonâ fide* lien-creditors, and as such, this court will protect them.

McLEAN, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of South Carolina. In their bill, the complainants ask the court to set aside or \*postpone a judgment for \$30,000, confessed by Gillett in favor of Higginbottom and Provost, on the ground of fraud; and that certain moneys made by execution on a judgment subsequently obtained by the complainants, be directed to be paid over in satisfaction of such judgment. The judgment for \$30,000 was confessed in 1819, on which executions were regularly issued, from time to time, and entered in the clerk's office; so as, under the laws of South Carolina, to bind the property of the defendant.

The appellant insists, that this judgment, which was held to be valid by the circuit court, should be set aside; because the promissory note on which the judgment was confessed, was given without consideration; and that the judgment must consequently be declared void, or postponed to the demands of *bonâ fide* creditors.

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From the facts of the case, it appears, that William S. Gillett was the acting executor of the estate of his father, and that under the will, he sold the property and became the purchaser of it, to a much larger amount than the sum for which judgment was confessed. He was then engaged in mercantile business, and had other property than that which he purchased at this sale; and the judgment was confessed to secure the payment of the purchase-money to the brothers and sisters of the defendant, who were the devisees in the will. This sale having been made by a trustee to himself, must have been set aside and annulled, on the application of the *cestuis que trust*; but no such application being made, it cannot be treated as a nullity, as it regards strangers to the transaction.

The appellants insist, that the plaintiffs in the judgment had no knowledge of it, at the time it was entered; that the amount to which the devisees were entitled had not been ascertained; that false representations were made by Gillett, subsequent to this judgment, as to the extent of his property, through which the complainants were induced to give time on the judgment entered in their behalf; and that these facts are evidence of fraud. The evidence does not show that, at the time the judgment was confessed, Higginbottom and Provost had any knowledge of it; but this is not deemed material, as they subsequently recognised the trust and acted under it. Nor is it essential to \*the validity of the judgment, that the distributive [<sup>\*58</sup> shares of the devisees should have been ascertained, provided they exceed in amount the sum for which judgment was entered. And this appears to be the fact, from a final adjustment of the executor's account. The false representations by Gillett, respecting the extent of his property, if true, as charged by the complainants, could not affect the previous judgment, if entered in good faith. But, connected with other facts, they may go to show, in its true light, the conduct of the defendant. If he represented his property as wholly unincumbered, after the judgment for \$30,000 had been confessed; it would show a design on his part to practise a fraud on the complainants, and might cast a suspicion over the first judgment. But these representations are not proved, as alleged in the bill. They were not, as made by the defendant, so incompatible with the facts of the case, as not to be accounted for by a somewhat partial estimate of the value of his property, free from motives of fraud. The defendant subsequently became a bankrupt, but this was produced by various occurrences, stated in his answer, which were not and could not be foreseen.

Shortly after the purchase, it appears, the defendant was solicitous to secure the devisees, and he consulted counsel as to the best mode of effectuating this object. A mortgage was at first suggested, but afterwards a judgment was deemed preferable. This mode, it seems, is frequently adopted in South Carolina, to secure the payment of money. A judgment being entered, it is only necessary to issue an execution, from term to term, which may remain in the clerk's office, to create and continue a lien on the personal property of the defendant. As a matter of form, a note was executed by the defendant for \$30,000, and this was made the foundation of the judgment. Was this note given without consideration? The defendant had purchased the property of the infant devisees, to a greater amount than that for which the note was executed. And was not the executor bound, by every consideration arising from the agency he exercised, and the

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relation in which he stood to the devisees, to secure for their benefit the purchase-money? They were infants, and consequently incapable of protecting \*their own interest. The defendant was enriched by the purchase \*59] of their property, to a greater amount than the \$30,000. And if, by the conditions of the sale, time was to be given for the payment of the money, that circumstance does not make either the note or the judgment fraudulent. The judgment was intended to operate as a security for the payment of the money, and the defendant was bound in good faith to give this security. Had he failed in this respect, he would have been guilty of a most aggravated fraud, against his infant brothers and sisters, whose property had been placed at his disposal.

But the appellants contended, if a judgment may be taken to cover a future debt, the intent should appear on the face of the proceedings, or, at all events, be evidenced by a contemporary written declaration; that, in this case, the judgment is assumed as a security for a debt to third persons not named in the proceedings, and whose interest in the judgment can only be proved by parol evidence. No written declaration of the trust, made at the time judgment was entered, is in evidence; but the counsel who procured the judgment swears that, at the same time, he thinks he wrote or sketched off, a draft of a declaration of the trust, upon which the judgment was given, to be signed by Higginbottom and Provost; and his impression has always been, that such a paper was executed; that in taking the judgment, he acted for the children of Doctor Gillett; and that William S. Gillett, the defendant, expressed apprehensions that the judgment, at some future period, might be used to his injury and contrary to his intention; and to obviate that difficulty, it was concluded that a declaration of the trusts upon which it was given, should be signed by Higginbottom and Provost. From this evidence, it is extremely probable, that a declaration of trust was executed, at the time of the judgment, or shortly afterwards; but whether this was done or not, the trust is clearly established by the evidence, and the transaction is not impeachable under the statute of frauds.

If, as contended by the appellants, the judgment was confessed by the appellee, with a view of covering his property from his creditors, it would have been fraudulent. And if he had expressed to no one the object of the trust, the confession \*of a judgment for so large a sum, to persons \*60] who had no claim against him, would be evidence of fraud. But there are no facts or circumstances connected with the entry of the judgment, which cast a suspicion of fraudulent intent by the defendant.

It is insisted, that this judgment is void, as it gave a preference to certain creditors, and tended to delay others. There was no unjust or illegal preference in the case, and it is not seen how creditors were delayed by the judgment. It did not prevent any creditor from bringing suit and obtaining judgment and execution. This was done by the appellants, and a large sum of money was made on their execution, by a sale of the defendant's property. This proceeding was in no respect embarrassed by the previous judgment for the benefit of the infant devisees of Doctor Gillett. But that judgment having been kept in force by the issuing of executions from term to term, the money made under the junior judgment must be applied in discharge of the prior lien. There is no injustice or hardship in this. After the first judgment shall be paid, any money collected from the

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defendant, by execution, would, of course, be paid on the judgment of the appellants.

But the counsel of the appellants contend, that the continued possession by the defendant of the property, on which the executions under the first judgment operated as a lien, is conclusive evidence of fraud. And a number of authorities are cited, to show that where an absolute bill of sale of property is made, and the possession does not accompany the deed, but remains with the vendor, the transfer is not only voidable, but is absolutely void. The authorities referred to, seem to have no direct application to the case under consideration. The judgment does not purport to transfer the property of the defendant, nor was it intended to produce this effect. Connected with the executions which were issued, a lien was created; and this was not only the fair and legal effect of the proceeding, but the one which the parties to the transaction intended to secure. The possession of the property by the defendant was perfectly consistent with the judgment, and affords no evidence of fraud. It was like every other case of judgment and execution, which bind the real and personal property of the \*defendant, though in his possession. By the laws of South Carolina, [\*61 this lien may be continued for any time, not exceeding twenty years. No one could have been misled by this judgment. It was entered on the public records of the district, and the executions which were issued on it, were duly noted on the clerk's docket, and these constituted the lien under the usages of South Carolina. It was, therefore, unnecessary to express on the record, or in any other manner, what the effect of these proceedings would be.

But it is contended, that the lien set up under these proceedings cannot be sustained, as it covered the entire property of the defendant, and that this must be considered evidence of fraud. The lien, it is true, extended to the entire property of the defendant, within the state of South Carolina; but it could at any time be discharged by the payment of the judgment. This lien, therefore, neither withdraws the property of the defendant from the reach of his creditors, nor delays the legal enforcement of their claims.

The circuit court, with the consent of parties, directed the sale of the entire property of the defendant; and as the proceeds of this sale fall many thousand dollars below the judgment, and a still greater sum below the amount the executor owes the devisees, it cannot be necessary to examine some of the principles settled by the circuit court preparatory to a final decree. We think, the application made of the money arising from the sale, by the final decree of the court below, was right; and it is affirmed. The bill of the complainants must, therefore, be dismissed, with costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of South Carolina, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.