

Keene v. Whitaker.

ble of discharging his duties as executor ; much less did it release him from the assets he received and paid over to his co-executor. In the case of *Griffith v. Frazier*, 8 Cranch 9, this court held, "that an executor who absents himself from the state, after taking out letters-testamentary, is still capable of performing, and is bound to perform, all the duties of executor." This was a case where there was but one executor.

The liability of the defendant arises under the laws of South Carolina, which regulated his duties as executor. He is responsible for all the assets of whatsoever kind which came into his hands as executor ; and which he has not accounted for and paid over, as directed by the will.

The circuit court held, that the facts set up in the answer, with the receipt of his co-executor, releases the defendant from his trust ; and from all responsibility under it. In this the court erred, and their decree, on this ground, is reversed and annulled ; and the cause is remanded to that court, with directions to have an account taken of all the assets which came into the possession of the defendant as executor, and to enter a decree in favor of the complainants against him, for the amount he shall have received and not accounted for to the ordinary, and paid over, in conformity with this opinion.

Decree reversed.

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\*170] \*RICHARD RAYNAL KEENE, Plaintiff in error, *v. WARREN WHITAKER, LAURA WADE, GEORGE DOUGHERTY, FRANCIS MARKS and C. CUNNINGHAM*, Defendants in error.

*Cession of Louisiana.*

The case of *Foster v. Neilson*, 2 Pet. 254 ; and *Garcia v. Lee*, 12 Ibid. 511, which cases decide against the validity of the grants made by the Spanish government, in the territory lying west of the Perdido river, and east of the Mississippi river, after the Louisiana treaty of 1803, cited and affirmed.

APPEAL from the Circuit Court for the Eastern District of Louisiana. On the 26th November 1833, the appellant filed a petition in the circuit court of the eastern district of Louisiana, claiming under conveyances to him from Daniel Clarke, deceased, a tract of land, of 947 acres, part of 50,000 arpents, which, in 1804, had been granted by the Spanish intendant, Don Juan Ventura Morales, in the name of the Spanish government, to Don Gilberty Andry, who was the vendor of part of the tract to Daniel Clarke. This tract was situated in that part of what was alleged to be a part of Louisiana, by the United States, between the river Perdido and the river Mississippi, they claiming the same under the cession of France to the United States of Louisiana. The United States had asserted that this country had been transferred to France by Spain, by the treaty of St. Ildefonso, of 1800, and under the treaty with France belonged to the United States. Under this claim, the United States had caused sales of the land to be made ; and the defendants in error had become the purchasers under the United States, of the tract which the petitioner asserted to belong to him under the grant to Don Gilberty Andry. The petition prayed proceedings against those who had purchased from the United States ; and all just and legal aid in the premises.

The defendants, in their answer to the petition, alleged, that subsequently

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to the treaty of St. Ildefonso, of 1800, the Spanish government never had any right or title to the property claimed. By that treaty, the whole of the territory lying between Mississippi and the Perdido, including the land claimed by the plaintiff, belonged, under the treaty with France, to the United States. The property of the defendants was held under titles from the United States. The circuit court made a decree against the plaintiff, who, thereupon, prosecuted this writ of error.

The case was submitted to the court, by *Key* and *Jones*, the counsel for the plaintiff in error, without argument.

\**TANEY*, Ch. J., delivered the opinion of the court.—This case [\*171 comes up by writ of error from the circuit court of the United States for the district of East Louisiana. It has been submitted by the counsel for the plaintiff in error, without argument; and upon looking at the case as agreed on and stated by the parties in the court below, it is evident, that the principles laid down in the case of *Foster v. Neilson*, 2 Pet. 254, and *Garcia v. Lee*, 12 Ibid. 51!, must decide this case against the plaintiff. The judgment of the circuit court must, therefore, be affirmed.

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

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\**JAMES TAYLOR*, Appellant, v. *NICHOLAS LONGWORTH* and *THOMAS D. CARNEAL*, Appellees. [\*172

*Specific performance.*

Specific performance of a contract by T., for the sale by him of a lot of ground in the city of Cincinnati, was asked, by a bill filed in the circuit court for the district of Ohio, by L. The complainant in the bill had purchased the lot, and had paid, according to the contract, the proportion of the purchase-money payable to T.; by the contract, a deed, with a general warranty, was to have been given by the vendor, within three months, on which a mortgage for the balance of the purchase-money was to have been executed by the purchaser; this deed was never given, nor offered; the purchaser went into possession of the lot, improved it, by building valuable stores upon it, and sold a part of it. A subsequent agreement was made with the vendor, as to the rate of interest to be paid on the balance of the purchase-money, the purchase was made in 1814, and the interest, as agreed upon, was regularly paid until 1822, when it was withheld. In 1822, the vendor instituted an action of ejectment for the recovery of the property, and he obtained possession of the same in 1824. In 1819, the purchaser was informed that one Chambers and wife had a claim on the lot, which was deemed valid by counsel; and in 1823, a suit for the recovery of the lot was instituted by Chambers and wife against T. L. and others, which was depending until after 1829. In 1825, this bill was filed, claiming from T. a conveyance of the property under the contract of 1814, on the payment of the balance of the purchase-money and interest. The circuit court decreed a conveyance; and the decree was affirmed by the supreme court.

After the filing of the original bill, amended bill, and answers, the circuit court considered that C., who held a part of the lot purchased by L., should be made a party complainant; and he came in and submitted to such decree as might be made between the original parties: *Held*, that this was regular.

There is no doubt, that time may be of the essence of a contract for the sale of property; it may be made so by the express stipulations of the parties, or it may arise by implication, from