the same day, the plaintiffs might have insisted on applying the funds in their hands to the payment of the notes without securities. But this would have been a very different case from the one now before us. After having accepted the bill under consideration, payable at a time stated, the plaintiffs accepled other bills, payable at a more remote period. Now, the contract by the acceptors was, that they would pay these bills, as they respectively became due. And this they were bound to do, so long as the funds of the consignors in their hands remained unexhausted. A bill became extinguished, as soon as it was paid by the plaintiffs, with the funds of Phillips & Company. And this principle applies as strongly to those bills signed by the accommodation drawers, as to others.

Could the plaintiffs lay a foundation for a recovery against Phillips & Company, by showing payment of a bill drawn by them, out of their own funds? This would not be pretended. And yet this is the principle contended for in the present case. The liability of the accommodation drawers was as completely discharged, on the payment of the bill in question, as that of the principals. The relation of factors which the plaintiffs bore to Phillips & Company, gave them no power to vary their acceptances. The cotton consigned was to meet the payment of the bills, as they became due. This was known to Horton and Terry; and it may well be supposed, that
*131] their liability was incurred in virtue of this *arrangement. But the plaintiffs, by appropriating the proceeds of the cotton to the payment of future liabilities, have violated their contract, endeavored to defeat the just reliance of the sureties, and charge them with the payment of the bills which they guarantied. This the plaintiffs cannot do. It would be a great hardship, if not a fraud, on the sureties. No lien can be regarded or enforced under such circumstances. The lien of a factor depends upon legal principles, founded on equitable considerations, and can be held valid on no other grounds. We think, that the instruction of the circuit court was correct; and the judgment is, therefore, affirmed.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the southern district of Alabama, 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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*132] *Tobias Nixdorff, Appellant, *v.* Lewis Smith, Appellee.

*Injunction.*

A decree of a perpetual injunction on suits instituted on the common-law side of the circuit court of the district of Columbia, reversed, and the bill dismissed; the accounts between the parties having been erroneously adjusted in the circuit court.

Appeal from the Circuit Court of the District of Columbia, for the county of Washington.

This case was argued by *Key*, for the appellant; and by *Coxe*, for the appellee.

Nixdorff v. Smith.

McKinley, Justice, delivered the opinion of the court.—This is an appeal to this court, from the circuit court of the district of Columbia, for the county of Washington, sitting in chancery. Smith, the appellee, filed a bill in chancery against Nixdorff, stating that he had purchased of Nixdorff all his right and interest in the stock in trade and commercial business, then carried on in the city of Baltimore, by Nixdorff & Hager; and agreed to pay to Nixdorff, in hand, the sum of $5000, and at the expiration of two years thereafter, such further sum as would be sufficient to reimburse to Nixdorff the balance of his interest, for investment of capital and interest thereon, after deducting the payment of the $5000. And in contemplation of the agreement, and after the terms had been fully settle, among the parties, but before it was written, Smith entered into partner, ship with Hager, and agreed with him to continue the same business, under the name and firm of Hager & Smith. And in anticipation of the new partnership, it was agreed, that the firm of Hager & Smith should assume the whole of the debts of Nixdorff & Hager, and provide for their payment; and that all the debts owing to Nixdorff & Hager should be collected by Hager & Smith; and it was further agreed, that Smith should sustain no loss by the collection of the debts due to Nixdorff & Hager.

It is further charged, that Nixdorff's half of the goods, in the store of Nixdorff & Hager, was sold to Smith, at twelve and a half per cent. discount on the cost price; that an inventory was *taken of the goods, and after making the stipulated deduction, Nixdorff's half amounted [*133 to $5975.32. The agreement, dated the 9th day of August 1833, and signed by the parties, was made part of the bill. It is there charged, that the amount of debts paid by Hager & Smith, for Nixdorff & Hager, including interest to the first of November 1837, was $45,092.52; and the amount collected for them, with interest, to the same period, amounted to $39,611.09; showing a balance against Nixdorff & Hager of $5381.43. It is further stated in the bill, that the firm of Hager & Smith afterwards purchased of Nixdorff, who was then doing business on his own account, goods and merchandise to the amount of $4500, for which they gave their promissory notes; that Hager & Smith afterwards failed in business, and Hager removed to the western country, leaving Smith to pay the debts of the firm; that Nixdorff has brought suit against him, on the common law side of the court, upon the promissory notes; and refuses to permit him to set off the above balance of accounts in that suit. He, therefore, prayed that Nixdorff might be enjoined from proceeding further at law; and that by decree of the court, this eqitable off-set should be allowed. The prayer for the injunction was granted.

Nixdorff, in his answer, denied that any balance was due from Nixdorff & Hager to Hager & Smith; and he also denied that he had ever refused to go into a settlement of the accounts between the two firms.

By order of the court below, the accounts between the parties, as set up in the bill and answer, were referred to an auditor, with many special instructions. By his report, it appears, that the amount of debts collected by Hager & Smith, for Nixdorff & Hager, under the contract between the parties, amounted to $42,026, including interest, to which he added the amount of goods contained in the inventory, after deducting twelve and a

half per cent. from Nixdorff's half, making in all $54,830.26, *to the credit of Nixdorff & Hager; and he charged them with debts paid under the contract, including interest, the sum of $45,992.52; to which he added the sum of $5000 paid by Smith to Nixdorff, making in all the amount of debts $50,992.52; showing a balance in favor of Nixdorff & Hager, of $3837.74. To this report, the complainant filed the following exception: "The auditor has erred in this, that he has charged the complainant with the amount of the whole inventory of the goods of Nixdorff & Hager; whereas, the complainant was purchaser of one-half of the goods only, and should have been charged with no more; the other half being the private property of Hager, and as such brought into the capital stock of Hager & Smith." The court sustained this exception, and directed the auditor to restate the accounts between the parties.

In the reformed report, the auditor charges Nixdorff with $45,992.52, for debts paid by Hager & Smith, for Nixdorff & Hager, and adds the $5000 paid by Smith to Nixdorff; making Nixdorff's debt to Hager & Smith $50,992.52; and he credits Nixdorff by $40,376.60, for debts collected for Nixdorff & Hager, to which he added $5975,32, for Nixdorff's half of the goods; making the whole amount of credits $46,351.92; leaving a balance due from Nixdorff & Hager, to Hager & Smith, of $4640.60. The amount of the debt due from Hager & Smith to Nixdorff, for which Smith was sued, being $4874.45, the auditor deducted the balance found due from Nixdorff & Hager, from that sum, and reports a balance finally due to Nixdorff of $233.85; and excludes Hager's half of the goods, included in the
*135] inventory, entirely *from the account, on the ground that they were not subject to the debts of Nixdorff & Hager. To this part of the report, the defendant excepted. But the court overruled the exception, confirmed the reformed report of the auditor, and decreed that the injunction should be made perpetual; except for the sum of $233.85, as reported by the auditor.

A very brief examination of the case will test the correctness of this decree. The equity set up in the complainant's bill, rests entirely on the assumption, that upon a full and fair settlement of accounts, under the contract referred to, a large balance would be found against Nixdorff; and upon the apparent establishment of this fact, is the decree founded. If, however, it be shown, that instead of Nixdorff being indebted to Hager & Smith, on such settlement, they are largely indebted to him, the bill will be without equity, and the decree, of course, erroneous. By bringing into the accounts all the effects of Nixdorff & Hager, the auditor's first report shows, very satisfactorily, a considerable balance in favor of Nixdorff.

But the complainant's counsel seems to have taken up the idea, that the $5000 paid by Smith to Nixdorff applied exclusively to the payment of Nixdorff's half of the goods; and that the legal effect of the payment was, to release Hager's half of the goods from liability to the debts of Nixdorff & Hager; and this principle was recognised by the auditor in his reformed report, and by the court in their decree; notwithstanding the allegations in the complainant's bill, and the stipulations of the contract, show clearly, that the $5000 were paid upon the purchase of the whole of Nixdorff's interest. Whether the payment was special or general, is not material to the merits of the case; but it is very material, in considering the effect

ascribed to it in the court below. For, if the payment had the power to release Hager's part of the goods from liability, because Nixdorff had sold to Smith his part of them, and received part of the purchase-money, it must necessarily have the same effect, if it applied to the sale and purchase of the whole of Nixdorff's interest. The fact being that Nixdorff did sell the whole of his interest to Smith, and received the $5000 in part payment of the whole, to carry out the principle assumed, the *whole of Hager's interest in the firm of Nixdorff & Hager was thereby discharged [*136 from liability to the payment of their debts; and the burden of paying them devolved upon Nixdorff. A course of reasoning leading to conclusions so much at variance with law and justice, is answered by merely stating it.

This singular error originated in charging Nixdorff with the $5000 paid by Smith, on account of the whole purchase; and then refusing to charge Hager & Smith with the whole amount of the partnership effects in their hands, originally belonging to Nixdorff & Hager. The very moment that Nixdorff was charged with this sum of $5000, the payment of it by Smith was neutralized, and the transaction between the parties stood as though no payment had been made. The only consideration left, therefore, to support the sale by Nixdorff to Smith, was the undertaking of Hager & Smith, in the written contract, to pay the debts of Nixdorff & Hager. In this aspect of the case, the liability of all their effects in the hands of the former, to the payment of the debts of the latter, cannot be doubted. By the first report of the auditor, it appears, that he settled the accounts between the parties upon the principles here suggested; that is, by charging Hager & Smith with the whole inventory of the goods, and the money collected for Nixdorff & Hager, and by charging Nixdorff with the money paid by Hager & Smith, in discharge of the debts of Nixdorff & Hager, and also with the $5000 paid to him by Smith. And upon this statement of the accounts, as already shown, a considerable balance appears in favor of Nixdorff & Hager. But the auditor afterwards, it appears, became a convert to the doctrine of the complainant's counsel; and in his reformed report, excluded Hager's part of the goods from the settlement altogether; and thereby created a seeming balance in favor of Hager & Smith, to nearly the amount of their debt to Nixdorff, on which the suit at law was brought. This statement of the accounts by the auditor, in his first report, as far as it has been here examined, is perfectly correct; and ought to have been confirmed by the court. The equity set up in the bill, depending entirely on the truth of the allegation, that the balance would be in favor of Hager & Smith, upon such settlement of the accounts; *the balance being clearly established against them, and in favor of Nixdorff, extinguishes, therefore, all [*137 pretence to any equitable set-off in favor of Smith. The decree of the circuit court is, therefore, reversed, the injunction dissolved, and the bill dismissed.

**Decree reversed.**