

BRIDGET McLAUGHLIN, APPELLANT, v. THE BANK OF POTOMAC AND OTHERS.

Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal.¹

A question, whether or not certain conveyances were fraudulent, was properly submitted to the jury. Fraud is often a mixed question of law and fact, and the jury can be instructed upon matters of law.²

A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards.

Where the original debtor had made a conveyance of property to a trustee for the purpose of securing his indorser, it was not necessary to pursue and exhaust that trust-property before proceeding against the indorser and his

¹ FOLLOWED. *Johnson v. Harmon*, 4 Otto, 379. See also *Warner v. Norton*, 20 How., 448; *Brockett v. Brockett*, 3 Id., 691.

² Fraud is actual and constructive; the former is generally a question of fact, the latter (the facts being found) is always a question of law. *Postmaster-General v. Reeder*, 4 Wash. C. C., 678.

In the following instances the question of fraud has been held to be one of law for the court: What acts of fraud in procuring the execution of a will are sufficient to invalidate it. *Yoe v. McCord*, 74 Ill., 33. Whether the fraudulent alteration of a note was material or not. *Belfast Bank v. Harriman*, 68 Me., 522; *Overton v. Matthews*, 35 Ark., 146.

In the following cases it was held to be one of fact for the jury: Whether a note was altered, and, if so, whether fraudulently or not. *Belfast Bank v. Harriman*, 68 Me., 522. Whether a statement as to the speaker's financial condition was an expression of opinion or a fraudulent representation. *Morse v. Shaw*, 124 Mass., 59; *Stubbs v. Johnson*, 127 Id., 219. Whether a sale of chattels was made with intent to hinder, delay, or defraud creditors. *Blaut v. Gabler*, 8 Daly (N. Y.), 48; s. c., 77 N. Y., 461.

A chancellor does not need a verdict to inform his conscience when the answer denies fraud in the ab-

stract, but admits all the facts and circumstances necessary to constitute it in the concrete. *Doss et al. v. Tyack et al.*, 14 How., 298. Though the evidence is contradictory, the chancellor is not bound to direct an issue if he is satisfied that the weight of evidence is on one side. *Hord v. Colbert*, 28 Gratt. (Va.), 49. *S. P. Abbott v. Monti*, 3 Col., 561; *Cook v. Houston County Comm'rs*, 62 Ga., 223; *Huntington v. Moore*, 1 New Mex., 489. A feigned issue should not be awarded when the truth of the facts can be conveniently and satisfactorily ascertained by the court itself. *Goodyear v. Providence Rubber Co.*, 2 Fish. Pat. Cas., 499; *Howe v. Williams*, Id., 395. That an issue will not be directed upon a mixed question of law and fact, see *Clendaniel's Estate*, 11 Phil. (Pa.), 50.

The verdict of a jury on an issue out of chancery is advisory merely. *Quinby v. Conlan*, 14 Otto, 420. *S. P. Rusling v. Rusling*, 8 Stew. (N. J.), 120; *McGau v. O'Neil*, 5 Col., 58. No judgment can be rendered on it until the chancellor has given his opinion on the facts. *Gadsden v. Whaley*, 9 So. Car., 147. If his decree rests wholly on the verdict, it is erroneous. *Charlotte &c. R. R. Co. v. Earle*, 12 So. Car., 53. On the coming in of the verdict, the court may set it aside and find the facts itself. *Wallace v. American Linen Thread Co.*, 16 Hun (N. Y.), 404.

McLaughlin v. Bank of Potomac et al.

property. A judgment had been obtained against the administrator of the indorser, which fixed his liability.

This judgment against the administrator in which a devastavit had been suggested, and a return of *nulla bona* to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate.

Although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate.

Although by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a devastavit, and the personal property was chiefly left in the hands of the surety, who was also the person charged with being a fraudulent grantee of the intestate, the general rule is not applicable.

In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of chancery.

The bill was filed in the Circuit Court by the President, Directors, and Company of the Bank of Potomac, Elijah Dallett and Elijah Dallett, Jr., trading under the firm of *221] Elijah Dallett & Co., William H. Miller, and A. C. Cazenove & Co., who sue in behalf of themselves and such other creditors of the estate of Edward McLaughlin, deceased, as will make themselves parties and contribute to the expense of this suit, against Edward Sheehy, in his own right and as administrator of Edward McLaughlin, and Ann Sheehy, wife of said Edward and one of the children and heirs at law of said Edward McLaughlin, Bridget, otherwise called Biddy McLaughlin, another of the children and heirs at law of said Edward McLaughlin, and surety for said Edward Sheehy's administration on said estate, and Edmund I. Lee, trustee under a deed of trust from the said Edward Sheehy.

The narrative of the case is as follows.

Edward Sheehy's notes, indorsed by Edward McLaughlin, were discounted at the Bank of Potomac as follows, viz. :—

1828.—Dec. 12, 1 note for	.	.	.	.	\$2,000
1830.—Jan. 15, 1 “ “	.	.	.	.	2,000
Feb. 5, 1 “ “	.	.	.	.	2,000

And they were curtailed and renewed from time to time, until they all became due the 20th January, 1832, viz. :—

McLaughlin v. Bank of Potomac et al.

1 note for	\$1,375
1 " "	1,900
1 " "	1,975

Amounting to \$5,250

when they were amalgamated, and one note substituted for the three, which note was renewed from time to time until 15-18 April, 1834, when it became due and was protested.

Whilst these notes were running on, namely, on the 27th of September, 1830, one James Robinson conveyed certain property in Alexandria to Bridget McLaughlin, who was the daughter of Edward McLaughlin, the indorser of the above notes. Sheehy, the maker, was married to another daughter. One of the allegations in the bill was, that this property was secretly paid for by Edward McLaughlin, who, it was alleged, procured it to be conveyed to his daughter for the purpose of placing it out of the reach of his creditors.

On the 24th of November, 1830, Sheehy conveyed a lot of ground in the town of Alexandria to Edmund I. Lee, in trust, to secure McLaughlin against his indorsements in the Bank, as far as the sum of \$3,950. Lee was to sell it whenever McLaughlin requested him, in writing, to do so.

On the 6th of November, 1832, Edward McLaughlin conveyed to his daughter Bridget four lots in Alexandria, in fee simple, reserving to himself a life estate.

*On the 15th of March, 1833, Sheehy and wife conveyed to McLaughlin certain other real property and [*222 slaves, and other personal property. It was an indemnity against loss from the indorsement of McLaughlin upon the notes in question and other notes.

On the 9th of November, 1833, McLaughlin executed another deed in fee simple of certain property to his daughter Bridget.

In April, 1834, the note mentioned in the beginning of this narrative became due and was protested. Its amount was \$5,250.

In May, 1834, the Bank of Potomac brought suit upon the note, and in August, 1834, obtained judgment by default, against Edward McLaughlin.

On the 15th of September, 1834, McLaughlin executed another deed for certain other property in fee simple to his daughter Bridget.

In September, 1834, after the execution of the above deed, McLaughlin died.

On the 12th of November, 1834, Sheehy took out letters of

McLaughlin v. Bank of Potomac et al.

administration upon his estate, and Bridget McLaughlin became the security upon his bond. It is not necessary to state the appraisement, or the measures pursued by other creditors than the Bank of Potomac. No administration account was filed.

In June, 1835, the judgment which the bank had obtained against McLaughlin in his lifetime was revived, by *scire facias*, against his administrator, upon which an execution was issued. The return was, that no effects of the said McLaughlin, in the hands of his administrator, were to be found whereon to levy the said execution.

In April, 1836, the bank brought an action against Sheehy, suggesting a devastavit, and in June, 1837, obtained a judgment against him *de bonis propriis*. Execution was also issued upon this, the return to which was, that no goods and chattels of the said Sheehy were to be found.

In January, 1838, the bank filed its bill on the equity side of the court, suing for itself and such other creditors of the estate of Edward McLaughlin as chose to make themselves parties and contribute to the expense of the suit. The bill recited the above facts; averred that a large amount of personal property came into the hands of the administrator; that the said administrator, and his said surety, combining together to defraud the creditors of the said McLaughlin, caused his personal estate to be appraised at prices greatly below its value, and then sent off the said slaves to distant parts for *223] sale, where they *were actually sold for sums greatly exceeding the said appraisement; that no account of the sales of the said McLaughlin's personal estate had ever been returned to the said Orphans' Court, nor had the said administrator ever made any settlement of his administration accounts; that large sums of money of the said estate yet remain unaccounted for, and misapplied to their own use by the said administrator and his surety; that McLaughlin had combined and confederated with his daughter Bridget fraudulently to convey and transfer his property to her, with a view to protect it from liability for his debts; that all the said deeds were fraudulent and void; that the deceased left no real estate, having thus conveyed it all fraudulently away; that his personal estate had been made away with and misapplied by the administrator and his surety, the said Bridget; that the bank had a right to be substituted to the benefit of the trust deeds. The bill then prayed a discovery and account of the personal estate; that the fraudulent deeds might be set aside and annulled, and the property mentioned in them

be applied to the payment of the debts of the estate, and for general relief.

A supplemental bill and answer were filed in the course of the proceedings, which did not essentially vary the state of the case.

In May, 1838, Bridget filed her answer, which was afterwards withdrawn, and another filed in May, 1842. Sheehy and wife filed their answer in May, 1839. The answer of Bridget denied all the allegations in the bill, and especially a legal recovery against Sheehy for said debt, but, if proved, contested that she was bound for the same, being no party thereto. She further admitted giving the bond as surety for Sheehy, but denied that it was binding on her, or that personal property of more value than \$1,653.28 came to his hands, as shown in the inventory thereof. She denied any combination to defraud the creditors of Edward McLaughlin, by undervaluing his personal estate, or selling it higher than the appraisement, or not having it accounted for. She denied the existence of any indebtedness now by Edward McLaughlin, or at his death, as indorser for Sheehy, which existed in September, 1830, and averred that notice of protest was necessary to make him so liable, which had never taken place, and that the deed then given to her was not fraudulent as to the bank. She further averred that the deeds were not void, because Sheehy was the principal debtor, and possessed sufficient real estate then to satisfy the debt. She further alleged, that the real estate of her father was liable in the hands of his heirs only for specialty debts, which this was not. She proceeded to deny fraud in the various other *deeds to her, and to allege a moneyed consideration [224 therefor. She admitted the conveyances in trust by Sheehy, and averred that the bank had never requested the land held in trust to be conveyed and applied to the discharge of this debt, or it would have been done, and that it ought now to be done before a resort to the personal estate. She denied the validity of the judgments against Sheehy as affecting her, and proceeded to answer the special interrogatories addressed to her.

Sheehy and wife, in their answer, denied all fraud in the inventory or management of the estate; admitted that no account of his administration had been rendered by Sheehy, but averred his readiness to do so; that although he was the nominal administrator, yet Bridget McLaughlin transacted all the business, and denied all combination with Bridget, or with any other person, to defraud the creditors of Edward McLaughlin.

McLaughlin v. Bank of Potomac et al.

In April, 1839, the court passed a decree for the sale of the property mentioned in the two deeds of Sheehy to Lee, of the 24th of November, 1830, and Sheehy and wife to Edward McLaughlin, of the 15th of March, 1833. The reports of sale need not be further adverted to.

In May, 1843, the cause standing under a general replication and issue, the court ordered it to be tried at law, for the purpose of ascertaining,—

1st. Whether any, and what, valuable consideration was paid or given, and by whom, to James Robinson, for the property conveyed by him to the said Bridget McLaughlin in the bill mentioned; and whether the said property, in the said deed mentioned, was purchased *bonâ fide* by the said Bridget, with her own funds.

2d. Whether the deeds of the 6th of November, 1832, and the 9th of November, 1833, in the bill mentioned, from the said Edward McLaughlin and the said Bridget McLaughlin, or either, and which of said deeds, were or was made with intent to hinder, delay, or defraud the complainants of their just and lawful actions as creditors of the said Edward McLaughlin, or whether the said deeds were made for valuable consideration, and *bonâ fide*.

3d. Whether the deed of the 15th of September, 1834, from the said Edward McLaughlin to the said Bridget, was made with a like intent to hinder or delay the said complainants, or *bonâ fide*, and for valuable consideration.

The jury, being unable to agree, were discharged, and the record transferred to Washington county, where the cause was tried at March term, 1844. The certificate was as follows:—

“Upon the first issue joined the jury say, that the valuable consideration expressed in the deed referred to in the said *225] issue *was paid by Bridget McLaughlin to said James Robertson, and that the said property mentioned in said deed was purchased *bonâ fide* by the said Bridget, with her own funds.

“And we find, as to the second of the said issues, that the said deeds of the 6th of November, 1832, and the 9th of November, 1833, in the said bill mentioned, from said Edward McLaughlin to said Bridget McLaughlin, were, and both and each of them were made by the said Edward with intent to hinder, delay, and defraud the said complainants of their just and lawful action as creditors of the said Edward McLaughlin, and that the said Bridget had notice of said intent, and that they were not, nor were either of them, made for an adequate

valuable consideration, nor were either of them made *bonâ fide* between the said parties.

“And as to the third of the said issues, we find that the deed of the 15th of September, 1834, from the said Edward McLaughlin to the said Bridget, was made with a like intent to hinder and delay the said complainants, and was not *bonâ fide*; and the same was not made for a valuable consideration.

“And we find upon the second and third issues for the complainants.”

In the course of this trial, sundry bills of exceptions were taken, which it is unnecessary to specify, because the points made were not brought before the court which sent the issue to be tried at law, and therefore it was held that they should not come before this court for review.

In June, 1845, the Circuit Court of Alexandria passed the following final decree:—

“The court, on consideration of the above matters, do now here, this 10th day of June, 1845, order, adjudge, and decree, that the aforesaid deed from James Robertson to Bridget McLaughlin, dated the 27th day of September, 1830, in the bill of the complainants mentioned, was not made with intent to hinder or defraud the creditors of the said Edward McLaughlin, and is not fraudulent and void. And they do further adjudge and decree, that the several deeds dated the 6th of November, 1832, and the 9th of November, 1833, and the 15th of September, 1834, from the said Edward McLaughlin to his daughter, the said Bridget McLaughlin, were made without valuable consideration, and were made with intent to delay, hinder, and defraud the creditors of the said Edward McLaughlin, and are, therefore, fraudulent and void as against them, and that the said deeds be set aside and annulled.

“And the court, proceeding to grant to the complainants such relief as they are entitled to, and as sought in their said bills, do further adjudge, order, and decree, that the real estate *described and mentioned in the above last-mentioned deeds, from the said Edward to the said Bridget [*226 McLaughlin, and by this decree declared fraudulent and void, be subjected to the payment of the debts of the complainants, in the manner hereinafter directed; and that the commissioners hereinafter named do proceed to make out of the said property, by a sale of the same, or so much thereof as may be requisite, and in such lots as to the said commissioners shall seem best, at public auction, to the highest bidder, after giving thirty days’ notice of the time, place, and terms of sale, by publication in the Alexandria Gazette, the following

McLaughlin v. Bank of Potomac et al.

several sums, that is to say" (proceeding then to distribute the fund amongst the creditors).

An appeal from this decree brought the case up to this court.

It was argued by *Mr. Francis L. Smith* and *Mr. Brent*, for the appellant, and *Mr. Bradley* and *Mr. Davis*, for the appellees.

The points raised by the counsel for the appellant were the following, viz:—

1st. That so far as regards the claim of the Bank of Potomac, the principal plaintiff, the property conveyed by Sheehy to Lee and McLaughlin in the deeds of trust should first have been exhausted, and appropriated to the payment of the debt. 15 Wend. (N. Y.), 588; 5 Id., 661.

2d. The bank might have made its debt by pursuing properly its remedy at common law. The suit against Sheehy as drawer of the note was brought to May term, 1834, and an office judgment was confirmed at November term, 1834. No execution was issued on this judgment, although the person of Sheehy, by the laws then in force, might have been taken in execution, and his lands sold under a *fi. fa.*, and although it appears from the record that he held the lands.

3d. The personal property of McLaughlin is the fund primarily liable for the payment of his debts; and before a sale of the realty could properly have been decreed, the administration account of Sheehy on his estate should have been settled, in order to ascertain the exact amount for which the realty was liable. 1 Story, Eq. (ed. 1846), § 548; 4 Johns. (N. Y.) Ch., 619.

4th. The real estate of McLaughlin could not be sold as long as there was any personalty. Act of Congress, 24th of June, 1812, putting real estate in the county of Alexandria on the same footing with that in the county of Washington. For laws of Maryland, see 1 Har. & J., 469; 4 Gill & J., 296; 8 Pet., 128.

5th. The complainants rely alone on judgments against the administrator, which we contend are no evidence against *227] Bridget *McLaughlin, as grantee in the possession of the property. 1 Mass., 445; 8 Pet., 528; 5 Gill & J. (Md.), 433; 4 Har. & Jo. (Md.), 126, 270; 6 Johns. (N. Y.) Ch., 360; 11 Leigh (Va.), 38; 4 Phil. Ev. (ed. 1843), note 639, page 921, where the authorities are collected.

6th. The liability of Bridget McLaughlin, if any, was on the administration bond as surety for Sheehy, which could not be enforced by the creditors at large. The doctrine is

McLaughlin v. Bank of Potomac et al.

well settled, in equity, that a suit to set aside a deed of real estate for fraud cannot be maintained until there is a judgment at law. 2 Leigh (Va.), 84; 1 Story, Eq., §§ 375, 376.

7th. There is no averment in the bill that the indorser, McLaughlin, was ever notified of the non-payment of the note on which the bank has sued. 6 Wheat., 146, 572-574.

Some other points were made relating to the instructions given in the court of law, to which an issue was sent to be tried; but the decision of this court being that those instructions were not properly before it, it is not deemed necessary to insert them.

These points were severally resisted by the counsel for the appellees.

Mr. Justice WOODBURY delivered the opinion of the court.

(He first gave a synopsis of the bill and answers, and then, after some reference to the evidence, proceeded as follows.)

A preliminary point to be considered in this case is in respect to the exceptions made at the trial by a jury of the issue at law, sent from the court of chancery, on the equity side of the Circuit Court of the United States. On the return of that issue to the equity side of the court, exceptions to the rulings were not made, or renewed against the correctness of the finding of the verdict, and consequently no opinion on them has ever been rendered by the court sitting in chancery. It is quite clear, then, that they are not before us on this appeal, which is only from a decree on the equity side of that court.

We wish it to be distinctly understood, as a matter of practice in like cases, that this court cannot express any opinion on matters ruled in any other court, or side of the court, than that appealed from; and if it be necessary to go into other courts to get verdicts or decisions on any portion of the case in its progress below, any objections to rulings on the points arising in those trials or decisions must be presented for revision to the court which orders the issue, and be acted upon there, if we are expected to take cognizance of them here.¹ *Brockett v. Brockett*, 3 How., 691; *Van Ness v. Van Ness*, 6 How., 62; *Mayhew v. Soper*, 10 Gill & J. (Md.), 372. Such, too, is substantially *the doctrine in England. 2 Dan., [*228 Ch. Pr., 746; *Bootle v. Blundell*, 19 Ves., 500.

It is next objected, that there was an error in the court in ordering such an issue to be tried by a jury, as it did in the present case. But we are not satisfied that, in referring the

¹ FOLLOWED. *Johnson v. Harmon*, 4 Otto, 379.

 McLaughlin v. Bank of Potomac et al.

question of fraud in the conveyances to a jury for their verdict to aid the court in its inquiries, any thing improper was submitted. It did not, as has been contended, refer a question of law only. Fraud is often, as here, a mixed question of law and fact. *Seward v. Jackson*, 8 Cow. (N. Y.), 406, 439; *Brogden v. Walker's Executor*, 2 Har. & J. (Md.), 291. And it might be very useful to have the views of a jury on it, taking care to instruct them concerning the law, and leaving to their exclusive consideration, as was probably done here, merely the facts as connected with that law. Such feigned issues are not for the assistance of parties so much as of the court. 2 Dan., Ch. Pr., 730. And though they may not always be well made up, yet, as the court are influenced by the finding or not, as seems to it proper (19 Ves., 500; *Allen v. Blunt*, 3 Story, 746), it is very rare that ordering such an issue can be deemed a ground of error. It may, however, be conceded, that, if such an issue be one of mere law, or idle, or impertinent, it is erroneous. 2 Dan., Ch. Pr., 315, 420, 730; *Nicol v. Vaughan*, 5 Bligh, 540-545; 3 Ves. & B., 43. Disregarding, then, those exceptions made in the trial of this feigned issue, as not being legally before us, and overruling the objection to the propriety of the issue itself, the finding of the jury, and the opinion of the court sitting in chancery on that part of the case relating to the fraudulent conveyances, would seem to be correct. At least, this court appears bound to consider it so, *primâ facie*; and we see nothing in the evidence itself, if reconsidered here, which would show the weight of it not to accord with their results. 2 Rand. (Va.), 398; *Hoye v. Penn*, 1 Bland (Md.), 28; *Kipp v. Hanna*, 2 Id., 26; 2 Har. & J. (Md.), 292.

Those results are, that all the deeds except the first one were fraudulent against creditors. The next inquiry is, whether the plaintiffs can legally be considered creditors at the time these deeds were executed. It is true, there must usually be a debt preëxisting. *Sexton v. Wheaton*, 8 Wheat., 229. In our view, a preëxisting debt by a note, which was only renewed afterwards, with the same indorser, continued to be the same preëxisting debt for this purpose as it stood originally, both as to the maker and indorser. They both regarded it virtually as the same, as no new consideration ever arose between the parties. Especially on the equity side of this court, and of the Circuit Court below, where the *229] question arises, such a case *ought to be regarded as much within the mischief of the statute against fraudulent conveyances as if the action leading to judgment against

the administrator had been on the original indorsement of the original note.

But further, it is objected that the debt here, at the time of the conveyances, was not absolute, as it should be in order to predicate fraud concerning it. But a contingent debt, likely to become absolute, and which afterwards does become absolute, is, both on principle and precedent, enough to furnish a motive to make a fraudulent conveyance to hinder or avoid its eventual payment. And this may be presumed to have been done here, provided circumstances exist indicative of fraud. *King v. Thompson*, 9 Pet., 220; *Heighe v. Farmers' Bank*, 5 Har. & J. (Md.), 68. Such circumstances must exist; and when the liability is contingent, like that of a warrantor or indorser, the conveyance cannot be considered as *per se* fraudulent. *Seward v. Jackson*, 8 Cow. (N. Y.), 406, 439. But all the attendant facts here were scrutinized, and the inference of fraud seems to have been fairly deduced from the whole. 5 Gill & J. (Md.), 533.

There is another objection to a recovery by this bill in equity, because the original debtor, Sheehy, had made a conveyance in trust to Lee for the indemnity of Edward McLaughlin, and it is argued that the plaintiffs should have resorted to that rather than to a suit against the administrator of Edward McLaughlin. But where the maker and indorser have both had their liability fixed on a note, an action will lie against either. Here both had become liable, else the indorser had not, for the latter is never liable unless the maker is also; and that the indorser had here become liable is to be presumed strongly from the actual recovery against his administrator.

The next objection is, that the judgment against the administrator of the indorser, the only evidence of a debt offered here, is no evidence against the surety of the administrator, or against a fraudulent grantee of the intestate debtor, as is Bridget McLaughlin. But we think otherwise. The administrator and his intestate are privies, and the former is liable after one recovery against the goods in his hands, and another against himself, suggesting a devastavit on a return of *nulla bona*. 2 Brock., 213, 214.

If the administrator, then, in such case, be estopped, as he is, to deny the indebtedness of the debtor whom he represents, so must be his surety, *primâ facie* at least. 1 Brock., 135, 268; 4 Johns. (N. Y.) Ch., 620, 2 Rand. (Va.), 398. So in a bill in chancery, charging, like this, fraud in the administrator and a grantee, we think that such a judgment, till impeached, is good against the fraudulent grantee. *Birely*

 McLaughlin v. Bank of Potomac et al.

*230] v. *Staley*, 5 Gill & J. (Md.), 433; **Alston v. Munford*, 1 Brock., 279; 2 Rand. (Va.), 398. As to the heir, the question is different, and the force of the recovery may be much less. 2 Leigh (Va.), 84; *Bank of United States v. Ritchie*, 8 Pet., 128; 4 Har. & J. (Md.), 270, 271; 1 Munf. (Va.), 437, 455. Not being a privy in estate or deed with the administrator, it may not be *res judicata* or even *prima facie* valid, so as to bind either the heir or a devisee. 1 Brock., 145, 247; 1 Munf. (Va.), 1, 437, 445; 5 Gill & J. (Md.), 433. But a fraudulent grantee stands in a different relation, and his rights are in several respects unlike theirs.

The form of proceeding which has been adopted here against the surety is also excepted to. There is another mode, to be sure, of proceeding against the surety, which is on the administration bond. But in that case, a judgment like this against the administrator would be presumptive evidence against the surety, though open, perhaps, to proof, if any existed, of collusion or fraud in the judgment. In this way, also, though the creditor has a double remedy, if the surety has combined to commit a fraud and waste of the estate, and may proceed against him for that in a bill, or proceed on the administration bond, yet this double remedy is not unusual, nor exceptionable; and bills like these may well include all who have colluded with the administrator, or improperly intermeddled with the property, like executors *de son tort*. *Holland v. Orion*, 1 Myl. & K., 240; 1 Vez. Sr., 105; 2 Keen, 534; Story, Eq. Pl., § 178. *Chamberlayne v. Temple*, 2 Rand. (Va.), 398. But whether fraud is charged or not, such bills should usually include all persons who may be affected by being interested in the estate. Story, Eq. Pl., § 178; *Bowsher v. Watkins*, 1 Russ. & M., 277. This is expedient in order to settle all the liabilities and exceptions in one proceeding, and to ascertain how much ought to be charged on real, and how much on the personal estate. Story, Eq. Pl., §§ 172-176. Here the collusion and waste are imputed to both the administrator and surety, and the same surety is charged with fraud in the purchase of the land, and this proceeding against them, whatever other remedy may exist, must therefore be deemed proper. Story, Eq. Pl., § 178; 1 Myl. & K., 237, 240; 1 Russ. & M., 281, note; 5 Gill & J. (Md.), 432, 453; 2 Rand. (Va.), 398, 399; 10 Gill & J., 65, 100.

The next objection is, that, by the laws prevailing in Alexandria, the first resort for payment of such a debt should be to the personal estate, before going to the real. There seems to be not much doubt of this, as a general principle, under

the laws of Maryland, by 5 Geo. 2, c. 7, before the cession of the northern portion of the District of Columbia. Those laws were adopted in that District, February 27th, 1801 (2 Stat. at L., 103, 756; *1 Har. & J. (Md.), 469; 2 Har. & M. (Md.), 12); and her laws in this respect [*231 appear to have been extended to Alexandria, June 24th, 1812. Davis's Laws of District of Columbia, 264. The laws of Virginia prevailing there before do not seem on this point to have been materially different. 2 Leigh (Va.), 84; 2 Lomax, Ex. 512. There the real estate was made liable for certain debts, under an act of Parliament, as early as 1732, extending in terms to the Colonies. *Tessier v. Wyse*, 3 Bland (Md.), 44; 2 Id., 325. But still, "in a creditor's suit" or bill, the personal estate should first appear on the hearing to be insufficient. 1 Brock., 79; 2 Bland (Md.), 317, 347; *Wyse v. Smith*, 4 Gill & J. (Md.), 302; 2 Har. & McHen., 12. It does so appear here in substance. Here it is alleged, and not denied, that the personal estate has never been accounted for by the administrator or surety. It would seem on the evidence to have been left chiefly in charge of the surety, and to have been improperly applied to her own use. The objection, therefore, comes with a very ill grace from her. The administrator has also been found guilty of a devastavit in respect to it, and it is manifest there never was enough, either as sold or appraised, to defray the debt of the bank alone. Under these circumstances, then, a resort was proper to the real estate. *Gordon's Adm'r v. Frederick*, 1 Munf. (Va.), 1; 2 Bland (Md.), 347.

It is further objected, that such a resort cannot be had, unless it is averred in the bill, as well as proved, that the personal estate has been all exhausted in the payment of debts. The fact of the personal estate being exhausted in some way before the real is taken from the heir, as heir, and applied, may, as before remarked, be proper to be first proved. But the necessity to aver it in so many words, even in the bill to charge an heir, is questionable. 1 Brock., 79; 2 Lomax, Ex. 250; 2 Story, Eq. Pl., §§ 174, 176. See forms in 2 Gratt. (Va.), 532, and 3 Id., 371; Equity Draftsman, 157, 161, 180; *Tessier v. Wyse*, 3 Bland (Md.), 44. Such an averment does not affect the merits, because, whether averred or not, the court will not generally charge the land till satisfied that the personal estate has been wasted or is insufficient. *Stevens v. Gregg*, 10 Gill & J. (Md.), 143. And it is usual, also, to have the prayer of the bill state, in some way, that the personal assets are insufficient. Such is the form in *Beall v. Taylor*, 2 Gratt. (Va.), 532. But this

 McLaughlin v. Bank of Potomac et al.

deficiency need not be alleged to have arisen from the actual payment of debts. Some seem to consider it enough to aver that waste has been committed of the personal estate. 2 Bland (Md.), 347. Others, that it will suffice to state and to show judgment against it and execution unsatisfied. *Rhodes v. Cousins*, 6 Rand. (Va.), 190; *Liggat v. Morgan*, 2 Leigh (Va.), 84. The English practice is, not to require *232] any averment that the personal estate is exhausted, but merely to ask the land to be charged, if the personal estate be not enough, 3 Bland (Md.), 43; *Davy v. Pepys*, Plowd., 439; 3 P. Wms., 92, 333. So is it in New York. *Thompson v. Bruce*, 4 Johns. (N.Y.) Ch., 620. It would seem, also, to be permissible in Virginia, where the heir or devisee for such debts as are chargeable on the land is joined in a creditor's bill with the executor or administrator, to examine into the condition of the personal estate, irrespective of any averment about its sufficiency, and, if found to be enough, to dismiss the bill as to the heir (1 Brock., 79); and if not enough, to sustain the bill against the heir for the deficiency. Such seems to be the practice, also, in some other places. 4 Johns. (N.Y.) Ch., 621; Story, Eq. Pl., §§ 172, 174, 176; *Hammond v. Hammond*, 2 Bland (Md.), 306, 359; *Tessier v. Wyse*, 3 Id., 59; *Gibson v. McCormick*, 10 Gill & J. (Md.), 65.

Many of the cases in Maryland, looking to the propriety of a fuller and direct averment that a deficiency has happened from the payment of debts, arise under laws passed since 1801, and after her prior laws had been adopted in this District, and relate to heirs or devisees, rather than fraudulent grantees. *Gibson v. McCormick*, 10 Gill & J., 102. The following cases were those of heirs who were infants or lunatics, and hence requiring the aid and vigilance of chancery to protect them, by having debts clearly proved, and the personal estate first exhausted. 3 Bland, 49, 84; *United States Bank v. Ritchie*, 8 Pet., 128; *Wyse v. Smith*, 4 Gill & J., 302.

Considering, then, that in Maryland and Virginia, no less than elsewhere, something is permissible short of a direct averment as to the exhaustion of the personal estate in the payment of debts in a bill against an ordinary heir as such, certainly the reason does not apply in a proceeding against a fraudulent grantee for anything fuller or more direct, if so full. 5 Gill & J., 433. Such a grantee has no protection, like the heir, from want of privity or misconduct, and though he may be, in fact, the heir, as in this case, yet he takes by his deed, *prior in tempore*, and holds any surplus after paying

debts as a voluntary and good grantee in respect to that surplus, and not as heir.

When, therefore, in a bill against such a fraudulent grantee, the fraud is averred, as here, and a waste of the personal estate, and the clause is stated to be made on that account, all is alleged which seems necessary for full notice, and for a decree against such grantee, if at the hearing the fraud is substantiated, and the personal assets are proved to be wasted or insufficient.

To show that the averments in this bill come quite up to the usual standard in this respect, we need only cite from it *the following, as to Edward McLaughlin:—"That [233 he left no real estate, having fraudulently conveyed and disposed of the whole of it in favor of the said Bridget McLaughlin, as before stated. That his personal estate has been made away with, and misapplied by his administrator, and the surety of said administrator, as before charged. Your orators are advised, that the personal estate of the said McLaughlin is, in the first place, liable to the payment of their debts, if he left sufficient for that purpose, and that the said administrator and his surety are bound to render an account thereof. That if the said personal estate be insufficient, then that the real estate, fraudulently conveyed by him as aforesaid, is liable to make good any deficiency."

Our conclusions, then, on this point, are, that these allegations must be considered ample and explicit enough for a proceeding against a fraudulent administrator and surety and fraudulent donee, whether looking to the Maryland, Virginia, or English practice as prevailing in Alexandria. Being also a proceeding in chancery, if in some respect argumentative, the averment is clear enough not to be mistaken, and opens for consideration the whole merits. Because, as regards the defendants, if on principle they are answerable for personal estate squandered and misapplied by themselves, and land fraudulently conveyed to one of them is not to be shielded from liability in consequence of the waste of personal estate by herself, then the allegations here are the proper ones, and, being the true ones also, need no amendment. The facts established under them fully justify the decree below.

So far from the principal defendant insisting or showing, at the hearing in this case, that the personal assets were large enough to pay this debt, or have been so applied, and the land in her possession has been thus relieved from the charge, she contended that they were less in amount than the plaintiffs did; and the latter prove clearly that she joined the administrator in committing waste of what did exist, that is, con-

Wagner et al. v. Baird et al.

sumed the very property she urges the creditors should resort to before calling on her. And though she is an heir of Edward McLaughlin, the proceeding here is against her, not as heir, but as surety to a defaulting administrator of the personal estate, and as fraudulent grantee of the real estate.

Their is no heir to this land, claiming it as heir, in any part of these proceedings, but a grantee of it, claiming by a deed, and which, if fraudulent, still entitles the grantee to hold it as grantee against the heirs of the grantor, of whom there is one other not here, and places the heirs as such entirely out of the case,—*hors de combat*.

*234] *As no other question arises on the appeal which is material and has not been arranged in submitting to a sale of the trust property, it is only necessary to add that the judgment below must be affirmed.

Mr. Justice McKINLEY dissented.

ORDER.

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 Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered 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.

PETER K. WAGNER, AND SIDONIA PIERCE WAGNER, HIS WIFE, JOHN LAWSON LEWIS, LOUISA MARIA LEWIS, THEODORE LEWIS, ELIZA CORNELIA LEWIS, ALFRED J. LEWIS, JOHN HAMPDEN LEWIS, ALGERNON SIDNEY LEWIS, GEORGE WASHINGTON LEWIS, AND BENJAMIN FRANKLIN LEWIS, ALL RESIDENTS AND CITIZENS OF THE CITY OF NEW ORLEANS AND STATE OF LOUISIANA, AND JOHN BOWMAN, AND MARY PIERCE BOWMAN, HIS WIFE, LATE MARY PIERCE LAWSON, RESIDENTS AND CITIZENS OF THE STATE OF TENNESSEE, AND GEORGE C. THOMPSON, A RESIDENT AND CITIZEN OF THE STATE OF KENTUCKY, COMPLAINANTS AND APPELLANTS, v. JOHN BAIRD AND OTHERS, RESPONDENTS.

There is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases the court often act upon their own inherent doc-