*Telfair *et al.*, executors of Rae and Sommerville, *v.* Stead's executors.

Decedents' estates.

The lands of a deceased debtor, in Georgia, are liable in equity for the payment of his debts, without making the heir a party to the suit.

This was a writ of error to reverse a decree in chancery of the Circuit Court for the district of Georgia, rendered in favor of the defendants in error

The bill alleged that John Rae and John Sommerville, as copartners in merchandise, were, on the first day of January 1775, indebted to Stead, a British creditor, in the sum of 3864*l.* sterling, on account. That Rae & Sommerville, in their lifetime, made a division of their supposed profits in trade, and drew out considerable proportions of the partnership funds, which they ought not to have done, before payment of their debts, and that each invested part of those funds in purchase of lands and negroes, as their own separate property. That Rae died in 1772 or 1773, intestate, and that Sommerville, the surviving partner, died in 1773, having made Edward Telfair his executor, and having a large real and personal estate. That the said John Sommerville, Samuel Elbert and Robert Rae administered upon the estate of John Rae. That a considerable part of his personal estate was purchased with moneys improperly drawn out of the joint funds. That he left personal estate to the amount of 9014*l.* 5*s.* sterling, which came to their hands. That the said administrators of Rae were all dead. That Belfair, as executor of Sommerville, who was administrator of Rae, became possessed of a considerable part of his estate, part of which had been purchased with the joint funds. That on the death of Robert Rae, his wife, Rebecca, then wife of Samuel Hammond, claiming as executrix of Robert Rae, became possessed of a considerable part of the estate of John Rae, senior, which had been purchased with the joint funds. That on the death of Samuel Elbert, the last surviving administrator of Robert Rae, Elbert's executors, viz., Elizabeth Elbert, William Stephens and Joseph Habersham, also became possessed of part of the estate of John Rae, senior, which had been purchased with the joint funds. That Habersham, as legatee of Jane Sommerville, daughter *of John Rae, senior, became possessed of a large personal [*408 estate, liable to the claims of the complainants. That administration *de bonis non* of the estate of John Rae, senior, was (after the death of Sommerville, Robert Rae and Elbert) granted to John Cobbison and Ann, his wife, and a part of the estate of the said John Rae, senior (purchased with the joint funds), came to their hands. That James Rae, deceased, as legatee of Jane Sommerville, became also possessed of an estate liable to the claim of the complainants, which had come to the hands of his administrators, Cobbison and wife. The complainants charged, that the defendants had wasted or misapplied the property which was liable to their claim, and sought a discovery against each of the defendants, of assets and funds, but did not ask for any specific relief.

The answer of Cobbison and wife admitted that they were in possession of 600 acres of land, part of the estate of John Rae, senior, "but whether it was purchased with moneys drawn from the funds of Rae & Sommerville was a fact which had not come to their knowledge." They also admitted personal estate to the value of 348*l.* 2*s.* 4*d.*

Hammond and wife, Habersham, and Stephens demurred to the bill. 1st. Because the complainants stated themselves to be executors, but did not show where the will was proved, nor whether letters testamentary were ever granted, nor whether they had taken upon themselves the execution of the will. 2d. That the bill contained no matter of equity.

The same defendants also pleaded in bar, a recovery at law, in the year 1775, by Stead, in his lifetime, against Telfair, executor of Sommerville, surviving partner of Rae & Sommerville, for the same debt for which the complainants were now seeking relief upon the original *assumpsit*, which is merged in the judgment.

Habersham and Stephens denied all knowledge of ever having had in their hands any part of the estate of John Rae, senior, under Elbert's will;
*409] but Stephens stated, that *in the lifetime of Mrs. Elbert, she delivered to him, as an attorney-at-law, a bond of Rae, Whitefield & Rae, to John Rae, senior, for 1637*l.* 0*s.* 4*d.*, which bond he was ready to deliver up to any person entitled to receive it.

Rebecca Hammond admitted, that her former husband, Robert Rae, as devisee of Jane Sommerville, came to the possession of two tracts of land, a family of negroes, called Boston's family, and some plate, but did not admit that they were part of the property of John Rae, or came from the funds of Rae & Sommerville. She stated, that one of the tracts of land, viz., Rae's Hall, had been sold for taxes.

Joseph Habersham admitted, that in right of his wife, a legatee of Jane Sommerville, he received negroes, valued at 300*l.* which had once belonged to John Rae, senior.

Telfair demurred to so much of the bill as sought a discovery from him of the amount due to the complainant's testator from the estate of John Sommerville, or from Rae & Sommerville, or either of them, at the time of their deaths, or to compel the payment thereof from this defendant, for want of equity, there being an adequate remedy at law; and answered as to the residue of the bill.

His answer stated that, before the war, he had fully administered on the estate of John Sommerville, in his own right, and as surviving partner of Rae & Sommerville, so far as had come to his hands; and had returned an account of his administration, on oath, to the satisfaction of the creditors. He did not admit that any division of profits was made by Rae & Sommerville in their lifetime, nor that they drew out any of the joint funds and invested them in lands, &c., as their, or either of their, separate property.

He admitted, that there were several real estates, and that he received assets to a considerable amount, a part of which were sold for paper money, which perished on his hands; and the books and papers of Rae & Sommerville, and his own accounts of payments and receipts, &c., were lost or destroyed by the British, while in possession of Georgia. He claimed also a right to retain for debts due to himself.

*410] *On the 30th of April 1794, the demurrers were, on argument, overruled by Judges Iredell and Pendleton.

To the plea in bar of Hammond and wife, Habersham and Stephens, the complainants replied, that there was no such record; the issue upon which

being joined, was adjudged for the complainants, on the 15th of November 1794, by the Judges WILSON and PENDLETON.

At the same term, auditors were appointed to ascertain the sum due to the complainants, but their report appeared to have been set aside, and the clerk was directed to ascertain the balance, and an issue was directed to ascertain the damages, upon the verdict for which, the following decree was made by Judge BLAIR, on the 5th of May 1795.

"The bill and answers in this cause being read and heard, it is ordered and decreed by the court as follows:—That the sum of 3634*l.* 14*s.* 7*d.* sterling, together with the interest accrued thereon, at the rate of five per cent. per annum, from the 1st of January 1774, to this day, deducting interest from the 19th of April 1775, to the 3d of September 1783, be paid to the complainants, together with five per centum on the amount of the said principal and interest, as a compensation for the expenses of remitting the said amount to Great Britain, where it was contracted to be paid; and that the partnership property, admitted by the defendants to be in their hands, be, in the first instance, applied towards the discharge of the complainants' demand. And that the several tracts and lots of land belonging to John Rae, or John Sommerville, deceased, referred to in the answers of the several defendants (and the title deeds whereof, admitted to be in their possession) be sold by the marshal of this court, on the first Monday of January next, for cash, giving two months' notice of such sale in the Gazettes of Savannah and Augusta; and the net proceeds of such sale be appropriated towards the payment and satisfaction of this decree. And that the title deeds, in the hands of the several defendants of such lands, be delivered over into the hands of the clerk of this court, in three months after notice given to the defendants for that purpose."

*Sundry sales having been made under this decree, and the clerk having reported the balance remaining due on the 4th of January 1796, to be $11,196.77½—The following decree was made, on the 15th of November 1796, by Judge PATERSON.— [*411

"It appearing from the report of the clerk, that on the 4th of January 1796, $11,196.77½ remained due to the complainants, upon motion of Mr. Gibbons, solicitor for the complainants, and by consent of Mr. Telfair, executor of Sommerville, it is further ordered and decreed, that in regard to the defendant Edward Telfair, the executor of John Sommerville, who was the surviving partner of John Rae, that the copartnership property, if any, which now is in the hands and possession of the said Edward, as executor as aforesaid, be sold by the marshal of this court, he giving sixty days' notice in the public gazettes of such sale. And the judgments, bonds, notes and other evidences of debts due the said copartnership be delivered over to his attorney or solicitor, under a general assignment by deed, in order to sue the same, if the assets acknowledged or proven to be in the hands of the defendants should not be sufficient to discharge the amount of the said decree. That after payment and satisfaction of a prior judgment obtained by Matthew Clarke, in the county of Richmond, against the said Edward Telfair, executor of the said John Sommerville, for the sum of 826*l.* 10*s.*, with interest from the 17th of March 1794, the balance of the property of the said John Sommerville, if any, in the hands of the said Edward Telfair, executor

as last aforesaid, agreeable to his answer, be sold as first aforesaid. And the bonds, notes and other evidences of debts remaining in this defendant's hands be delivered over and assigned as aforesaid, subject to the further order of this court, after deducting all lawful commissions, and paying costs and charges for administering and conducting the business of the said estate, and that the said Edward Telfair be discharged from the same, on complying with this order.

"It is further ordered, that the bond admitted by William Stephens, one of the defendants, to be in his hands, given by Rae, Whitefield & Rae, to *412] John Rae, senior, dated the 1st of June 1782, conditioned for the *payment of 1637*l.* 0*s.* 4*d.*, with lawful interest from the date, be delivered over to the complainants, or their agents, to be sued for and recovered, and that the sum so recovered be applied to the extinguishment of the complainants' demand.

"It is further decreed, that the following negroes, that is to say, Boston, Jenny, Phillis, Boy Boston, Molly, Peter, Sally and Ned, charged to be in the hands of the defendants, Samuel and Rebecca Hammond, and not denied by the said defendants, be sold at public sale, by the marshal of this court, first giving sixty days' notice thereof, and that the proceeds be applied to the discharge of the complainants' debt.

"It is further ordered and decreed, that the following negroes, Cuffey, Bet, with her issue and children, Nelly, Peter, Nancy, Toney, Mary, Jenny, Sucky and Doll, admitted by the defendant, Joseph Habersham, to be in his hands, be sold by the marshal, in manner aforesaid, and the net proceeds be applied to the payment of the complainants' demand."

On the 2d of May 1797, before Judge Chase, leave was given to the complainants to add Elizabeth Course, executrix of Daniel Course, deceased, as a defendant to the bill.

On the 17th of November 1797, Judge Wilson decreed a number of tracts of land belonging to the estate of John Rae, senior, to be sold.

On the 2d of May 1799, Ellsworth, Ch. J., on the circuit, made the following decree, viz :

"This cause came on to be heard on a decree made at November term 1796, by which it is ascertained and stated, that on the 4th of January 1796, the sum of $11,196.77½ remained due to the complainants ; and upon a supplemental bill against Elizabeth Course, which charges that a certain tract of land, containing 450 acres, on Savannah river, known by the name of Rae's Hall, is a part of the estate of John Rae, senior, deceased, and subject to the complainants' decree, and upon the answer of the said Elizabeth Course, by which it is ascertained, that the said defendant claims the said *413] tract of *land, under a deed of conveyance executed by Francis Courvoisie, tax-collector of Chatham county, to Daniel Course, deceased, late husband of the said defendant, bearing date the fifth of May 1792, for the consideration of 128*l.* 19*s.* 4*d.* sterling. And the cause being heard, and argued by counsel on the said decree, and the said bill and answer, together with the proofs and exhibits produced by the parties respectively :

"Whereupon, it is ordered, adjudged and decreed, that the said pretended conveyance be set aside and held as void ; and that the said tract of land

and premises be sold at public auction, by the marshal, first giving forty days' notice, in one of the Savannah newspapers, of the time and place of such sale. And it is further ordered, adjudged and decreed, that the following negroes in the possession of William Stephens and Joseph Habersham, executors of Samuel Elbert, to wit, Young Sambo, Billy, Chance, Oronoko, Fanny, Diana and Nero, be sold by the marshal, at public auction, giving forty days' notice of the time and place of sale as aforesaid. And it is further ordered, that the marshal shall pay to the complainants, or their solicitor, the proceeds of such sales above ordered and decreed, towards satisfaction of the balance due to the complainants on this day, being $9,157.90."[1]

On the 28th of April 1800, Judge MOORE made the following decree :— "This cause came on to be heard on the bill, answers and replications, and on decree made in this cause in the term of April 1799 ; and it appearing by the answer of Ann Cobbison, one of the defendants, that she hath assets in her hands amounting to the sum of 348*l.* 2*s.* 4*d.*, equal in value to $1491.90 : Whereupon, it is ordered, adjudged and decreed, that the said Ann Cobbison do, within ninety days, pay over to the complainants, or their solicitor, the said sum of $1491.90."

From these decrees, the defendants appealed, and assigned for error,

*1st. That there was not sufficient equity in the bill.

[*414

2d. That the decree of the 5th of May 1795, is vague and uncertain as to the amount directed to be paid by the defendants, it being expressed in pounds, shillings and pence, which are of no fixed value, whereas, it ought to have been in dollars and parts of dollars.

3d. That the sum decreed to be paid ought to have been apportioned among the several defendants (they not being the original debtors), in proportion to the amount of assets by them severally acknowledged, or proved to be in their hands respectively.

4th. That a court of chancery has no power to order the sale of real estate, especially, as the heirs-at-law are not parties to the suit : and inasmuch as the title to the real estate was not the subject-matter of the bill and proceedings.

5th. That the decree does not state to whom (whether to Rae or Sommerville) the lands belonged, which were ordered to be sold.

6th. That the private property of the partners was decreed to be sold, before it was ascertained whether the joint property (which had before been decreed to be sold) was not sufficient to satisfy the claim, or how far it would go towards satisfaction.

7th. That the decree of 15th November 1795, is founded only on the consent of one of the defendants, and yet materially affects some of the other defendants.

8th. That it directs the sale and application of individual funds, while it shows the existence of large copartnership funds, not previously applied by the complainants to the extinguishment of their demands, as directed by the decree of 5th May 1795.

9th. That it orders the sale of negroes, not specifically claimed by the

[1] See Course *v.* Stead, 4 Dall. 22.

complainants, and especially, the negroes inferred to be in the then possession of Samuel and Rebecca Hammond, although not by them, or either of them, admitted so to be.

*415] *10th. The decree of the 17th of November 1797, is liable to the objections stated in the 4th error.

11th. That the said decrees are not personal against each defendant, and apportioned according to the different amounts of assets in the hands of each.

12th. The decree of 28th of April 1800, is erroneous, in ordering Ann Cobbison to pay the full amount of assets admitted by her, while a *feme covert*, to be in her, or her then husband's hands, without her being called on, since becoming *sole*, to show whether her husband left the said assets, or any, and what part thereof.

13th. The decrees are against the real and personal estate, and not personally against the defendants, or either of them.

14th. That by the decree of May 1799, certain negroes are said to be in the hands of Habersham and Stephens, executors of Elbert, whereas, it was denied, that the said negroes were in their possession, but in the possession of the children of Elbert, in right of their mother, or otherwise, which negroes, by the said decree, are ordered to be sold, without proof of their being in the possession of Habersham and Stephens, and without the said children (many of whom are under age) being made parties.

This cause was argued in this court, at February term 1803, by *Key* for the original complainants, no counsel appearing on the other side.

By the decisions of the courts of Georgia, on the statute of 5 Geo. II., making lands liable to a *fieri facias*, it is not necessary that the heirs should be made parties. The lands are assets, until all the debts are paid. The executor of an administrator is not, as such, liable to a suit, on account of the original intestate; but is liable in equity for the property of the original intestate which has come to his hands.

*416] The record contains a special demurrer to the bill, which was very properly overruled. The causes for demurrer were, *1st. That it did not appear in the bill, by whom, or where, the letters testamentary were granted. 2d. That there was a complete remedy at law.

As to the first, it was not necessary for the complainants to make *profert* of their letters testamentary. It was sufficient for them to state that they were executors. At law, the defendants might crave *oyer;* but in equity they must petition that the will and letters testamentary may be produced. It is no cause of demurrer, that they are not set forth in the bill. As to the second cause of demurrer, a court of equity will sustain a bill against executors, because they are considered as trustees for the creditors and representatives of the deceased, and are liable to account; especially, where they are executors of several copartners; and because the court may compel an equitable distribution.

They are fourteen errors assigned in the record. 1st. That there is no equity in the bill. This has been considered and answered. 2d. That the decree, being in pounds, shillings and pence, is vague and uncertain. The relative value of dollars to the currency of Georgia is well known, and if the decree can be rendered certain, it is sufficient.

3d. The decree ought to be proportioned to the assets. This is done by applying the decree to the assets themselves. The object of the bill was not to enforce a responsibility further than assets should appear; it was not against the persons, but the property, that the bill sought relief; its object was to follow the assets. It does not appear, that the whole assets were sufficient to satisfy the claim, and therefore, there was no necessity to apportion the decree to the assets in the hands of each defendant.

*4th. The heirs-at-law were not made parties. By the practice and law of Georgia, the lands are assets, and therefore, the executor [*417 is the representative of the testator as to lands, as well as to the personal estate, until the debts are paid, and is the proper person to defend them against the claims of creditors.

5th. The decree does not state whether the lands belonged to the estate of Rae, or of Sommerville. The answer to this is, that the fact is not so.

6th. That the private property was decreed to be sold before it was ascertained that the joint property was not sufficient. The answer to this is, that it did not appear that the joint funds were sufficient. And it is to be presumed, that they were not, until the contrary appears. No error is to be presumed, until it is shown.

7th. That the decree is founded on the consent of Telfair alone, but affects some of the other defendants. The decree is founded on the consent of Telfair, so far only as respects him. It was not necessary for the court to insert in the decree, the grounds on which it was founded, so far as it affected the other defendants. If the court had sufficient grounds to justify the decree against the others, it is enough. The objection is, that the court did not state the grounds, not that they did not exist.

8th. This objection is the same as the 6th, only applying it to another decree; and is liable to the same answer.

9th. That the negroes, ordered to be sold, were not specifically claimed by the complainants. It is true, that the complainants did not specifically claim those negroes; but they were seeking for assets generally, and the defendant admitted that the negroes came to her hands, as executrix of Robert Rae. The court, having adjudged them to be liable to the complainants' demand, decreed them to be sold. Whether they were then in her actual *possession or not, was immaterial; they had been [*418 traced to her hands, and she must account for them.

10th. This objection is the same as the 4th, and liable to the same answer. 11th. This is the same as the 3d. 12th. That the defendant became *sole*, since her answer, and before the decree. Neither the complainants nor the court were bound to take notice of that fact until it was shown. If the assets did not remain in her hands, after the death of her husband, it was for her to show it. The court was not bound to make the inquiry.

13th. The decrees are not against the defendants personally. This is no error. The complainants were following the property of their debtor, not the persons of his representatives. 14th. The answer to this objection is, that the facts do not appear in the record to be as alleged in this exception.

On a subsequent day, the court expressed a doubt, whether the heirs ought not to have been made parties to the bill, and continued the cause to ascertain what construction the courts of Georgia had given to the statute of 5 Geo. II.

MARSHALL, Ch. J.—The only doubt which the court had, was, whether, by the laws of Georgia, the land could be made liable, unless the heir was a party to the suit. We have received information as to the construction given by the courts of Georgia, to the statute of 5 Geo. II., making lands in the colonies liable for debts, and are satisfied, that they are considered as chargeable, without making the heir a party.

Decrees affirmed.[1]

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*419] *GRAVES & BARNEWALL *v.* BOSTON MARINE INSURANCE COMPANY. (*a*)

Marine insurance.—Reformation of policy.

A policy in the name of one joint-owner, "as property may appear" (without the clause stating the insurance to be for the benefit of all concerned), does not cover the interest of another joint-owner.[2]

The interest of a copartnership cannot be given in evidence, on an averment of individual interest, nor an averment of the interest of a company be supported, by a special contract relating to the interest of an individual.

The evidence of the knowledge of the underwriters of the intention of the insured, at the time of making the policy, ought to be very clear, to justify a court of equity in conforming the policy to that intention.[3]

THIS was an appeal from the Circuit Court for the district of Massachusetts, on a decree in chancery, dismissing the plaintiffs' bill; the object of which was to charge the defendants upon a policy of insurance, and to obtain relief against a mistake alleged to have been made, by inserting only the name of Graves in the policy, whereas, the interest of both Graves & Barnewall was intended to have been insured.

The bill stated that Graves & Barnewall were equally and jointly interested in the ship Northern Liberties and her cargo; and that various sums of money were, by each of the partners, and at different places, procured to be insured upon the ship and cargo, from New York to Teneriffe, as well as from thence to La Vera Cruz, but in every instance, for their joint and equal benefit. That among other applications for insurance thereon, Graves, on the 24th of April 1800, wrote to Messrs. E. Sigourney & Sons, of Boston, inquiring of them at what rate of premium, insurance could be there obtained upon that risk, and therein describing himself as one of the parties interested in the property to be insured. Upon receiving their answer, he wrote again on the 5th of May 1800, saying, "Your office ask too high a premium for the risk I was inquiring after; the vessel cannot be out of time, as she sailed from hence for Teneriffe, in February, where we have not learned that she had arrived; less so, that she had sailed; but as it is my principle to run no risks, where I can help it, I have prevailed upon my copartner to anticipate her arrival and sailing again to Vera Cruz. To give you a perfect idea of the nature of the risk to be insured, you will find a

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(*a*) Present, MARSHALL, Ch. J., PATERSON, WASHINGTON, CUSHING and JOHNSON, Justices.

[1] For a further decision on the tax-title of Elizabeth Course, see 4 Cr. 403.

[2] Turner *v.* Barrows, 5 Wend. 541; 8 Id. 144.

[3] See Snell *v.* Insurance Co., 98 U. S. 85.