

## Statement of the case.

vive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value? If an action at law had been brought on the covenant at that time nominal damages at most, if any damages at all, could have been recovered. It did not come within the category of annuities and debts payable in future, which are absolute existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities. Had a proposition for a compromise of her right been made between her and the owner of the land, such a mode of estimation would have been very proper. But, without authority from the statute, the assignee would not have been justified in receiving such an estimate and making a dividend on it.

It is unnecessary to review the authorities *pro* and *con* on the subject. They are quite numerous, and are mostly cited in the note of Mr. Hare, above referred to. The case is so clear that we have hardly entertained a doubt about it.

JUDGMENT AFFIRMED.

## FROW v. DE LA VEGA.

1. A final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others.
2. If one of several defendants to a bill making a joint charge of conspiracy and fraud, make default, his default and a formal decree *pro confesso* may be entered, but no final decree on the merits until the case is disposed of with regard to the other defendants. The defaulting defendant is simply out of court and can take no farther part in the cause.
3. If the bill in such case be dismissed on the merits, it will be dismissed as to the defendant in default, as well as the others.

APPEAL from the Circuit Court for the Western District of Texas; the case being thus:

De La Vega filed a bill in the court below against Frow

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and thirteen other defendants, charging eight of them (including Frow) with a *joint* conspiracy to defraud him, the complainant, out of a large tract of land in Texas, by the use of a forged power of attorney purporting to be executed by the complainant, and by various conveyances and mesne conveyances, deraigning a false and fraudulent title from him. The defendants, other than Frow, all put in answers to the bill on the merits; but Frow's answer having been delayed (as he insisted, by misunderstanding, sickness, and other accidents), a decree *pro confesso* was taken against him at September Rules, 1868; and notwithstanding he afterwards prepared his answer and asked leave to file it (being in substance the same as the answers of the other defendants), yet the court afterwards, on the 23d of March, 1870, on application of the complainant, and against the protestation of Frow, made a final decree absolute against him, adjudging the title of the land to be in the complainant, and awarding to him a perpetual injunction as against the appellant. From this decree the present appeal was taken. After this final decree against the appellant, the court proceeded to try the issues made by the answers of the other defendants, and decided the merits of the cause adversely to the complainant and dismissed his bill. This fact was made to appear by the return to a certiorari sued out by De La Vega himself.

The question now was, whether the court in such a case as that mentioned could lawfully make a final decree against one defendant separately, on the merits, whilst the cause was proceeding undetermined against the others.

*Mr. P. Phillips*, for the appellant, argued that it was improper to have granted the prayer against a single defendant whose interests were all bound up with those of the other defendants.

*Mr. T. J. Durant*, contra, insisted that everything done had been done in accordance with the 18th Rule in Equity, prescribed by this court.

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Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. This was so expressly decided by the New York Court of Errors, in the case of *Clason v. Morris*.\* Spencer, J., says: "It would be unreasonable to hold, that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree."†

Irregularities, if any occurred in the proceedings after

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\* 10 Johnson, 524.

† See 1 Hoffman's Chancery Practice, 554.

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the decree complained of, are not now before us for adjudication.

DECREE REVERSED with costs, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

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ADGER v. ALSTON.

1. Where a suit was brought in Louisiana, for a debt due January 1st, 1858, the writ being served February 29th, 1868, *held* that in view of the decision in *The Protector* (12 Wallace, 700) that in the State named, the war of the rebellion began on the 19th of April, 1861, and closed on the 2d of April, 1866, the plea of what is known in Louisiana as "prescription of five years" could not be sustained.
2. A statute of Louisiana passed in 1858 enacts that—

"Parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact."

The purpose of such an act is that no verbal declaration of a deceased man shall be given in evidence to prove against him an acknowledgment of a debt which would otherwise be barred by the statute of limitations; and that no written evidence shall be offered unless signed by him or his agent.

*Held* accordingly that oral statements of conversations and admissions of a decedent, tending to prove an acknowledgment of a debt, as due, within the period of prescription, and also indorsements, by himself, on the bond of payments made of interest up to a term which took it out of that period, were neither of them admissible under the statute, in a suit against his estate.

ERROR to the Circuit Court for the District of Louisiana; the case being thus:

On the 29th of February, 1868, Alston, a citizen of South Carolina, brought an action in the court below against W. E. Adger, administrator of John Adger, the latter in his lifetime and the former at the commencement of the action citizens of Louisiana; the foundation of the action being a