Statement of the case.

KEHR *v.* SMITH.

A deed by which a husband, on articles of separation between him and his wife, binds himself to pay, in trust for her, a certain amount of money (capital), and interest on it till paid, becomes a voluntary settlement if, before payment is made, the parties are reconciled, make null all the covenants of the articles of separation, and cohabit again, with an agreement that the settlement shall stand as agreed on, except that the husband shall not pay interest while he and his wife live together.

A voluntary settlement of $7000 cannot be sustained against creditors where the person owes $9306, and has, of all sorts of property, the same being not cash, not more than $16,132.

APPEAL from the Circuit Court for the Eastern District of Missouri.

Smith, assignee of Martin Meyer, a bankrupt, brought a bill in equity in the District Court for the Eastern District of Missouri, to set aside as fraudulent a deed of trust given by the bankrupt in August, 1867, to one Kehr, on a house and lot where he lived, and owned by him, to secure two promissory notes, of even date with the deed, for $2500 each, payable respectively in one and two years from date, with interest, which the bankrupt executed to a certain Schaeffer, as trustee of Clara Meyer, his wife.

The case was thus: In August, 1867, Meyer, a trader in St. Louis, and his wife agreed to separate, and entered into an agreement for this purpose. They were to live separate from each other without molestation, and the rights given to one in the articles of separation were secured to the other. In order that the wife might have sufficient means for her support the husband covenanted with a person named that he would pay to him, as trustee for the wife, the sum of $7000 on the execution of the instrument. In consideration of these and other agreements the trustee and the wife covenanted with the husband to accept the stipulated sum in full satisfaction of any claim for maintenance or support, and also for any claim for alimony or dower in case of the husband's death. The trustee also covenanted to save the husband harmless from any debts the wife might contract

on his account. No fault was imputed by one to the other, but each was left at liberty, if so disposed, to prosecute an action for divorce. Two thousand dollars of the seven was paid in money to the trustee, and the balance was secured to be paid by the deed of trust, which was the subject-matter of this controversy.

At the time of this settlement by Meyer his pecuniary condition, as assumed by the District Court, a report of whose opinion in full is given in the reports for the Eighth Circuit,* was thus:

He owed, ...		$9,306
He had property as follows:		
The property charged in favor of his wife, about the value of which witnesses differed, one valuing it at $10,500, a sum which, free from all incumbrances, it brought at public sale, ...	$10,500	
Other real property, at most, ...	632	
Personalty, ...	5,000	
	$16,132	
Deduct amount settled on his wife, . .	7,000	
Leaving to pay all his debts, ...		$9,132

The Circuit Court estimated the real estate charged at about $2000 more than did the District Court; noting, however, that being the party's homestead, the homestead right (in Missouri $1000) was chargeable on it. The result was, of course, not much different.

After the execution of the deed of separation the parties separated, but within two and a half months became reconciled, and, with the trustee, entered into articles of reconciliation, rescinding the whole of the previous agreement, except in the matter of the separate estate created by it; agreed to forget past differences, and to live together as husband and wife; it being further agreed that the husband was not to pay any interest on the notes during their reconciliation. The covenants in the first articles, except in the particular named, were declared to be void, and each party

* 2 Dillon, 51.

released the other from any breach of them. A "complete condonation" was also declared by the new arrangement.

The husband and wife lived together for some four years, when the husband left the country, and soon after this he was declared a bankrupt. After the filing of the bill in this case, the property on which the notes to Mrs. Meyer were secured was, with the assent of the parties litigant, sold by the order of the court, and the right reserved to the parties to proceed against the fund. The question for decision was whether Mrs. Meyer should have these notes paid to her out of the proceeds of this property to the exclusion of the creditors of her husband.

There was some effort to prove that Mrs. Meyer had received from a first husband's estate a considerable amount of money, which Meyer, who was her second, had received and used for his own purposes; and that this use of it by him was the equitable basis of the settlement of $7000. The deed of settlement, however, did not allude to this as a consideration, nor allude to it otherwise, and there was no sufficient proof of the fact that when she married Meyer she had any property, or that afterwards she ever got any from any source independently of Meyer himself.

The District Court decreed in favor of the assignee, and the Circuit Court having affirmed that decree, the wife and her trustee took this appeal.

Messrs. N. Meyer, M. Blair, and F. A. Dick, for the appellant; Mr. S. Knox, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to discuss the question whether the settlement made, in view of actual separation, could be upheld or not in the condition of the husband's affairs, because this case must turn on what occurred afterwards. All the elements of value which entered into the composition of the first agreement ceased to exist when the parties became reconciled. The marital relations were resumed on the basis of mutual forgiveness for past misconduct, and the

wife became entitled to support from her husband and to dower in his estate. These rights of the wife had been relinquished in the first contract, and this relinquishment was the only consideration to support it. The withdrawal of the consideration left the notes without any element of value in them, and the execution of the new contract, followed by cohabitation, placed the parties exactly where they would have been if there had been no separation. The notes thus became a voluntary gift, and it can make no difference in their character that they are reserved as a separate estate to the wife. It is not a question in the case whether, as between the parties, they could not be enforced. The question is whether a husband, at the time largely indebted, can make a voluntary donation or even voluntary conveyance to his wife to the prejudice of his creditors. An attempt is made to show that Meyer received from his wife a considerable amount of money obtained by her from her first husband's estate, and that this formed part of the consideration of the settlement when they separated; but there is no evidence of any value to prove such a state of things. Besides, the articles of separation decide this point against the wife, as no notice is taken of it, and it is hardly possible, if the fact were as claimed, that on such an occasion it would not have been mentioned.

In this controversy, therefore, with creditors, the gift must be treated as purely voluntary; a gift being nothing more than the transfer of property without consideration.

We could not profitably add anything to what has been so well said by the district judge in his opinion in this case on the subject of the indebtedness and property of Meyer at the time of the settlement upon his wife. On a careful consideration of the whole evidence we are satisfied that the value of the property was not materially different from the estimate he put upon it. If he erred at all in this estimate it was within a very narrow limit. The homestead on which the notes were secured was the only piece of real estate of any consequence owned by Meyer, and witnesses differed as to its value, but the opinion of one was sustained by what

it brought at the sale, which was the criterion of value adopted by the District Court. In this he may have been mistaken, but if so, the mistake was within the limits of $2000, which the Circuit Court thought was about the worth of the property. Outside of the homestead the assets of Meyer were uncertain, but they did not exceed, if they equalled, the estimate of the District Court. The conclusion reached by that court, after going into particulars, was that the estate of Meyer could not have exceeded the sum of $16,132. Deducting from this the sum of $7000 paid, and agreed to be paid, to the wife, would leave $9132 to meet debts confessedly due, amounting to $9306.

Surely the voluntary provision for the wife, in such a condition of things, is not sustainable against existing creditors. Nor can it be supported on the theory that the whole estate was worth a few thousand dollars more. Suppose it was, there would still be that extent of embarrassment, which would have a direct tendency to impair the rights of creditors. In such a case a presumption of constructive fraud is created, no matter what the motive which prompted the settlement. Meyer was not only largely indebted for a person in his situation, but it is easy to see it would have been close work for his creditors to have made their debts, if they had tried to enforce their collection by judicial process, a surer way of ascertaining the real worth of the property than by the opinions of indifferent persons, as experience has proved that this kind of testimony is often unreliable on such a subject. The ancient rule, that a voluntary post-nuptial settlement can be avoided, if there was some indebtedness existing, has been relaxed, and the rule generally adopted in this country at the present time, will uphold it, if it be reasonable, not disproportionate to the husband's means, taking into view his debts and situation, and clear of any intent, actual or constructive, to defraud creditors.*

Testing this settlement by this rule, it must be taken to

* See the note to Sexton *v.* Wheaton, 1 American Leading Cases, 5th edition, page 37, where the law on this subject is fully considered.

be in bad faith towards existing creditors, as, clearly, it was out of all proportion to the means of the husband, considering his state and condition, and seriously impairs his ability to respond to the demands of his creditors.

It is well settled, where a deed is set aside as void as to existing creditors, that all the creditors, prior and subsequent, share in the fund *pro rata.**

We have considered the contract in this case as if it were executed, because no point is made by the respondents that it is executory, and the case has been argued by both sides on the theory that the law applicable to an executed contract of this sort applied to the one in controversy. It may well be doubted whether in any case a mere promise by the husband, without consideration, to pay money to the wife at a future time, can be enforced against the claims of creditors.

DECREE AFFIRMED.

PACIFIC RAILROAD COMPANY *v.* MAGUIRE.

1. The twelfth section of the act of the Missouri legislature, passed December 25th, 1852, by which it was declared that—

> "The Pacific Railroad shall be exempt from taxation until the same shall be completed, opened, and in operation, and shall declare a dividend, when the road-bed, buildings, machinery, engines, cars, and other property of such completed road, shall be subject to taxation at the actual cash value thereof:
>
> "*Provided*, That if said company shall fail, for the period of two years after said roads respectively shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said tax—"

created a contract that, subject to the proviso, the railroad should not be taxed.

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* Magawley's Trust, 5 De Gex & Smales, 1; Richardson *v.* Smallwood, Jacob, 552–558; Savage *v.* Murphy, 34 New York, 508; Iley *v.* Niswanger, Harper's Equity, 295; Robinson *v.* Stewart, 10 New York (6 Selden), 189; Thompson *v.* Dougherty, 12 Sergeant & Rawle, 448, 455, 458; Hoke *v.* Henderson, 3 Devereux, 12–14; Kissam *v.* Edmundson, 1 Iredell's Equity, 180; Sexton *v.* Wheaton, 1 American Leading Cases, 45; Norton *v.* Norton, 5 Cushing, 529; O'Daniel *v.* Crawford, 4 Devereux, 197–204; Reade *v.* Livingston, 3 Johnson's Chancery, 481–499; Townshend *v.* Windham, 2 Vesey, 10; Jenkyn *v.* Vaughan, 3 Drewry, 419–424.