UPSHAW FAMILY JOURNAL

Volume VIII July 1981 Number 3

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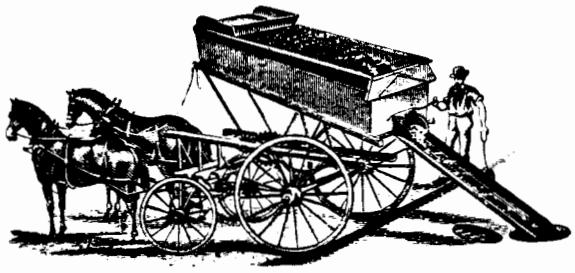
Managing Editor

Ted O. Brooke 79 Wagonwheel Ct., NE Marietta, Georgia 30067



THE EDITORS DESK

This issue and the one to follow contain information of court cases from 1658 to 1906 which have had briefs published in the Century and Decennial Digests. I have located the printed account of each case in the various State Reports and present them here in their entirety.

Especially interesting is the case of Elizabeth Upshaw vs. Leroy Upshaw and "others" (John Upshaw and Milley (Upshaw) Burnett), which is found in the Virginia Reports, Vol. 2, pages 381-394. This case will be published in the October 1981 Issue (Vol. VIII no. 4). We find in this case that Leroy Upshaw (RS), son of Forrest, with his brother John and sister Milley, filed suit in the Richmond (District) Supreme Court of Chancery in March, 1797, against Elizabeth Upshaw, widow of William Upshaw. This, incidentally, is the same Elizabeth Upshaw who had been the "beloved companion" of Drury Christian, who died in Amherst County in 1783. On 3 June 1803, this court ruled in favor of Leroy, John and Milley, which decision was appealed to the Supreme Court of Appeals by Elizabeth Upshaw, case being heard on 29 June 1807, and the decision was given on 28 April 1808 affirming the Court's opinion, with only slight exceptions regarding compensation to Elizabeth for past expenses.

Regarding Leroy Upshaw, he is found in Halifax Co., Va., on 20 July 1805 (Personal Property Tax List) and married Milley Scott on 4 November 1805 in Halifax Co. (See UFJ, Vol. IV, page 72). Jeremiah Burnett, Sr., husband of Milley Upshaw, as her legal representative appointed Leroy Upshaw Power of Attorney on 4 Feb. 1806, which was in the interim between the Supreme Court decision in 1803 and the appeal which was heard in 1807 (see UFJ, Vol. IV, page 76). In our unpublished records, I find that Leroy Upshaw was in Lunenburg Co. in March 1807 (Personal Property Tax List); he is next found in Halifax Co. in 1809, 1810, and 1811 (Personal Property Tax Lists); and is next found in September, 1812, giving Power of Attorney in Halifax Co., quite possibly to protect his interest in this court matter; he is last found (to my knowledge, thus far) in March 1814, in a suit with his nephew, Philip Burnett, in Lunenburg Co. (see UFJ, Vol. IV, page 76).

Research of Leroy Upshaw, Revolutionary Soldier, has now been in progress for nearly 50 years, since the beginning efforts in the 1930s of Mrs. Cora Lou (Upshaw) Herndon of Social Circle, Walton Co., Ga., Mrs. Grace E. Jared of Olney, Ill., and Mrs. Lenora H. Sweeney, author of "The Upshaw Family of Essex" article in the William and Mary College Quarterly in 1938. This court case is obviously the most important evidence yet found concerning him and it answers many of the persistant questions about him remaining unanswered from existing research until now. The personal motives behind his actions are impossible for us to determine, although certain observations may be made from the factual evidence we do have. This court case is a new milestone in the research of Leroy Upshaw (RS), and I hope you find it interesting.

Ted O. Brooke

Ted O. Brooke,
Editor

NOTES AND NEWS

Mr. Clifton Upshaw

(Atlanta Journal-Constitution, 3 Sep 1983. There was no later, more descriptive, notice in any Atlanta newspaper that I checked. TOB)

Mr. Clifton Upshaw of 795 Grant St., S.E., the husband of Mrs. Annie Upshaw, passed Sept 2, 1983. Funeral announced later. Pollard Funeral Home.

Mrs. Ruth Hopkins Upshaw

(The Atlanta Constitution, Mo., Sept. 26, 1983)

A Graveside service for Mrs. Ruth Hopkins Upshaw, 88, of College Park will be at 2 p.m. Monday at College Park Cemetery.

Mrs. Upshaw, a retired elementary school teacher, died Sunday of a stroke.

A graduate of Young Harris College, Mrs. Upshaw taught at Stone Mountain, Buena Vista and College Park elementary schools.

She was a member of the College Park First Baptist Church, the College Park Women's Club and the College Park Music Club.

Mrs. Upshaw was the widow of Elbert M. Upshaw, Sr.

Surviving are her sons, Dr. Elbert M. Upshaw, Jr. and Dr. C. Calvin Upshaw, both of Atlanta.

Upshaw

Graveside services for Mrs. Ruth Hopkins Upshaw, 2 p.m. Monday in College Park Cemetery. Family and friends assemble at cemetery. Mrs. Upshaw, the widow of Elbert M. Upshaw, Sr., died Sept. 25. She was an active member of College Park First Baptist Church and a pioneer member of the College Park Women's Club and the College Park Music Club. She was born in Lithonia, Ga., was a graduate of Young Harris College and attended Georgia Normal School in Athens, Ga. She taught school in Stone Mountain, Buena Vista and College Park. Surviving are two sons, Dr. Elbert M. Upshaw, Dr. C. Calvin Upshaw, both of Atlanta, ten grandchildren, four great-grandchildren. Contributions may be made to College Park First Baptist Church, 1773 Hawthorne Ave., College Park, Ga. or the A. G. Rhodes Home, Inc., 350 Boulevard, S.E., Atlanta, Ga. Howard L. Carmichael & Sons.

MEMBER'S ROSTER

Mrs. Edna K. Bush, 2004 Michigan Ave., N.E., St. Petersburg, Fl. 33703

(No Upshaw Lineage Chart received as yet)

Mrs. Beverly M. Upshaw, P.O. Box 869, Kearny, AZ 85237

(See Upshaw Lineage Chart of Mrs. Vivian E. Cole, UFJ Vol. VII, pg 6)

TABLE OF LEGAL CASES, 1658 - 1906

1906 Decennial Edition of the American Digest; A Complete Table of American (Legal) Cases from 1658 to 1906; Vol. 25, Table of Cases Digested in Century and Decennial Digests, S-Z; by West Publishing Co., St. Paul, 1912. (Note: Case citations are indexed by name of Plaintiff only; I have spoken with two law librarians, neither of whom is aware of there being any such index by Defendants for these digests.)

Explanation: The citation below is followed by an explanation of each portion of its references:

Upshaw vs. Gibson, 53 Miss 341; 27 C Infants, Sect. 101.

"Upshaw vs. Gibson" indicates the Plaintiff "Upshaw" and the Defendant "Gibson".

"53 Miss 341" indicates the volume of Superior Court Case Decisions, which is no. 53, in the Case Reports of Mississippi, and that this particular case begins on page 341 of this volume.

"27 C Infants, Sect. 101" indicates that a Brief (Summary), filed by subject, of this case will be found within the subject heading of "Infants", in "Section 101" of Volume "27", of "C", which is the "Century Edition" of the American Digest, which is "A Complete Digest of all reported American cases from the earliest times to 1896." In the few instances where the letter "D" is given, it refers to a Brief filed in the "Decennial Edition" of the American Digest. The principle difference between the Century and Decennial Editions is that the Century cases are the earliest (1658-1896), and the Decennial are later (ca 1896-1906). It is important to note that there is no additional information to be found in the briefs, so none of the Briefs have been given here for our genealogical purposes, although I have included references to the Briefs, as cited in the Table of Cases.

All of these volumes should be available at any large law library, and some may be located in state libraries and Archives.

Parties	State	Volume	Page
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Upshaw vs. Booth (Brief: 17, C, Dist. & Pros. Attys., Sect. 6)	Tex	37	125
Upshaw vs. Debow (Brief: 8, C, Can. of Inst., Sect. 21) (Brief: 16, C, Deeds, Sect. 180)	Ky	7 Bush	442
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(Brief: 4, C, ARB. & AW., Sect. 165, 263, 496)			
(Brief: 19, C, Equity, Sect. 417)			
(Brief: 39, C, Plead., Sect. 1469)			
(Brief: 48, C, Ven. & Pur., Sect. 627)			
Upshaw vs. McBride	Ky	10 B Mon.	202
(Brief: 19, C, Estop., Sect. 67)			
(Brief: 44, C, Spec. perf., Sect 55)			
(Brief: 48, C, Ven. & Pur., Sect. 386)			
Upshaw vs. Mutual Loan Ass'n.	N.Y.	29 Misc. Rep.	143
Upshaw vs. Mutual Loan Ass'n	N.Y.	60 N.Y.S.	242
(Brief: 11, D, Insurance, Sect. 222)			
(Brief: 15, D, Paymt., Sect. 87(2))			
Upshaw vs. Oliver	Ga.	Dud.	241
(Brief: 29, C, Judges, Sect. 165)			
Upshaw vs. Upshaw	Va.	2 Hen. & M.	381
Upshaw vs. Upshaw	Va.	3 AM. Dec.	632
(Brief: 26, C, Hus. & W., Sect. 25)			
(Brief: 49, C, Wills, Sect. 2056)			
(Brief: 17, D, Remaind., Sect. 12)			
Upshaw's Heirs vs. Sthreshly	Ky.	3 Bibb	444
(Brief: 49, C, Wills, Sect. 1155)			

LEGAL CASES (DIGESTED), 1658-1906

The following are copies of all Upshaw cases given in the above Index from the various State Reports, as indicated.

Ex Parte Upshaw
(Application For Habeas Corpus)

Alabama Reports, Vol. 45, Page 234-236; Reports of cases argued and determined in the Supreme Court of Alabama, during the January and part of the June term, 1871; published at Montgomery, Ala., 1871.

1. Act changing line between Russell and Barbour County; not unconstitutional. -- The act "to change the line between the counties of Russell and Barbour, approved December 31st, 1868, is not unconstitutional. The constitution does not forbid the incorporation into a law of everything needful to the proper operation of the one subject to which it is limited.

This was an application to this court by John Upshaw, for a writ of habeas corpus to obtain his discharge from custody, on a warrant issued by a justice of the peace of Russell County, against said Upshaw, on a charge of assault and battery, the same having been denied by the probate judge of Russell county. The other facts of the case will be found in the opinion.

Shorter & Bro., for petitioner.
E. Herndon Glenn, contra.

B. F. SAFFOLD, J. -- The applicant claims to be discharged from custody, because he was arrested in Barbour county, under a warrant issued by a justice of the peace of Russell county, not endorsed as required by law. Without inquiring whether for this reason alone he was entitled to be discharged, if the commission of any offense for which he ought to be arrested was proven against him, we will at once determine the question upon which a decision of this court is sought.

The probate judge, to whom the application was first made, held that the offense charged was committed in that portion of Barbour county which was attached to Russell county, by an act of the legislature passed in 1868, and the prisoner was arrested there on a warrant issued by a justice of the peace of Russell County, and, therefore, he was legally in custody. This is admitted by the prisoner, unless the act referred to is, as he claims, unconstitutional.

The said act is entitled, "An act to change the line between the counties of Russell and Barbour." It contains two sections. The first adds to Russell county a described and defined portion of Barbour county. The second is as follows: "Sec. 2. Be it enacted, That all taxes due from the now inhabitants of said county of Barbour be, and is hereby required to be paid over to the proper tax collector of the county of Barbour, with the taxes for the year 1869, and that from and after the passage of this act, the persons residing above said line have citizenship in the county of Russell." -- Acts 1868, p. 524.

The provision of the constitution said to be violated, is the second section of Article IV, requiring, among other things, that "each law shall contain but one subject, which shall be clearly expressed in its title." This requirement of the constitution was designed to remedy a very great evil, and not to impose harassing and ensnaring restrictions upon proper legislation. It may be troublesome to the careless and indifferent legislator, and a barrier to the unscrupulous one; but it never can be injurious to the people. The legislator knows what law he proposes to alter or amend, and in what respect he wishes to revise it. What is more reasonable than to require him to set out the act or section to be revised, and the amendment in such connection, that all may see at once the full extent of the change in the law they must be presumed to know, whether they do or not. For the same reason, and to avoid entrapping the people, he ought to be required to embrace in one law but one subject, which shall be clearly expressed in its title. The additional expenditure, if any, occasioned, is too insignificant to mention in comparison with the manifold evils sought to be prevented.

It would be a violation of the letter and spirit of this constitutional safeguard, if such a construction should be put upon it as would forbid the incorporation into a law of every thing needful to the proper operation of the one subject to which it is limited. The addition of a considerable number of the inhabitants of one county to another, would necessarily involve changes in their rights and duties which, with eminent propriety, are adjusted in this act. The law is not unconstitutional.

The application is denied.

S. C. Upshaw vs. C. T. Booth

Texas Reports, Vol. 37, page 125- ; Reports of Cases argued and decided in the Supreme Court of the State of Texas, during the earlier part of the Third Annual Session of the Court, commencing the first Monday of December, 1872; published at Houston, Texas, 1874.

On the 30th of September, 1870, the Governor, acting under the authority of the "Enabling Act", approved June 28th, 1870, appointed U. to be district attorney of the 35th judicial district. On the 5th day of September, 1871, he appointed one B. to fill the same office. Held, that under the appointment of September 30th, 1870, U. was entitled to hold the office of district attorney until his successor was elected and qualified, and the law provided that the election should take place in November, 1872; and the Governor had no authority to remove him and appoint another person in his stead, the term of office of district attorneys being defined by Section 7 of the Act of August 15th, 1870. (General Laws, 129)

(Followed by the opinion of the Court which, in this book, is on a torn page).

Upshaw, &c. vs. Debow

(Case 17 - Petition Equity - December 17; Appeal from Fulton Circuit Court)

Bush's Reports, Winter Term 1870, Vol. VII, page 442-448; reports of selected civil and criminal cases decided in the Court of Appeals of Kentucky, by W. P. D. Bush, Reporter, Vol. VII, containing cases decided at part of Winter Term, 1869, and summer and winter terms, 1870; published at Louisville, Ky., 1871.

1. Vendor fraudulently misrepresented the quantity and boundary of the land sold and conveyed -- Vender in possession under the deed -- Contract Rescinded. -- The vendor in this case induced the purchaser to make the contract and accept his conveyance by fraudulently representing the land as three hundred and eighty-six acres when in fact it was only three hundred and four acres. He also fraudulently represented and caused a line to be surveyed as his true southern line so as to include one hundred and eighty-two acres of rich ridge land, which were not included in his true boundary.
   Contract is rescinded, and
   Vendee to be charged with rents since he took possession, and for the value of wood and timber he sold from the land, and for deterioration of the soil, and to be credited by the amount, and interest thereon, of the purchase-money actually paid by him, and for the ameliorations he may have made on the land owned by the vendor.

2. Defect of title will not alone authorize a rescission when the conveyance is executed and vendee is in possession. -- A court of chancery will not decree a rescission of the contract where there is no other ground for claiming its interposition than a defect of title in vendor. The vendee has an adequate remedy in an action at law on the covenants contained in the deed. (Campbell v. Whittingham, 5 J. J. Marshall, 96; Miller v. Long, 3 Marshall, 336.)

But if the contract be tainted with fraud it vitiates the whole transaction, and presents a proper ground upon which to declare it void.

3. Vendee is not bound to examine his vendor's title papers. -- He might rely on the statements of his vendor, and in doing so, if the statements relied on were not true, the consequences must fall on him to whom confidence was given. (Young v. Hopkins, 6 Marsh. 23.)

John & John W. Rodman, ... For Appellant,

CITED

15 B. Monroe, 517, Campbell v. Hillman.
2 Duvall, 156, Warrin v. Barker & Co.
2 Dana, 274, Williams v. Rogers.

A. J. James, . .)
Randle & Tyler,) . . . . . For Appellee,

CITED

1 Marshall, 500, Shackelford v. Handley's ex'r.
4 Howard (Miss.) 435, Parham v. Randolph.
1 McCord, 121, Tunno v. Flood.
8 Paige, 312, Marvin v. Bennett.
5 Binney, 355, 363, Stoddart v. Smith.
9 Johnson, 465, Waters v. Travis.
Kent, 6th ed., 475, 576.
Sugden on Vendors, side-pages 357, 358, 271, 272.
Printed Decisions, 116, Damils v. Pogue.

Judge Peters delivered the opinion of the Court.

This suit in equity was brought by the personal representative of Thos. R. Upshaw against S. L. Debow to subject a tract of land in Fulton County to sale to pay an unsatisfied balance of the purchase-money.

It is alleged in the petition that decedent, on December 25, 1860, sold to the defendant the south-east and south-west quarters of section 4, of township 1, range 6, west; and the south-east fractional quarter of section 5, township 1, range 6, west; for four thousand five hundred dollars -- three thousand of which was paid down, and a note executed on the day the contract was made for the residue, due and payable one day after date; and on the same day decedent executed a deed to defendant for the land, a copy of which is filed as part of the petition; and judgment is asked for the amount unpaid on said note, after deducting the credits indorsed thereon, and for sale of so much land as would be necessary to satisfy the same.

Debow in his answer, which he made a cross-petition against the plaintiff, the heirs of Thos. R. Upshaw, and the heirs of Merriwether, admits he executed the note sued on for part of the price of the land he purchased, which he states was four thousand six hundred and thirty-two dollars, instead of four thousand five hundred dollars as charged in the petition; that the price he paid down three thousand one hundred and thirteen dollars, and executed his note for the residue, being one thousand five hundred and nineteen dollars, due December 26, 1860; that decedent represented the tract as containing three hundred and eighty-six acres when in fact it only contained three hundred and four acres, as is shown by the deed under which he claims, a copy of which was filed; that before he made the purchase he informed decedent that he desired to engage in the

business of farming, and would only purchase land suited to that business; that decedent represented his land as superior farming land, and invited him to go with him to examine it, which he did; that decedent showed him land south of his tract, which was rich ridge land, above overflow, and which he represented as being within his boundary; that he did not own nor propose to sell him in the tract more than thirty or forty acres subject to overflow, and that the balance of his tract was dry upland, well adapted to farming purposes, and assured him that the rich ridge land south of his true boundary was his, and relying on these statements of decedent he made the purchase; that said upland on the south of said boundary did not then and never did belong to said decedent, but belonged to the heirs of Merriwether, and to consummate his fraudulent purpose he caused McMurry, the surveyor of Fulton County, to make an incorrect survey by showing false corners, and had the lines so run as to include the ridge south of his true line, when he knew the same did not belong to him, and was not embraced in his deed, so as to induce appellee to make said contract, and that he could not effect a sale to him unless that land was included; that upon a correct survey of the quarter sections and fractional quarter to which appellant's intestate had title, and which he fraudulently conveyed to him, do not include said ridge; that there are one hundred and eighty-two acres of land between the true southern boundary of the land owned by said decedent and the southern line as run by McMurry, and which he represented as his true southern line, and that the land north of the actual line is subject to overflow, swampy, and very inferior to that which he represented to appellee he was selling him, and not worth half as much as the land he believed he was getting; that he entered upon the ridge land shown him by intestate as a part of his purchase, and made lasting and valuable improvements thereon by clearing, fencing, and building houses, and was not apprised of the fraud practiced on him until recently, before the institution of this suit; that he accepted the deed, believing that all the land shown by said intestate to him was embraced in said deed, and never would have made the contract, nor accepted the deed if he had not been deceived by the fraudulent misrepresentations of said intestate as to the boundary of said land.

Merriwether's heirs, having been made defendants to the cross-petition by appropriate pleadings, assert title to the land south of the true southern line of said appellant's intestate; to which, on final hearing, it was adjudged by the court below they were entitled, and judgment rendered in their favor for the same. And it was further adjudged that the note sued on should be canceled, and that appellee in addition thereto recover against the heirs of Upshaw, his vendor, the sum of two thousand seven hundred and seventy dollars, with interest from the date of the judgment, and costs; it having been admitted that they had received assets by descent from their said ancestor more than sufficient to satisfy the same. From that judgment Upshaw's heirs and representatives have appealed, and Debow prosecutes a cross-appeal; the one complaining that the judgment is for too much, and the other that the contract was not rescinded.

If cross-appellant is entitled to a rescission, that will dispense with the consideration of the questions raised on the original appeal, and that therefore is the primary question to be disposed of.

In Campbell v. Whittingham, 5 J.J. Marsh. 96, this court held that where a conveyance had been executed and a vendee let into possession a court of chancery will not decree a rescission of the contract, where there is no other ground for claiming its interposition than a defect of title in the vendor -- the vendee having an adequate remedy in an action at law on the covenants contained in the deed of conveyance -- and there would therefore be no propriety in nor necessity for the interference of the chancellor; and Miller v. Long,

3 Marsh. 336, is cited for sustaining the same doctrine. But if the contract be tainted with fraud, it vitiates the whole transaction, and presents a proper ground upon which to declare it void.

The first fact to be noticed in this case is that, upon a survey of the land conveyed to appelles, it is found to fall far below in quantity that represented in the deed to appellee, and that the deed under which the intestate claimed calls for three hundred and four acres only, when in the deed he made to appellee calling for the identical quarter and fractional quarter-sections he professes to convey three hundred and eighty-six acres, knowing, as he must have done, what the deed to him called to contain.

2. He knew that the high fertile land lying south of his line, and which he represented as his land, and informed appellee would be included in his sale, formed the principal inducement with appellee to make the purchase; and he, as must be presumed, caused the survey to be made so as to include said land, and in doing so he departed from the true lines and corners of his own land. This departure and error in the survey are shown by the evidence of Tyler and Brevard, practical surveyors, both of whom were upon the ground, found the true original lines and corners of intestate's land, and also traced the survey made by McMurry for intestate, having been shown where he ran the lines of his survey by the men who carried the chain when that survey was made, and by a plat of both surveys explain the difference in location.

3. Although McMurry made the survey for said intestate, and made the quantity three hundred and eighty-six acres, when he made the deed to appellee he did not describe the metes and bounds of the tract as made by McMurry, but describes the land by quarter and fractional quarter-sections, precisely as it was described in his deed, and then gives the quantity different, representing the quantity therein to be eighty-two acres more than his deed calls for.

It seems to the court appellants, under these circumstances, have no peculiar claims on the chancellor to aid them in enforcing a contract procured to be made by misrepresenting material facts to a vendee, who appears to have been a stranger in the country, and which were confided in, and by which appellee was put off his guard, as may be presumed, and where the precise location and situation of the land could not have been ascertained without a correct survey of it. Nor was he bound to examine the title-papers. He might rely on the statements of his vendor, and in doing so, if the statements relied on were not true, the consequences must fall on him to whom confidence was given. (Young v. Hopkins, 6 Mon. 23)

Wherefore the judgment is reversed on the cross-appeal of Debow, and the cause is remanded with directions to cancel the deed to him and to set aside the sale, and to refer the case to the master with directions to charge Debow with the rents since he took possession of the land owned by Upshaw, and for the value of any wood and timber he may have sold from said land, and deterioration of soil, and credit him by the interest on the amount of purchase-money actually paid by him, and the ameliorations he may have made on the land owned by Upshaw. The judgment is affirmed on the original appeal.

W. E. Upshaw et al vs. C. W. Gibson

Mississippi Reports, Vol. 53, Pages 341-345; Reports of cases in the Supreme Court for the State of Mississippi, Vol. LIII, containing cases decided at the October term, 1876; published at Boston, 1877.

Estoppel. Infant feme covert. Not estopped by acquiescence in sale of her property.

An infant feme covert can recover her personal property sold in her presence by her husband, with her knowledge and without objection on her part or any notification to the buyer at the time that she was the owner of the property, although the rights of mortgagees from the buyer have supervened.

Error to the Circuit Court of Yazoo County.
Hon. W. B. Cunningham, Judge.

This was an action of replevin by the defendant in error, trustee in a deed of trust given by one Humphreys on some mules. Mrs. Upshaw petitioned to be made a party defendant to the suit on the ground that the mules belonged to her. By consent she was made defendant; and the case going to trial before the circuit judge, without a jury, on the single question of title to the property, he decided in favor of the plaintiff, and Mrs. Upshaw brings the case to this court.

Miles & Epperson, for the plaintiff in error.
Robert Bowman, on the same side.

An infant is not estopped even by his deed. Cook v. Toumbs, 36 Miss. 685. It has been held that the doctrine of estoppel is inapplicable to infants. Tyler on Infancy and Coverture, # 54; Brown v. McCune, 5 Sandf. 224. A deed of property by an infant married woman is invalid and not binding upon her, unless ratified by her after she becomes of legal age. Markham v. Merrett, 7 How. (Miss.) 437; Sanford v. McLean, 3 Paige, 117; Cason v. Hubbard, 38 Miss. 45.

The judge below held, however, that notwithstanding Mrs. Upshaw was an infant and married woman, she was estopped by her acquiescence.

The contract of a married woman being void, it cannot be ratified unless by deed in the mode prescribed by statute. Positive acts of encouragement, which might operate to estop one sui juris will not affect one under legal disability; and a wife cannot do or forbear to do any act to affect her property, unless settled to her separate use. Tyler on Infancy and Coverture, #541.

The above principle is deduced from the decisions of the courts of Pennsylvania, Maryland, and other states where the statutes in regard to married women are similar to ours.

Garnett Andrews, for the defendant in error.

As to the general doctrine that ordinarily, under facts like those presented in this case, the party would be estopped, there can be no doubt. 2 Smith's Leading Cases (5th Am. ed.), 660, 661.

The question in the case at bar is, how far the principle is applicable to an infant feme covert.

At page 653 of 2 Smith's Leading Cases (5th Am. ed.), in the American notes, the subject is summed up in the following language: "It has sometimes been doubted whether the favor which the law shows minors should not extend to protecting them against the loss of that by an estoppel arising out of their words and actions, which they were not permitted to part with by a direct contract. It is evident that, where a contract is voidable, any estoppel which is solely founded upon it must be invalid. Brown v. McCune, 5 Sandf. 224; but as minors are equally liable with adults for torts, it would seem they may be barred by an estoppel growing out of a course of conduct which is fraudulent, or equivalent to fraud in itself or in its consequences. Barham v. Turbeville, 1 Swan, 437; Whittington v. Wright, 9 Ga. 23. Yet, as an equitable estoppel must always be founded, either wholly or in part, on the wrong of the party estopped, the age of the minor should be taken into consideration in deciding on his guilt or innocence, and he should not be barred by what he has done or said, unless there is sufficient reason for believing that he was cognizant of his own rights, and aware of the injurious effect which his conduct might produce on others."

While infants and married women are not bound by estoppels by deed, they are bound by equitable estoppels. Herman on Estoppels (ed. of 1871), paragraphs 416, 501, and authorities cited. "If an infant suffers another to purchase his property without informing such person of his ownership, he cannot recover the property of the purchaser. An infant standing by and seeing his property mortgaged, saying nothing, cannot afterwards claim the property as his." Herman on Estoppels, 481, 482.

Campbell, J., delivered the opinion of the court.

The facts of this case are, that Mrs. Upshaw being a married woman and an infant of eighteen years of age, her husband, in her presence, made a sale of her mules to one Humphreys, who had leased her plantation for two years, and that afterwards, while occupying said plantation and having possession of said mules, Humphreys executed a deed of trust on them for supplies. The plaintiff in replevin claimed the mules against Mrs. Upshaw by virtue of the deed of trust executed by Humphreys, and the question presented is, whether a married woman who is under twenty-one years of age can recover her personal property sold with her knowledge by her husband, without objection on her part, or any notification to the buyer at the time that she is the owner of the property. The court below held that Mrs. Upshaw was estopped from claiming the mules, and this is the error assigned.

If Mrs. Upshaw had been twenty-one years of age at the time of the sale, her title would have passed to Humphreys by the sale made by her husband; for her silence would have amounted to consent, and it would have been as if she had sold the mules herself. It is competent for a married woman to sell her personal property as if she was unmarried. The restriction of the statute as to the mode of disposing of the property of a married woman relates alone to real estate. Harding v. Cobb,47 Miss. 599.

The difficulty in this case arises from the infancy of Mrs. Upshaw. It is certain that she could not have contracted a valid sale of the mules or other

personal property, and that the rights of third persons had supervened makes no difference. Hill v. Anderson, 5 S. & M. 216; Cason v. Hubbard, 38 Miss. 35.

Did her silent consent, deduced from her failure to proclaim her rights and object to the sale, confer any greater right on Humphreys than her contract would have done?

The authorities assert a distinction between rights based on contracts with infants and those resulting from the frauds of infants; and in the effort of the courts to prevent the privilege of infancy from being employed to do great wrong, they have sometimes applied the principle of estoppel to infants to prevent such result. While we may be willing, in a proper case, to follow the lead of these decisions, we have not been able to find a case like this, in which the infant feme covert has been held to have lost her property because of her silence in the presence of her husband, who was making a sale of her property. It is true that "neither infants nor femes covert are privileged to practise deception or cheats upon other innocent persons," that infants are liable for torts, and will, where justice requires, be precluded from profiting by their frauds. But there is a marked distinction between "actual and positive fraud, committed by some unequivocal act," and that inferred from mere silence or acquiescence. Barham v. Turbeville, 1 Swan, 437; Wilie v. Brooks, 45 Miss. 542. We think the Circuit Court erred in holding that Mrs. Upshaw lost her title to the property by her silence in the presence of her husband when he was negotiating the sale. It does not appear that Humphreys was induced to buy the property, or that the person who trusted him on the faith of it was induced to do so, or was misled by any act of Mrs. Upshaw. No question of affirmance, after the sale, by Mrs. Upshaw arises, because she was under twenty-one years of age when this action was brought.

Judgment reversed, and cause remanded for new trial.

Arthur M. M. Upshaw et ux, vs. Seaburn Hargrove, Administrator of W. T. Caruthers

Mississippi Reports, Vol. VI, Pages 286-293; Reports of cases argued and determined in the High Court of Errors and Appeals for the State of Mississippi; by W. C. Smedes and T. A. Marshall of Vicksburg, Reporters of the State. Vol. VI, containing cases for January Term, 1857; published in Boston, 1846.

A vendor of land who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but bona fide purchasers, without notice can set up an implied waiver of this equitable Mortgage.

To constitute a bona fide purchaser without notice, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt.

W. purchased a tract of land of H.; and agreed to pay for it with other lands if title could be had to them, if not with a stipulated sum; upon which H. conveyed the land to W.'s wife; the title to the other lands not being made, H. filed his bill against W. and wife to subject the land sold by him, to the payment of the stipulated sum, the purchase-money thereof: Held that the land was subject to the vendor's lien.

Whether an award upon the voluntary submission to arbitration by the parties made by the arbitrators without notice to the parties, is void -- Quaere.

Where a bill in chancery sets up an award of arbitrators, and traces the claim of the complainant through it, the award will be held prima facie good, on pro confesso, even though the bill does not aver that the award was made upon notice.

Where the demurrer to a bill is overruled and the defendant allowed ninety days in which to answer; and the complainant die before the next term of the court, and the bill is revived at that term in favor of the administrator of the complainant; and on the same day of the revival, the defendant having failed to answer, the bill is taken for confessed against him, and a decree entered accordingly, it will be error; the defendant should have been allowed some day for the purpose of answering the bill of revivor.

In error, from the district chancery court, held at Holly Springs; Hon. Henry Dickinson, vice-chancellor.

On the 25th of April, 1844, Wilson T. Caruthers filed his bill in the vice-chancery court, in which he alleged that Arthur M. M. Upshaw and himself entered into a written agreement on the 18th of December, 1839, in these words, vix. "Whereas Wilson T. Caruthers, of Holly Springs, Miss., has this day executed to Ann Hamilton Upshaw and her heirs, his deed for two sections of land, viz.: Sections ten and fifteen, township four, range one, west, Chickasaw cession, N. Miss.; in consideration of my having given to said Caruthers heretofore an order on Colbert Moore to convey to him my undivided one half interest in five and a half sections land in Chickasaw county, North Miss., being the Tomshek's settlement of land; and whereas said Caruthers and myself entertain a doubt about the value of said undivided interest of five and a half sections land and believe there will be a balance due said Caruthers upon the exchange: Now therefore, it is hereby agreed mutually by the parties, that Felix Lewis and Colbert Moore shall settle upon the difference due said Caruthers upon said exchange of land, and that the amount so settled upon by them shall be settled and paid out of a contingent interest that said Upshaw has in sections of land, viz. -- Sections one and twelve T. 4, R. 9 W.; southern division of Sec. 4, T. 1, R. 4 W.; Sec. three, T. 10, R. 2 W; Sec. twenty-nine, T. 9, R. 9 E.; all of which latter lands are in the hands of F. Lewis and Daniel Saffaraus to get titles perfected, &c. And in case said titles all fail to be perfected, then the amount above settled upon and by this arrangement to be paid to said Caruthers by said Lewis out of the proceeds of said land is to be yet due and to be paid to said Caruthers by said Upshaw."

This agreement was signed by Upshaw and Caruthers. The complainant filed also a copy of the deed from himself to Mrs. Upshaw, the wife of Arthur M. M. Upshaw; and averred further, that Felix Lewis and Colbert Moore had indorsed on the back of this agreement the following award, viz.

"We, Felix Lewis and Colbert Moore, having met at Holly Springs, Miss., this the 4th day of January, 1840, for the purpose of settling the difference between Col. A. M. M. Upshaw's undivided interest in the Tomshek's land and W. T. Caruther's two sections in Marshall county, viz. Sections ten and fifteen, T 4, R. 1 West, do hereby agree in accordance with our appointment as valuers or appraisers of the relative value of the respective tracts of land of said Upshur and

Caruthurs; that there is a difference of three thousand dollars in favor of said Caruthers, which sum of three thousand dollars we hereby award to said Caruthers from said Upshaw.

Felix Lewis,
Colbert Moore."

The bill further averred, that the title to all the lands specified in the articles as in the hands of Lewis and Saffaraus failed, and that no part of the three thousand dollars had been paid; that the title to the land sold by him was still in Mrs. Upshaw, to whom it was conveyed at the instance of her husband, for the consideration expressed in the articles of agreement, and no other; that Mr. Upshaw and his wife were non-residents, and that unless the land thus conveyed to Mrs. Upshaw was subjected to the payment of this $3,000, the debt would be lost. The bill prayed accordingly.

The defendants demurred to the bill on the following grounds:
1. That the bill was filed upon an indebtedness growing out of an award, and it did not show or state that the defendants, or either of them had any notice to attend and be heard at the arbitration. 2. That there was no averment that the three thousand dollars had ever been demanded. 3. That the execution of the deed to Mrs. Upshaw and the taking of the separate obligation of Mr. Upshaw to pay any balance due on the lands conveyed, was a discharge of the equitable lien on the land. 4. That Mrs. Upshaw was not charged with notice of the agreement between Caruthers and her husband, or of the unpaid purchase-money, and therefore her title to the land would be free from incumbrance. 5. The complainant conveyed to Mrs. Upshaw and took Mr. Upshaw's bond to pay the debt, which released the vendor's lien.

At the January term, 1845, the demurrer was overruled, and the defendants allowed ninety days in which to answer.

At the July term, 1845, the death of the complainant was suggested and leave given to revive in the name of Seaborn Hargrove, administrator of complainant. At the same term, on the 12th day of July, Hargrove filed his bill of revivor, and on the same day, the defendant failing to answer within the time allowed, the bill was taken for confessed and a decree signed two days after, ordering a sale of the land by a commissioner of the court to pay the debt due to the complainant.

The defendants sued out this writ of error.

Totten and Bradford, for appellants.
The main point in controversy is, whether, upon the state of facts presented by the bill, the complainant was still entitled to, or had waived, his vendor's lien on the land which he conveyed to Mrs. Upshaw.

The doctrine in regard to the circumstances which will be held to have waived the lien of a vendor of land for his unpaid purchase-money, seems now to be firmly settled, in America, at least; and the present rule we apprehend to be, that the lien is waived whenever the vendor accepts, for the purchase-money due him, the responsibility of a third person, or other independent security, or does any other act which, even by implication, evinces his intention not to look to the land itself as a security. 4 Kent's Comm. 153; Fish v. How-

land, 1 Paige Ch. R. 20; Eskridge v. M'Clure et al. 2 Yerger, 84; Phillips v. Saunderson et al. 1 S. & M. Ch. Rep. 562.

Let us apply that rule to the case disclosed in this record. Caruthers conveys land, in fee, to Mrs. Upshaw, and takes the obligation of her husband for the balance of the purchase-money, agreeing with him, also, in regard to the mode in which that balance shall be ascertained. He goes even further than this, and stipulates that such balance shall, when ascertained, be paid -- not out of the land conveyed to Mrs. Upshaw, nor even by Upshaw himself in the first instance, but out of the interest of Upshaw in other lands, the titles to which were not then perfected. It was only in the event that those titles should not be perfected, that he was to have a personal claim upon Upshaw for the money.

Here, then, we have the case of a vendor who has taken no note, bond, or other obligation from his vendee for the payment of the purchase-money due him, but who, by an independent agreement with a third person, has taken, as a security for that money, a kind of equitable mortgage upon a contingent interest in other lands, and, moreover, has bound himself, in express terms, to look to that third person for payment in case of the failure of that contingent interest; thus showing, by necessary implication, that his intention, at the date of the agreement, was to look for payment, first, to Upshaw's contingent interest in the other lands, and, if that fund failed, then to Upshaw himself, and not, in any event, to the land conveyed to Mrs. Upshaw.

If any further evidence were wanting to show that the vendor in this instance intended to part with his lien, it would be found in the fact that, under a contract with Upshaw alone, he conveyed the land in question to a third person, in fee.

Under this view of the case, we believe the decree of the vice-chancellor must be reversed; but as other grounds were taken in the demurrer, we crave permission briefly to advert to them.

1st. It is not alleged in the bill that Upshaw was ever notified that the arbitrators were about to make their award, so that he could be heard before them. Their award, therefore, must be regarded as a nullity. Peters v. Newkirk, 6 Cow. 103; Kyd on Awards.

2d. There is no allegation in the bill, that payment of the sum awarded has ever been demanded of Upshaw. The decree directs the payment of the amount awarded, with interest from the date of the award. To the extent of the interest, at least, the decree is clearly wrong. 2 Stark, on Ev. 7th Am. ed. 1st part, 117; and Kyd.

3d. It is not alleged in the bill that Mrs. Upshaw was privy to the agreement between Caruthers and her husband, or that she ever assented to its terms. We insist, therefore, that her interest cannot be affected by the provisions of that agreement.

Further, we contend that, even admitting the existence of a vendor's lien, in this case, the complainant has an unembarrassed remedy at law against Upshaw,

whose non-residence furnishes no ground for an application to a court of equity, without an allegation of his insolvency or of the exhaustion of his personal property; and we believe we may safely affirm, that the decree for the sale of Mrs. Upshaw's property, under this bill, is without a precedent in its support.

Again. What evidence had the vice-chancellor that Hargrove was the administrator of Caruthers? No copy of his letters is filed with his bill of revivor. We have had no opportunity, either to answer the original bill or to contest the claim of Hargrove to the character which he has assumed. The suit having abated by the death of Caruthers, we could not file our answer. And if any one who chooses to do so, can come into court of chancery, and, by his unsupported claim to be an administrator, instantly stifle all investigation into his claim, and prevent all further litigation in an abated suit, without notice to those who are to be affected by his proceedings, he must do it by virtue of some arbitrary rule, unknown to us, which would be far "more honored in the breach than in the observance." Story on Eq. Pl. 301, and n. 4.

Mr. Justice Clayton delivered the opinion of the court.

The main question in this cause, is whether the vendor, under the circumstances. retained any lien upon the land which he conveyed, for the purchase-money. The circumstances relied on to defeat the lien, are that the land was sold to Arthur M. Upshaw, and his written agreement taken for the adjustment of the price, but the land was conveyed to Ann Hamilton Upshaw, the wife of the appellant. The agreement as to the payment was, that other lands should be conveyed by A. M. Upshaw, in the Chickasaw cession, the titles to which were not then complete; but if the titles to the lands designated should not be perfected, then the sum to be paid in money in lieu thereof should be ascertained by the award of Felix Lewis and Colbert Moore. The titles were not perfected, and the sum of three thousand dollars was awarded as the price to be paid.

The doctrine is now well settled, that a vendor of land, who takes no separate or other security for the purchase-money, retains a lien upon the land for its payment; and none but bona fide purchasers, without notice can set up an implied waiver of this equitable mortgage. Stafford v. Van Renssalaer, 9 Cow. 318. To constitute a purchaser of that character, the party must have advanced a new consideration, or have relinquished some security for a pre-existing debt. Dickinson v. Tillinghast, 4 Paige, 215; Gouverneur v. Titus, 6 Paige, 347; Barnett v. Dunlop, MS. Op. this court. We cannot think that Mrs. Upshaw occupies this attitude. She is a mere volunteer, no consideration appears to have moved from her either to her husband or to Caruthers, for this conveyance. She derived her title directly from Caruthers; there was no intermediate conveyance, and she could not but know, that she had not paid for the lands. She does not come within the rule of exemption, and the lien must therefore be recognized as in full force.

The next objection is, that the valuation of the lands by Moore and Lewis does not appear to have been made after notice to the parties. The authorities are not uniform as to this rule of notice. A distinction is made between those cases in which the submission to arbitration is the voluntary act of the parties, and those in which it is under rule of court. In the former, proof of notice seems not to be necessary, all that is required is proof of the execution of the award according to the submission. Miller v. Kennedy, 3 Rand 2. This was a case at law, and so was the case in 1 Saund. R. 327, referred to in its support.

In the latter case, although the defence was excluded at law, the party filed his bill in the exchequer and obtained relief, upon the ground of corruption and partiality in the arbitrators. The case of Peters v. Newkirk, 6 Cowen, was a case of voluntary submission. The court paid no attention to the distinction above adverted to, but said the award without notice was a nullity. Only one case was referred to in support of the opinion, (4 Dallas, 222,) which was an award under a rule of court. By statute in Pennsylvania too, the rule is different from the common law rule in this, that an award under rule of court may be set aside for error of law or of fact, when made manifest. Kyd on Award, 380, n. It is not necessary, now, to decide between these conflicting rules. The award set out in the bill is prima facie good. The presumption is in its favor. If from partiality, corruption, or other cause, it is bad, the circumstances which establish it must be made to appear.

The last objection is, that the decree was pronounced prematurely. At the January term, 1845, a demurrer to the bill was overruled, and the defendants allowed ninety days to answer. Before the succeeding court the complainant died, but whether before the expiration of the ninety days, does not appear. At the July term, 1845, the death of the complainant was suggested and a bill of revivor filed by the administrator. On the same day, this order was entered: "The defendant, having failed to answer within the time allowed at the last term, it is ordered that the bill be taken for confessed." This was erroneous. Notice of the application to revive is necessary. 2 Paige, 477; 2 Mad. Chan. Pr. 533. The defendant must have some time to put upon the record what is necessary to show, if such be the fact, that the person reviving is not entitled to do so. When a revivor becomes necessary by the death of a defendant, who has not answered, the plaintiff must have an answer to both the original bill and the bill of revivor. 11 Ves. 312. Upon bill of revivor, according to the English course of practice, the party is entitled to eight days to answer it. Mit. Pl. 118; and he was in this instance certainly entitled to some day for the purpose.

For this error the decree is reversed, and the cause remanded.

Upshaw vs. McBride, &c.

(Chancery case 57, Error to the General Circuit. Limitation. Estoppel. Presumption.)

Kentucky Reports, Vol. 49 (Ben. Monroe's Reports, Vol. 10B), Pages 202-206, Winter Term 1849.

January 21. Judge Simpson delivered the opinion of the Court.

Case stated.

In the year 1798, William Chamberlain and Lyne Shackelford executed to Edwin Upshaw an obligation by which they bound themselves to convey to him a tract of land containing one thousand acres, entered and surveyed in the name of Javin Miller, and to warrant the title to the same, to the said Upshaw, his heirs, &c.

In the year 1803, Chamberlayne conveyed said land to Upshaw by deed,

containing a clause of general warranty. The land had been previously conveyed to Chamberlaine by one Armstrong, to whom it had been conveyed by Mary Parsons, who claimed to be the mother and heir at law of Javin Miller, deceased, in whose name the land had been entered and surveyed, and to whom a patent issued in the year 1824, after his death. Lyne Shackelford does not appear ever to have had any title to the land.

This suit in chancery was commenced by Upshaw in the year 1840. He states the foregoing facts in his bill, and alleges that about the year 1819, James Metcalfe, who had married one of the daughters of Lyne Shackelford, took possession of said tract of land, in conjunction with some of the other heirs of Shackelford, who had died, claiming the land as having belonged to Shackelford, and asserting a right to it as his heirs. That Metcalfe afterwards, with full knowledge of complainant's claim, caused two surveys of five hundred acres each, to be fraudulently made on Kentucky Land Office warrants, embracing the whole of the land; and, by further fraud, obtained patents therefor, in his own name, elder in date than the patent to Javin Miller. That Metcalfe, after the patents were issued, had conveyed portions of the land to the other heirs of Shackelford, by which the fraudulent combination among them to cheat him of out the land, was fully demonstrated. He made the heirs of Shackelford defendants, alleged that they had received assets to a considerable amount, and prayed that they might be required to execute to him a deed for the land, in fulfilment of their ancestor's obligation and surrender to him the possession of it.

Metcalfe answered, denying that he took possession of the land, claiming it under Lyne Shackelford, who he denies ever had any title to it. Admits that he appropriated and obtained patents for it, under Kentucky treasury warrants, believing that the land was vacant. Denies all knowledge of the complainant's claim or right to the land; and alleges that he and those claiming under him, have been in possession of it ever since the year 1819, claiming it as his own. He denied that his wife, or himself, had ever received any assets from Shackelford's estate. He states that if Lyne Shackelford ever executed such a bond as the complainant relies upon, which is not admitted but denied, it was executed by him merely as the surety of Chamberlaine, and has been long since satisfied. He relied upon his elder title, the statute of limitations, and the staleness of the complainant's claim.

As no right or title to the land descended from Shackelford to his heirs at law, the complainant cannot demand from them a specific execution of the contract of their ancestor. If Shackelford had been the owner of the land, or had any title to it, either legal or equitable, at the time he executed his obligation to the complainant in conjunction with Chamberlaine, and that title had passed to his heirs at law upon his death, they would have been compelled, in a Court of Equity, to have conveyed it to the complainant. But it does not follow, that they are bound to convey him any other title they may have acquired to it, even with a knowledge of his claim. Admitting that Shackelford was one of the vendors, then any title which he might have subsequently obtained, would have enured to the benefit of his vendee. But his contract only imposes on his heirs an

A vendor without title afterwards acquiring title it enures to the benefit of his vendee--but if the heir of such vendor acquire title he cannot be compelled to surrender it or to answer in damages for failing to convey unless he received assets from the ancestor.

obligation to convey any title which may have descended to them from him, or to respond in damages, so far as they may have received assets for a breach of any of its stipulations. In other respects they occupy the attitude of third parties, and as their ancestor never had any title to the land, they as heirs, are under no obligations to convey it to the complainant, or to surrender any title to it, which they have acquired since his death.

The heir of one who has conveyed land is estopped to deny that the ancestor had title at the time he conveyed.

Had Shackelford joined in the execution of the deed made by Chamberlaine to the complainant, his heirs would have been estopped to deny that he had title at the time. But that estoppel could not have imparted any equity to the complainant, or given him any right to relief in a Court of Chancery, although it would have enabled him to have maintained a suit, at law, against the heirs for the land.

A bond for conveyance, under the circumstances of the case presumed to be satisfied, after the lapse of 40 years.

There is no evidence that Metcalfe or his wife ever received any part of Shackelford's estate after his death. The complainant did exhibit the will of Shackelford, by which it appeared, that the testator had made specific devises to his children; and had also devised to them the residue of his estate, after the payment of his debts. But there is no testimony that any part of the estate was ever received by Metcalfe or his wife, and as they have denied, any of it ever came to their hands, the probability is, it was all exhausted in the payment of debts. The covenant of warranty, therefore, creates no obligation on Metcalfe, even if it could for any purpose, be relied upon by the complainant in a Court of Equity.

Inasmuch, however, as the bond executed by Chamberlaine and Shackelford was dated in 1798, and a deed for the land was made by Chamberlaine to the complainant in 1803, and this suit was not commenced until upwards of forty years afterwards, the presumption is almost conclusive that the stipulation for a conveyance of the title, was considered by the parties as fully complied with and satisfied by the deed executed by Chamberlaine. This presumption is fortified by the fact, that Shackelford had no title to the land, it having been previously conveyed to Chamberlaine; and it is not repelled by any of the facts or circumstances proved in the cause. If the stipulation in the bond for a conveyance of the land is to be regarded as having been complied with, and we think it should under the circumstances, the consequence is, that the complainant's equity, so far as it is based upon a right to a specific execution of the contract, has completely failed.

One having taken possession under a particular title cannot, whilst so in possession, assert an adversary title.

If, however, the defendants took possession of the land under the complainant's title, claiming it as the heirs of Shackelford, and afterwards, while so possessed, obtained an elder legal title, do these facts create an equity in the complainant, and authorize him to apply to a Court of Chancery for a surrender and conveyance of the legal title and the possession? They do not, in our judgment, have this effect. If they acquired the possession of the land under the complainant's claim, the defendants could not, whilst in

possession, set up and rely upon any other claim in opposition to it, unless they had openly assumed a hostile attitude and possession, with the knowledge of the complainant, and had continued such adverse holding a sufficient length of time to bar his right of entry. But they would be under no equitable obligation to convey to him the title thus acquired, but might, after having restored the possession, if they were bound to do so, assert their own title to the land.

But the complainant's remedy on this ground would be in a Court of Law. If the defendants entered under his title, and in subordination to it, they are estopped to deny it, or to rely upon any other title, until they restore the possession to him. His legal remedy is full and ample, unless he has lost it by negligence and unreasonable delay in asserting his rights. If he has permitted the defendants to continue an open and notoriously adverse, uninterrupted possession, until his right of entry has been barred, that does not give him a right to relief in equity. His remedy is purely legal; and the decree of the Court below dismissing his bill was correct.

Wherefore the decree is affirmed.
L. Hord for plaintiffs; Morehead & Reed for defendants.

Upshaw vs. Mutual Loan Ass'n.

(29 Misc. Rep. 143; Supreme Court, Appellate Term, October 4, 1899)

National Reporter System; The New York Supplement, Volume 60, Pages 242, 243, containing the decisions of the Supreme and Lower Courts of Record of New York State; Permanent Edition. October 5 - December 14, 1899; published in St. Paul, 1900.

1. Pledge of Insurance Policy - Debts Secured.
   Where a wife made a general and absolute assignment of an insurance policy in her favor on her husband's life, as collateral for a loan, and the pledgee afterwards advanced an additional sum on the policy to her husband on his application alone, the policy is collateral for both loans.

2. Payment Under Duress.
   There can be no duress in the payment of money, where the party to whom payment was made was entitled to all he demanded.

Appeal from municipal court, borough of Manhattan, Tenth district.
Action by Eda T. Upshaw against the Mutual Loan Association. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before Freedman, P. J., and MacLean and Leventritt, JJ.

Flemming & Shoup, for appellant.
Jacob M. Guedalia, for respondent.

Per Curiam. On the following state of facts, the plaintiff seeks to recover the sum of $75 from the defendant: The plaintiff was the beneficiary named in an insurance policy on the life of her husband. For the purpose of securing a

loan of $300 from the defendant, she executed to it an assignment of her interest in the policy. The loan was thereupon made. Subsequently, on the application of the husband alone, the defendant made a further advance of $75. On the death of the husband the plaintiff tendered the sum of $300, and demanded the return of the policy. This was refused on the ground that the policy was collateral for both loans. The additional $75 was then tendered under protest. The defendant still refused to return the policy, and insisted on an unconditional tender. Payment of $375 was then made, without protest or qualification, and the policy delivered. This action is brought to recover the $75, as having been paid under duress.

On the proof, we are satisfied that the justice's finding in favor of the defendant should not be disturbed. The plaintiff admits that the defendant advanced $375. Its right to refuse delivery of the policy until the repayment of that sum is dependent on the nature of the assignment. That instrument was not placed in evidence, and its contents were proved without objection by oral evidence. From that it appears that it was a general and absolute assignment, and not limited to the first loan. Under those circumstances, the policy was a collateral for both loans. The plaintiff sought to prove an oral, extraneous agreement restricting the security of the first loan. Even conceding the admissibility of the testimony, it gave rise to a conflict, which, in our opinion, was properly resolved in favor of the defendant. It thus having been found that the defendant was entitled to all it demanded, there could obviously be no duress. The judgment should be affirmed.

Judgment affirmed, with costs to respondent.

(Legal Cases to be continued and concluded in next issue)

* *

- MISCELLANEOUS -

The Morris, Arnold, and Related Families; by Louis A. Morris, Southern Historical Press, Easley, S.C., 1985.

page 135) Mary Cordelia Latimer, born February 3, 1834, married to George Upshaw, he died January 5, 1862. She remarried to Steven Stokely.

Mary Cordelia Latimer was the third child of William Latimer, born November 14, 1798 in Virginia. He married Elizabeth (Allen) Word on January 17, 1830, daughter of Robert C. Word and Sarah Joyce Allen Jones. (The Word's family record shows Elizabeth Adams Word). He died May 17, 1864 and is buried in Oglethorpe County, Georgia.

Elizabeth (A.) Word, born January 1, 1810 in Laurens County, South Carolina. She died in Lexington, Georgia. It is reported that she is buried on private property in or below Laurens, S.C. She was a daughter of Col. Robert C. Word, born in 1773. He died August 5, 1830 at the age of 50(sic) and is buried in Abbeville Long Cemetery, South Carolina.

Page 137) Mary Cordelia Latimer, born February 3, 1834, married 1st, George L. Upshaw, he died January 5, 1862, 2nd marriage was to Stephen H. Stokely, June 22, 1865.

Family Record

1B71A

HUSBAND Thomas Robinson Waring

Father: Robert Payne Waring
Mother: Elizabeth Gouldman

Birth	circa 1766	Essex County, Virginia
Marriage	circa 1790	Essex County, Virginia (?)
Death	March-September 1795	Essex County, Virginia
Burial		

Biographical Data: His will dated March 24, 1795 & proved September 21, 1795, Essex Co, Va.

Other wives, if any:

WIFE Lucy Upshaw

Father: John Upshaw
Mother: Mary Lafon

Birth	circa 1766	Essex County, Virginia
Death	7 Feb 1816	Kentucky
Burial		

Biographical Data: (death date is unsubstantiated, from Files of Mrs. Grace Jared)

Other Husbands, if any: (B) William Sthreshley

SEX	CHILDREN'S NAMES IN FULL	DATA	DATE	LOCATION
1 M	John Upshaw Waring	Birth	circa 1792	Essex County, Virginia
	Full name of Spouse	Marriage		
		Death		
		Burial		
M	Robert William Waring	Birth	circa 1794	Essex County, Virginia
	Full name of Spouse	Marriage		
		Death		
		Burial		
3 F	Elizabeth Matilda Waring	Birth	circa 1795	Essex County, Virginia
	Full name of Spouse	Marriage		
		Death		
		Burial		
4		Birth		
	Full name of Spouse	Marriage		
		Death		
		Burial		
5		Birth		
	Full name of Spouse	Marriage		
		Death		
		Burial		
6		Birth		
	Full name of Spouse	Marriage		
		Death		
		Burial		

Authorities: Will of Thomas Robinson Waring, Essex County Will Book 15, page 153; see William & Mary College Quarterly; 2nd series, Vol. 18, no. 1; Jan. 1938: pp 82, 83.

Compiler Ted O. Brooke Date July 1981 Revised

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