

CHAUNCY BROOKS ET AL.
 vs.
 HENRY H. DENT,
 ADMINISTRATOR D. B. N. OF
 HENRY BRAUNER ET AL.

MARCH TERM, 1850.

[SECRET TRUST—RESULTING TRUST AS AGAINST CREDITORS—STATUTE OF FRAUDS.]

- A HUSBAND and wife, for a *bona fide* and valuable consideration, may contract for a transfer of property from him, to her.
- A settlement upon the wife after marriage, in pursuance of a valid agreement before marriage, is good and binding against the creditors of the husband.
- In marshalling assets, lands descended, are to be applied before lands devised.
- Evidence of declarations, made by a husband during coverture, is not admissible against creditors of the husband, to establish a secret parol agreement between him and the wife, in reference to property standing in the husband's name during his lifetime.
- But if the wife had performed her part of an agreement, made between her husband and herself, she would have an equity as against the husband and his heirs, to have it carried into effect on their side, though the agreement was only by parol.
- The court does not favor secret trusts, and will not allow them to be set up to defeat the rights of creditors.
- If it could be proved, that the land was purchased with the wife's money, then as between her and the heirs at law, or volunteers claiming under her husband, a trust would result to her, being implied by law, from the intention of the parties, and the justice of the case, and which being expressly excepted from the statute of frauds, may be proved by parol.
- But such resulting trust cannot be set up to the prejudice of the rights of subsequent creditors.
- The act of 1785, ch. 72, sec. 11, authorizes the court to direct a deed to be recorded, but with a limitation, that it shall not effect the rights of creditors becoming such after the execution of the deed.
- Where a party holding a bond of conveyance is in possession, and has paid the purchase money for the land, the court will direct a conveyance, which will prevail against creditors whose judgments intervened between the equitable title by the bond and the legal title by the decree.
- Where two persons executed a joint note, the estate of the one, will, under the chancery rule, be charged with only half the amount, unless it is shown, that he is the principal debtor, or that the other is insolvent.
- The weight of American authority, is, that it is sufficient to bind a surety if his *engagement* to pay the debt of another is in writing, although the *consideration* may not be reduced to writing. But where both the *consideration* and the *engagement* are in writing, the surety is bound, even according to the strict English construction of the statute of frauds.