

[July,

No answers were put in by the defendants, and the bill was taken *pro confesso*.

*At the hearing it was proved by the witnesses, that they had heard Wm. Fortune complain that his father had by his last will cut him off, and had devised his land to his mother, for the benefit of herself and the other children; and he declared if he could get at the will he would destroy it, and then claim as heir at law. He sometime after said, he had been at his mother's, and fixed things as he wished; and he said, he would take possession of the land.

Woodward, one of the defendants, was cautioned against purchasing the land, by one of the witnesses, who informed him that Mrs. Fortune had made bonds to execute titles for the same to John Milling. But the defendants purchased and took Wm. Fortune's title.

Several trials at law were had between the defendants, claiming under William Fortune, and David Milling, as heir at law of his father. The defendants failed in their claim.

It was contended for the complainants that every thing was to be presumed against the destroyer of the will or deed, in *odium spoliatoris*; and those claiming under him must suffer by his misconduct. That the will having been established by parol evidence, and the destruction of it proved, and the complainants having succeeded at law, were entitled to the aid of this Court, to have their title established, and to obtain the original grant, and the title deeds delivered up to them, which might otherwise, at some future day, be set up to their disadvantage. And that they were entitled also to have costs, because the defendants by retaining the deeds and grant, had compelled the complainant to come to this Court, to have his title, already established at law, forever quieted.

For the defendant little opposition was made to the claim of the complainant as to the title deeds; but on the ground of costs, it was insisted, that the defendants ought not to be obliged to pay them. They had been defeated at law, and could not support the legal title. The complainants then were under no necessity to bring them into this Court. It would have been enough for them to have *brought the Fortunes here, to have compelled a specific performance—and that even then it is not usual to make the heirs pay costs.

Chancellor DESAUSSURE delivered the following decree:

It is ordered and decreed, that the defendants do bring into this Court and deliver up to the complainants, the deed which William Fortune executed, conveying to them the land in dispute between the parties, and also such other grants and conveyances, as relate to the said estate, as the said William Fortune delivered to them.

It is further decreed that the defendants do execute such releases of all the title to the land in question, which they may have derived from the conveyance of William Fortune to them, as shall be prepared by the commissioner of this Court for that purpose.

It is further ordered that each party do pay his own costs of suit.

Columbia.—Heard by Chancellor DESAUSSURE. July, 1815.

CATHARINE THREEWITS by her next friend, vs. LEWELLIN THREEWITS.—
Case LXXXII.

A wife being abused and ill treated by her husband fled to her relations, but was induced by his promises of amendment to return. She soon after again left him and returned to her

relations. Although her return to him is a waiver of objection as to his prior ill treatment, yet the Court will receive evidence of his prior ill conduct, to aid the presumption of harsh treatment after her return, of which there was no very positive proof. The voluntary settlement made by him after marriage, though certainly not good against prior creditors, was good as between the parties. One half the property included in the deed, vested in the hands of the trustee therein named, for the use and maintenance of the complainant and the younger children, remaining with her, and to pay half the debts. The other half of the property to remain in defendant's hands for his own use and support, and that of his eldest child, unalienable by him to any other purpose, and subject only to such debts as have a legal right to be satisfied out of it. Defendant ordered to enter into a recognizance before the Commissioner to keep the peace towards his wife, who is protected in living separate from him. Defendant to pay costs.

*THIS case was argued before the Circuit Court at Columbia, which thereupon made the following decree: [*561

This is one of those unhappy cases in which courts of justice are obliged unwillingly to enter into the privacy of domestic life, and to judge between persons whose relations are so close, that they ought not to require any other guide for their conduct, than that pure and strong affection, which is the guarantee of domestic felicity.

The bill charges that the complainant being entitled to a personal estate of the value of \$3000, intermarried with the defendant on the February, 1810; and that he possessed himself of her property. That during the courtship, the defendant proposed to settle certain property on the complainant, and the issue of the marriage, if the same should take effect; but the agreement was not perfected till the month of October, 1813, when the defendant executed a deed by which he conveyed ten negro slaves to certain trustees, for the use of complainant and the issue of the marriage: But he reserved a life estate in the property to himself. That soon after the marriage the defendant became much addicted to intoxication; and when in that situation, he beat, abused and ill-treated the complainant; so that her life was frequently in danger; and she was obliged to seek refuge with some of her neighbours: that his paroxysms became so frequent, and his abuse so great, that finding no dutiful submission on her part made any difference in his conduct, she took shelter with her relations; but upon his repeated solicitations, and professions of better behaviour, she returned to his house, and conducted herself with all duty, affection and tenderness. That he soon forgot his promises, and acted more outrageously and brutally than ever; beating and abusing her more grossly than before, which drove her from him a second time. Again he solicited a reconciliation, and again she returned to him, and used every means in her power to sooth his angry *passions. But in vain—he burst out again into new abuse and ill treatment, till at length, finding all hope of better conduct at an end, she finally left him, and sought protection with her mother and other near relations. And he has pursued her with slanders on her reputation, to deprive her of asylum. That the complainant with her children, is dependant on the bounty of her mother and brethers for subsistence, the defendant refusing to make her any allowance for a separate maintenance.

The bill prays that the complainant may be protected in living separate from the defendant, and that the defendant may be decreed to deliver up the ten negroes, mentioned in the deed above-mentioned, for the use of the complainant and her children, or to make some other just and adequate provision for them.

The answer of the defendant admits the marriage of the complainant with the defendant, and the execution of the deed of settlement stated in the bill; but insists that it was made to gratify the wishes of the complainant's friends, and not upon any agreement either before or after marriage. That he never meant to place the negroes mentioned in the deed, out of his own control,

and submits whether the language of the deed, will authorize such a construction as will deprive him of the use and possession of them. The answer further admits, that from intemperance, in which he indulged too much, he might and did treat the complainant with that roughness and want of tenderness which might superinduce complaint on her part, and shame and confusion on his; and that being incapable, from the fatal effects of spirits, of appreciating the value of the complainant's society, or of endeavouring to regain her affection and attachment, he admits that for this cause, the complainant did absent herself, and continued with her relations for some time;—and defendant insists that even during this period, when she received such treatment, (as he alleges she has never received since,) the complainant would have been averse, as he believes, to a total and final separation from this defendant, inasmuch as she solicited, in a tender letter, an interview, and a return to this defendant. That *in consequence of these pacific [*563] overtures, a reconciliation took place, and he received the complainant affectionately, and they continued to live in peace and harmony, till some time in February last. She then applied to this defendant in terms of affection, for the means of visiting her mother and friends in Edgefield, to which the defendant acceded—And he accompanied her on the way, and parted from her in apparent harmony and good humour. And at separating she requested him to meet her at Major Bond's, on a certain day, to attend her home; which he accordingly complied with; but she did not come, and he has never since seen her. He believes she would have returned home in affection with him, but from the interference of her relations and friends; and the defendant offers in the sincerity of affectionate regard, to receive and treat her as a wife ought to be received and treated.

Defendant denies the statement that their children are dependant on the bounty of the complainant's connections. One of them is with the defendant's mother, and the other two can at any time, claim the protection and care of a father, if they are returned to the defendant.

On the trial of this case, Mrs. Thomas, the mother of the defendant, was called by the complainant, who swore that the complainant has been married to her son about five years; and that they lived in harmony for about a year after the marriage. That when the husband was in a drinking way he used his wife ill, spoke roughly to her, and once he laid hold of her in a great passion and shoved her about; but the witness interfered and prevented his beating her. She never saw him beat her; but she has seen her with marks of beating about her, which she said was done by her husband. He did not use her ill when sober; but he was drunk pretty often; and then he abused her violently. The last time she returned home to him, he drank less than before, and he treated her better; at least not so ill as before, and a woman might have put up with it:—They seemed to live in harmony, except once, [*564] when she heard them disputing.—*This was sometime in January or February last:—He was intoxicated. They had high words and she came out of the chamber, and complained of his threatening to strike her; upon which the witness told her to remind him that she had bound him over to the peace. He appeared to be angry, but did not strike her: The witness has never advised the complainant to separate from her son; nor does she remember ever to have said that they could not live together; or that she regretted that her daughter-in-law returned back to her husband the last time. When she went away the last time, her son and daughter-in-law went together in a chair in apparent harmony, and she appointed to return in about ten days. The witness told her daughter-in-law, that if she wished to remove and live apart, she would have a house prepared for her near to witness. But she said she had no inclination to remove, and wept at the idea

of a separation. She always conducted herself with propriety as a dutiful and affectionate wife. When they lived apart, (before the last time of coming together,) the complainant told witness she wished to return home to her husband. Her brother, Mr. Daniel, appeared to be averse to her going home; and told her not to speak to her husband but in his presence. They consorted as man and wife, when he accompanied her to Major Bond's, on her way to visit her mother, whence she has not returned. The complainant has told witness lately, that she never had any contract before marriage with her husband for a settlement. Also, that her relations interfered to prevent her going home. Has heard her son tell his wife, since they came last together, that if she wished to part entirely, it might be done amicably, and he would consent and arrange it, and give her some of his property: but she then said she had no desire to leave him. When the time arrived which had been fixed for him to go and meet her, she heard him say he would go; but does not know if he went. She thinks her son would willingly receive his wife again.

Capt. Thomas testified on the part of the complainant, that the marriage took place in 1810. He witnessed the strife between Threewits and his wife. It began *a year or eighteen months after the marriage:—the defendant was in the habit of drinking hard: and when drunk he treated [*565] her severely. He was very outrageous when he got into his drunken frolics—thinks he is somewhat reformed latterly, but not wholly. He was very drunk last Monday. Did not see him get drunk at home since the last time his wife returned home to him; but he got drunk when from home. They lived in more harmony the last time they were together than before. She always behaved unexceptionably as a wife. The witness was not on good terms with his step-son, Mr. Threewits. He was displeased with him for his ill conduct. On one occasion he found him near his house armed with a gun, and the family had left the house, greatly alarmed at his conduct. His wife and mother were part of the family. He was angry and took the gun from Threewits,—beat him a little, and broke the gun, and ordered him not to come near his house again. This was before the last coming together of the parties. The defendant's personal property was worth about \$4,000 when he married. He has disposed of it to about \$1500 or \$2,000. He got about four grown and two small negroes by his wife, and some money; and he has disposed of part of that.

Major Threewits, the uncle of the defendant, was called by the complainant, and he testified that the quarrels between his nephew and his wife, arose about a year or eighteen months after their marriage. He was subject to intoxication and used her ill; they were once on a visit to witness's house, and at the breakfast table he was drunk, and suddenly rising from the table, he cursed himself and his wife in outrageous terms, and made a blow at her with a knife—she fended off the blow from her body, and received a cut on her hand. At another time, and some weeks after she was confined with her last child, Mrs. Threewits came running over to witness's house, which is not far from his residence, with her head naked and her child in her arms: a negro sheltered them from the rain with a blanket—she was greatly alarmed. Mrs. Thomas, the mother of the defendant, came running *after her; she also appeared greatly alarmed. This was, as he believes, the [*566] day on which Mr. Thomas took the gun from him, and broke it. Mrs. Threewits was an exemplary wife, and behaved perfectly well. The witness said he had endeavoured to reclaim the defendant, his nephew, from hard drinking; and offered him a thousand dollars if he would leave off drink; but he refused it, and said he would drink as long as he had a seven-pence. Mrs. Threewits, several times, came running over to his house in great alarm

and apprehension, in some instances with marks of beating. They live within a quarter of a mile of the witness. The witness does not think that Mrs. Threewits could live with her husband, unless he would leave off hard drinking, which he does not think will take place. He was drunk on the Monday preceding this trial. Witness has heard Mrs. Thomas say she regretted that her daughter-in-law came home the last time, as she did not think her son would behave better than he had done. He saw Mr. Threewits and his wife several times since her last return; he behaved better in public.—But when he was gone, she said to the witness, it would not do; she could not live with him. He believes she would be willing to live with him, if he would leave off hard drinking, not otherwise. He has spoken with his nephew, who said he did not wish the cause to come into court; and proposed an accommodation; but she said she was ignorant, and left it to her counsel. Mr. Threewits was in good circumstances when he married; but he has wasted his property a good deal.

Mr. Daniel, the brother of complainant, swore, that she had made a determination not to return home, for she did not believe he would quit hard drinking. He is persuaded she would have kept to this resolution, but for her husband's solemn promise, which he heard, that he would never drink to excess again. He told his wife that he had taken an oath that he would never drink to excess again. She was induced to go back the last time by these assurances. The oath which he took, was made before a magistrate, and reduced to writing, and recorded; a copy of it was produced in evidence. It contained a *solemn oath that he never would knowingly or voluntarily drink any spirituous liquors, or intoxicating liquor, in this State, or in any State, to which he might remove. It was dated 16th August, 1814. He got by his wife six negroes and about \$700 in money.

The letter from Mrs. Threewits to her husband, mentioned in the defendant's answer, was produced in evidence. It was an affecting letter, deploring their disagreement, and earnestly soliciting him to come and see her and not to leave the State, or she should be miserable. It bore no date. His letter to her was in these words:

“Madam,—As you have left me and my house, at a time and in a manner, calculated by you to injure and expose me, and without my consent, I write this to desire you to keep away; you shall never return to my house in safety; do not attempt it.

(Signed)

THREEWITS.

Mr. Caver was examined for the complainant. This witness had kept himself out of the way for some days, and gave some trouble to procure his attendance. A suspicion was excited that he was kept out of the way designedly. On his examination, he attributed his removal from his usual place of residence, after he had been subpoenaed and the case brought to trial, to sickness. In some degree the suspicion was removed, but not wholly. He testified that he was present when Mrs. Threewits, the complainant, returned home to her husband the last time. They seemed to be reconciled, he heard no quarrels, and she was well treated by her husband. He saw them almost every day, and he did not see any ill behaviour. She appeared to be well pleased. He saw Mr. Threewits drunk twice during their last residence together, but he did not hear him abuse her, or ill use her. He was not violent when drunk, as far as witness saw, though he saw them together when he was drunk. He was a little groggy a third time, in the evening. Mrs. Threewits came out of the room where the company was sitting; *568] she was not alarmed. Mr. Threewits followed *her, and said she might as well have come to bed to him, as to another bed; he heard nothing more. This was in January or February last. When she went

away to visit her mother, he heard Mr. Threewits say, he would go with her—he does not know if he did.

This was all the testimony given in the case. It having been strongly stated by the counsel for the defendant, that the complainant, Mrs. Threewits, was not disposed to prosecute the suit, and would rather compromise the affair, and return home to her husband, but that she was overruled by her brother, and her other relations, the Court felt it a duty to ascertain that fact, and requested Colonel Chappell a near relation of Mr. Threewits, the defendant, to visit Mrs. Threewits, and learn her real sentiments, as well as to endeavor to bring about an amicable arrangement of their differences if possible. Colonel Chappell accordingly visited that lady, and conversed freely with her. He communicated in writing to the Court the result of his conference with her. She stated that she could not return to her husband, for she could not confide in any promises which he might make. He had repeatedly made solemn promises to her, and her friends, that he would reform his conduct to her, all which had been so often broken, that she could not now hope for a different result; and that she should now be afraid of her life, if she ventured home to him. Colonel Chappell also saw Mr. Threewits, the husband, and was satisfied from what passed between them, that her determination not to return to him was correct.

On the argument of this case, the counsel for the defendant admitted the charges in the bill, generally, as the answer had done; but insisted that the complainant having returned to live with her husband, after the most atrocious instances of ill conduct, was a waiver of all objections up to that time; and that the conduct of the husband to the wife, after that time, was not so harsh or severe, as to justify her in separating herself from her husband, or to warrant her claim to a separate maintenance. The counsel admitted the jurisdiction of the *Court, but insisted that such a case of severity had not been made out, on their last living together, as would support [*569 the claim of the wife, to the protection and aid of the Court. I had occasion some years ago to examine this subject, in the case of *Prather v. Prather* at Laurens, in which a demurrer was put in to the bill, and the question of jurisdiction was fully argued, and I decided that in the absence of Ecclesiastical Courts, and from the incompetency of the Courts of law to give relief, it devolved of course on this Court to give relief, or the citizen would be left remediless, in one of the most important particulars of human life. And I also noticed that in several instances, since the revolution, this Court had given relief, on proper cases being made out.

The first case after the establishment of the Court, was decided in April, 1785. The Court stated that the conduct of the wife was free from all blame, and that the husband's conduct was blameable, and warranted the wife in separating herself from him; and that the custody of the children belongs to the father, but the mother is entitled to access to them. It then decreed, that the defendant enter in recognizance to the Master, for 1,000*l.* with two sureties for 500*l.* to keep the peace towards complainant. That the complainant be enjoined from proceeding at law, against any person for receiving or entertaining her. That the estate which devolved to the complainant on the death of her brother, be settled by the defendant, to the use of the complainant, and her children, subject to her disposition among them; and that the defendant should execute the deeds necessary to give effect to the decree before the Master, to trustees, for the purposes aforesaid. That it be referred to the Master to examine into the value of the estate which the defendant obtained in marriage with the complainant, and of defendant's estate, and to report thereon. That the complainant have free access to her children, and they be allowed to visit her, whenever she desires to see them.

And in case of sickness, she shall have the care of them till recovery. That the parties may apply from time to time in a summary way by petition for *570] further or other directions, *and that all costs be paid by defendant. The next case which occurred, was that between Mrs. Winifred Wilson, by her next friend, against her husband John Wilson. This was an application to protect the wife, in living apart from her husband, *propter sævitiam*, and in compelling him to settle a large property which she brought him in marriage, but which he had agreed by bond to secure. The Court in the first instance, in March 1789, granted an injunction to restrain defendant from selling the personal estate, till the ultimate hearing and decree, and to account for the rents and profits with the Master, reserving sufficient for the support of the husband and wife and child. Afterwards, in August 1791, the Court established the bond, and protected the wife in living separate. Again, in the case of Elizabeth Jellineau, suing by her next friend, against her husband, Francis Jellineau, the Court upon full argument made a decree so full and clear to the points in question that I will, for the benefit of the profession, state it fully, as it is not in print. "This is a bill filed by a wife against her husband, for a separate maintenance, on the ground of cruelty and ill conduct. It has been contended by defendant's counsel that this Court has not the power to decree a separate maintenance for a wife, however harshly treated by her husband, unless a divorce has been previously obtained, or unless there be an express or implied agreement, on their separation, for that purpose. The cases cited from the English books to establish this doctrine, may be good law in England, where the ecclesiastical Courts have competent jurisdiction to grant divorces *a mensa and thoro*. But in this State there is no such Court, and hard would be the lot of females if they alone should be excluded from the protection and benefit of the laws, and be obliged to submit to any degree of cruelty from their husbands, without any redress." If there were no precedents of the interference of the Court of Equity in cases of this sort, we must make them, rather than so wanton an abuse of power by a husband over his wife should escape with impunity. But this Court has all the power incident to a Court of Chancery, and its jurisdiction is not in *any manner restricted, except in cases where *571] the party can have no complete and adequate remedy at law. The cases of *Huger v. Huger* and of *Wilson v. Wilson*, determined in this Court, have established precedents. It is true that the separate maintenance in these cases, was a provision out of the wife's estate. But it cannot be inferred from thence, that if they had not such estate, they would not have been provided for out of the estate of the husband. The complainant has made out her case by testimony. She has been insulted, despised, degraded below a negro slave, who was preferred to her, and threatened (though not beaten) with a horse whip. He has calumniated her, by alleging the child she bore him is not his, without his producing any testimony to support the charge against her. He has attempted to prove that they lived happily together, but he has not succeeded in his proofs. The complainant's letter to defendant, which was given in evidence, shows a sincere desire to be reconciled to him, and to return home. And he said her letter deserved no answer. In his answer filed in this Court, he has lavished his abuse on her, and denies that he is obliged to take her back or maintain her; and asserts that he would be happier without her than with her, yet he has the confidence to say, that if the Court orders him to receive her, he is ready to do so. It would be absurd to suppose after what has passed, that they would be happy together. Complainant is entitled to some provision for her and her child's maintenance. He once offered to maintain her, and now offers some provision for the child. Referred to the Master to inquire, and report his circumstances." To make the history of

the doctrine as established by this Court complete, I will mention that in another case, decided on full argument in May, 1803, the Court refused to allow allimony to a lady, who had lived apart from her husband for many years, and who never made any legal claim till the death of her husband. The Court said she came too late, after his death.

We come now to consider the circumstances of the case under discussion.

*It was clearly proved that the complainant was blameless, and even meritorious in her conduct from the time of her marriage to the [*572 final separation. This testimony was borne her by the nearest relations of her husband, his mother and his uncle. It was also clearly proved, that Mr. Threewits, the defendant, has been habitually in a state of intoxication, and when in that state, has generally abused and ill used his wife, and sometimes beat her, and put her life in jeopardy; in two instances most barbarously. This makes a strong and clear case for relief; else forlorn would be the condition of the female sex, and disgraceful the inefficiency of the laws.

But it is said, that all the instances of brutal conduct which might have warranted the wife separating herself from her husband, and obtaining the protection of this Court, occurred before their last re-union; and that she went away the last time without any real ill usage, or any just provocation; and that her husband is willing to receive her back, and treat her tenderly as a wife ought to be treated.

If this was the real state of the case, and there was good reason to believe that this offer was the genuine effusion of a mind repenting its past errors, and seeking occasion to remedy them, it would make a material alteration in the case. But let us look at the facts. It is manifest from this lady's whole conduct, and particularly by her repeatedly returning to her husband, on his promises of reformation and better treatment, that she was sincerely attached to him. It is equally manifest that he has violated those promises. He obtained her return the last time by a promise made upon oath, of reformation, on the article of excessive drinking, and with respect to his treatment of her. It is in full proof that he violated that oath, and was repeatedly drunk during the short period they stayed together the last time they were united; at least three times at home, in the course of a month, and oftener when from home. He had always used her ill before when drunk; the presumption is, he would do so again; for he who could violate an oath for reformation and sobriety, could not hesitate to repeat the ill *usage, to guard against which that reformation was promised. The uncle [*573 of the defendant who has acted a very friendly part to him, and advised him well, and offered him a large sum if he would leave off drinking to excess, swears that he does not think Mrs. Threewits could live in safety or comfort with him, unless he would leave off hard drinking; and of this he swears he has no hope, as he has repeatedly violated his oath; and has been drunk even pending the trial of this cause. The mother of the defendant too, expressed in the presence of Major Threewits, that she (whose maternal partiality made her view everything most favourably for her son) regretted that her daughter-in-law had returned home at the last time, as she did not think it would be better than before. Appearances were, to be sure, kept up better than they had been. He was more cautious of offending in public by gross ill usage; but it is discernible, that he did not behave well; for we find through the reluctant narrative of the fond and perhaps excuseable mother, that when they came out of the chamber, where she heard high words, that Mrs. Threewits complained, he had threatened to beat her; and he did not contradict her assertion; he was then intoxicated. The *evidentia rei*, too, is against him. The wife had earnestly sought a reconciliation. He had written a stern letter, forbidding her to return, as it would be unsafe for her to do so. Yet she afterwards ventures,

such is her attachment for him, to return and live with him, on his renewed promises to avoid excessive drinking, and to reform his conduct to her. He broke the first promise, though made under the sanction of an oath; and I must believe he broke the other promise of better treatment. There is some direct evidence that he did, and this is supported by vehement presumptions. Else why should a wife so attached, and behaving so correctly in all respects, abandon him, if he had reformed. But it is said her friends interposed and obliged her. There is no evidence of this after her last return. Her repeated returns when she had hopes of reform, show that she acted independently of them, or that they were not inimical to her attempting to live with him, as long as *there was any hope of her doing so in harmony; and *574] the result of the inquiry lately made at the instance of the Court, shows that she is acting from her own judgment and feelings, and refuses to return to her husband on a deep conviction that her life would not be safe with him. Under these circumstances, I cannot do as I am desired to do; I cannot separate the evidence of his conduct at different times; I cannot shut my eyes to the light of the truth disclosed by the whole evidence. To be sure, if a woman forgives ill usage and returns to her husband, on promises of good usage, she shall not afterwards obtain the protection and assistance of this Court, if those promises had been faithfully kept, and she again leaves her husband from caprice; but if there are clear indications of a breach of those promises, and some actual ill usage, she is not bound to wait for extremities as in the first instance, but may depart as soon as she finds the promises violated, and her husband returning to his old bad habits. She has a right to judge of the future by the past; and the Court will connect the whole of his conduct, in order to form a correct judgment.

But it is insisted that the defendant has offered to take back his wife, and treat her kindly and affectionately as a husband ought to do. If this offer were made *bona fide*, in good earnest, with a view to keep his promises, and not merely to elude the effects of the breach of former promises, the Court would most willingly listen to it, and endeavor to obtain its reception by the wife. But there is little reason to believe that this offer is made with that fixed intent to reform and behave better to his unfortunate wife, on which reliance can be placed. I speak the language of his nearest kinsman, the respectable old witness Major Threewits, when I say that I have no hope of this reform, and no confidence in these promises. His violation of all former ones forbids it; and it would be a miserable elusion of justice, to permit the defendant to disarm the Court, and to send back his wife to his cruelty, on the faith of promises so often broken. Upon the whole, I am too well convinced that there is no resource for this lady, but in being protected by the *575] *Court in living separate from her husband, and in having a provision made for her out of his property. The voluntary settlement made by him after marriage, though certainly not good against prior creditors, was good as between the parties. But as he reserved the possession and use of the negroes to himself, for life, that would not furnish any immediate supply. It is in evidence that he has diminished his own property, as well as that which he got by his wife, by extravagance and bad habits. This renders it necessary that an immediate provision be made.

It is therefore ordered and decreed, that the defendant enter into bond or recognizance to the commissioner in the sum of \$1000, with two sureties, each in the sum of \$500, to keep the peace towards the complainant; and that the defendant be enjoined from proceeding at law, against any person for receiving or entertaining the complainant. That the complainant have free access to her children, and in case of sickness, she shall have the care of them till their recovery. The defendant having repeatedly declared his

willingness to make a reasonable provision for his wife and children, the Court would prefer that the terms should be proposed by himself.

It is therefore ordered and decreed, that the defendant do immediately lay before the commissioner, proposals for the establishment of a fixed fund for the support of his wife and children. And in the mean time he is enjoined from selling or otherwise disposing of any part of his personal estate, till the ultimate decree as to such provision. And farther, that the parties may apply from time to time in a summary way by petition for further or other dispositions; and that all costs be paid by the defendant.

HENRY W. DESAUSSURE.

The Commissioner having made a report, the following additional order was made:

This case having been referred to the Commissioner to examine and report upon the circumstances of the defendant, *the Commissioner reported [*576] there were debts due by the defendant, contracted before the 20th October, 1813, (the date of the deed of trust) to the amount of \$931, and that his estate now consists of eleven negroes, which are included in the deed of trust, and one other negro man slave, and some inconsiderable personal estate. The report also states that several negroes of defendant have been sold to pay debts. To this it must be added, from the evidence on the trial, that the defendant has expended a considerable part of his property since his marriage; so that his present possessions are not worth as much as his own property, or his wife's, were severally worth at the time of the marriage. Nor has he contributed in any degree to support or maintain his family since his separation from his wife.

On this report being taken up, it was proposed by the counsel for the complainant, that the Court should order the delivery to the trustee of all property comprehended in the deed, to be managed by him, and applied to the maintenance and support of Mrs. Threewits and the children, as well as Mr. Threewits; and an offer was made, that the trustee would then pay off the debts contracted before the date of the deed, and which threatened destruction to the property. On the other hand, the counsel for the defendant proposed that a certain portion of the property should be put into the hands of the trustee, for the purpose of maintaining her, and that the remainder should be left in his hands to maintain himself and the children.

I have considerable difficulty in this case. I am reluctant to intermeddle with the rights of the husband and the father, beyond what is forced on me by the circumstances. But the past conduct of the defendant leaves little doubt that his property would be wasted, and his family left in beggary, if every thing remained at his disposal. This raises a strong inclination to do something for the security of this unhappy family. I cannot however, on reflection, feel myself justified to take all the property of the trust deed out of his hands, for that property is for his benefit, as well as that of his family; *and however improper his conduct has been, there is no evidence of such derangement as would justify the taking it wholly out of his [*577] hands. I must therefore restrain myself, and act upon the defendant's proposition rather than upon the complainant's.

It is therefore ordered and decreed, that the defendant do forthwith deliver up to Mr. Jesse Daniel, a trustee named in the deed of the 20th October, 1813, one half of the negro slaves comprehended in the deed, regarding number and value, (and separating families as little as possible) for the use and maintenance of Mrs. Threewits, the complainant, and of those children, who, by reason of their tender age, have been properly left in her care and

custody; and that the said trustee shall thereupon pay off one half the debts stated in the report of the commissioner.

It is further ordered and decreed, that the other half of the said negro slaves shall remain in the hands of Mr. Lewellin Threewits, the defendant, for the use and support of himself and the eldest child, which is with his mother; unalienable by him to any other purpose, and subject only to such debts as really have a legal right to be satisfied out of it; and he is directed to pay the other half of the debt reported by the Commissioner.

HENRY W. DESAUSSURE.

By the consent of the parties, James Rogers, Benjamin Busby and Randolph Geiger, are appointed commissioners to divide the property, as above directed, with directions to include in the wife's moiety the negroes which belonged to her before the marriage.

From this decree and order, an appeal was made by the defendant on the following grounds, to wit:

First,—Because by her reconciliation and subsequent cohabitation with defendant, the complainant had waived all antecedent grounds for relief.

Second,—Because the decree in this case makes a provision for two children of defendant, out of a specific trust fund, contrary to the provisions of the deed creating such trust.

*578] *Egan, defendant's solicitor.

The case came on in the Appeal Court, and the following decree was made:

Court of Appeals, November, 1815.—Upon hearing counsel in this case, it is ordered and adjudged, that the decree of the Circuit Court be affirmed, for the reasons given therein, and the appeal dismissed.

(Signed)

HENRY W. DESAUSSURE,
THOMAS WATTES,
W. D. JAMES.

Beaufort District.—Heard by Chancellor DESAUSSURE. June, 1815.

The VESTRY of St. Luke's Church, vs. The Reverend PHILIP MATHEWS.—
Case LXXXIII.

A clergyman entered into a contract with a vestry, who were not legally elected, but who were yet the vestry *de facto*, for a year's service in the church. He was ignorant of the illegality of the election, and there was no collusion. He performed the duties, and is entitled to the benefit of his contract. But in the ensuing year he entered into another contract with the same vestry, when apprized of the illegality of their election. This furnishes sufficient proof of collusion, and the Court decreed a perpetual injunction against any suit for the services rendered the second year.

THIS case was argued, and the following decree was made thereon by the presiding judge:

This is a bill filed to restrain the defendant from availing himself of a judgment at law, obtained for a year's salary, alleged to be due to him on a contract made with the vestry and wardens of the Episcopal Church of St. Luke's Parish, to serve as rector of that church, from Easter, 1811, to 1812.

The bill states "that the defendant was rector of St. Luke's church, by the appointment of certain persons, who had usurped the office of vestry and wardens; and that the defendant was knowing to the usurpation, and therefore came in by collusion with them." That such was the intimate under-

standing between the defendant *and these usurpers, that the terms of agreement were that the defendant was to be paid as long as he chose to continue with them. That when the title of these usurpers came to be examined in Court, on a motion for a *mandamus*, the application was dismissed, because the *mandamus* was not the proper remedy; of which cause of dismissal the presiding judge informed the parties, and apprized them, that the tenure by which those persons held their offices was illegal; yet after this the defendant renewed his engagements with the usurpers in question. That the complainants were not satisfied that the defendant is recognized as an Episcopal minister, by the church of this State. That the complainants, and the body of the parishioners never concurred in defendant's appointment, but regarded him as an unfit person, on account of the reports which had reached them, concerning his general character. That the defendant Mathews has obtained judgment at law, for the amount of one year's salary; and issued his execution, and threatens to levy upon, and sell the church.

The bill prays for an injunction against the judgment at law, and that the complainants may not be further troubled at law. The answer of Philip Mathews denies that he had any knowledge of any conspiracy between the vestry and wardens elected in April, 1811, to retain their appointments, in despite of the wishes of the congregation. That defendant for five years before he came to St. Luke's parish, had been rector of the Episcopal Church of St. James, Santee. That receiving pressing letters from Capt. J. W. Alston, an officer of the church of St. Luke, encouraging him to expect the appointment to that church, with a salary of \$1,400, to be the minister for St. Luke's and Hilton Head, he was induced to leave his residence. That at that time the defendant was entirely ignorant of any contention existing in St. Luke's. That on his arrival, he found in office J. W. Alston and others, who appeared from the books of the said church to have been members and officers of the same for several years; by whom the defendant was engaged to preach every Sunday in said church, for a salary of \$800.

*That although the defendant was present on the day of election, in April, 1811, having come into the parish only the evening before, he was entirely unacquainted with the nature of the controversy between the conflicting parties of the said church. But he understood it at that time to be a contention who should have the disposition of the funds of the said church. The defendant further states, that the charge of complainants, that the defendant is not a legally ordained minister of the Episcopal Church, is false and unfounded; he having been ordained by Bishop Madison, who conferred on him the grade of deacon and priest's orders, on the same day, as would appear by exhibits filed with the answer. That the defendant is recognized by the parish of St. Helena, as its rector, and has been returned by the vestry to Bishop Dehon, who promised to enrol his name; having been previously enrolled, to wit, in 1805, by the standing committee.

This defendant further states, that he agreed with the vestry and wardens of St. Luke's, to serve as rector for the year 1812, (which was his second year,) before the Court of Common Pleas had pronounced any decision on the question then in litigation; as the said vestry and wardens were then recognized by a large portion of the congregation. That J. W. Alston was either a warden or vestry-man, for several years, before any dispute originated; and that this defendant did not abandon the said congregation, till he found that he could not reconcile them. That the charge of collusion with usurpers is untrue, for at the time of passing the bye-law, so much complained of, the defendant was in the enjoyment of the rectory of St. James.