REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

NEW-YORK:
Printed and published by Isaac Riley.
1812.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh year of the Independence of the United States of America, LEWIS MOREL, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. I. By WILLIAM MUNFORD."

IN CONFORMITY to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of "maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, "supplementary to an act, entitled an act for the encouragement of learning, "by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending "the benefits thereof to the arts of designing, engraving and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

OCTOBER, 1810.

Hooe v. Tebbs.

As to the rule, "that the preamble of a statute furnishes a guide to its construction," where the enacting words are *ambiguous*, or *doubtful*, it may be well to resort to the preamble as a key to discover the will and intention of the Legislature; but where an enacting clause is *clear* and *explicit*, as in the present case, it seems to me improper to resort to the preamble, to discover the meaning of the statute, in order to give it an operation, or to destroy its effect, contrary to the will of the Legislature.

I am of opinion, upon the whole, that the judgment is erroneous, and ought to be reversed; and the cause remanded to the Superior Court of *Prince William*, for a new trial to be had therein.

Judgment reversed, and new trial directed.

Monday, October 15.

Henderson *against* Hudson.

The statute to prevent frauds and perjuries applies to an agreement between a purchaser of land, and a third person, that such third person should be admitted as a partner in the purchase; the proof of such agreement being *only parol* evidence of subsequent declarations and acknowledgments by the parties.

THIS was a suit in the late High Court of Chancery, brought by *Christopher Hudson* against *John Henderson*, for the purpose of obtaining a conveyance of a moiety of a tract of land purchased by the defendant of a certain *Thomas Booth*, and of *Robert Andrews*, who, as executor of *Samuel Beall*, deceased, had a mortgage upon it. The plaintiff relied on a *verbal* agreement between himself and the defendant, that he should be let in as a partner in the purchase. The defendant in his answer denied the agreement, and claimed the benefit of the statute to prevent frauds and perjuries. The testimony related altogether to *parol* declarations and acknowledgments by the parties at sundry times subsequent to the alleged agreement. The late Chancellor, Mr. WYTHE, was of opinion, "that the defendant was by the testimony proved to have agreed to associate the plaintiff in the purchase of the land; that the statute applied only to contracts and actions upon them, (*quæ frequentius accidunt*,) between the BUYERS and the SELLERS of lands," but not to such a contract as the one now in question; "that the defendant, (when he transacted with the sellers the business about which they treated,) *observing good faith*, would have joined the plaintiff's name in the convey-

ances; that, if the statute were capable of an exposition comprehending such an example as the present subject of litigation, it ought rather to be called an act to *permit fraud and perfidy.*"

He therefore decreed "that the defendant convey with warranty against himself, and claimants under him, one moiety of the land purchased by him of *Thomas Booth*, and deliver possession thereof to the plaintiff, upon payment by him of the like proportion of the purchase-money, with interest, to the defendant; which moiety the County Surveyor was ordered to distinguish and describe on a map, in presence, and by direction, of Commissioners appointed to superintend the partition, and to allot and assign the purparties. And the said Commissioners were required to report the said plan, allotment and assignment, with an account stated between the parties, debiting one with his proportion of the purchase-money and interest, and the other with one half of the profits of the said land, whilst he had withholden the possession thereof." From which decree the defendant appealed.

Wickham, for the appellant, took a view of the evidence, by which he contended the contract alleged in the bill was *not* proved. *Some* conversation between the plaintiff and defendant on the subject of a proposed partnership in the purchase was admitted in the answer: but the defendant says that the contract was not closed, because an advance of money on the part of the plaintiff was necessary; and every circumstance in the case proves this. Especially, if *Hudson* was a partner, is it not unaccountable that he should never have been called upon to advance his share of the purchase-money?

But the statute of frauds puts an end to all question. This is the very kind of case intended to be prevented, by the statute, from coming before a Court of Justice. The contract, as *alleged*, was not to be performed *within one year;* and, even if not for *land*, could not be enforced.

Peyton Randolph, for the appellee. The statute of frauds does not relate to a contract *between joint purchasers* of land; but only to contracts between vendor and vendee. *Hudson* (the *appellee*) originally contracted for the land: *Henderson* (the *appellant*) applied to be admitted as a partner. At that time the

OCTOBER, 1810.

Henderson v. Hudson.

land had not been purchased. According to the bargain made by *Hudson* on his application, he was a mere agent and trustee. As between *Hudson* and *Henderson*, it was only a contract that *Henderson, as agent for both*, should buy the land; not a contract of *Hudson* to buy the land *of Henderson*. Why should he employ *Henderson* to purchase, if not for their mutual benefit? The testimony proves his great anxiety to purchase; and that he understood the bargain was joint: yet, according to the *answer*, you lose sight of *him* altogether.

Wirt, on the same side, quoted *Moseley's Rep.* 39. *Atkins* v. *Rowe*, as shewing that where a man sends an agent to buy land with his money, and the agent takes the deed in his own name, the principal, on proving this by *parol* evidence might claim the land in equity; and he was inclined to think that, even if the agent paid his own money, the Court would give the principal relief. The case of *Waller* v. *Hendon*, 5 *Viner*, 424. proves that an authority to treat, or buy, may be good without writing, and binds the principal to pay the money, for which his agent may agree. In the present case, what was *Henderson* but an *agent* for *Hudson*, as to one half of this land? The contract should bind him to *Hudson*, as it would bind *Hudson* to the seller. A contrary doctrine would destroy all agency by *parol:* and, though declarations of trusts are required by the statute to be in writing; yet such as arise by operation or construction of law are excepted; as, where the conveyance has been made to one, but the purchase-money was paid by another; this is a resulting trust for him who paid the money;(*a*) and the existence of such trust may be established by *parol* evidence, shewing the mean circumstances of the pretended purchaser;(*b*) or by the party's own *confession:*(*c*) or other circumstances.(*d*) The objection that this will open the door to *perjuries* applies in all these cases; but it shuts the door to *frauds*. The cases of contracts partly performed are of the same sort: yet the law is well settled that part-performance takes a *parol* agreement out of the statute. *Lamas* v. *Bayly*, 2 *Vern.* 627. which seems against me, was not a case of a joint purchase, but of an agreement that, *after* the purchase, *Lamas* should have part as purchaser *from Bayly*, who, in the first instance, bought singly. But the authority of that case, as reported in *Vernon*, has been questioned.(*e*)

(*a*) *Willis* v. *Willis*, 2 *Atk.* 71.

(*b*) *Ibid.*

(*c*) 2 *Atk.* 150. *note. Noland's* edit.

(*d*) 5 *Viner*, 521. pl. 31. *Sellack* v. *Harris.*

(*e*) 1 *Pow. on Cont.* 310. referring to 5 *Vin.* 521. pl. 32. and to 2 *Eq. Cases Abr.* 45. pl. 10. as reports of the same case.

Wickham, in reply. The case of *Lamas* v. *Bayly* is conclusive upon the present question; applying directly in my favour. *Vernon*, by whom it is reported, was an able lawyer; and his authority is better than that of *Viner*, who was a mere compiler. But even as reported in *Viner*, and 2 *Eq. Cas. Abr.* it is not against me; for it is there said that the very agreement charged in the bill was admitted in the answer, and yet, on the ground of its being *ambiguous* and *uncertain*, the contract was not enforced; "the statute being intended to *oust* as well *all* such *ambiguous* agreements, as to prevent perjuries," &c. The case therefore was stronger than ours, in which the pretended contract is *denied* in the answer. *Atkins* v. *Rowe*,(*a*) quoted by Mr. *Wirt*, contains nothing decisive. The Chancellor there "let the plea stand for an answer," with liberty to except; but did not overrule the plea, or give any positive opinion; and the reporter concludes with a *quære*. *Waller* v. *Hendon*, 5 *Viner*, 424. is not law; for a power of attorney to buy or sell land must be in *writing*, to be binding on the principal.

(*a*) *Moseley*, 39.

I admit that, where by *fraud* a contract is *prevented* from being in writing, the statute does not apply. *Selluck* v. *Harris*, 5 *Viner*, 421. is not like this case. In 2 *Atk.* 150. *Lane* v. *Dighton*, *Amb.* 409. is referred to; and that was not a case where *parol evidence of the party's confession* was admitted; the rule is, that such *confession* must either be in *writing*, or appear *judicially*, by the answer.(*b*)

(*b*) *Ryall* v. *Ryall*, 1 *Atk.* 59. *Ambrose* v. *Ambrose*, 1 *P. Wms.* 322.

Wednesday, *October* 31. The Judges pronounced their opinions.

Judge TUCKER. The bill charges that the complainant having begun a treaty with Mr. *Andrews*, and one *Booth*, for the purchase of a tract of land mortgaged by the latter to *Samuel Beall*, deceased, whose executor Mr. *Andrews* was, a conversation took place between the complainant and the defendant, from which the former discovered that the latter was desirous of purchasing the same land, and consulted the complainant on the means of effecting the purchase; that the defendant proposed to the complainant during that conversation to admit him as a partner in the purchase, which he refused; that, shortly after, meeting with the defendant again, the latter repeated his former proposition of

October, 1810.

Henderson v. Hudson.

a partnership, which he again refused; that the defendant "then promised that, if the complainant would give him an interest in the purchase, he would be at all the trouble and expense of waiting on Messrs *Andrews* and *Booth*, and, at the expiration of four or five years, would let the complainant have *his* part *again*; that, upon the complainant's objecting to that condition that the defendant would, *then*, probably demand too high a price for his part, he said, he would agree to leave the price to be settled by referees; as he only wished to be paid for his improvements, and whatever rise might take place in the price of lands after the purchase: that the complainant *then* acceded to the defendant's proposition, *solely upon* the conditions last mentioned; and it was agreed between them that the defendant might offer as far as 400*l.* or 500*l.*, with as long a credit as possible; the *complainant* assigning as a reason that he did not know at that time what price he might get for his wheat and tobacco:" that the defendant accordingly went down, and made the purchase, and, on his return, informed the complainant thereof, and of the terms, viz. 100*l.* cash to *Booth*, and 300*l.* to Mr. *Andrews*, in two annual payments; that the defendant has since refused to let him have his stipulated proportion, although he has always been ready to pay his proportion of the price, and has actually tendered to the defendant 60*l.* as a compensation for the 50*l.*, which he had advanced on the first purchase.

The defendant answered, setting forth several conversations, between the complainant and himself, on the subject, "and denying that those conversations ever *terminated in a contract*, or ever approached nearer to one than he had before stated." In an amended answer which he was permitted to file, he insists upon the benefit of the statute of *frauds* and *perjuries*.

I shall briefly observe upon this answer, that the conversations which it states differ very materially from those set forth in the bill; that no witnesses (of whom a great number were examined) were present at the time of making the contract; their testimony going only to *conversations* between the parties in their presence subsequent to the purchase; or to communications made to them at different times by the plaintiff, or defendant. And, although one witness, Mr. *Carter*, swears positively, "that the defendant *informed him* that he and the complainant were in *partnership* in that purchase, and that he had made a very advantageous bar-

gain," yet even *he* does not mention the *terms* of the partnership, nor any particulars whatsoever relating thereto. Another witness, *James Lucas*, says the defendant told him that the complainant *was to join him* in the purchase of the land, OR WISHED TO DO SO; but he cannot recollect *which of those expressions* he used. Two other witnesses, *William Clarkson* and *David Anderson*, whose depositions were much relied on by the complainant's counsel, and are, in fact, in great measure *literal transcripts* of each other, (a circumstance which in my mind does not strengthen their testimony,) state a conversation between the parties in their presence respectively, in which they both say, in the *same words*, that each of them "heard the complainant demand of the defendant a compliance with a contract which the *complainant* stated to have existed between the defendant and himself respecting a partnership in the purchase of the aforesaid tract of land, *the particulars of which contract the deponent does not recollect to have heard*, except so far as relates to a conversation which the *complainant stated* to have taken place between them to the following effect;" which they set forth, nearly, or entirely, in the same words; and in which the complainant and defendant contradicted each other in several particulars. Neither does any thing stated by them in their depositions shew the terms of the agreement (if any can be collected, or presumed, from what they say) to be such as the complainant has set forth in his bill.

I deem it unnecessary to enter into a more minute examination of the evidence, the statute of frauds and perjuries being relied on by the defendant in his amended answer.

In giving my opinion in the case of *Argenbright* v. *Campbell*,(a) I said, that the true intent and meaning of our statute of frauds and perjuries was, according to my apprehension, to reduce all such parol agreements as are mentioned in the purview of the act to the level of a mere *nudum pactum*, or of a mere *colloquium*, or the *inception* of a contract, instead of the *completion* of it; that although it was very clear that the statute intended to *prevent fraud* as well as perjury, yet, from the purview of it, declaring that *no* ACTION *shall be* BROUGHT in the cases therein enumerated, the true intent of the statute was to prevent the *fraudulent imputation* of a contract, rather than the fraudulent *denial* of one; and, therefore, that all promises, agreements, and contracts within the purview of the statute, *if not reduced to writing and signed* pur-

(a) 3 H. & M. 160.

OCTOBER, 1810.

Henderson v. Hudson.

suant to the statute, and if nothing were done, in performance thereof, whereby the actual state of the parties, or one of them, is *materially* affected, ought to be considered as *imperfect* and *incomplete*, so as to be incapable of supporting a suit either at law, or in equity. For the reasons and authorities in support of this opinion, I beg leave to refer to that case, p. 160—169. An opinion not very dissimilar to some parts of the preceding may be found in the case of *Rowton* v. *Rowton*,(*a*) delivered by another member of the Court. And, though, in that case, I was of opinion that the contract was not only fully proved, but *fully executed* on the part of the son, and his situation thereby *materially altered*, the difference of opinion between myself and a majority of the Court did not arise from a different construction of the true policy of that statute, but from the difference of opinion which was entertained respecting its application to the peculiar circumstances of that case. In the case of *Cooth* v. *Jackson*,(*b*) Lord Chancellor *Eldon* declared that, if a defendant denies that any parol agreement ever took place, a Court of Equity will not inquire into the truth of *that* denial. The same Judge says, in the same page, that all the doctrine of a Court of Equity attributes great weight to the oath of the defendant; and that the moment the defendant, in the form in which issue is joined in that Court, in his answer says that there was *no agreement*, *the witness cannot be heard;* or, if he was heard, unless supported by special circumstances, giving his testimony greater weight than the denial by the answer, the Court could not make a decree. In the case now before us, the agreement charged in the bill is denied by the answer, and the whole mass of evidence taken together does not prove it as alleged in the bill. The statute appears to me emphatically to apply to such a case.

(*a*) 1 *H. & M.* 92.

(*b*) 6 *Ves.* jun. 39.

But it is objected, this is not a contract for the *sale* of lands, but for a purchase thereof in partnership. Whoever looks at it, as charged in the bill, must, I think, be sensible it was for *both:* the terms on which the complainant alleged he was to have the defendant's part back again, appear to me incapable of being understood in any other sense. The contract also must, I conceive, be taken as *one entire contract*, and not as different bargains. The latter part being, for the reasons just mentioned, within the statute, the cases of *Cooke* v. *Tombs*,(*c*) and *Lea* v. *Barber*,(*d*) are, in my apprehension, conclusive against the Chancellor's decree.

(*c*) 2 *Anstr.* 420.

(*d*. *Ibid.* 426. in a note.

The case of *Chater* v. *Beckett*(*a*) is an affirmance of the same principle. So was that of *Lord Lexington* v. *Clarke*,(*b*) if the note of it in the report of *Chater* v. *Beckett* be correct. I have not the book to refer to. I will here say, with Lord *Kenyon*, in the last-mentioned case, "that I lament extremely that exceptions were ever introduced in construing the statute of frauds: it is a very beneficial statute; and if the Courts had, at first, abided by the strict letter of the act, it would have prevented a multitude of suits that have since been brought."

(*a*) 7 *Term Rep.* 201.
(*b*) 2 *Vent.* 223.

I am of opinion that the decree be reversed, and the bill dismissed.

Judge FLEMING.* It is agreed by the counsel on both sides that the only two points in the cause are, 1st. Whether the case be within the statute of frauds and perjuries; and, 2dly. Whether the contract, as stated in the bill, has been proved; both of which appear to me in favour of the appellant: but I shall reverse the order, and first consider whether the contract, as stated in the bill, be proved? And I have no hesitation in saying that it is not proved to my satisfaction. It is, in the first place, expressly denied by the answer, which is corroborated in some of its material parts by oral testimony: and, in the whole cloud of witnesses examined on the part of the appellee, not one was present at the time of the pretended contract or agreement between the parties; but the whole of their testimony relates to loose confessions of the appellant, and assertions of the appellee when the matter in controversy happened to be the subject of conversation: and not a single witness pretends to have heard the appellant state or confess the substance or conditions of any agreement whatever between the parties, relative to the subject in dispute. Such evidence as this (were the statute of frauds and perjuries out of the way) is, in my mind, too slight and feeble to deprive any one of his freehold and inheritance, or any part thereof.

2dly. But, were the oral testimony of the appellee more particular and pointed in support of the contract, it appears to me, (notwithstanding the opinion of the Chancellor to the contrary,) that the case is within the statute of frauds and perjuries, which I consider as a very beneficial and salutary law, that has been too

* Judge ROANE did not sit in this case.

October, 1810.

Henderson v. Hudson.

much disregarded in some of our Superior Courts of Chancery And, although, in the case before us, it is not immediately between a buyer and seller of land, yet it is within the mischief intended to be guarded against by the statute, which being a remedial one, and intended to prevent a growing evil, ought to be liberally construed: and the admission of oral testimony to prove the agreement, denied by the appellant, tended by imputation to deprive him of a considerable part of his freehold and inheritance. But the first point being, in my apprehension, clearly against the appellee, I have considered the latter with less attention than I otherwise should have done. And, upon the whole, I concur in the opinion that the decree be reversed, and the bill dismissed with costs.

Decree reversed, and bill dismissed.

Monday, November 11.

Harvey and Wife *against* Pecks.

1. A deed from a husband and wife without her privy examination and relinquishment, is utterly void *as to her*, and furnishes no consideration to support a subsequent conveyance.

2. What are badges of *fraud* in obtaining a deed.

BENJAMIN BORDEN, the elder, by his last will, dated the 3d of *April*, 1742, and admitted to record the 9th of *December*, 1743, gave to five of his daughters (of whom *Lydia*, who afterwards married *Jacob Peck*, was one) five thousand acres of land, "*all of good quality;*" (being part of his lands on *James River*, without specifying the situation or boundaries;) "that is, one thousand acres of good land, a piece, to every one of the said five daughters, to them and their heirs and assigns for ever;" and all the rest of his said lands to be sold, &c.

By a deed of bargain and sale, dated the 17th of *September*, 1745, *Jacob Peck*, and *Lydia* his wife, for and in consideration of the sum of 30*l.* current money, conveyed to *Benjamin Borden*, the younger, who was the testator's executor, "all the said *Jacob's part* of the land which *he* had by virtue of his intermarriage with the said *Lydia*, containing one thousand acres, situate, lying and being on *one* of the branches of *James River*, and in that part of *Orange* called *Augusta;*" without any farther description; the land, as it seems, having never been allotted according to the will. This deed had the name of *Lydia Peck* as well as that of