REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

NEWYORK:

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1814.

"The court is of opinion that, if the agreement stated in the bill as the ground thereof has not been relinquished on the part of the appellee's intestate,(1) she should not have been limited by the decree of the courts below to the annuities which had actually fallen due before the date, but that liberty ought to have been reserved to her, thereby, to apply to the court, from time to time, to extend its decree, so as to embrace all the annuities thereafter falling due during her life. The court is also of opinion that, under the actual testimony exhibited in this cause, it would have been proper to have directed an issue to inquire whether the receipt of the 2d of *February*, 1789, was fairly obtained, with a full knowledge of its contents, on the part of the appellee's intestate, and whether it was then understood by her to extend to the whole bond."

Decrees of both courts reversed, and cause remanded to the superior court of chancery for an issue to be directed, and farther proceedings to be had, agreeably to the foregoing principles, in order to a final decree.

(1) Note. The suit (having abated by the death of the appellee) had been revived against her administrator.

Scott's Executor *against* Osborne's Executor.

Wednesday, September 18, 1811.

JAMES SCOTT filed his bill, on the 2d of *March*, 1795, in the late high court of chancery against the exe-

1. A father-in-law having promised his son-in law that, if he would purchase a certain tract of land, he would assist him in paying for it by letting him have the amount of a particular bond, when collected; and the son-in-law having thereupon made the purchase, this promise was determined to be upon sufficient consideration, and obligatory in law.

2. It was determined, also, that the son-in-law properly sued *in chancery* to *discover* whether, and at what time, the money due on the bond was collected.

3. And, since his claim did not accrue before such collection, the act of limitations did not begin to run against him until then.

4. A legacy to a *wife* for her life, and afterwards to the children of the marriage, is no satisfaction of a promise, to the *husband*, of the amount of a specific debt, (when recovered,) to be applied to a particular purpose; there being no declaration in the will that the legacy was intended as satisfaction for the promise.

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cutors of *William Osborne*, deceased; charging that, some time prior to the 16th day of *February*, 1785, the plaintiff being about to purchase a tract of land, in the county of *Prince Edward*, of a certain *Robert Donald*, for the sum of 946*l.* current money, whereof 434*l.* 10*s.* in part, was to be paid immediately, and the balance the *Christmas* following; *William Osborne*, of the county of *Nottoway*, in order to encourage him to make the purchase, and in consideration that he, the plaintiff, had married his daughter *Elizabeth*, and for her advancement, did advise and instruct the plaintiff to contract for the purchase of the said land, and to make the first payment himself; and, in consideration of his so doing, agreed that he, the said *William Osborne*, would pay the last payment for him, out of a debt due to him by bond from a certain *Henry Anderson*, (amounting to 315*l.* 15*s.* 3*d.* with lawful interest from the 1st of *April*, 1776,) when the same should be collected; that the plaintiff, depending on those promises, concluded the contract for the purchase, made the first payment to *Robert Donald;* and gave his bond for the balance of the purchase-money, amounting to 512*l.* 10*s.* payable the 25th day of *December*, 1785, in full hope and assurance that the same would be duly paid and taken up by the said *Osborne;* that his circumstances would not justify his making the said purchase; and that he would not have made it, if the promise aforesaid had not been made him; that, nevertheless, the said bond was not discharged by *Osborne*, who had not been able to collect the money from *Anderson*, and the plaintiff was himself compelled to pay it, with great difficulty and inconvenience, and a considerable sacrifice of property, which he finally accomplished, and took in the bond, about the year 1790; that *Osborne*, by his last will, made and published the 2d of *October*, 1786, bequeathed to his daughter *Elizabeth*, wife to the plaintiff, 5*l.* current money, and soon after departed this life, without having, in any manner, paid

or satisfied the plaintiff for the said sum of 512*l.* 10*s.* or any part thereof; that his executors had, since the year 1790, completed the collection of the debt due from *Anderson;* but the plaintiff is unable to prove, *at law,* when the same was collected, and to what amount; that the said executors had assets to satisfy the plaintiff's claim, and were accountable to him, *as trustees,* to an amount equal to his last bond to said *Donald.* The bill concluded with special and distinct interrogatories, requiring the defendants to answer the several allegations aforesaid, and prayed a decree for 512*l.* 10*s.* with interest from the 25th day of *December,* 1785; also for the legacy of 5*l.* and for general relief.

The defendants, by their answer, contended, that, if the plaintiff's claim could be supported at all, it could in a *court of law;* that the promise of their testator (admitting that he made it) was not binding either in law or equity, because there was no consideration to support it, unless *marriage* shall be regarded as a *continuing consideration;* and because the *time* limited by law for the institution of actions for claims of this nature had long ago expired. They further answering said, that they were present when a conversation took place, between their testator and the plaintiff, about the purchase of *Donald's* land; and they understood that, if the money due on *Anderson's* bond could be collected, the plaintiff was to have the use of it, free from interest if returned in a short time; and that he was to give his bond for it: "they feel a conviction that *such* was the nature of the agreement, (if it can be called one,) not only because their memories tell them so, but because, if their testator really intended that the said complainant should have the absolute ownership of the said bond, no reason can be conceived why an immediate delivery, or assignment, did not take place."

The answer further stated that the complainant had

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given an incorrect, if not an uncandid, statement of the will of *William Osborne*; who, in fact, devised to his daughter *Elizabeth*, wife to the complainant, during her natural life, a negro woman, named *Cutchina*, and all her increase that she then had, or might thereafter have, and directed his executors to lay out the sum of 280*l.* in the purchase of negroes, which negroes he bequeathed to the said *Elizabeth* during her life, and, after her death, to her children by the complainant: he also devised to the said *Elizabeth*, (after the death of his wife,) during her life, with a limitation to her children as before, a negro woman named *Poll*, and her daughter *Milly*; "all which, it is conceived, were certainly meant by the testator to be in full of the provision which it was proper for him to make for the plaintiff's family; the defendants aver that the complainant was spoken to by the testator, and then expressed his approbation of the manner in which the legacies aforesaid were to be made to his wife; that the said sum of 280*l.* has been disposed of according to his wishes, and he has received every benefit which was intended for him, or any part of his family, by the will aforesaid; that the widow of the said testator hath since departed this life, and hath made considerable bequests, to the children of the complainant, out of the residue devised to her; which residue could not be ascertained until all accounts were settled, and the estate divided; and now the complainant finding, perhaps, that he has got all that he is likely to receive, is setting up a claim, about which he has thought proper to be silent for nearly ten years."

In this answer the respondents said nothing about the time of collection of, or sum received by, them upon *Anderson's* bond. But from certain *exhibits* in the cause, (whether filed by the plaintiff, or by the defendants, does not appear,) the sum of 128*l.* 14*s.* 6*d.* appears to have been made, by an execution issued *May* 13, 1790, and the balance, amounting to 594*l.* 9*s.* 4*d.* be-

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sides costs, to have been recovered, in an action of debt on the judgment, *in September*, 1793.

The last wills of *William Osborne* and *Elizabeth Osborne*, his widow, were also *exhibits*, and corresponded with the description of them given in the answer. Many depositions were taken on both sides; the general tendency of which was to prove the plaintiff's having been induced to make the purchase of *Donald's* land by *William Osborne's* promise to let him have the amount of *Anderson's* bond when collected.

The late chancellor dismissed the bill with costs; from which decree the plaintiff appealed to this court; and, the appellant and appellees having departed this life, the appeal was revived in favour of *Scott's Executor* against *The Executor of Abner Osborne*, who was surviving executor of *William Osborne*.

Wickham, for the appellant. 1. *Scott* came into *equity* upon two grounds; 1st. The *trust* relative to *Anderson's* bond; the amount of which, when collected, he was entitled to receive; and for that purpose had a right to demand an *account;* and, 2d. The uncertainty as to the time when the money was collected; which made a *discovery* necessary.(*a*)

(*a*) *Chichester's Ex'x* v. *Vass's Adm'r*, 1 *Munf.* 98.

2. The promise was supported by a sufficient consideration, the purchase of *Donald's* land having been made at the *request* of *Osborne;* and the plaintiff having thereby sustained a great inconvenience, against which he promised to indemnify him.(*b*)

(*b*) *Carr* v. *Gooch*, 1 *Wash.* 260—262. 3 *Burr.* 1671. 1 *Pow. on Cont.* 343, 344. 1 *Roll. Abr.* 22. pl. 23.

3. The act of limitations did not bar the plaintiff's claim; which never accrued until the money due from *Anderson* was collected.

Hay, contra. According to *Scott's* own statement, the money when collected being his, an action for money had and received, or a special action for breach of contract, would have lain in his favour: adequate redress

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might then have been had *at law;* and, therefore, even if the consideration were sufficient, and the contract proved, there is no ground for coming into a court of equity.

But the consideration, in this case, was not sufficient: the promise, in fact, was merely voluntary. For the bill states that the plaintiff was *about* to purchase the land in *Prince Edward*, before his father-in-law said any thing to induce him to make the purchase. He must have applied to *Osborne* for help, and the promise must have been made in consequence of that application. His allegation, that the purchase was far above his ability, is no basis for a consideration; since (from his own showing) he was able, and actually did pay for the land.

The delay of bringing suit ought to bar the plaintiff; especially, since he waited till the deaths of Mr. and Mrs. *Osborne*, to get whatever might be bequeathed, by either of them, to himself, or his wife and children, and then set up this claim on account of *Anderson's* bond, for which, probably, the old gentleman supposed he had made him complete satisfaction by the ample provision made in his will. The bill being, in substance, for a *specific performance*, in which case the giving relief is *discretionary* with a court of equity, the court ought not to countenance the present plaintiff.

Wickham, in reply. An action for money had and received will lie against every trustee; yet the bill in equity lies. That action is, in many respects, of modern date; introduced to obtain relief *at law* in many cases where the remedy formerly was, *exclusively*, *in equity*. But this circumstance does not take away the old established jurisdiction of the court. Proving, then, that *that* action *will* lie, does not prove that a bill in equity will *not* lie. But the prayer for a *discovery* is abundantly sufficient to give the court jurisdiction.

As to the consideration of the promise; the plaintiff's saying he was *about* to buy the land, proves nothing;

for this was not actually buying it. Another allegation in the bill is, that he would not have bought it, *but for this promise.* In all human probability, *Anderson's* bond was *in suit* at the time, and *that circumstance alone* prevented *Osborne's* assigning it to the plaintiff.

In *Rowton* v. *Rowton*, 1 *H.* & *M.* 92. there was no difference of opinion among the judges, on the point that the agreement, *if proved*, was upon sufficient consideration.

Mr. *Hay's* argument that *Scott's* claim is *unconscientious*, is not supported by the facts in the record. The devise in *Osborne's* will, to *Scott's wife*, is no satisfaction of the contract. Even a devise to *himself* could not have had that effect, without an express declaration in the will. Such a devise could not be *presumed* to have been intended as a satisfaction; especially in opposition to the testimony of witnesses, which ought always to be admitted to rebut an equity.

Hay. The suggestion of a want of *discovery* is merely *colourable*, to give jurisdiction. The time when *Anderson* paid the money might easily have been proved.

Wickham. The decision in *Chichester's Ex'x* v. *Vass's Adm'r*, is a complete answer to this objection. I contended, there, that the plaintiff having proved his case by evidence *aliunde*, a discovery was not necessary; but my argument was overruled.

Wednesday, September 25th. The following opinion was pronounced as the opinion and decree of the court, consisting of Judges FLEMING, ROANE, BROOKE and CABELL.

The chancellor, in this case, dismissed the appellant's bill, without assigning any reason for doing so; and the

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counsel for the appellee stated four points in support of the decree;

1st. That, if the appellant had a right, he had a complete remedy at *law*, and therefore a court of equity had no jurisdiction of the cause.

2d. His action was barred by the statute of limitations.

3d. The promise, or declaration of *Osborne*, as stated in the bill, was void for want of a consideration; and,

4th. If good, the legacies to his wife, of which he had the benefit during his life, ought to be regarded as a satisfaction, *pro tanto*, of his engagement.

But we are of opinion, 1st. That a bill *in chancery* was necessary to discover whether, and at what time, the money due on *Anderson's* bond was recovered and received by *Osborne's* executors; 2d. That the appellant was not barred by the statute of limitations, as he had no right to the money, under the said promise, until it should be recovered of *Anderson*, the time of which was uncertain, and which, it appears, did not happen until the year 1793; 3d. That a very good and sufficient consideration is charged in the bill, and proved by sundry witnesses; and, lastly, that the legacies to the appellant's wife, being for life only, are by no means a satisfaction, *pro tanto*, of the engagement of the testator *Osborne*; it being a promise of a specific debt, when recovered, to be applied to a particular purpose.

The decree, therefore, ought to be reversed, with costs.

"Decree reversed; and, this court proceeding, &c. it is decreed and ordered that the appellee, *Conrad Webb*, executor of *Abner Osborne*, the surviving executor of *William Osborne*, out of the estate of the said *William Osborne*, pay to the appellant the full amount of the debt, with the interest thereon, by him recovered and received, on the bond of *Henry Anderson*, in the proceedings mentioned, and also interest, at the rate of *5 per centum per annum*, on the said aggregate sum, from the time the

same was received by the said executor, until payment thereof shall be made by virtue of this decree. And it is ordered that the cause be remanded to the said court of chancery, for such further proceedings to be had therein, as shall be deemed necessary to carry this decree into full effect."

Moore's Executrix *against* Ferguson and others.

Wednesday, October 9th.

IN a suit in chancery, on behalf of the residuary legatees of *George Moore*, deceased, against his widow, being his sole executrix, for a settlement of her administration account, and distribution of the balance due to the plaintiffs; the defendant, in her answer, set up a claim, against the estate of the decedent, for the profits, *in his lifetime*, of sundry slaves, which, before the coverture, were her property, and, by a marriage settlement, bearing date the 10th of *May*, 1783, were conveyed to a trustee, "upon this express condition and trust, that, at any and every time she should think proper, after the said marriage should take effect, as well the *property* as the *use* of the said slaves, all or either of them, should be in the sole and absolute disposal of her the said *Molly*, either by will, or otherwise, either in the lifetime of the said *George*, or otherwise."

It did not appear that, in the lifetime of *George Moore*, Mrs. *Moore* exercised any act of ownership over the slaves, or, in any respect, interfered with his receipt of their profits. It appeared that she lived with him, upon the usual terms of man and wife.

Commissioners, appointed by the county court, reported a balance against her of 400*l.* 8*s.* 10*d.* 1-2. upon the administration account; and, giving her credit for hire of her slaves from *May*, 1793, to the time of her husband's death, amounting, by a particular statement of

1. A wife, who lived with her husband, and was maintained by him, cannot, after his death, demand an account of *profits*, which *he* received, of a separate estate settled upon her; no such demand having been made by her in his lifetime.

2. A decree, and execution thereupon, against an executor, or administrator, for a balance due on his administration account, should not be against the goods and chattels of the decedent in his hands to be administered, but against his own goods and chattels.

See the same point decided by Chancellor *Taylor*, in *Barr* v. *Barr's Adm'r*, 2 *H. & M.* 26.