REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

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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."

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

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

At the term commencing the 15th day of April, 1810.

IN THE THIRTY-FOURTH YEAR OF THE COMMONWEALTH.

JUDGES, WILLIAM FLEMING, ESQUIRE, *President.*
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,
PHILIP NORBORNE NICHOLAS, ESQUIRE.

Tuesday, March 13.

Chichester's Executrix *against* Vass's Administrator.

1. In cases where it is proper and necessary to go into equity for a *discovery*, the Court (having possession of the subject) will proceed to *decide* the cause, without turning the parties round to a Court of Law, notwithstanding (if such discovery had not been necessary) relief might originally have been had at law.

AFTER the decision of the Court of Appeals in the case of *Chichester* v. *Vass*, (for which see 1 *Call*, 105.) a

2. If *A.* promise *B.* that, if he and *A.'s* daughter marry, "he will endeavour to do her *equal justice* with the rest of his daughters, as fast as it is in his *power* with *convenience*;" and the marriage be afterwards had with his consent; the promise is sufficiently certain and obligatory.

3. In such case, *A.* has not his *life-time* to perform it in; but, in a *reasonable* time after the marriage, (taking into consideration his property and other circumstances,) is bound to make an advancement to *B.* and wife, equal to the largest made to his other daughters.

4. A promise in the above-mentioned terms enures to the joint benefit of the husband and wife; and is not to be satisfied by a conveyance of *lands* to the *wife*. The husband (to whom the promise was made) has his election to consider it a *personal* contract; and if he survive the wife, may sue in his own right to recover damages for a breach.

5. A husband surviving his wife (or in case of his death afterwards, his executor or administrator) may maintain an action on a personal contract made with the wife before the marriage, or for their joint benefit afterwards; notwithstanding he did not take administration on her estate.

new suit was brought by *Vass*, in the late High Court of Chancery, against *Sarah Chichester*, widow, devisee and executrix, and others, children and grandchildren of the said *Richard Chichester*, deceased.

The case was this. Dr. *Vass* having paid his addresses to a daughter of Col. *Chichester*, on the 10th of *April*, 1789, wrote to him to ask his consent to their marriage. In his letter he says, "Should you disapprove of the matter, we shall endeavour to bear the *disappointment* with all possible fortitude; being determined to do *nothing* that may create the least uneasiness or anxiety to you."

Col. *Chichester*, in answer to that letter, on the 12th of *April*, 1789, says, "he has no reason to doubt his daughter's understanding and prudence; that, if it be her choice in full consideration, his approbation will not be withheld; that his circumstances are such that his daughters cannot expect large fortunes, but he shall endeavour to do them *equal justice, as fast as it is in his power*, with *convenience;*" and concludes with repeating "that he should not object to his daughter's determination, but give his approbation."

The marriage shortly after took effect. On the 5th of *January*, 1790, in answer to a letter from Dr. *Vass*, offering some objections to settling in *Alexandria*, Col. *Chichester* writes thus: "Your observations respecting *Alexandria* carry reason with them. *Nothing in my power*, without *distressing ourselves*, shall be wanting to assist YOU *in settling to* YOUR *satisfaction.*" He then adds, "if a *plantation* in the upper parts of the country would be more agreeable than a settlement in town, perhaps I can with propriety get off the contract made with *Stewart* for that tract of land in the county of *Shenandoah;* but, when I contracted with him," (for the sale, it would appear,) "I did not expect any of *my family* would be pleased with that part of the world for a settlement; which was my only reason for attempting to sell it. If *Colchester* or *Dumfries* would be more agreeable, I will endeavour to

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procure a *lot for the purpose in* FEE-SIMPLE, or will *do any thing in my power*, in any place *you think most agreeable.*"

On the 24th of *February* following, Col. *Chichester* wrote a letter to Col. *James Gordon*, in *Lancaster*, which begins thus: "Our friend and connection Dr. *Vass* and myself *concur* in opinion that in the neighbourhood of your Court-house is a good and proper stand for a physician;" and then proceeds to inquire whether a small tract of land with a house on it can be bought in that neighbourhood on reasonable terms; speaks of several which he is informed are for sale; says that two or three hundred acres of tolerable land, with a sufficiency of wood, and a small comfortable house, will be quite enough; mentions a particular plantation on which there is *no* house "*and how it would suit the Doctor to* BUILD, he cannot determine." He then adds, "that his late advancement for his daughter *Lee* put it out of his power to make immediate payment for the lands before mentioned to be bought, but that he expected about 50*l.* could be paid in *May* following, and the balance at two annual payments after. If it could be of any material advantage in the purchase, perhaps the whole balance may be advanced in *May* or *June*, 1791;" which was the succeeding year. In a postscript he says, "I do not wish any contract *confirmed* until I receive your answer, but conditionally *secure* for my approbation."

The bill stated, that Mrs. *Vass* dying in child-bed before any advancement was actually made, her father shewed no farther inclination to give any thing to the complainant, and actually refused to do so, although he had before made some very considerable advances to the husbands of his other daughters; that the complainant thereafter brought an action at law against *Chichester*. and obtained a verdict for 500*l.* damages; but the judgment thereupon was reversed in the Court of Appeals; that, pending the appeal, *Chichester* died, leaving the defendant, his widow, his executrix; as also a very large estate devised and bequeathed to her and the other defend-

ants; and called for a *discovery* of what advances their father in his life-time had made to his daughters severally, and of *what value* they were, and *when made* to them respectively; and that they should state the value of the several devises and bequests to their children respectively; and that, such discovery being made, as well as a discovery of the other estate of the said *Chichester*, there might be decreed to the complainant as much as came to the share of any of the said daughters, or the children of any of them, &c.; concluding with a prayer for general relief.

The executrix demurred to so much of the bill as seeks for *redress*, by decree of the Court of Chancery, on the promise charged in the bill to have been made by her testator to the complainant, and shewed for cause of demurrer, that it appeared, by his own shewing in his bill, that he had not any equity or title whereon such a decree can be grounded; and that the validity of such promise is a matter properly triable at *law*, and the remedy thereon is *at law*, and *not in equity*.

She then proceeds to answer the allegations of the bill *generally;* and, from her answer and those of several of the other defendants, (the daughters and their husbands,) it appeared, that Col. *Chichester* had made some considerable advances to the husbands of two of them; from one of whom he took a bond in the penalty of 3,000*l.* with condition that the husband should leave the wife lands of the value of 500*l.* for *her life*, in case she should survive him; that, on the marriage of a third with Mr. *Hancock Lee*, he laid out 500*l.* in land, and settled the same on Mrs. *Lee* and the children of the marriage; and that, some time after the marriage of his daughter *Sarah M'Carty Chichester* with *Thomson Mason*, he gave to the said *Thomson Mason*, as her portion, 500*l.* a negro girl, and a horse and saddle.

The will of *Chichester*, (which was among the exhibits,) dated the 10th day of *October*, 1793, (while the suit at common law brought by *Vass* against him was pending,) contains a variety of devises and bequests to his sons and

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daughters and his grandchildren, with as great a variety of limitations and contingencies; the property given to his daughters being *in general* expressly limited to them for *life* only, with remainders over. But, in one part of the will, this caution seems to have forsaken the testator: for after devising and bequeathing a very considerable portion of property, in lands, slaves and personals, to his wife *Sarah*, the executrix, " for and during the term of her natural life, with a power, either by deed or deeds in her life-time, or by a last will and testament, to give, devise and bequeath the said lands and slaves, and all other mentioned property, or any part thereof, to *any one child or children*, or any one grandchild or grandchildren, of her's and *his* in fee-simple and absolute property, or for any lesser estate," &c.; he gives and bequeaths (" for want of such disposition of any part of the said *land* and slaves and other property mentioned) the said *personal* estate to be divided among his three daughters," (naming them particularly,) " to them and their heirs and assigns respectively for ever." In another part of the will (having bequeathed to his wife a considerable number of slaves so long as she should remain a widow) he directs that, in case of her marriage, those slaves, with their increase, are to be equally divided into six parts; one equal sixth part whereof he gives to his daughter *Sarah M'Carty*, with *all their increase*, to her and her heirs for ever. There are some other limitations, in fee-simple, of slaves to his daughters, upon certain contingencies; and, finally, by a residuary clause, he gives all his estate, real and personal, not before disposed of, to all his children, by name, to them, their heirs and assigns for ever.

The Chancellor (overruling the demurrer) decreed that the executrix, out of the estate of her testator, should pay to the complainant 565*l.* " being the *supposed* value of the marriage portion of *Sarah M'Carty*, the wife of *Thomson Mason*, and the advancements to her, (and which value should have been ascertained by a Jury, if the parties would have con-

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sented to it,) with interest thereon at the rate of *six per centum per annum* from the last day of *October*, in the year 1791:" from which decree an appeal was taken by the defendant *Sarah Chichester*, and, having abated by the death of *Vass*, was revived against *Robert Dunbar*, his administrator.

Wickham and *Randolph*, for the appellant.

Williams, *Warden* and *Botts*, for the appellee.

The cause was argued at great length on the merits; and especially on the question whether a Court of Equity had jurisdiction to give the *relief* sought by the bill.

1. On the question of *jurisdiction;* the counsel for the *appellant* contended that the face of the bill presented a mere *legal* case.(*a*) If the agreement was to convey *personal* estate, a bill for *specific performance* would not lie, *in general*,(*b*) though, perhaps, in this country, it might lie for *slaves*. Neither could the jurisdiction be sustained on the ground of *discovery*. It is not enough for a party to *allege* that *he wants* a discovery: it must be *proved to be wanting*. And here, in fact, it appears unnecessary; for all the evidence to shew what *Chichester* had done for his other children was to be found in his last will and testament and deeds; copies of which could be procured from the several Clerks' offices.

(*a*) *Banister's Executors* v. *Shore*, 1 *Wash.* 173. *Long* v. *Colston*, 1 *Hen. & Munf.* 111. *Pollard* v. *Patterson*, 3 *Hen. & Munf.* 67.

(*b*) *Cud* v. *Rutter*, 1 *P. Wms.* 570.

But, even if a discovery had been requisite, the case, *after* such *discovery had*, was clearly proper for a Court of law. The bill, therefore, should have prayed for the discovery only, and not for *relief* thereupon; a bill for discovery being always at the costs of the plaintiff, 1 *Harr.* 145. The general rule in such cases is, that the plaintiff, having obtained the discovery sought for, must bring his suit at law:(*c*) and it is now settled that if the bill seek *relief*, where the plaintiff is only entitled to *discovery*, a general demurrer

(*c*) *Mitf.* 52. *Hinde's Pr. Ch.* 36. *Harr. Ch. Pr.* 139. 141. 2 *Bro. Ch. Cases*, 61 *Geach* v. *Barber*. 1 *Vesey*, 345. *Walmsley* v. *Child*. *Ibid.* 531. *Piers* v. *Piers*.

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will be sustained.(a) Indeed, the case of a *lost bond* seems an exception to this rule; because, *originally*, in that case, there was no relief at law; a *profert* according to the old decisions being necessary;(b) and, therefore, the Court of Equity having obtained jurisdiction, still gives relief, though the reason for doing so has ceased, since, according to the modern authorities, a *profert* is not necessary, at law, where the bond is averred to be lost.(c) But this concurrent jurisdiction as to *relief* does not extend to the case of a lost promissory note.

It may be said that 2 *Fonb.* 494.(d) observes, that "there are some cases in which, *though the plaintiff might be relieved at law*, a Court of Equity having obtained jurisdiction for the purpose of *discovery*, will entertain the suit for the purpose of relief." But the cases he cites do not support his position; for in 1 *P. Wms.* 496. *Bishop of Winchester* v. *Knight*, there was certainly no remedy at law; and the same observation applies to 2 *Atk.* 630. *Story* v. *Lord Windsor*. The case of *Lee* v. *Alston*, 1 *Bro. Ch. Cases*, 194. was also a proper case for a Court of Equity; because, in *England*, the tenant for life is considered as bailiff for the reversioner, and may be compelled to *account*. *Fonblanque*, indeed, seems to have been at a loss to strike out the distinguishing principle upon which Courts of Equity in such cases have proceeded: but it is evidently this, that, wherever the case, independently of the discovery, is proper for a Court of *Equity*, there the *discovery* and *relief* will *both* be granted; but where, in itself, it is proper for a Court of *Law*, equity will grant the *discovery only*. If the doctrine were otherwise, even actions of assault and battery and slander might be brought in Chancery.

In answer to this, it was said, that the uniform decisions *in this country* were otherwise. The oldest practitioner of law cannot point out an instance where a discovery has been had in equity, and the party then sent to law for relief.

(a) 4 *Bro. Ch. Cases*, 480. *Collis* v. *Swaine*. *Coop. Eq. Pl* 188, 189 *Ibid.* 58. 3 *Vesey*, jun. 4. *Loker* v. *Rolle* 2 *Bro. Ch Cases*, 280. *Fry* v. *Penn* *Ibid* 319. *Price* v. *James*.

(b) *Coop Eq. Pleadings*, 129, 130.

(c) *Ibid.* 130.

(d) *Book* 6. c. 3. s. 6. *note* (p).

The cases of *Carter* v. *Carter*,(*a*) *Foster* v. *Foster*,(*b*) *Pryor* v. *Adams*,(*c*) *Barrett* v. *Floyd*,(*d*) and *Chinn* v. *Heale*,(*e*) decided in this Court, and *Taylor* v. *Ewell*, decided by Chancellor *Taylor*, in *February*, 1810, together with *Burnley's* case, shortly after the revolution,(*f*) were relied upon as in point.

On no principle ought a party to be sent to law for *relief*, after obtaining a discovery in equity. The maxim of equity is to prevent circuity of action; and, therefore, when the Court can determine the matter, it should not be a handmaid to the other Courts, nor beget a suit to be ended elsewhere.(*g*) The modern practice in *England*, in violation of this principle, is founded on an arbitrary dictum of Lord *Thurlow's*,(*h*) and ought not to overrule the more equitable decisions of our own Courts.(*i*) In many instances the practice of this country differs from that of *England;* as in the case of a bill to foreclose a mortgage, the decree *there* is simply that the mortgagor be foreclosed of his equity of redemption, and that the mortgagee have the absolute right of property: but *here* the practice is to decree a *sale*.

The objection that, if *relief* attached on discovery, actions of assault and battery and slander might be brought in Chancery, is altogether groundless; for Courts of Equity never assist in cases of torts, even to compel a discovery. As to other cases of a merely legal nature, there is no hardship in giving relief upon the discovery; for the plaintiff lays himself at the mercy of the defendant, relying on his conscience; and the decree is founded on his own admission.

But, in this case, the bill on its face presented a proper case for a Court of Equity, for it prayed an *account*, and the matter in controversy was a proper subject for an account. It was also a proper case for abatement and contribution by the legatees.

There was certainly a necessity for going into equity to obtain the discovery; for at law the distributees might, on the ground of interest, have objected to giving evidence. The plaintiff could not prove a negative; that he *did not*

(*a*) In 1784, (according to a MS. of the late Judge *Pendleton*.
(*b*) MS.
(*c*) 1 *Call*, 382.
(*d*) 3 *Call*, 531.
(*e*) *Ante*, p. 63.
(*f*) Judge *Pendleton's* MS.
(*g*) 2 *Fonbl.* 494.
(*h*) 2 *Bro. Ch.* 319.
(*i*) See also, *contra*, *Brandon* v. *Sands*, 2 *Ves.* jun. 514.

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know what *Chichester* had advanced to the other children: but, from the nature of such transactions, it was sufficiently evident that he had not the knowledge requisite to enable him to proceed at law. Had *land only* been given, information might have been obtained, but as to *money* it was impossible, it never being the usage in transactions of this kind to call on witnesses to take notice what a father gives his son-in-law.

But the question, whether a discovery was necessary or not, was closed by the defendant's *demurring*, instead of *pleading* to the jurisdiction. On a *demurrer*, the allegations in the bill are considered as true.(*a*) The defendant, therefore, cannot now deny that the necessity actually existed as alleged in the bill. If she meant to say that the plaintiff had no need of such discovery, but that the statements in the bill were only colourable to give jurisdiction, she should have put in a *plea* to that effect;(*b*) for the ground of a demurrer must always appear on the face of the bill; and if you intend to take advantage of any thing not on the face of the bill, it must be by *plea*.(*c*)

(*a*) *Coop.* 111. *Mitf.* 172.

(*b*) *Mitf.* 175. 2 *Ves.* jun. 122 *Mundy* v. *Mundy.* 4 *Bro Ch. Cas.* 254. S. C. *Coop. Eq pl.* 292. *Mitf.* 222.

(*c*) *Mitf.* 14. 1 *Ves.* 245.

In reply it was observed, that Mr. *Pendleton's* MS. opinion in *Carter* v. *Carter* proves nothing. The appeal was dismissed, because, perhaps, the appellant's counsel, or the rest of the Court, were of a different opinion. *Foster* v. *Foster* was a case where negroes were claimed, of which the plaintiff had never been in possession, but to which he was entitled by executory contract. Neither detinue nor trover would lie: but a bill in equity lay for specific performance.

In *Pryor* v. *Adams* (it was contended) the Court evidently mistook the law. It is not true that this case depends upon the more *modern* authorities in *England:* all the *old* books of practice lay down the doctrine that where relief was prayed in a bill for *discovery*, the *part praying relief* might be demurred to, though the defendant was still compelled to answer as to the *discovery*. The only difference between the old and modern authorities is, that latterly the doctrine

has been established that, in such case, the *whole* bill may be demurred to, and *no* answer is necessary. Here the *answer* was to the *discovery;* the *demurrer* to the *relief;* exactly according to the old rules of practice. In the case of *Pryor* v. *Adams*, there was no argument on this point; and, that decision being against the authorities, had this Court a right to change a law? Other instances were mentioned in which this Court had been mistaken, and had had the magnanimity to acknowledge its errors; for example, as to its jurisdiction relative to appeals from interlocutory decrees,(*a*) and to criminal cases.(*b*)

In *Chinn* v. *Heale*, the bill was for specific performance, and the ground for relief in equity clear. Authorities in this country, therefore, do not appear to differ with those in *England* on the point in question.

(*a*) *M'Call* v. *Peachy*, 1 *Call*, 55.
(*b*) *Bedinger* v. *The Commonwealth*, 3 *Call*, 461.

The ground taken, that the matter in this bill is of *equitable* cognisance, is entirely untenable. The plaintiff could not call for *specific performance;* for he could not point out any particular land, or slaves, and demand a conveyance. His only remedy was for *damages* for breach of contract; and he ranked only as a simple contract creditor. There was no ground for contribution against the legatees; for all the advancements were made in *Chichester's* life-time, and there was no pretence of a deficiency of assets in the hands of the executrix; without which the legatees could not be sued. And, as to the ground of relief for the sake of an *account;* a bill in equity for an account lies only where the old action of account lay; in cases of mutual trust and confidence, as between guardian and ward, principal and factor, &c.; not in common cases, where there is no such trust and confidence; for, if it could, a merchant would have nothing to do but to bring suits in Chancery on all his store accounts.

Upon the MERITS, it was contended by the counsel for the appellant, 1. That the promise made by *Chichester* was too indefinite and uncertain to be obligatory in law or equity. It was a mere declaration of an intention to do

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equal justice to all his daughters, according to his own *convenience;* of both which he was himself the best judge. The letter of *Vass* merely asked his consent to the marriage, without any proposition for a portion, and therefore takes the case out of the class of marriage agreements.(*a*)

2. If the promise was binding at all, *Chichester* had his whole life to perform it in.(*b*)

3. It might have been satisfied by a conveyance of *lands* to Mrs. *Vass*, the contract having been for *her* benefit only; in which case, upon her death, the lands would have reverted to her father, as heir at law; and her husband would not have been entitled, even as tenant by the curtesy; since there was no issue born alive. Of course, Mrs. *Vass* being now dead without issue, her father ought not to be compelled to make a conveyance to her husband, for whose benefit the contract never was intended.

4. *Vass* had no right to bring the suit as representative of his wife; having never administered on her estate.

(*a*) 1 *Vin.* 292. citing *Poph.* 148. *Sylvester's* case. 1 *Bac. Abr.* 264. (*Gwill.* edit.) same case cited more correctly. *Banister* v. *Shore*, 1 *Wash.* 173.

(*b*) 1 *Call*, 83. *Chichester* v. *Vass.*

In answer to the first and second points, the opinion of three Judges of this Court, in the case of *Chichester* v. *Vass*,(*c*) were relied upon as in favour of the validity of the promise; Judge LYONS alone seeming to incline against it, but expressly reserving the point, for future argument, if the case should ever occur again.(*d*) The other Judges acted on a review of all the *British* cases, among which *Wankford* v. *Fottherly*(*e*) is nearly in point; to which may be added *Allen*, 36. *Roll. Abr.* 347. and *Sid.* 25.

(*c*) 1 *Call*, 83.

(*d*) *Ibid.* 103.

(*e*) 2 *Vern.* 322.

The suit at common law went off altogether upon the defect in the declaration; and no such point was decided by the *Court*, as that *Chichester* had his whole life to perform his promise. If the Court had seen there was no promise at all, or that no action could have been brought against *Chichester*, in his life-time, they would not have sent *Vass* back with encouragement to bring a new action.

The case in 1 *Viner*, 292. is in favour of the *appellee*. The promise ought to be understood as to be performed

in a *reasonable time* after the marriage; for the purpose of maintaining *Vass*, and his wife and children, if he should have any. This could not be satisfied by postponing performance until after *Chichester's* death. So, with respect to a promise to pay money when *convenient*, it is settled that it must be in *reasonable* time.(*a*) But, in fact, this point is of no great importance; for *this* suit was not brought until after *Chichester's* death.

(*a*) 6 *Co. Rep.* 31 1 *Co. Rep.* 25. *Porter's* case. *Co. Litt.* 208. *Roll. Abr.* 456, 437. *Cro. Eliz.* 798. *Moor*, 472. *Hardr.* 10.

3. The contract could not have been satisfied by a settlement of *land* on Mrs. *Vass*. The case in *Viner*, and that of *Chichester* v. *Vass*, before cited, prove this.(*b*) Contracts are to be understood according to their intent and subject matter. A promise of this kind (in case of ambiguity) is to be taken most strongly against the party promising, and most beneficially for the person *to whom* the promise was made. Here *that person* was *Vass;* and it must be understood as intended to enure to *his* benefit, as well as that of his wife. If *Chichester* had his election to convey *lands*, he has not done it; and he lost that election when the convenient time (to be judged of by the Court) expired.

(*b*) See also 3 *Bac. Abr.* (*Gwill.* edit.) 709. tit. *Obligation*, letter F.

4. The compensation for breach of a contract is a *personal*, not a *real* property, and belonged to the husband; either as administrator of the wife, if he had administered, or as sole contracting party. In equity he had a right compounded of these two; and might bring his suit as sole distributee of his wife.(*c*) If any other person had been the administrator, such administrator could only have sued upon contracts made with the wife: but here the contract was with the *husband.*

(*c*) 1 *Wms.* 168.

If the husband does not administer, he still has the right of representation in equity.(*d*) The cases of *Robinson* v. *Brock*,(*e*) *Dade* v. *Alexander*,(*f*) *Drummond* v. *Sneed*,(*g*) and *Hord* v. *Upshaw*,(*h*) were all instances in which the husband sued without administering; and those above cited affirm the proposition that, if administration were sought on Mrs. *Vass's* estate, Dr. *Vass's* representa-

(*d*) 1 *P. Wms.* 378. *Squib* v. *Wyer. Ib.* 381. citing the case of *Cart* and *Rees* in 1718. 3 *Atk.* 527. *Harg. Co. Litt.* 351. note (1).
(*e*) 1 *H. & M.* 213.
(*f*) 1 *Wash.* 30.
(*g*) 2 *Call.* 491.
(*h*) *Cited in* 1 *Wash.* 30.

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tives would be entitled, and, if any other person should get administration, such person would be merely a trustee for *his* representatives.

Friday, April 20th. The Judges pronounced their opinions.

Judge TUCKER stated the case; in the course of which he observed that the defendant, *Sarah Chichester*, by answering the allegations of the bill *generally*, without confining herself to the matters a discovery of which was sought, might, perhaps, according to some authorities,(*a*) be considered as waiving the benefit of her demurrer. He was inclined, however, when sitting as a Judge of a Court which professes to soften the rigours of the law, not to refuse to a party the same latitude of defence which our statutory law now indulges in Courts of Law.

(*a*) *Mitf* 171. 3 *P. Wms.* 80. 2 *Atk.* 157.

He then proceeded as follows:

The principal point relied on by the counsel for the appellant is, that a Court of Chancery has no jurisdiction over this case, and, therefore, that the decree is erroneous in overruling the demurrer and granting relief: for although the complainant might have been entitled to the *discovery* sought, he was not entitled to any *relief*. And, among the arguments urged on this point, it was more than once insisted on that Mrs. *Vass* being dead, and the promise being *literally* to do equal justice to all his daughters, as fast as it should be in his power with *convenience*, *no* suit or action either at *law* or in equity will lie upon this promise. And a further reason for this objection was, that Mr. *Chichester* might have given his daughter land, if he had chosen so to do; in which case, as she died without ever having a child, Doctor *Vass* could not even have a life estate therein; and moreover, that *Chichester* had his whole life to perform his promise in; and having survived his daughter, and being moreover her next heir, it would be doing a vain thing to compel him to make a conveyance which would be of no benefit to the complainant under these circumstances.

It will not, I presume, be denied, that a promise to do a moral action founded upon a good and sufficient, or valuable consideration, actually given or performed in pursuance of such promise, is binding upon the party making the same, and may be enforced, according to the nature of it, either in a Court of Law or Equity. Of course, if the law *cannot* equity *ought* to enforce it. Taking then the position, that an action *at law* cannot, under the circumstances of the present case, be maintained upon this promise, as contended for, I will consider whether this promise contains such ingredients as that a Court of *Equity* ought to grant the relief sought.

The following principles appear to me to require no comment or illustration.

1st. That a promise made by a father to a person who seeks an alliance with his daughter is a promise made in *consideration* of marriage, if the marriage be afterwards had with his consent.

2d. That although such promise may *literally* import a provision to be made for the daughter; yet, being made *to the intended husband*, it must be construed to be one which shall enure to the benefit of *both*, unless there be some *special* reservation to the *contrary;* manifesting a clear intention to preclude him from participating in the benefit thereof.

If these principles be correct, the letter of the 12th of *April*, 1789, must be considered as a promise made by Mr. *Chichester to* Doctor *Vass in consideration* of his intended alliance with his daughter, which, according to the expressions contained in the Doctor's letter to him of the 10th of *April*, depended upon *Chichester's consent*, the young couple being determined to do nothing that might create the *least* uneasiness or anxiety *to him;* but to *bear their disappointment* with all possible fortitude. No repugnance to this consent is expressed by Mr. *Chichester, nor any terms or settlement* at any time hinted at, in any of his letters to the Doctor,

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or others on the subject. It must therefore be taken as a promise to enure to the benefit *both* of the *future* husband and wife. Even when Mr. *Chichester* had it in contemplation to purchase a plantation, or a lot and house in *Colchester* or *Dumfries*, or to give a plantation which he had in *Shenandoah* County, not a word is said which conveys the most distant hint that he meant to make the conveyance to his daughter, *separately*, or to require a settlement from Doctor *Vass*, before he should give his daughter any thing. In his letter of *January* 5th, 1790, he tells him nothing in his power, without distressing himself, shall be wanting to assist the Doctor in settling to *his satisfaction*. In the same letter he offers to purchase a lot in *Colchester* or *Dumfries* in *fee-simple*, or do any thing in his power in any place the *Doctor* should think most agreeable. Surely these expressions manifest an intention to do something that should enure to the Doctor's benefit, and must be referred to the *original promise*, and as manifesting the intention of it. And, though it should be true (which it is unnecessary to decide) that Mr. *Chichester* had his whole life to perform any part of that promise, since it was made to depend upon his convenience; and that he *might* have given his daughter land, only, and not money, or other personal property, yet if he had such an election, he made no use of it, and the promise ought to be enforced in such a manner as may be most beneficial to the person to whom it was made, having regard to the measure of his bounty to his other daughters, to determine that which was due to the others. As this was a matter not within the privity of Doctor *Vass*, if the performance were refused upon the ground that the contract was not obligatory, (as seems to have been the case according to the testimony of one witness,) or remained unperformed at the time of Mr. *Chichester's* death, a Court of Equity was certainly the proper tribunal to resort to for a *discovery* of the advances made by Mr. *Chichester* to his *other* daughters, as the standard by which to ascertain the measure of the benefit claimed by

his son-in-law; as also for a discovery of the funds out of which the relief sought was to be given; for, if Mr. *Chichester* had died leaving no estate whatsoever undisposed of, but it should appear that, after the promise made to Doctor *Vass*, he had given property to his other daughters, would not that property be liable to contribution, as far as it would go, to make the portion of Mrs. *Vass* equal to that of her sisters? Or, if he had died intestate, leaving only lands into which the daughters or their husbands had entered as his heirs, would not those lands be liable to such a contribution for the portion promised the remaining daughter? Again, the nature and quality of the property or estate given to the other daughters, with the conditions (if any) under which it was given to the other daughters, might form a proper subject of inquiry in a Court of Equity, in order to enable that Court to do, what *Chichester* promised to do, "*equal* justice" among all the daughters. A *discovery* of all these things was therefore very properly required; and until that discovery were made, the Court could not possibly judge whether the complainant wa *entitled to relief, or not.* The case exhibited by the bill does not therefore furnish, in my opinion, any proper or reasonable ground for the demurrer, which is confined to the *relief* sought; of the propriety of granting or refusing which the Court could not possibly judge until the merits were brought before it by the answer and other evidence in the cause. I therefore think the Court decided properly in overruling the demurrer. That obstacle once removed, the complainant's right to *relief*, either as an original party to the contract, or as the administrator of his wife, was unquestionable.

I have before said that if a promise be made to two persons of different sexes, in consideration of a marriage to be had between them, if they marry, the promise shall enure to the benefit of *both.* And this upon the principle of that *unity of person* which the law establishes between them upon their marriage, and that upon the principles of the common

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law; for, by that, if a reversion be granted to a man and a woman, and their heirs, and before *attornment* they intermarry, and then *attornment* is made, the husband and wife shall have no moieties: so, if a feoffment be made to a man and a woman, with a letter of attorney to make livery, and then they intermarry, and livery is made *secundum formam chartæ*, in that case also it is said they have no moieties. So, if an estate were made to a *villein*, and his wife being free, and to their heirs, although they have several capacities, viz. the *villein* to purchase for the benefit of the lord, and the wife for her own, yet, if the lord of the *villein* enter, and the wife survive her husband, she shall enjoy the *whole* land; because there are *no moieties* between them:(a) and that this is the true reason of the law, appears from this; that if a joint estate be made to a husband and wife and to a *third person*, in that case the husband and wife have in law but one *moiety*, and the *third* person shall have the *other moiety*.(b) And Judge *Blackstone*, speaking upon the same subject, says, that if an estate in fee be given to a man and his wife, they are neither properly joint-tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties; but *both* are seised of the *entirety*, *per tout* and *non per my;* the consequence of which is, that neither the husband nor wife can dispose of any part without the assent of the other, but the *whole must remain to the survivor*.(c) The case of *Back* v. *Andrews*, 2 *Vern.* 120. is to the same effect.(d) According to these authorities, and particularly the latter, it would appear that if there be a specific promise of lands to a man and a woman, in consideration of their intended marriage, and they afterwards marry, and the conveyance be not made according to the promise; the survivor, in whom the whole interest and estate would have vested if there had been a conveyance made during the life of both, would be well entitled to come into a Court of Equity for a conveyance of the *whole* estate to *himself* or *herself*. How far the second section of the act concerning joint rights

(a) *Co. Litt.* 187. b.

(b) *Litt. sect.* 291.

(c) 2 *Bl. Com.* 182.

(d) *Prec. in Ch.* 1. S. C. 2 *Eq. Ca. Abr.* 230. S. C.

and obligations,(*a*) may be considered as operating on this case, so as to destroy the principle of *entirety*, is a matter which may hereafter deserve great consideration. But, should it be determined in the affirmative, still it would seem that the survivor might well come into a Court of Equity for a conveyance, if not of the *whole*, at least of a *moiety*. Judge *Pendleton*, in delivering his opinion on this very case, when before this Court on a former occasion, speaking of the promise contained in Col. *Chichester's* letter, says, " If it were considered merely as a promise of a personalty, that right would vest, as a *joint interest*, in the husband and wife, until reduced into possession, and go to the *survivor*, if either died before that happened." This perfectly accords with what I meant to advance upon this subject. In the case of *Elliott* v. *Collier*,(*b*) where a bill was brought by the representative of a husband, who died without administering to the personal estate which the wife had in her own right, for the wife's share of her father's customary estate, as a citizen of *London*, Lord *Hardwicke* declared that the plaintiff was entitled to a decree for the same, notwithstanding the husband had not taken out letters of administration.(*c*) From these authorities, strengthened by our own act concerning wills, &c. which expressly establishes the priority of the husband's right to administer on the estate of his wife, and exempts him from making distribution of it,(*d*) I conceive it was not necessary for Doctor *Vass* to administer upon his wife's estate, in order to entitle him to bring this bill; and that, upon the whole, the decree overruling the demurrer, and giving relief, as prayed for, ought to be affirmed, after correcting the error in the rate of interest, which, perhaps, was the effect of inattention.

(*a*) 1 *Rev. Code*, c. 24.

(*b*) 3 *Atk.* 526.

(*c*) 1 *Wils.* 168. 1 *Vern.* 15. S. C. 1 *P. Wms.* 380, 381. S. P. *Harg. Notes on Co. Litt.* 351. S. P.

(*d*) *Laws Virg.* 1794, c. 92. s. 27, 28. 1 *Call*, 1. *Cutchin* v. *Wilkinson.*

Judge ROANE. Having heretofore given my opinion upon the merits of this case, I shall not enter into them at present. On those merits I am content to affirm the decree; merely making the change which has been suggested in relation to the interest. With respect to the jurisdiction

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of the Court, under the actual circumstances of the case, and the allegations of the bill before us, we are undoubtedly justified in sustaining it, by the decisions in this Court, if not by those of *England.* The case of *Pryor* v. *Adams* is a stronger case than the present on the point of jurisdiction, and is perhaps fully justified, among others, by the case of *Atkins* v. *Farr*, 1 *Atk.* 287.

Judge FLEMING. On the decision of the action at law, between the same parties, and on the same subject, by this Court, all the Judges seemed of opinion that there was sufficient evidence of a marriage promise, on the part of the appellant, to bind him to fulfil it; but, that the appellee failed in his suit, from an incurable defect in the declaration; in omitting to aver that the appellant had made advances to some one, or more, of his daughters, to a certain amount; and that it was convenient for *him* to make the like advancements to the wife of the plaintiff.

The counsel for the appellant in the present case, stated several points for the consideration of the Court. First, that a Court of Equity had no jurisdiction, it being a proper subject for a Court of Law; but if the suit be sustainable, as a bill of *discovery*, the plaintiff, having obtained the discovery sought for, ought to have gone into a Court of *Law* for *relief.* And with respect to the merits, it was contended, 1st. That there was no proof of a promise, binding either in law or equity; 2. That if the letter of the 12th *April*, 1789, should be construed to amount to a promise, the appellant had his whole life to perform it in; as the letter is qualified with the expression that he would endeavour to do his daughters equal justice as fast as it should be in his power, *with convenience;* 3. That an advancement to the daughter in *land*, would have been a complete fulfilment of the promise, and that, had such an advancement been made, the *land* would have immediately descended to the appellant, on the death of the daughter,

without having issue, born alive, to entitle the husband to hold the land, as tenant by the curtesy.

The case has been so fully and ably discussed by the Judges who have preceded me, particularly by Judge TUCKER, that I shall add but little to what has been already said on the subject.

With respect to the jurisdiction of the Court, this is clearly a bill of discovery, to ascertain what advances had been made to the other daughters by the father, either in his life-time, or by his last will and testament: and, that discovery being made, the only remaining question is whether the complainant was bound to dismiss his bill, and seek redress by a new suit, in a Court of Law? Mr. *Wickham* cited some *English* authorities that seem to favour the doctrine; but I believe the uniform practice in this country has been otherwise; especially where the subject matter is within the cognisance of a Court of Equity, and there be no latent facts, to be inquired of by a Jury, necessary to be found, in order to enable the Court to give a correct decision. And, even in such a case, the general practice is, for the Court of Chancery to direct an issue to try any particular uncertain fact that may be thought material in the cause. In the present case there was sufficient disclosed in the answer of the defendant to enable the Court to determine what sum would place the deceased wife of the complainant, or her representative, who was her surviving husband, on an equality with the other daughters of *Richard Chichester*.

As to the *first point*, on the merits, I have no doubt but that the letter of the 12th of *April*, 1789, amounted to a marriage promise; but, say the counsel, *Richard Chichester* had his whole life to perform his promise in: but that position is not admitted. His promise was, that he would do equal justice to all his daughters, as fast as it was in his power with *convenience;* the true meaning of which was, that he would do it in a reasonable time, taking into consideration the circumstances of his estate, and the length of

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time that elapsed between the marriages of his other daughters, and his advances to them respectively. But we find that he never performed it at all, not even by his last will. And, as to his having the right to make the advancement in *land*, that is not denied, provided it had been in value equivalent to the advancements to his other daughters. But, not having made such, nor any other advancement to Mrs. *Vass*, except a negro girl, and some other trifles, I concur in the opinion that *Vass* was entitled to recover a sum of money equal in value to the advances made to the other daughters.

But there seems to be an error in the decree, in giving *six* instead of *five per cent.* interest on the sum decreed; the decree must be reversed, and corrected so far as respects the interest, and affirmed as to the residue.