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IN THE

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VIRGINIA.

BY DANIEL CALL.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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Flemings *v.* Willis and Wife.

Monday, November 4, 1799.

Parol evidence of contemporary facts and circumstances, admitted to explain the meaning of the parties, in marriage articles, when a conveyance is called for; in a Chancery suit for specific execution of the articles.*

Lewis Willis and Anne his wife, and John Taliaferro, brought a bill in the High Court of Chancery, stating, that on the 17th of April, 1762, the plaintiff Anne, daughter of Charles Carter, being about to intermarry with John Champe, jr., son of John Champe, it was agreed between the fathers, that the said Charles Carter should pay the said John Champe, jr., 1,000*l.*; and, that the said John Champe, the father, should give to his said son John Champe, jr., (amongst other things,) in fee-simple, *all the lands which he held* in the County of King George *above* Poplar Swamp, *and which he had purchased of* Jeremiah Bronaugh. That notwithstanding this agreement by indenture of the same date, it was stipulated among other things, that in case the marriage took effect, the said John Champe and his heirs should convey to his said son John Champe, jr. and his heirs, *all that part of* the said John Champe's *tract of land, whereon he then lived, lying above the eastern branch of the old mill run called* Lamb's creek, *and the land bought of* Bronaugh *thereto adjoining.* That there is a material variance, between the original agreement and the said indenture, in this, "that the said John Champe held distinct tracts of land bought of Jeremiah Bronaugh, and lying above Poplar Swamp, in the county of King George aforesaid, and all of them except one called the Farm containing by estimation acres of land adjoining to the said tract on which

* Parol evidence is admissible to explain or vary *latent* ambiguities in deeds, &c.; but not to explain or vary *patent*, or apparent ambiguities. Stark, Evid. Part iv, p. 1000 and 1021. Phila. ed. 1832. Cases illustrating the former rule, *Ross* v. *Norvell*, 1 Wash. 14; *Ambler* et ux. v. *Norton*, 4 H. & M. 25; *Buster's* ex'r. v. *Wallace*, *id.* 82; *Bumgardner* v. *Allen*, 6 Mun. 439; *Land* v. *Jeffries*, 5 Rand. 211; *Bird* v. *Wilkinson*, 4 Leigh, 266; *Bierne* v. *Erskine*, 5 Leigh, 59.

Cases illustrating the latter rule, *Gatewood* v. *Burrus*, 3 Call, 194; *Tabb* v. *Archer*, 3 H. & M. 399; *Puller's* ex'ors. v. *Puller*, 3 Rand. 38; *Harris* v. *Carson*, 7 Leigh, 632.

Cases illustrating both rules; *Crawford* v. *Jarrett's* adm'r. 2 Leigh 630; *Shelton* v. *Shelton*, 1 Wash. 53.

As to the *consideration of deeds*, the rule seems to be suspended. For,

Where a deed purports to be "in consideration of natural love and affection," and of "one dollar," parol proof is admissible of other valuable considerations. *Harvey, &c.* v. *Alexander, &c.* 1 Rand. 219. And see *Duval* v. *Bibb*, 4 H. & M. 113, point 3. That the consideration may be explained or varied by parol proof, see also 16 Windell, 460.

the said John Champe lived on the day of the date of the said indenture; and, by the aforesaid description of Bronaugh's land thereon, the said farm, although distant from the manor tract, only a quarter of a mile, and separated only by a small slip of land of William Bronaugh, is omitted." That John
[6] Champe the father, died, leaving William Champe his eldest son and heir at law, without having executed a deed agreeable to the original agreement, or even according to the said indenture, but after having devised an estate-tail only *in all the lands above* Poplar Swamp. That the said John Champe, jr. also departed this life in 1774, and by his last will, devised the whole of his estate real and personal to the plaintiff Anne for life, with a remainder in tail made in the Farm aforesaid to John Taliaferro.

That the plaintiffs applied to the said William Champe, after the death of the said John Champe, for a deed; which he always refused, and died in 1784; having by his last will, devised the omitted tract called the Farm as aforesaid to Caroline, Jane, Lucy and Mary Fleming; to whom the plaintiffs have likewise applied to execute a deed *according to the true intent and meaning of the said* Charles Carter and John Champe, *and the will of the said* John Champe, junior; but, that they also have refused, alleging that the said indenture cancelled all contracts preceding it: Whereas the plaintiffs charge, "that before the signing of the indenture aforesaid, the said Charles Carter objected to the expression *thereto adjoining*, as excluding the Farm aforesaid, and that he asked the said John Champe what he meant by Bronaugh's lands, who replied, *all the land* in King George county *above* Poplar Swamp, and that the said Charles Carter immediately and openly desired a certain John Robinson who was present at signing, to take notice of what then passed." The bill, therefore, prays a conveyance, according to the original agreement, and the will of the said John Champe, jr., that is to say, for, not only the tracts of Bronaugh in the said indenture mentioned, but for the Farm tract also.

[7] There is a second bill, which agrees in substance with the first, but states further, that the said John Champe the father, bought of Bronaugh three tracts of land, one of which actually adjoined to the tract on which the said John Champe lived, and the other two were only separated therefrom by a small slip of land, not more than four hundred yards wide. That the whole of the said three tracts only contained 439 acres, and were always considered as appendages belonging to and a part of the manor plantation of the said John

Champe, the elder, and were never spoken of as distinct estates from the same. That an attorney was directed to draw the articles, agreeably to the original agreement, which being drawn and ready to be executed, on the day of the marriage, the said Charles Carter objected, as is mentioned in the first bill, to the words *thereunto adjoining;* and received the answer in the said first bill stated: Of which the company were desired to take notice. That, after the death of the said John Champe, the elder, the said John Champe, jr. took possession of the whole of the land bought of Bronaugh, which he quietly held until his death, comprising a period of seventeen years. That the said William Champe never was possessed of the said lands bought of Bronaugh; and, that his claim was only founded on the *mistake*, in the letter of the marriage articles. That, therefore, either the explanation of the articles given in the bill should be admitted, or should be considered as a new and additional marriage agreement, which had been in part carried into execution, by the long possession of the said John Champe, jr.

The answer admits the purchase of the three tracts from Bronaugh; that one of them (to wit: that which is first mentioned in Bronaugh's deed,) joins the tract, on which the said John Champe resided, called Lamb's creek; but, that the other two tracts which adjoin each other, are separated from the first mentioned tract and from the nearest part of the old Lamb's creek tract, more than three-quarters of a mile, and full three miles from the mansion-house, where the said John [8] Champe dwelt. That he settled a quarter and negroes thereon, soon after the purchase and before the marriage articles. That from the time of settling the quarter, it was distinguished from the manor plantation by the name of the Farm. That the defendants do not admit any *mistake or ambiguity* in the marriage articles; but, the words *thereunto adjoining*, distinguish the tract first mentioned, in Bronaugh's deed as aforesaid, from the other two called the Farm. That great inconveniences would result, from receiving parol evidence to explain a deed and extend its operation, contrary to what the plain words would warrant. That the defendants admit, that John Champe, jr. took possession of the Farm tract, which he held for some time; but, how long they do not know, perhaps until his death; they presume, however, that this was owing to William Champe's being ignorant of his rights. That the defendants admit the devise by the said William Champe to themselves. To this answer, the plaintiffs replied generally.

The deposition of Chadwell, states, that he was in the employ of John Champe, the elder; that the land on which the mansion-house stood, and that bought of Bronaugh on the south side of the run, were considered as the same plantation, overlooked by an overseer, who resided at the manor plantation; that the two tracts were only separated by a creek and run; and, that the run touches the Farm plantation; that the Farm is not more than three-quarters of a mile from the Lamb's creek tract. That William Champe never claimed the Farm tract till a little before his death. The deposition of Bruce is to the same effect.

Jones states, that he drew the articles. That the instructions were furnished by John Champe, and (to the best of the deponent's recollection,) in his own hand-writing. That the said Charles Carter, called at his house for the articles, and when the deponent read them over, he objected "to the description of Bronaugh's land, as adjoining to the Lamb's creek [9] tract; saying, he apprehended the tract of land called the Farm, which was intended to be settled on Mr. Champe by his father, was not adjoining thereto, and would not be comprehended by the description." To which the deponent replied, that the deed was drawn agreeable to Col. Champe's memorandum, and if any doubt existed respecting the Farm tract of land, it should be mentioned to, and explained by Col. Champe. Jordan states, that all the lands on both sides Lamb's creek, were considered as one plantation, worked by the same hands, and overlooked by the same overseer. The deposition of Robinson, states, that he was called on to witness the marriage articles; that, Charles Carter "objected to some words; which he said, did not fully mention the lands promised. That the said John Champe, the elder, answered, that there was no occasion for an alteration; for, his meaning was to give his son his manor plantation and all his lands above Poplar Swamp, and also the lands he bought of Jeremiah Bronaugh, mentioned in the marriage settlement; and, also, all the negroes that should be on the Farm plantation at the time of his death." That John Champe, jr. took possession after the death of his father and mother. That he never heard that William Champe ever claimed the disputed lands; and, that the Farm plantation is about the half of a mile from Lamb's creek.

Chadwell's second deposition is substantially the same as the first, but adds that the Farm is not more than 600 yards from Lamb's creek tract. That the land sold by Wm. Champe to his brother John, called Grant's land, lies near the middle of the Farm land. That the Farm land does not, in any part,

join the land reserved by Col. John Champe, for his son William; but lies most convenient to the Lamb's creek tract given to John Champe. That without the Farm plantation and slaves, John's part would not be equal to William's: [10] That it was never called the Farm till Champe bought it of Bronaugh.

The deed from Bronaugh to Champe, is for three tracts of land in King George, to wit: one of 153 acres bounded by Rappahannock river, Lamb's creek, and the main road. One other of 151 acres, bounded by the lands of Col. William Thornton, deceased, and John Grant; and the third of 135 acres, known by the name of the Hill's tract, bounded by the lands of William Rowley, John Grant and Daniel Grant.

The marriage articles are for "all that part of his, the said John Champe's tract of land, whereon he now lives, lying above the eastern branch of the old mill run, called Lamb's creek tract, and the land bought of Bronaugh, *thereunto adjoining;* together with all the negroes now on the said land, and their future increase, &c."

The deed from William Champe, to his brother John Champe, is for 93¾ acres, bounded by the lands of Daniel Grant's orphans, and side line of the said John Champe; thence to three saplins, joining the lands of said John Champe; thence to a small oak, joining still to the said Champe's land; thence, joining the land of Daniel Grant's orphans, to the beginning.

MARSHALL, for the appellants.

Two questions occur in this cause: 1. Whether parol evidence is admissible at all? 2. Whether, if admissible, the evidence produced is sufficient to maintain the relief sought by the bill?

1. The cases on the first point are numerous. In some it is laid down as a clear principle, that parol evidence can in no case be received to contradict a deed; and that it can only be received to rebut an equity. In others again it is admitted, that where there has been fraud, or a clear mistake, or a secret trust, there parol evidence may also be received to shew it. But, in all, it has been received with great caution; and none of them has gone so far as the present. Cheyney's [11] Case, 5 Co. 68, and Altham's Case, 8 Co. 155, are the oldest cases upon the subject, and fully prove the rule. But, amongst the modern cases, [*Finney* v. *Finney*,] 1 Wils. 34, is express. For, there was no attempt in that case to contradict the deed, and yet parol evidence was rejected. The case of *Meres* v. *Ansell*, 3 Wils. 275, is precisely apposite and needs no com-

ment. That of *Brown* v. *Selwin*, Cas. Temp. Talb. 240, is very much to my purpose. For, although that was the case of a will, the circumstances were much stronger than in our case; and yet the parol evidence was not permitted. The general doctrine is confirmed in [*Maybank* v. *Brooks*,] 1 Bro. C. C. 84; and upon a full review of all the cases, I conclude the rule to be fixed, that parol evidence shall not be received to contradict or vary the terms of a deed; unless it be in some of the instances which I have before mentioned. For example, in the case of a latent mortgage not inserted in the deed; but that case turns upon the fraud: So in the case of a secret trust, because that affects the conscience of the trustee; or lastly, in cases of oppression, imposition or mistake; which are circumstances necessarily to be shewn by parol evidence, or the relief could not be afforded. But, no case can be produced, which goes the length of deciding, that property not conveyed by the terms of the deed, can be comprehended therein by the aid of parol evidence, unless some of the ingredients, just mentioned, existed in the cause.

2. But, if the testimony were admissible, that offered is, nevertheless, not competent to establish the claim of the plaintiffs. That of Jones, is only that he drew the articles according to Champe's instructions; which, so far from supporting the bill, goes to defeat it; because it affords a presumption, that the articles correspond with the views of the parties. The testimony of Robinson leaves the matter doubtful, and [12] according to one way of considering his words, the declarations of Champe are consistent with the deed. The reference to the articles seems rather to confine his meaning to the lands therein expressed. At most, his testimony is uncertain; and, therefore, can never be a proper foundation for overturning a fixed rule of law. For, if evidence, liable to conjectures and doubt, be introduced into questions, relative to the construction of written instruments, then all the dangers of parol evidence, which the law has so anxiously endeavored to guard against, will be increased.

RANDOLPH, contra.

The case of *Ross* v. *Norvell*, 1 Wash. 14, goes the full length, of deciding the principle we contend for in this. It proves clearly, that the circumstances of each case are to determine, whether parol evidence shall be received or not? The addition to the contract actually made by the evidence there, was as great as that which is desired here. The 3 Atk. 388, [*Joynes* v. *Statham*,] shews, that either fraud or mistake are

proper grounds, for the introduction of this kind of testimony. All the cases upon the subject are brought together by Powell, in his book on devises; and from them it appears, that the Courts in England are relaxing from the former strictness of the rule, in order to attain the justice of the case. The case in Wils. is repugnant to that in Vern. cited by the Court in *Ross* v. *Norvell;* and the effect of the other cases cited by Mr. Marshall, is fully considered by the Court in that case, which may now be considered as having established the rule.

Advert therefore to the circumstances. The counsel's draft was objected to by Carter, at the time when the articles were about to be signed; and Champe, instead of denying that they were wrong, rather admits it, saying he meant to give the whole tract; and, therefore, that it was unnecessary to alter them. Consequently, if he did not mean to include the whole, his expression was a fraud; because it was calculated to delude those to whom it was addressed. Besides, the evidence is, that all these lands were considered as forming one [13] entire tract; and, therefore, the expression was calculated to embrace them. But what strengthens this opinion is, that William suffered John to enjoy them unmolested: although as heir at law, he might have entered into and occupied them himself, had he not been conscious, that they were included in the articles. Robinson's deposition is not liable to the interpretation contended for, but expressly proves the objection of Carter, and the acknowledgment of Champe, as already mentioned.

MARSHALL, in reply.

I admitted the principle in *Ross* v. *Norvell,* which only establishes the case of a latent mortgage; and the circumstances there were extremely flagrant. But that case proves nothing, in the present controversy; because, here it is said that other property than has actually passed, was meant to be conveyed by these articles, and parol evidence is offered in support of it. But the cases which I cited prove, that it cannot be done. That in Wils. was an attempt to prove that other property was included in the grant; but the attempt did not succeed. It is said that the circumstances here are important, because the lands were all conveyed to old Champe, by one conveyance; and, therefore, that they were meant to be comprehended by the articles. But, although they were all included in one conveyance, still they were different tracts, for they were at a considerable distance asunder. It was asked, if the parties did not mean to include them all in the articles, why did William suffer

John to occupy them? and I, in my turn, ask, Why, if they did consider them as included, did William undertake to devise them? These circumstances prove nothing. At most, they only shew that at one time he misapprehended the articles, and at another, that he had informed himself upon them. I repeat again, that if parol evidence is admitted at all, it should be clear, distinct and pointed; but here, the testimony offered [14] is equivocal and uncertain. It may be reconciled with the articles; for, if old Champe meant to include the whole, why did he particularise them by the words, *the lands purchased of* Bronaugh *in the settlement?* It would have been enough if he said, the lands bought of Bronaugh; and it was not necessary to have added the other words. That addition seems to tie up the meaning, and confines it to the articles expressly.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the Court, as follows:

This is a bill for a specific execution of a marriage agreement, in which we are permitted by reason and authority (notwithstanding the agreement was reduced to writing) to hear parol proof, of what was the real intention of the parties, the governing principle of the decree.*

Col. Champe had acquired a large tract of land where he lived, and Poplar Swamp running through it, he had fixed upon that, as a proper line of division, between his two sons, William and John. By his will, in 1759, he devised to William all his lands in King George, *below*, and to John all *above* Poplar Swamp; clearly giving to the latter the Farm plantation in dispute.

It is obvious that he did not mean to change this land provision for John, when he was about to marry, in 1762, by taking from him this small farm of 286 acres, convenient to John, but separated from William's land by John's whole tract. There was another difficulty occurred. If I do not mistake the position of the land purchased of Bronaugh, which (according to the depositions of Chadwell and Bruce, and the deed of Bronaugh) adjoined, it lay below Poplar Swamp, and under the will would have passed to William. To secure this to John, was the true reason why Bronaugh's name was mentioned at all;

[* See *Gatewood* v. *Burrus*, 3 Call, 194, 198; *Tabb* et al. v. *Archer* et al. 3 H. & M. 399; *Randall* v. *Willis*, 5 Ves. jun. 262.]

and although Champe, in his instructions, or the draftsman in pursuing them, might embarrass the literal sense, the intention was, that John should have all the land above [15] Poplar Swamp, comprehending the Farm; and should also have the tract below, purchased of Bronaugh: which makes Robinson's deposition perfectly intelligible. It was thus Champe explained it to Carter, who so understood it, and was satisfied. The same opinion was entertained by Mrs. Champe, who having a right, for life, to John's land, and not to William's, possessed the Farm until her death, in 1767. How did William understand it? He suffered his mother to hold it as John's; he afterwards permitted John himself to possess it till his death, in 1774, and then let his devisees hold it till 1783, when he brought suit. But, a more direct proof of his opinion appears from his deed to his brother, in 1774, for 93¾ acres of land; which the father had purchased of John Grant, after the marriage agreement, and which descended to William as heir; in the bounds of which, he calls the Farm John's land. Can it be imagined, that if he had considered the Farm (a small tract of 286 acres detached from his other land) as belonging to him, that he would not have preserved these adjoining 93 acres to increase it?

It is urged, however, that he might be ignorant of his title. But is it reasonable to suppose, that he did not understand his rights as well in 1763, as in 1783? He was probably the eldest son, at his brother's wedding; where he heard the conversation between the two fathers, and it is most likely he had heard his father, at other times, speaking on the same subject.

Upon the whole, the decree is a very just one; and is to be affirmed.

OSWALD, DENISTON & Co. *v.* DICKINSON'S EX'RX.

Monday, October 14, 1799.

Where goods are sold by a factor in Virginia for merchants in Britain, it is necessary (under the act of 1755,) to state the name of the factor in the declaration.*

So, if some of the partners reside in Great Britain and some in Maryland in America.

And a suit of this kind will be dismissed, after issue joined upon the merits, and after the jury were sworn, if the fact appear on the trial of the cause.

And it will not prevent the dismission, that there are money counts in the declaration.

This was *indebitatus assumpsit* brought by Oswald, Deniston & Co. against Dickinson's executrix, in the County Court. The declaration contained four counts. 1. For goods, wares and merchandizes sold and delivered to the testator. 2. A *quantum valebat* for the same. 3. For money paid and advanced for the use of the testator. 4. For money had and received by the testator to the use of the plaintiffs. Plea, *non assumpsit*, and issue. Upon the trial of the cause, the Court, on the motion of the defendant's attorney, ordered the jury to be discharged from giving a verdict, and the suit to be dismissed, at the costs of the plaintiffs. To which opinion of the Court, the plaintiffs filed a bill of exceptions, stating, that "on the trial of the cause, it was given in evidence, that the goods, wares and merchandises mentioned in the declaration, were sold and delivered to the defendant's testator, by John Murray, factor for the plaintiffs; and that, at the time of said sale or delivery, the house of Oswald, Deniston & Co. consisted of George and Alexander Oswald, Deniston, who resided in Great Britain, and Robert Dick, who resided in the State of Maryland; and at the time of bringing the suit all the surviving partners of the said house resided in Great Britain. That thereupon the defendant's counsel moved the Court to dismiss the suit, because it was not stated in the declaration, that the goods, wares and merchandises were sold and delivered to the defendant's testator, by John Murray, as factor for the plaintiffs; and that the Court accordingly ordered the suit to be dismissed, and the jury to be discharged."

* The act of 1755 here alluded to, provides, that Where any suit shall be brought in the name of any person residing in Great Britain or Ireland, to recover a debt for goods sold and delivered here by a factor, the declaration shall express by what factor the goods were sold and delivered; or else such suit shall be dismissed, with costs. 6 Hening's *St. at Lar.* 481, § 7.

There is an account which the Clerk of the County Court has copied into the record, and certifies was filed in the cause; but which was not made part of the record, by any act in the County Court. In this account the plaintiffs charge the testator, with various articles of merchandise, and several sums in cash, (the whole account of *debits*, for cash and merchandises, amounting to £245. 11s.) and give credit for sundry hogsheads of tobacco and a few small sums in cash; the whole amount of credits, for cash and tobacco, being £121. 10s. 3d.; thus leaving a balance due the plaintiffs of £124. 0s. 9d. [17]

The plaintiffs appealed from the judgment of the County Court, to the District Court; where the judgment was affirmed, and from the judgment of affirmance, the plaintiffs appealed to this Court.

CALL, for the appellants.

The District Court, in affirming the judgment of the County Court, erred in two respects. 1. Because the act of Assembly only relates to cases, where all the partners lived in Great Britain and Ireland; but, here the bill of exceptions states that one resided in the State of Maryland; and this being a mere positive law, relating only to matter of form, will be construed strictly. 2. Because there were two money counts in the declaration, and the exhibits copied into the record, shew that there was a demand for cash advances: Therefore, at most, the Court ought only to have directed the jury to disregard the counts for merchandise, and to confine themselves to those for money only. Instead of which, they have dismissed the whole suit; which they had no authority to do; as the plaintiffs had a right clearly, to proceed upon the money counts.

WICKHAM and BOTTS, contra.

The act of 1755, c. 2, § 7, [6 Stat. Larg. 481,] is express, that the name of the factor shall be inserted, under pain of having the suit dismissed with costs; and of course the plaintiffs, by omitting to insert it in the present case, subjected themselves to the inconvenience of a dismission. That the objection was not taken till the trial of the issue, makes no difference; because, the defendant could not tell for what the suit was brought, until it was made known upon the trial of the cause; and, therefore, it is within the reason of the case of *Corrie's ex'rs.* v. *Campbell*, 1 Wash. 153. That [18]