REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)
PRINTED AND PUBLISHED BY I. RILEY.
1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. Volume II. By William W. Hening and Wil- "liam Munford."

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

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

MARCH, 1808. Pollard v. Cartwright and others.

" whom liberty is reserved to pursue by all legal means, " the estates of *Burnley* and *Cartwright*, wherever to be " found, until he receives full indemnification for his " loss."

Thursday, March 17. Chandler's executrix, *against* Hill and Lipscombe, executors of Charles Neale.

Under what circumstances a promise *in writing* will be considered merely *nudum pactum*, and will not be enforced, even in equity.

A trust created by will for the payment of debts by a general direction that all the testator's debts shall be paid, extends only to such as he was bound *in conscience* to pay: therefore an undertaking which is merely *nudum pactum* is not comprehended, and may be barred by the act of limitations.

ON an appeal, taken by the complainant, from a decree of the Superior Court of Chancery, for the *Richmond* District, pronounced on the 17th of *March*, 1803.

William Neale, father of *Charles Neale*, the testator of the appellees, became indebted to Doctor *Chandler*, the appellant's testator, in the sum of 25*l.* 14*s.* 7*d.* the balance of an account for services rendered as a physician, between *Dec.* 1761, and *Feb.* 1768. On the 13th of *July*, 1768, *William Neale* made his will in due form of law, and desired, " that his executors should sell such part of his es- " tate, either *real* or *personal*, as they should think fit, ex- " cept the land whereon he lived, *for the payment of his* " *debts*," &c. That will was exhibited for probate by one of the executors in *November*, 1768: *but Charles Neale was not named an executor therein, nor does it appear that he received a larger portion of his father's estate than any other of the legatees*, of whom there were several; the

The surviving obligor in a *joint* note, (made before the act of 1786, see *Rev. Code*, vol. 1. ch. 24. sect. 3. p. 31.) is alone liable to an action *at law*; nor can the note be set up *in equity* against the representatives of the deceased obligor, but on the ground of a moral obligation antecedently existing on his part to pay the money.

It seems, that to authorise the proving of an exhibit at the hearing, by *viva voce* testimony, a previous order for that purpose must have been obtained from the Chancellor, and notice given to the adverse party of an intention to introduce such evidence.

only specific devise to him, was the tract of land whereon the testator lived, to be enjoyed after the death of his widow, on the payment of 400*l.* and on his refusal to take it on those terms, then to his other sons in succession.

The account of Doctor *Chandler* against the estate of *William Neale*, amounting, with 16 years interest charged thereon, in *June*, 1782, to 46*l.* 5*s.* 3*d.* was subscribed by *James Quarles*, (who intermarried with a daughter of *W. Neale*, and to whom he gave by his will "what she had then in pos-"session, together with two negroes to be raised out of "his estate, agreeable to his promise on her marriage,") and by *Charles Neale*; in the following words:

"We the subscribers oblige ourselves to pay the above "account of 46*l.* 5*s.* 3*d.* on or before the 1st *December* "next, with interest from this date, on 25*l.* 14*s.* 7*d.* Given "from under our hands, this 12th *June*, 1782.

"*James Quarles.*

"Teste, "*Charles Neale.*

"*Francis Graves.*"

Charles Neale died in *September* or *October*, 1790, and *James Quarles survived him about four years, and died insolvent.* By the will of *Charles Neale* dated on the 22d of *September*, and proved on the 25th of *October*, 1790, he desired that the "plantation whereon he then lived should "be sold by his executors, *in order to discharge his* "*debts.*"

The appellant, in *March*, 1796, exhibited her bill in the High Court of Chancery against the appellees, as executors of *Charles Neale*, stating the origin of the account, and the acknowledgment of *James Quarles* and *Charles Neale*; and further charging, that *Charles Neale*, on whom the whole of the estate of *William Neale* had devolved, by succession, inheritance, or executorship, had at various times promised to pay the amount; *James Quarles* not only having died insolvent, but not being in equity bound to pay it; that *Charles Neale* died without having fulfilled his promise, and the appellees, his executors, had refused to

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perform it, alleging that they had no assets, and neglecting to render an account of their administration. The bill prays for a discovery, an account of the assets belonging to the estate of *Charles Neale*, and for general relief. The appellees, by their answer, deny the justice of the demand, and state several circumstances to shew that the account had been paid by *William Neale* just before his death. They express their belief that their testator, *Charles Neale*, never could have assumed the payment, as he had often refused, conceiving the transaction to have been fraudulent. Proof of the execution of the acknowledgment of *James Quarles* and *Charles Neale*, is called for, by the appellees; who admit assets; rely on the length of time, (no demand having been made of them till the year 1795,) and on the survivorship of *James Quarles;* and state, that although he died insolvent, yet the remedy of the appellant was at law, there being no equitable circumstances to charge *Charles Neale*, as he was only one of *seven* sons of his father, to whom portions of his estate were given.

At the hearing in *March*, 1803, the Chancellor DISMISSED THE BILL, and directed the following entry to be made: "Memorandum, ordered to be certified, that, on the "hearing of this cause, yesterday, the plaintiff by her "counsel offered in Court a witness to prove the hand-"writing of *Francis Graves*, who was the only witness to "the exhibit stated in the proceedings as an assumpsit of "*James Quarles* and *Charles Neale*, and was dead at the "time of commencing this suit; but the defendants by "their counsel objected to the introduction of the witness "first named, *because no notice had been given of the in-*"*tention to offer testimony to that effect.* Whereupon the "Court refused to permit the said witness to be examin-"ed." The complainant appealed.

Wickham, for the appellant. It is the regular practice in the Courts of Equity in *England* to prove exhibits at

the hearing by *viva voce* testimony: but, in this country, to save the trouble of witnesses' attendance, they are usually proved by commission. In most cases, indeed, they are merely exhibited and inserted among the papers. But if, when an exhibit is introduced, it be objected to, the Court of Chancery ought to permit proof in legal form.

As to the length of time, it was clear that the clause in the will which directed that the testator's land should be sold for the payment of his debts, created a trust and took the case out of the statute of limitations.

Warden, for the appellees, observed that it was only necessary to refer to dates to shew that the decree of the Chancellor was correct in dismissing the appellant's bill. The claim was clearly barred by the statute of limitations; and no circumstances existed which would bind the executors of *Charles Neale* either in equity, or at law. Neither *Charles Neale* nor *James Quarles* who subscribed the account, were executors of *William Neale*, for whom the services were performed. They were only part of several legatees; but it does not appear what portion of the estate they received. Their promise was without consideration, and merely *nudum pactum;* to which a trust, created in equity by directing lands to be sold for the payment of debts, is never presumed to extend.

But *Quarles* having survived *Charles Neale*, the appellant's remedy, if ever she had any, was gone against the representatives of *Charles Neale* both at law, and in equity.

Randolph, in reply. There is nothing more clear than that a party has a right to prove his exhibits at the hearing; and the appellant having been prohibited, in this case, the Court of Chancery must have erred. It is only necessary to inquire what ought to be the conduct of this Court, when such error is detected.

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Judge TUCKER. How do you get over the question arising from the survivorship of *Quarles?*

Randolph. I acknowledge it to be a principle both of Courts of Equity and of Law, that where there are joint obligors, the survivor is considered the person indebted. This, though *universal* at law, is always *qualified* in equity. If the person who dies first, is found to be in possession of the property for which the debt grew, his estate will be liable. It is the *fund*, and not the *person*, which is regarded in equity.

Wickham, as to the same point. The case of *Field* and *Harrison*,(a) goes so far as to say, that an obligation would not be set up in equity against a *surety only*. But here, *Neale* is liable as devisee, and the Court will set up the obligation against him on the ground of assets received from his testator; *Quarles* the other obligor being insolvent.

(a) 2 *Wash.* 136.

Friday, March 25. The Judges delivered their opinions.

Judge TUCKER. The first error which is assigned by the appellant's counsel to the decree in this cause, is, that the Court did not permit the appellant to prove an exhibit at the hearing by *viva voce* testimony.

The exhibit in question was an assumpsit, or promise in writing, purporting to be subscribed by *James Quarles* and *Charles Neale*, and to be attested by *Francis Graves*; by which *Quarles* and *Neale* in *June*, 1782, obliged themselves (jointly) to pay an account against the estate of *William Neale*, deceased, commencing in 1761, and ending in 1768, on or before the 1st day of *December* then next; and the counsel for the appellant offered at the hearing, a witness to prove the hand-writing of *Francis Graves*, the witness to the paper; but not the hand-writing of the parties. On referring to *Harrison's Ch. Pr.* p. 596. I find

the rule there laid down to be, that to authorise the examination of a witness to prove an exhibit at the hearing, an order must be previously obtained for that purpose. No such order had been obtained, nor any notice given of the intention to offer such testimony; I therefore think the witness was properly rejected.

The second error assigned is, that the promise in writing made by *Charles Neale*, was made on good consideration, and was binding on him. If *Charles Neale* had been an executor of his father's will, this would have been correct; or if there had been any devise or legacy to him in the will, on *condition* that he should pay the debts of the testator. *William Neale's* will among the exhibits, directs his executors to sell such part of his estate, either *real* or *personal*, as they shall think fit, (with the exception of the land whereon he then lived,) for payment of his debts. That will was proved in 1768, near fourteen years before the date of this pretended assumpsit. There is no proof that *Charles Neale* had either a larger portion of his father's estate than the rest of his children, or even any portion whatsoever; and no *consideration* whatever is mentioned in the assumpsit; this brings the case to the question decided in this Court between *Hite*, *executor of Smith*, and *Fielding Lewis's executors*, *October* term, 1804. That was an action founded upon a promise in writing in these words: "I hereby oblige myself, my heirs, executors and "administrators, to indemnify Mrs. *Smith*, (who was ex-"ecutrix of *Charles Smith*,) for the said *Charles Smith's* "becoming security for my son *F. S.* from any demand "which *E. D.* &c. may have against the executors of "Captain *Smith* on that account, provided the sum does "not exceed two hundred pounds," to which he subscribed his name in the presence of a witness. And a majority of this Court, consisting then of five Judges, decided it to be a *nudum pactum*. And though I was not one of that majority, I consider the question as settled by that decision, and as deciding this case; there being no equitable cir-

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cumstances in the record, that I can discover, to make such a promise, as this is alleged to have been, binding upon either of the parties who are said to have subscribed it.

But, even were this point in favour of the appellant, it appears that *James Quarles*, who subscribed the paper at the same time, *survived Charles Neale*, so that, according to the decision of this Court in *Johnson* v. *Richardson*,(a) the death of the latter discharged his estate. And there are no equitable grounds that I can discover to charge it further in equity, than it was chargeable at law.

(a) 2 *Call*, 527.

As to *Charles Neale's* having subjected his estate to the payment of his debts, that must be understood as to *just* debts, only; and I consider this as not belonging to that class. I am therefore of opinion that the decree be affirmed.

Judge ROANE. It is unnecessary to decide whether the Court of Chancery erred in refusing to receive proof of the exhibit at the trial; inasmuch as, *upon the merits*, the appellant never can recover, and therefore was not *injured* by that error, if it were one.

The note on which this suit was founded, created no debt on the part of the makers, as it was made without any adequate consideration. It is a mere *nudum pactum*. Neither of the makers received the benefit of the services for which it was given: neither of them are executors of *William Neale* from whom the debt was owing: nor is it shewn that there is any deficiency of his assets, which would render the property received by the makers liable to the payment thereof; in which case it might be argued that such liability would afford an adequate consideration.

The debt was barred by the time incurred between the making of the note and the date of *C. Neale's* will, (to say nothing of the lapse of time preceding,) and, although the trust created by such will for the payment of debts would be considered as a waiver of the act of limitations, it is presumed, it will not extend to a mere *nudum pactum*.

The trust created by the will of *C. Neale* was for the payment of *his debts;* under which description the claim in question is not comprehended. In the case of *Trueman* v. *Fenton*,(a) upon this subject, the point arising in the present case seems to be conceded. The cases in which a debt extinguished is *revived* by a new promise, appears to be where the debt was due *in conscience*, and this would seem to exclude the case of a *nudum pactum;* for a man is not bound *in conscience* to pay any thing, unless he has received a benefit from, or produced a loss to, the other party. So also it is held, that an acknowledgment of a debt so as to take it out of the statute, does not give any *new* cause of action; but only revives the *old* cause, and is of no other use but to prevent the bar by the statute.(b)

(a) *Cowp.* 548.

(b) 4 *Bac. Abr. Gwil. Ed.* 483. 1 *Salk.* 29. *Heylin* v. *Hastings*.

Considering this also as a *joint* note, the action is gone at law against the representatives of *Neale*, in consequence of *Quarles's* surviving him; and in equity it cannot be set up against *them* but on the ground of a moral obligation antecedently existing on the part of *Neale* to pay the money.(c) In this case no such obligation existed, nor is it shewn that either of the promisers were responsible for any thing prior to the making the note in question. On the *merits*, therefore, the law is clear for the appellees, and the decree must be affirmed.

(c) See *Harrison*, executor of *Minge*, v. *Field's* executor. 2 *Wash.* 156. and the cases there cited.

Judge FLEMING was in favour of affirming the decree of the Chancellor.

By the whole Court, (absent Judge LYONS,) the decree of the Superior Court of Chancery AFFIRMED.