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VIRGINIA.

BY DANIEL CALL.

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TO WHICH, BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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Pryor *v.* Adams.

Thursday, October 25, 1798.

The Court of Chancery has jurisdiction in all cases where a discovery is wanting.*
Mode of proceeding on the part of the defendant, where a merely colorable suggestion is made, in order to give the Court of Chancery jurisdiction.
The Court of Chancery should judge on the proofs before it, and in a clear case, decree thereon, without directing an issue.
Payments in paper for debts due before 1771, good.
Plea to the jurisdiction of the Court of Chancery, how tried.

This was an appeal from a decree of the High Court of Chancery. The bill states, that the defendant Pryor was indebted to the plaintiff as surviving partner of Adams & Parke, in £66, 7s. 10d. specie, with interest from the year 1774; when the bond was given, amounting to £16, 14s. That in the year 1780, the defendant insisted to discharge the said bond, and applied to Street, the plaintiff's agent, to receive payment thereof in paper money: who refused, unless the defendant would agree to pay the depreciation. That the defendant undertook to do so, and in February, 1780, paid through the hands of Brand, £83 1s. in paper money, worth only, when reduced by the scale, £1 17s. specie. That neither the plaintiff nor his agent would have received the same, if the defendant had not promised to make good the depreciation, whenever a general scale should thereafter fix the same. That the defendant now refuses to pay, "pretending that, as the plaintiff was so credulous to give up the bond on his promise to pay the depreciation, that he could not compel him to fulfil his said engagement, or prove the same but by the oath of the defendant." The bill, therefore, in the usual form, prays that the defendant may answer the premises: Interrogates him relative to the facts: Asks a decree for the balance of the money, after deducting the payment aforesaid, reduced by the scale: And concludes with a prayer for general relief. [383]

The defendant demurred to the jurisdiction of the Court, because the plaintiff's suit was brought upon an assumpsit,

*And where it is proper to go into Equity for a *discovery*, the Court (having possession of the subject) will decide the whole cause, without sending the parties to a Court of Law, though, had not a discovery been necessary, relief might originally have been had at law. *Chichester's executrix* v. *Vass' adm'r*, 1 Mun. 98. Other cases involving nearly the same principle, *Scott* v. *Osborne*, 2 Mun. 413; *Baird* v. *Bland and others*, 3 Mun. 570; *Cross' curatrix* v. *Cross' legatees*, 4 Gratt. 257; *Lyons* v. *Miller*, 6 Gratt. 427.

which, if made, was cognizable at law; and, by way of answer, he refers to Street's certificate, to shew the payment of the money; denies the promise to make up the depreciation, or that he made any other promise than the following: "That if the depreciation was generally made up, so that the defendant could recover it from his debtors, he would make it up to the said Street."

The deposition of Hopkins states, that he was called on in February, 1780, by Street, to take notice, that if the said John Street would receive a sum of money, due on bond to Adams & Parke from Pryor, that he, Pryor, agreed to make good the depreciation, if any depreciation should ever be demanded; and that Pryor agreed thereto in the presence of the deponent.

Brand says, that he paid off and took up the bond, which he can't find; and that Street told him, Pryor was to pay the depreciation, if customary.

Street, (whose deposition was rejected in the High Court of Chancery because he was interested,) says, that the defendant told him, if he would receive the money of Brand, and any depreciation was paid by any one, that he, the defendant, would pay it likewise. That he received it upon those terms and no other. That Hopkins was called on as a witness to the agreement. That, as well as he remembers, upon a conversation betwixt him and the defendant, some time afterwards, [384] relative to an enquiry made by the defendant of him, the deponent, in whose hands the bond was? and on being told that it had been given up to Brand, (with whom the defendant seemed displeased,) under the agreement aforesaid, the defendant answered, whoever had the bond had a right to the depreciation, and that he would rather the deponent should have it than Brand, who had denied his having the bond. That the deponent asked the defendant if Brand did not claim the depreciation, if he would pay it? and that he answered, he had rather the deponent should have it than Brand. That Brand afterwards told the deponent, that he would give up his right to the depreciation to Parke's estate.

The second deposition of Hopkins states, that Street called on him to take notice, that Pryor agreed to pay the depreciation on the bond, and that Pryor answered very well, and turned off.

In May, 1792, the Court of Chancery dismissed the bill, with costs, upon a hearing; but, at the same term, set aside that decree, and directed an issue to be tried before the District Court of Richmond, to determine, "whether the defend-

ant, at the time the money paid in discharge of the bond in the bill mentioned was received, or after, agreed to allow the depreciation?"

The jury found that the defendant did agree to allow it.

The Court of Chancery, upon the verdict being certified, decreed the defendant to pay to the plaintiff £66 7s. with interest from the 3d day of January, 1780, and the costs. From which decree, Pryor appealed to this Court.

Street's certificate is, that Brand paid him £66 7s. with £16 14s. interest thereon; and, in a short time afterwards, took in the bond.

There is a receipt in the record from Brand to Pryor for £3 2s. (the amount of the money reduced by the scale,) which Brand had paid Street on account of the bond.

MARSHALL, for the appellant. [385]

The decree is erroneous upon two grounds: 1st. That the Court of Chancery had no jurisdiction, there being a competent remedy at Common Law. 2d. That the Chancellor ought to have directed a new trial upon the certificate of the Judge, that the weight of evidence was against the verdict.

As to the first. The matter stated in the bill, was but a plain assumpsit; and, therefore, properly triable at law. For, there is no ground for the jurisdiction of the Court of Chancery, unless the suggestion, that the plaintiff could not ascertain the amount of the bond, gave it; but, this suggestion will be no foundation for the jurisdiction in this case, because it appears by the testimony that the plaintiff could have proved it. Therefore, the suggestion was only colorable, and for the sake of translating the jurisdiction.

Although there is no plea in form, to the jurisdiction, yet there is a demurrer, which, as to this matter, will serve as a plea.

As to the second point. The Judge, who tried the cause, having certified that the weight of evidence was against the verdict, it ought to have induced the Chancellor to set aside the verdict. In England, new trials are repeated until the Judge who tries is satisfied; perhaps here, though, in analogy to the proceedings at law, there should not be more than two new trials; but, in a case circumstanced like this, there should be at least that number.

DUVAL, for the appellee.

We could not prove the amount of the bond, except by the testimony of a witness (Street) whose deposition is objected to

by the appellant. The defence was an unrighteous one; and, therefore, a Court of Law would not have set aside a verdict against it. Consequently, by analogy to their practice, the Court of Chancery did right in not awarding another trial.

RANDOLPH, on the same side. The bill asks the setting up a higher security for a debt, and the demurrer con-
[386] fesses it; which gives the plaintiff a clear title to his demand.

The jurisdiction of the Court of Chancery is threefold. 1st. It is assistant to the Courts of Law. 2d. It is concurrent with them. 3d. It is exclusive of them. As to the first. The jurisdiction is maintainable on that ground, because the bond was of higher dignity than the assumpsit; and, therefore, the demand was a proper foundation for application to a Court of Equity. As to the second. Although the plaintiff might have had redress at law, that will not prevent his application to the Court of Chancery. There was a promise, which should be carried into execution, upon the circumstances of the case. As to the third. The discovery could only be compelled in the Court of Chancery; for, a Court of Common Law was incompetent thereto: and, of course, the plaintiff was entitled to come into equity for relief.

With regard to the Judge's certificate. In England, the Court of Chancery repeats new trials only in two cases. 1st. When a freehold is concerned. 2d. When the verdict is against the Chancellor's own opinion. Neither of which is the case here. In *Southall* v. *M'Keand*, 1 Wash. 336, it was held by the Court, that the Chancellor ought to have decided upon the testimony before him, without the intervention of the jury.

MARSHALL, in reply.

It was said, that the Court of Chancery, in this case, was assistant to the law. But how was it assistant? Did the plaintiff ask that a higher security might be decreed him? On the contrary, he only asks that a debt, which he says is founded on a promise, may be decreed him. But, if he had asked the bond to have been delivered up, what use would he have made of it? He could not have entertained a suit upon a cancelled bond; he must still have sued upon his assumpsit; and, therefore, he in fact, only asks the same redress in equity, which he
[387] might have had at law. But, then, it is said, that the Court of Chancery has jurisdiction in all cases of fraud and seduction. Be it so; but still none appears here. It is only the common case of a breach of promise, for which an

action of assumpsit at Common Law would have lain. But still it is urged, that a discovery was wanting. I have already answered this argument; for, it appears that the plaintiff could have proved it; and, therefore, upon his own ground, it was not necessary to resort to a Court of Equity.

As to the other point; *Southall* v. *M'Keand*, has no influence upon the case. Because there it appeared, that the whole evidence, which was then before the jury, was before the Court of Chancery: a circumstance, that does not appear in this case.

ROANE, Judge. The bill of the appellee now before us, although it contains no specific prayer for a discovery of the bond in question, yet, upon the whole, by a liberal construction, it may amongst other things be considered, as a *bill of discovery*.

Admitting with the demurrer in this case, that the question concerning the depreciation is one purely of a legal nature, yet as in a trial at law, the appellee would have had occasion to produce the bond itself, or at least to have had evidence of its amount and date from the confession of the appellant; and as he should not be compelled to trust to the chance of being able to establish the amount by other testimony, the present bill is on that ground clearly sustainable.*

The demurrer stating, according to the form of such proceedings in other cases, "that the said bill contains no matter of equity," is taken to refer to the bill only; and when the demurrer is overruled, the jurisdiction of the Court is sustained, at least until the hearing; and if at the hearing, the evidence should support those allegations in the bill which confer a jurisdiction, the Court being in possession of the cause will make an end of it; and not turn over the parties to another forum so as to produce circuity and expense. But if, after the demurrer is overruled, which has impliedly admitted the truth of the allegations in the bill, the evidence of the answer and other testimony should contradict the allegations in [388] the bill on the point conferring jurisdiction on the Court, it would then be material to enquire, whether the Court should consider their jurisdiction as sustained on that point, by the implied admission in the demurrer, in opposition to such positive testimony, and go on to conclude the cause? This is an important question; and one, respecting which I should require further time to deliberate, but that it is not necessary to be decided in this cause; since it is in testimony, that the bond is

* See Ld. Hardwick, in *Finch* v. *Finch*, 2 Ves. *sen.* 492.

or was in the hands of the appellant or his agent; and the appellant has given testimony respecting the amount of that bond in his answer: which the appellee had in equity a right to require.

The evidence, then, as to the point of discovery of the bond or its amount, supports the allegation of the bill instead of falsifying it; and the only remaining question is, what shall be done in a cause which as stated and proved at the trial, is deposited with a Court of Equity on one of the ordinary grounds of its jurisdiction? And this will lead us to the testimony.

The answer of the defendant Pryor, positively denies the agreement to make up the depreciation as charged in the bill, in a manner which substantially corresponds with the account given by Brand, of the acknowledgment of J. Street, relative thereto. This acknowledgment, then, may be thrown out of the scale, which opposes the defendant's answer; and then the comparison of the latter will be made with the testimony of Mr. Hopkins. His first deposition, for his second does not appear to have been relied on in the argument, if it were as clear and positive on one hand as the answer is on the other, must be repelled by the rules of Equity.* But the terms of the deposition, "if depreciation should ever be demanded," (which exclude the idea of a demand by the obligee; who had
[389] before and would again demand such depreciation; and, therefore, would not be put upon an hypothesis,) are supposed to refer to a general legislative requisition, which hath never yet taken place with respect to payments actually made in paper; and, therefore, by the best construction of this testimony, the appellant, by the terms of it, is clearly not responsible.

But, it is also in testimony, that application was made for payment by Street and Brand; and though the particular times are not mentioned, it is supposed they were not long before the actual payment of the bond; and this tends to overrule an idea, that there was any very great aversion in Street, to receive paper money. The same inference may be drawn from the circumstance of this money being as valuable as specie to Adams.

For these reasons I agree with the Chancellor in his first decree, that "the allegations of the bill which are denied by the answer not being proved by the evidence," the bill ought to have been dismissed; and I think he ought to have adhered

[* See *Maupin* v. *Whiting*, ante, p. 224, and note.]

to that opinion, conformably to the rule of evidence established in equity. It appears to me, therefore, that the issues were improperly awarded, and that all the subsequent proceedings were consequently erroneous.

FLEMING, Judge. Two questions have been made in this cause. The first is, whether the Court of Chancery had jurisdiction of the case? and secondly, whether there was such an assumpsit proved, as should oblige the defendant to pay the money claimed by the bill?

As to the first question: This was plainly a bill of discovery; and although the plaintiff might have had redress at Common Law, if he could have clearly proved the facts, yet this might have been attended with difficulty and hazard; and ultimately perhaps, he might not have been able to have produced effectual testimony by any other mode, than a bill in Chancery in order to compel a discovery; especially as the bond was out of his possession and the transaction of pretty long standing. Therefore, upon the ground of jurisdiction I see [390] no reason to disturb the decree.

But upon the merits, I think the weight of evidence was clearly with the defendant; and that the assumpsit was not sufficiently proved to entitle the plaintiff to a decree.

The answer denies the assumpsit; and says, that the defendant told Street, that "If the depreciation was *generally made up*, so that he could recover it of his debtors, he would make it up:" Which was reasonable in itself, as he would then be placed on the same footing with others; and could recover the same measure from his debtors, which he was obliged to pay to his creditors.

This allegation of the answer, is confirmed by the testimony of Brand; who says, Street told him that the defendant had agreed to pay the depreciation *if customary*, (and not that he would pay it at all events, whether others did or not:) Thereby still alluding to what should be established as a common rule throughout the State.

So that here is a positive answer corroborated by the deposition of a witness; and these are opposed by the testimony of Hopkins only, whose recollection does not appear to have been perfect, as there is some variation in his two depositions, which both refer to Armstead's sale. For, in the first he says, that the defendant agreed to make good the depreciation, *if any depreciation should ever be demanded.* And in the second, he says, that Street called on him to take notice that Pryor agreed to pay the depreciation on a bond, the said Street had to col-

lect for Adams and Parke, when Pryor answered, *very well*, and turned off. Of course, the positive answer corroborated by the deposition, must prevail; according to the known rule in Chancery proceedings, that in order to defeat an answer when responsive to the bill, it must be contradicted by two witnesses, or by one witness and strong circumstances:* Of which there are none in the present case.

[391] The result is, that I am of opinion that the first decree of the Court of Chancery was right; and that the subsequent issues were improperly directed, as I think there was no occasion for a jury at all. Of course, the final decree founded on the issues is erroneous; especially as the Judges who tried the cause have certified, that the verdict was against the weight of evidence.

I concur in opinion, therefore, with the Judge who preceded me, that the decree appealed from should be reversed; that all the proceedings subsequent to the first decree should be set aside; and the first decree affirmed.

CARRINGTON, Judge. Concurred.

PENDLETON, President. On the first point as to the jurisdiction, I am well satisfied that the demurrer is to be considered as a plea to the jurisdiction;† so as to take the case out of the act which precludes appellate Courts from proceeding to a reversal for want of jurisdiction, if it be not pleaded in the inferior Court: And I am also of opinion, that we are to consider the question of jurisdiction now, as if the cause was heard upon the bill and demurrer, independent of any subsequent proceedings.

It was objected that a man may in his bill allege any fact to give jurisdiction, and bring every case into the Chancery; and it was asked, how a defendant is to avail himself of the objection to the jurisdiction, in case the fact alleged to give it be not true? The mode is obvious; he may by plea deny the fact, and on that, ground his objection. The fact thus put in issue is to be tried: If found for the defendant, his objection operates: If found for the plaintiff, the question occurs, whether the fact alleged be a sufficient ground of equity to sustain the jurisdiction?

[* *Maupin* v. *Whiting*, ante, 224; *Bullock* v. *Goodall* et al. 3 Call. 49; *Wilkins* v. *Woodfin* et al. 5 Munf. 183; and the recent case of *Woodcock* v. *Bennet*, (in error,) 1 Cowen's N. Y. Rep. 711, 742-7.]

[† See *Pollard* v. *Patterson's adm'r.* 3 H. & M. 67.]

A demurrer admits the facts to be true; and comes to the other question at once; which we are to consider upon the suggestions of the bill.

The plaintiff charges a promise to pay; which, if proved, would entitle him to a remedy at law. But he says, that having in consequence of the promise given up the bond, he is unable to fix the quantum of his demand, without a discovery from the defendant; * which he calls upon him [392] to make. In this view it is a bill of discovery; which is admitted to be proper in equity: And the consequence is also admitted and established; namely, that on this discovery the Court will finish the cause, and not send the parties to another Court for trial.†

On the point of jurisdiction, therefore, I have no difficulty in over-ruling the demurrer, and come to the question upon the merits.

The Court approve of the principle laid down in *Southall* v. *M'Keand*, that we are to consider whether the Chancellor exercised his discretionary power properly, either in not being satisfied to decide upon the merits, without directing an issue; or in being satisfied with the verdict as certified.‡

We, therefore, consider the case, 1st. upon the merits. The complainant charges a positive promise to pay the depreciation, in consideration of the plaintiff's receiving his paper. This is denied by the answer, which is contradicted but by one witness, Mr. Hopkins; and that too in a second deposition, after he had, in the first, proved a conditional promise, much of the same nature with that admitted in the answer, and spoken of by the other witnesses. Is this a circumstance to aid his testimony against the answer? It strikes me as giving additional weight to the scale of the answer, that he should vary in so material a point.

We then come to what was the real promise. The answer admits he promised to pay the depreciation, *if it was generally made up, so that he could recover it of his debtors.*

Brand proves the account of the promise given him by Street, was, to pay depreciation *if it was customary;* and Hopkins in his first deposition says, it was to pay if [393] demanded: Which must be understood, if demanded and paid generally; and not a demand by that particular credi-

[* *Duvals* v. *Ross*, 2 Munf. 290.]

[† *Chichester's ex'x.* v. *Vass's adm'r.* 1 Munf. 98. Marshall, C. J. in *Russell* v. *Clark's ex'rs.* 7 Cranch, 89, delivering opinion of the Court.]

[‡ *Stannard* v. *Graves* et al. 2 Call, 369. *Rowton* v. *Rowton*, 1 H. & M. 91.]

tor, since it could not be doubted that he would make the demand, if that alone could entitle him.

If the promise be understood literally, and to depend upon depreciation being generally or customarily paid, then there is no proof of a single instance of depreciation being made up by a debtor. On the contrary, we have three, where it was not made up; that is to say, one of Quarles for Pryor's debts; and the others of Mr. Adams, (one as creditor, the other as debtor;) who would probably never have complained of it, if our act of Assembly had not been over-ruled by a law of superior authority. Upon the strict letter of the promise, therefore, it is against the plaintiff.

And what is the spirit of the promise? Nothing more than to subject this case to the general regulations which should be established, either by general consent, or by the Legislature. In this sense, Pryor swears he made it, and gives a sound reason for doing so; namely, that as a creditor, he would receive a benefit to compensate for his loss, if it may be called one, as a debtor.

And what rule is given by the act of 1781?

The appellee's counsel say, that the scale in that act fixes the rule, either in the enacting part or in the proviso, authorising Courts to vary the scale upon circumstances.

But these are confined to debts and contracts commencing after the first day of January, 1777, and they do not reach the present debt created in 1774; the rule as to such debts being, that if not paid, they are to be recovered in specie; but, if paid before 1781, the payment is to stand as a discharge.

I am, therefore, of opinion, that the merits were clearly against the plaintiff; that there was not occasion to [394] have directed an issue in the cause; but that the first decree of May the 17th, 1792, dismissing the bill with costs was a proper one, and ought to be affirmed;* and that all the subsequent proceedings should be reversed.

Which renders it unnecessary to consider the questions discussed on those proceedings.

On the next day, PENDLETON, President, observed, he was apprehensive that when speaking of the jurisdiction yesterday, he said, that the defendant "may by plea deny the fact; and on that ground his objection. The fact thus put in issue, is to

[* But if the proofs leave the point *doubtful*, 'tis the duty of the Chancellor to direct an *issue*: See *Marshall* v. *Thompson*, 2 Munf. 412; *Bullock* v. *Gordon* et al. 4 Munf. 450; *Johnson* v. *Hendley*, 5 Munf. 219; *Galt* et al. v. *Carter*, 6 Munf. 345; *Banks* et al. v. *Booth*, 6 Munf. 385; *Knibb's ex'r.* v. *Dixon's ex'r.* 1 Rand. 249, *Douglass* v. *McChesney*, 2 Rand. 109, *Savage* v. *Carroll*, 1 Ball & Beatty, 283.]

be tried, and if found for the defendant, his objection operates; if found for the plaintiff, the question occurs whether the fact alleged, be a sufficient ground of equity;" it might be inferred that he thought it ought to be tried by a jury: But that, however, was not his meaning; for, he meant only, that it should be tried according to the usual course of Chancery causes.

PROUDFIT *v.* MURRAY.

Monday, Nov. 5, 1798.

The act of 1748, relative to bills of exchange, did not cease until Nov. 1793, notwithstanding the act of 1792, upon that subject: Which did not repeal the act of 1748, because all the suspended acts of that session, related to the first day thereof, as well as the general suspending law, and so there was no time during the session, in which the suspended acts operated.*

If the declaration state that the bill was for current money here received, without naming the *sum of current money*, the plaintiff can only recover *current money*.

Quære.—Whether the bill should be presented protested, to entitle the plaintiff to ten *per cent?*

This was an action of debt upon a bill of exchange drawn in Virginia, upon the second day of February, in the year 1793; whereby the drawer requested the drawee to pay to the *payee*, or his order, three hundred pounds sterling, *for value in current money there received*, and to place the same to account, with or without advice. The declaration stated the tenor of the bill as above; and that the same had been protested for non-acceptance and non-payment. After which, it proceeds thus: "Of all which premises the said defendant, on the day of , 179 , and at the county aforesaid, [395] had notice." Plea, *nil debet*, and issue. Upon the trial of the cause, the defendant filed a bill of exceptions to the Court's opinion; which stated, "that a question was made to the Court, by the counsel for the defendant, whether this action, which is founded on a bill of exchange, bearing date the 2d day of February, 1793, could be maintained under the

* The act of 1748, ch. 33, § 2, (6 Hening's Stat. at Lar. 85, '6,) enacted,—that any bill of exchange for the payment of money, expressed to be for value received, should, if protested for non-acceptance or non payment, carry interest from its date till payment at ten *per cent. per annum;* but not for more than eighteen months from the date, to the time it should be presented, protested, to the drawer or indorser.—This act makes no difference between foreign and inland bills.