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 III.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-second day of January, in the thirty-fourth 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 III. by "William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entitled, "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, entitled, "An act, supplementary to an "act, entitled, 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 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.

Lewis's Executor *against* Bacon's Legatee and Executors.

AN appeal, taken by one of the defendants from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced by the late Judge of that Court.

The appellees filed their bill in *March*, 1792, against the appellant and others, executors of *Fielding Lewis*, deceased, stating, that their testator, *Anthony Bacon*, of *London*, departed this life some time in the year 1786, having previously by his will, dated the 14th of *June*, 1785, devised a debt of 2,338*l.* 6*s.* 5*d.* sterling, due him, by account thereto annexed, from the said *Fielding Lewis*, of *Fredericksburg*, in *Virginia*, on the 31st of *December*, 1773, together with sundry other debts, to the appellee, *William Bacon;* one fourth part whereof was payable to the daughters of the testator's brother, *Thomas Bacon*, of *Maryland*. That *Fielding Lewis* died some time in the year 1782, and,

An *ex parte affidavit*, taken in *London*, prior to the *American* revolution, pursuant to the act of Parliament (5 *Geo.* 2. c. 7. s. 1.) "for the more "easy recovery of "debts in his "majesty's "plantations "in *America*," cannot be admitted as evidence to charge the defendant in this country.

It is not sufficient in an account to charge balances of other accounts *as rendered and agreed*, without producing the accounts so alleged to have been agreed, (if in existence,) and proving them as alleged, unless there be proof of the defendant's acknowledgment of the justice of such accounts, or of his promise of payment.

A creditor kept an account current with his debtor; and also an interest account, in which he charged interest on the several items of *debit* to a particular period, and gave *credit* by interest on the several payments to the same period, and charged in the *account current* the balance appearing in the *interest account*. A balance being then struck, and a new account opened, in which interest was charged on that balance, thus consisting of principal and interest; it was held to be *compound* interest, and not allowable.

If the defendant in equity plead the statute of limitations, and the complainant come within any of the exceptions in the act, he will not be entitled to the benefit thereof, unless he set it forth by a replication.

A testator devised a large real and personal estate to his wife and children; charged the portion of one of his sons with the payment of 1,500*l.* sterling towards his debts; directed sundry tracts of land to be sold, and the monies arising therefrom, as well as from loan office certificates, or otherwise, (*after payment of his just debts,*) to be equally divided among his six sons. On a bill brought by one of the creditors of the testator, the statute of limitations being pleaded, and the complainant not having shewn that he came within any of the exceptions of the act; it was held that the statute ought not to operate to prevent a recovery of so much of the *specific fund* as remained undisposed of, but that it would be a bar to a recovery out of the *general fund*.

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by his will and codicil thereto annexed, devised that sundry tracts of land should be sold by his executors for the payment of his debts, and moreover charged the real estate devised to his son *John*, (the now appellant,) with the payment of 1,500*l.* sterling, to be applied to the discharge of his debts; besides which, he left a large estate, consisting of lands, slaves, and personal estate, which came to the hands of his executors. That they cannot state particularly how those various funds have been disposed of, nor what sales have been made; but charge that the funds were very ample; that the executors had been grossly negligent in effecting sales; pray a full discovery and account, also an account of administration and payment of their debt, and for general relief.

The answer of *John Lewis*, styling himself the only acting executor, was filed in *March*, 1793. He states, "that the executors of *Fielding Lewis* did not know that "any sum of money was due to the said *Anthony Bacon*, "deceased, from their said testator;" admits that *Fielding Lewis* departed this life, after having made his last will and testament, possessed of a considerable real and personal estate, consisting of 2,300 acres of land in the County of *Frederick;* about 1,250 acres in the County of *Spotsylvania*, wherein the said *F. Lewis* resided; 10,000 acres in the County of *Jefferson* and State of *Kentucky;* one share in the *Dismal Swamp* Company, and one moiety of a tract of land, supposed to contain 800 acres, in the State of *North Carolina*, with sundry other tracts of land and lots of ground in the town of *Fredericksburg*, particularly enumerated; that the executors had sold their interest in the *Dismal Swamp* Company, and in the *North Carolina* lands for 1,350*l.* which, with the 1,500*l.* sterling charged on the estate devised to the defendant *John Lewis*, had been applied to the payment of the testator's debts due in *Virginia;* that the other lands remained unsold, as their supposed value could not be procured; and that the testator died possessed of 91 negroes, and personal estate to the amount of ———,

which were distributed agreeably to the testator's will. To which answer the complainants replied generally.

Afterwards, at the *September* term, 1793, leave was given, by the Court, to *John Lewis* to amend his answer. His amended answer stated, that since filing his former answer he had discovered in an old pocket-book of his testator's, and in his hand-writing, a memorandum written with a pencil, thus: "Paid Mr. *Mercer*, for *Anthony Bacon*, 483*l.* "0*s.* 7*d.* *April* 1, 1776."

The deposition of *Charles Simms* was taken, which proved, that about the year 1759, (it should be 1789,) the claim of *Anthony Bacon's* representatives against *Fielding Lewis's* estate, was put into his hands for collection; soon after which he called on *John Lewis*, the executor, and informed him of the circumstance; that in the course of conversation on the subject, *John Lewis* acknowledged, that there appeared, from his father's books, to be a considerable debt due from his father's estate to *Anthony Bacon*, and promised to call on the deponent in a day or two in order to ascertain the balance, but failed to do so. This deposition was taken on the 17th of *February*, 1794; and at rules held, in the Clerk's office, during the same month, the cause was set for hearing, on the motion of the plaintiffs by their counsel.

In *April*, 1794, *John Lewis* filed a plea of the statute of limitations; but it does not appear to have been done with leave of the Court.

At the *April* term, 1795, the bill was taken for confessed against *George Lewis*, one of the executors, as to whom the complainants had regularly proceeded; and the Court reserving to *John Lewis* the benefit of his plea, at the final hearing, directed that he should make up an account of his administration, before commissioners then appointed, who were also to state an account between the estates of *Fielding Lewis* and *Anthony Bacon*; and the Court further ordered, that *John Lewis* should produce to the commissioners "all "the books in his possession, of his testator, relative to the "transactions between him and the testator of the plaintiffs."

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On the 6th of *March*, 1802, another set of commissioners was appointed to perform the above order.

The commissioners, on the 10th of *September*, 1802, reported, that they had called on *John Lewis* for the purpose of settling the account, as directed by the High Court of Chancery, when he informed them that it was impossible, all his, and his testator's books, having been consumed by fire on the 3d of *April*, 1799.

The following exhibits were filed: 1. A letter from *Fielding Lewis* to *Anthony Bacon*, dated the 24th of *January*, 1775. In this letter *Lewis* admits a debt, (which from the funds designated for payment, it may be presumed was very considerable,) and promises a remittance, but no precise sum is mentioned. It states the amount of his property and debts, (the latter exceeding 5,000*l.*) and that his last crop of wheat had been reduced by a severe frost early in *May*, to little more than 3,000 bushels, which he was manufacturing into flour in order to ship to the account of *Bacon*, a continuance of whose former indulgence is requested; that the debt was perfectly secure, our lands being liable for *English* debts, and begs that he would delay sending out a power of attorney to collect the money. He also assures *Bacon* that his estate, after the payment of all his debts, is very ample, and promises him a security to double the amount of the debt, on any part of it.

2. An affidavit of one *James Deane*, book-keeper to *Anthony Bacon*, made before *John Wilkes*, Esq. Lord Mayor of *London*, on the 13th of *April*, 1775, and stated in the certificate of attestation to have been in pursuance of an act of Parliament passed in the 5th year of the reign of his late majesty king *George* II. intituled, "An act for the more easy "recovery of debts in his majesty's plantations and colonies "in *America*."(1) The affiant swears, that the account

(1) *Stat.* 5 *Geo.* II. c. 7. s. 1. In any suit, in any Court of Law or Equity, in the plantations, for any debt or account, wherein any person residing in *Great Britain*, shall be a party, it shall be lawful for the plaintiff or defendant, and for any witness, to be examined to prove any matter by affidavit or solemn affirmation, before any mayor or chief magistrate of the city or town

thereto annexed, entitled, " Dr. *Fielding Lewis*, Esq. his " account current with *Anthony Bacon*, Esq. credit;" signed " *Anthony Bacon*," is a just and true account in every particular; and that the interest account thereto annexed is also just and true; that there was then justly due to *Anthony Bacon*, from *Fielding Lewis*, of *Fredericksburg*, in the Colony of *Virginia*, the sum of 2,448*l.* 7*s.* sterling, the balance of the said account; that neither *Anthony Bacon*, nor any other person, by his order or direction, had received any part of the said sum, or any security or satisfaction therefor, to the best of the affiant's knowledge and belief, the affiant giving as a reason for his knowledge in relation to the subject, that he had kept the books of *Anthony Bacon*, and been conversant with his trade and business for more than eight years then last past. The first and principal account of these items are thus stated:—

" 1769, *December* 31st. To balance of account cur- " rent, as per account rendered and *agreed*, 1,897*l.* " 13*s.* 5*d.*"

" 1771. To do. of slave account, as per account current " rendered and *agreed*, 2,565*l.* 6*s.* 6*d.*"

Then follow a few other items for premiums of insurance, amounting to 28*l.* 6*s.* 3*d.* and a charge of 530*l.* 19*s.* 4*d.* being a balance taken from an interest account, in which interest was charged on the several items of *debit* down to the 31st of *January*, 1773, and credit given by interest on the several payments to the same period. After entering these payments to the credit of *Lewis*, (which amount to 2,683*l.* 19*s.* 1*d.*) a balance is struck of 2,338*l.* 6*s.* 5*d.* and carried to

in *Great Britain*, where, or near which, the person shall reside, and certified under the common seal of such city or town, or the seal of the office of such mayor or chief magistrate; and every affidavit or affirmation so made and certified, shall be of the same force, as if the persons had appeared and sworn or affirmed *viva voce* in open court, or upon a commission.

Sect. 4. The houses, lands, negroes, and other real estate, situate within any of the said plantations, belonging to any person indebted, shall be liable to all just debts and demands, and shall be assets, in like manner as real estates are by the law of *England* liable to the satisfaction of debts due by bond, and shall be subject to the like remedies in any Court of Law or Equity in the plantations, in like manner as personal estates. See *Cay's Abr.* tit. "PLANTATIONS," lxiii.

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a new account. Interest is then charged on that balance, thus compounded of principal and interest, to the 13th of *April*, 1775, amounting to 150*l.* 5*s.* 7*d.* and a credit of 40*l.* 5*s.* omitted in 1772, entered, leaving a balance of 2,448*l.* 7*s.* for which the suit was brought.

3. A letter of attorney from *Anthony Bacon* to *Joseph Court*, of *London*, then bound on a voyage to *North America*, bearing date the 13th of *April*, 1775, authorising him to collect this debt.

4. The will of *Fielding Lewis*, dated the 19th of *October*, 1781, and codicil thereto annexed, dated the 10th of *December* following. To his wife, his six sons, and his daughter's husband, he gives a very considerable real and personal estate; declaring that the portion given to his wife was in lieu of dowry, and that the provision made for his son *John*, was "in consideration that he should pay 1,500*l.* "sterling towards the payment of his debts." In the latter part of his will are the following clauses: "*Item:* It is my "will that my share in the *Dismal Swamp* Company, my "lands bought of *Marmaduke Naughflett*, in partnership "with General *Washington;* my lands bought of Dr. "*Wright* and *Jones*, in *Nansemond* County, in partnership "with General *Washington* and Dr. *Thomas Walker;* and "the three hundred and twenty acres of land in *Frederick* "County, bought of *George Mercer's* estate, be all sold at "the discretion of my executors; also my share in the "*Chatham* rope-walk, at *Richmond*, which money so rais-"ed, to be disposed of, as I shall hereafter direct. *Item:* All "monies arising from the sale of lands, loan-office certifi-"cates or otherwise, *after my note to* Mr. CHARLES CAR-"TER *and just debts are paid*, I give to my six sons before "mentioned, to be equally divided," &c. This will, with the codicil annexed, was exhibited for probate, to the Court of *Spotsylvania* County, on the 17th of *January*, 1782, and *John Lewis*, *George Lewis*, and *Fielding Lewis*, three of the executors therein named, qualified according to law.

At the hearing, in *May*, 1802, the Chancellor overruled the plea of the statute of limitations, filed by *John Lewis*, because it was proved by a witness that *John Lewis* himself, in the year 1789, acknowledged, that a considerable debt appeared by the testator's books to be due from him to the plaintiff's testator; "which acknowledgment resuscitated, if otherwise the statute would have antiquated the "said debt—a debt arising from such accounts as concern the "trade of merchandise, between merchant and merchant." And the cause being further heard on the same day, the Court, considering the account, with its appendages, to be sufficient evidence both of the justice and amount of the plaintiff's demand, especially when the letter of *Fielding Lewis* was compared therewith, and the circumstance that the defendants had not produced the original account supposed to have been transmitted to their testator, decreed against *John Lewis*, the sole acting executor, to be paid out of the estate of his testator to be administered, the sum of 2,488*l.* 12*s.* lawful money of *Great Britain*, equal to 3,318*l.* 2*s.* 8*d.* current money of this Commonwealth, together with the costs, &c. The plaintiffs prosecuting no further, at present, against the other defendants, liberty was reserved to the plaintiffs to reinstate their demand against them.

At a subsequent day of the same term, execution of the above decree was suspended as to 483*l.* 7*s.* and the cause retained on the docket for the future decision of the Court in relation thereto. From the above decree, *John Lewis* appealed to this Court.

Wickham and *Williams*, for the appellant, contended, that there was no evidence before the Chancellor, which would warrant a decree for any definite sum. From the letter of *Fielding Lewis*, and the acknowledgment of *John Lewis*, his executor, it might be inferred, that there was a considerable balance due; but suppose the decree had been grounded on this evidence, it could only have been for a *considerable debt*.

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Besides, the acknowledgment of the executor could not be relied on to charge the estate of his testator.

The order directing the production of the books of *Fielding Lewis*, they contended, was wholly illegal. If the books had been the common property of the parties, the order might have been proper; but they were the private property of *Fielding Lewis*, contained his secrets, and no Court had the power to direct the production of them. The Court, indeed, might compel the executor to state what the books contained in relation to this particular subject. It was, however, unimportant in this case, because it appeared from the report of the commissioners that the books were burnt.

The cause having been set down for hearing on the plea of the statute of limitations, it must be taken to apply; as no special matter was replied to take the case out of the act. The circumstance relied on, of the acknowledgment of the executor, it has already been shewn, is inadmissible; and as to the fact stated, that the plaintiffs were *British* subjects, and out of this country, it cannot avail, unless it had been specially replied.

There was no legal proof of the justice of the account. The first and principal items were, "To *balance* of an account rendered and *agreed*." This *balance* and sum *agreed* must have been of an anterior date, and yet that has not been shewn. They must have been taken from *other* books, which are not produced. The Chancellor had mistaken the law in supposing this case to have been an exception in the act of limitations, on the ground of merchants' accounts; that applies only while there are running accounts, but ceases the moment the last item is entered.

According to the course of decisions in this country, this account would not be held to be sufficiently proved, even if there had been *depositions* taken in due form. But this was a mere *ex parte affidavit*, which was entitled to no weight in any Court.

It surely will not be contended, that the affidavit, in this case, is evidence, because the complainants are *British* subjects. The statute of 5 *Geo.* II. for the recovery of debts in *America*, may be binding on subjects of *Great Britain*, but not on citizens of the *United States*. At the first organization of the Federal Courts, it was solemnly decided, that the statute was not obligatory in this country; and the decision has been universally acquiesced in.

Botts, for the appellee. There is no question between the parties but that something considerable is due; the only doubt is, as to the amount. The complainants state the amount in their bill, and call on the executors of *Fielding Lewis* to say whether it be correct or not. One defendant answers, and says, "that the executors of *Fielding Lewis* "did not know that any thing was due to the testator of the "complainants." Of the knowledge of the other executors, he could not possibly be conusant. The deposition of *Simms* shews that the executor, who thus swears, had possession of the books and papers, and acknowledged that a considerable balance appeared to be due from his testator to *Bacon*. If he had answered the interrogatories in the bill, he must have stated the grounds on which he made the promise to settle that balance. A more evasive answer was never filed.

[Judge TUCKER. If the answer was considered evasive or defective, why did you not except?]

Botts. It would certainly have been most regular to except; but still the plaintiff may draw his inferences from the defects of the answer. In matters of account, too, it is not usual to insist on a very minute answer, where the cause may be regularly referred to a commissioner.

The apology of the executor, that the books of his testator had been burnt, ought not to protect him. He had once seen the account entered on those books; and when called on by the commissioners, he ought to have stated his best recollec-

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tion concerning it; instead of which, he roundly tells them that he cannot render any account.

The doctrine contended for on the other side, that the Chancellor had no right to order the production of the books, is in opposition to the settled practice in the Courts of *England* and of this country from the earliest period. These books were not merely private property. Both the creditors and legatees of *Fielding Lewis* had an interest in them. The executor is bound to pay the debts first, and then the legacies, consequently he is bound to disclose whatever he knows of the testator's affairs. Can it be presumed that the executor is allowed to keep such possession of the testator's books, as will enable him to commit a fraud on the creditors and legatees. In *Hook* v. *Ross*,(a) the principle is affirmed, that the defendant may be compelled to produce books which are not merely the private books of the party. *John Lewis* would not produce these books, or give any information of their contents, on the presumption that they would operate against him. The maxim, then, emphatically applies, *in odium spoliatoris omnia præsumuntur*;(b) and the executor may be presumed against to its full extent. There are many cases on this point; none, perhaps, exactly alike; but some carry the doctrine much further.(c)

(a) 1 *Hen. & Munf.* 310.

(b) *Princip. Leg. & Æquit.* 42.

(c) See 1 *P. Wms.* 730. 732. *Dalston* v. *Coatsworth.* 1 *Vern.* 207. *Childrens* v. *Saxby.* *Ibid.* 308. *East-India Company* v. *Evans et al.* 1 *Ch. Ca.* 292. *Gartside and others* v. *Radcliff and others.* *Hob.* 109. *The King and Lord Hunsdon* v. *The Countess Dowager of Arundel et al.*

The letter exhibited in proof of the account, indicated circumstances sufficient to establish the demand; but, if it should not be thought enough to carry the whole claim, there can be no question but that the value of the 3,000 bushels of wheat should be allowed. It is conclusive that he thought himself indebted to that amount.

As to the statute of limitations which has been relied on, it was not pleaded in time, and was filed without leave of the Court. The Chancellor, on application, ought not to have permitted the plea to be filed, against the justice of the case; nor will a Court of Equity, under such circumstances, apply the statute by analogy.(d) But even if the plea had been regularly filed, it could not avail; because the promise of the executor, which was made within five years before the suit was commenced, to look at the books of his

(d) 3 *Call*, 538. *Lomax* v. *Pendleton.*

testator and ascertain the balance, would take the case out of the statute.(*e*) This was, moreover, a foreign debt, as appears by the record; and it behoved the defendant to shew that *Bacon* was in *Virginia*, so as for the statute to run against him. But a complete objection to the operation of the statute is, that the testator, by his will, directs his debts to be paid; which has always been held to revive the debt in equity.

(*e*) 2 *Saund.* 64. a. *Williams's* note to *Hodsden* v. *Harridge.*

Monday, *October* 24, 1808. The Judges delivered their opinions.

Judge TUCKER. The object of this suit is to obtain payment of an account alleged to be due from *Fielding Lewis*, deceased, to *Anthony Bacon*, of *London*, deceased. The bill charges that on the 31st of *December*, 1773, the balance of 2,338*l.* 6*s.* 5*d.* was due from the former to the latter, as by an account annexed, which is prayed to be taken as a part of the bill. That *Lewis* died in 1782, seised and possessed of a large estate in lands, slaves, &c. That he devised sundry tracts of land to be sold by his executors for payment of his debts, and charged the real estate devised to his son *John*, who is also an executor, with the payment of 1,500*l.* sterling towards payment of his debts. Alleges that the executors have failed to sell those lands, and have also neglected to make any inventory of the personal estate, or to render any account of their actings and doings as executors. Interrogates them whether that sum was not due, or what other sum was, or remains due; and how the debt arose, and what each of them has *acknowledged* concerning the same, and the *time* of so doing. Prays a discovery of the assets, an account of the sales of the lands sold, and that if any remain unsold, that they may be sold; and for a general account, and for general relief. *John Lewis*, who admits himself to be the only acting executor, answers, that the executors "DID" not know that any sum of money was due to *Bacon* from their testator; an *equivocal* expression which certainly furnished good grounds for excepting to the answer, which, however, was not excepted to.

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Admits that his testator died, after making his will, possessed of a considerable real and personal estate, and particularizes sundry tracts, two of which they have sold for 1,350*l.* and the remainder are still on hand, as their supposed value could not be procured for them. That the amount of that sale, and the 1,500*l.* charged upon *John's* part of the estate, have been paid in discharge of debts due from their testator to sundry persons in *Virginia*. That he died possessed also of ninety-one negroes, and other personal property to the amount of ————, which were distributed agreeably to the testator's will. No regular account accompanies the answer, to which the plaintiffs replied generally. After which an amended answer was filed by leave of the Court, in which the executor, *John Lewis*, states, that since filing his former answer, he had discovered in an old pocket-book of his father, the following memorandum made with a pencil in his hand-writing. "Paid Mr. *Mercer* "for *Anthony Bacon*, 483*l.* 0*s.* 7*d.* *April* 1st, 1776," to which he refers, as a part of his answer.

Both the justice and amount of the plaintiff's demand, is, in the opinion of the Chancellor, clearly and sufficiently proved by the affidavit of one *John Deane*, a book-keeper to *Anthony Bacon*, annexed to the account, and made before the Lord *Mayor of London*, *April* 13th, 1775. And a letter from *Fielding Lewis* to *Anthony Bacon*, dated *January* 24th, preceding.

The two principal items in this account are thus stated; 1769, *December* 31st. To balance of account current as per *account rendered* and AGREED, 1,897*l.* 13*s.* 5*d.*

To ditto per slave account as per *account rendered* and AGREED, 2,365*l.* 6*s.* 6*d.*

The letter from *Lewis* makes no mention of the amount of his debt, but certainly acknowledges one in terms which shew it to have been very considerable; yet without affording any data by which any conjecture can be formed of the sum.

This affidavit, on which the Chancellor has founded his decree, was made near seventeen years before the com-

mencement of this suit, in another country, and without notice to the party sought to be charged thereby. Consequently, according to the decision in *Blincoe* v. *Berkeley*, (1 *Call*, 405.) it was wholly inadmissible ; there being no proof that *F. Lewis* ever acknowledged the justice of the account thereto annexed, or promised payment of *that* account, or that the same was ever seen either by himself, or either of his executors, previous to the commencement of this suit. *Fielding Lewis's* letter furnishes no such evidence, because it was written *before* this affidavit was made. Nor does *Charles Simms's* deposition mention that he shewed *that* account, or any other to the executor, *John Lewis*. The affidavit, and the account annexed, which must be taken as part of it, are wholly unsupported by any subsequent or collateral circumstance, or testimony, and therefore, ought to have been rejected as evidence, for the reasons before mentioned. But, further, there is intrinsic evidence in the account itself, to prove that *this* account was not the *best* evidence that could be had, inasmuch as those two items are charged as balances of *other* accounts *rendered* and AGREED. These accounts, so alleged to have been *agreed*, ought to have been produced, and the agreement thereto proved as alleged. Had this been done, the evidence arising out of *Fielding Lewis's* letter, would have had the effect, which the Chancellor erroneously imputes to it, of corroborating the plaintiff's demand. Whereas, being written several months before the affidavit was made, and in a different quarter of the globe, and containing no mention of any specific sum acknowledged to be due, it cannot be supposed to refer to any matter therein contained. The cause was not ripe for a final hearing and decree, upon this evidence ; *Fielding Lewis's* letter certainly affords sufficient grounds to believe that a very considerable debt was, at the time he wrote it, due from him to *Anthony Bacon ;* but furnishes not the least evidence by which the Court could ascertain the amount. At law, if an executor plead *plene administravit* in a suit founded upon an account, which is an admission of A debt ; or, if he even suffer judgment by default, or *nil dicit* to pass against him in such a case, yet

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must the plaintiff prove his account, or he shall recover only one penny damages.(a) I can discover no reason why Courts of Equity should be supposed so much more sharp-sighted than Courts of Law, as to be able, from *general* acknowledgments, to ascertain a determinate sum. Perhaps, indeed, it may be sufficient to establish a debt equal to the value of 3,000 bushels of wheat, but I am not altogether satisfied of that. In my opinion, the Chancellor, instead of proceeding to make a final decree upon this evidence, ought to have retained the cause for a year, to give the plaintiffs an opportunity of producing evidence, if they could, whereby the AMOUNT of the debt might be ascertained; and failing to do so, the bill should have been dismissed. That the account was not ascertained by a reference to *Lewis's* books, is imputable, in *part*, to the plaintiff's own neglect. The order for an account was made in *September*, 1795. The cause slept from that period till *March*, 1802, when other commissioners were appointed, who reported in *September* following, that they had called on *John Lewis*, the executor, for the purpose of settling his accounts of administration of the estate of his testator, when he informed them that it was *impossible* for him to make the settlement required, having on the 3d day of *April*, 1799, (near four years after the date of the first order,) lost all his books and papers, concerning that estate, as well as his own private books, by fire. No further steps appear to have been taken after this report.

But, even if this affidavit and account had been properly admitted as evidence in this cause, there are two manifest errors in the decree, which a bare inspection of the account will shew. The first is, that compound interest upon the balances stated as before mentioned, is not only charged in the account, but interest upon that compound interest, from the time of the institution of the suit, is given by the decree. The second is, that the decree is for 2,488*l.* 12*s.* the amount of the debit side of the account, instead of 2,448*l.* 7*s.* the amount of the balance apparent on the other side; which possibly may have been a mere clerical error in entering the decree; but is yet too important to pass unnoticed.

(a) 1 *Esp. N. P.* 142. and *Bull. N. P.* 140. cite 1 *Salk.* 296. *Shelly's* case. *Quarles* v. *Littlepage*, in this Court, *May* term, 1808, vol. 2. p. 401.

The decree not being final as to the 483*l.* 7*s.* alleged to have been paid to *Mercer*, for account of *Bacon*, no remarks are necessary, or would be proper upon that point.

We come now to consider a second, and that a very important point in this cause, as to the operation of the act of limitations.

Fielding Lewis, by his will, dated in *October*, 1781, appears to have bequeathed the whole of his slaves, stocks of horses, cattle and sheep, carriages, plate and household furniture, to his wife, his six sons, and his daughter's husband; as also a very considerable estate in lands, to those sons, and to his wife, the provision for whom is declared to be in lieu of her dowry. No mention is made of any provision for payment of debts, (except a charge of 1,500*l.* sterling upon the estate devised to his son, *John Lewis*,) until near the close of his will, we find the following clauses: "*Item:* It is my will that my share in the *Dismal Swamp* "Company, my lands bought of *M. N.*" [and several other tracts particularly enumerated,] "be sold, at the discretion "of my executors, which MONEY *so raised*, to be disposed "of as I shall hereafter direct. *Item:* All MONIES arising "from the *sale of lands*, *loan-office certificates*, or OTHER-"WISE, *after* my note to Mr. *Charles Carter*, *and just* "*debts are paid*, I give to my six sons before mentioned, to "be equally divided among them," &c. Under the term OTHERWISE, we may suppose he meant to include his outstanding debts, of which, in his letter to *Anthony Bacon*, he says there were not less than 5,000*l.* due at that time, and any other personsal effects not specifically bequeathed to his wife and children. It appears, I think, to have been clearly his intention to exonerate his slaves, and other specific legacies, from the payment of his debts; by the substitution of the 1,500*l.* charged upon the estate devised to his son, and the lands, &c. mentioned or comprehended within the meaning of these clauses. The executor, *John Lewis*, seems to have understood the will in this manner, and in his answer states that the same have been distributed agreeably thereto. After filing his answer, to which the

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plaintiff replied generally, and an amended answer, to which there is no reply, and after the deposition of a witness had been taken, and the cause set for hearing by the plaintiff's counsel, that defendant filed a plea of the act of limitations, in bar of the plaintiff's demand. And at a subsequent term the cause was heard, as to that defendant only, upon the bill, *plea*, answer, exhibits, and the examination of a witness; when the Court reserving to the defendant the benefit of his plea, at the final hearing, directed the account already noticed: and upon the final hearing of the cause, overruled the plea; and proceeded to make a final decree in favour of the plaintiffs. I must here observe, that the plea neither appears to have been filed with leave of the Court, nor was it replied to by the plaintiffs, as it ought to have been, if they could shew, as possibly they might, that they came within any of the exceptions in the statute of limitations.(*a*) The Chancellor, upon what grounds I cannot perceive, pronounced it to be a debt arising from such accounts as concerned the trade of merchandise between merchants. But there is no charge to that effect in the bill, nor any thing else in the record that shews it. Nor, that I recollect, was this point insisted on, or even mentioned in the argument here. Besides, if it were such an account originally, it had been long since settled and agreed; which takes it out of the exception.(*b*)

(*a*) 3 *Call*, 1. *Bogle* and *Scott* v. *Conway's Executors.*

(*b*) 3 *Bac. Abr.* 513. old ed. or 4 *Bac. Abr. Gwil.* ed. 477. tit. "*Limitation of Actions*," letter E. 1 *Vent.* 89, 90. 2 *Saund.* 124. *Webber* v. *Tivil*, cited 1 *Eq. Ca.* 304. *Watson* on *Partn.* 207, 208, 209. *Dublin.* ed. 2 *Ves.* 400. *Welford* v. *Liddel.* See also 2 *Saund.* 127. note (6) by *Williams.*

The objections to the plea insisted on here, were, first, that it was a foreign debt, and the plaintiffs foreigners. This, if true, ought, nevertheless, to have been specially replied, for the reasons already mentioned. Secondly, that *Fielding Lewis's* letter was an *assumpsit* within the times limited by our statute. This is not correct. Thirdly, that the executor, *John Lewis*, acknowledged the debt to *Charles Simms*, as agent for the plaintiffs, which took it out of the statute; and fourthly, that the debt, if barred by the statute, was nevertheless revived by that clause in the testator's will, which speaks of the payment of his just debts. The two last remain to be considered.

Charles Simms deposes "that in 1789, the claim was put "into his hands for collection, soon after which, he called "on the defendant, *John Lewis*, and informed him that he "had the collection of the said debt, and in the course of "conversation on that subject, the defendant acknowledged "that there appeared from his father's books to be a con- "siderable debt due from his father's estate to *Anthony* "*Bacon*, and promised to call on the deponent in a day or "two, in order to ascertain the balance, but failed to do "so." That a very slight acknowledgment by the party himself who contracts a debt, will take it out of the statute of limitations, is admitted. But this Court, in the case of an executor, seems to have thought there was some distinction. In the case of *Henderson* v. *Foote's* executors,(*a*) the plaintiff gave in evidence, that *John Fitzhugh*, the defendant, frequently said that he understood there was a considerable debt, of between two and three hundred pounds, due from *Foote's* estate to the plaintiff; that he believed the debt to be just, and found the account in the house, and was willing to pay his part of it; that the legatees and sons of *Foote* were determined to take every advantage, &c. The President, in delivering the opinion of this Court, said, "We are of opinion that, in this case, the loose con- "versation of *Fitzhugh*, *even if he had been executor*, in- "stead of being only the husband of the executrix, would "*not* have operated, either as a *new* promise, or as an *ac-* "*knowledgment so as to revive the debt.*" That case appears to me infinitely stronger than the present, as to this particular point. And there seems to be good reason why such a slight acknowledgment as might revive a debt against a *debtor himself*, should not receive the same liberal construction against an executor or administrator, who may be well persuaded of the justice of the debt, barred by the act, and yet not have assets to pay it; or, not without making themselves chargeable with a *devastavit*. And it is not improbable that the first clause of the statute of frauds and perjuries, was intended to protect executors from being made

(*a*) 3 *Call* 251.

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chargeable as for a *devastavit*, upon such slight grounds of a promise to pay the debt of their testator.

But, the last ground of exception to the plea, to wit, that if the debt were barred by the statute, it was nevertheless revived by those clauses of the testator's will, which relate to the payment of his debts, still remains to be considered.

It seems to be doctrine pretty well established in equity, that if a testator direct in his will that all his just debts shall be paid, and charge his lands with the payment, debts barred by the statute of limitations are thereby revived.(*a*) But in all these cases *lands* were clearly charged with the debts, which made the executors *trustees* as far as that fund went. In 3 *Peere Williams*, 89. the reporter makes a *quære*, "whether if a man were to devise his *personal* estate "in trust to pay his debts, would this, *as creating a trust*, "revive a debt barred by the statute; or would not such "devise be merely void, as saying no more than the law of "course says, viz. that a man's personal estate shall pay his "debts." My own opinion is, that it would not. For suppose he were to direct that simple contract debts, particularly noticed, should be paid before any bond, or debt of greater degree: could a Court of Equity change the course which the law has established, and order such debts to be first paid? The personal estate is the *legal* fund for payment of debts, and which, as against *creditors*, unless they please, the testator cannot exempt, although as against a devisee of his land he may, by appropriating his lands, if sufficient, for payment of his debts. Where a testator gives his personal estate to his executors, he does no more than the law does, and it is like giving lands to the heir, which is void.(*b*) Such a devise, therefore, would not create a trust, which is, emphatically speaking, a mere creature of a Court, which claims to direct a man's actions according to conscience; because, the law has clearly and fully prescribed the course which an executor is bound to

(*a*) 1 *Salk.* 154. *Anonymous.*(1) 2 *Vern.* 141. *Gofton* v. *Mill.* 1 *Eq. Ca.* 304. 2 *Eq. Ca.* 579. 2 *P. Wms.* 373. *Blakeway* v. *Earl of Strafford.* 3 *Bro. Parl. Ca.* 305. S. C. 3 *P. Wms.* 84. 89. *Jones* v. *Lord Strafford. Ibid.* 91. *Harris* v. *Ingledew. Ibid.* 358, 359. *King* v. *King and Ennis.* See also *Amb.* 231. *Oughterlony* v. *Earl Powis*, where *Lord Hardwicke* avoided the question; but seems clearly to be of opinion against a *particular* debt being revived by such a trust as to lands: and 3 *Atk.* 107. *Lacon* v. *Briggs.*

(*b*) 3 *P. Wms.* 328, 325. per Ld. Ch. *Talbot*, in *Hazlewood* v. *Pope.*

(1) See a valuable note to this case in *Evans's* edition of *Salkeld.*

pursue: his conscience, therefore, is bound by the law, and not by the will of the testator in any matter which may be incompatible with the law. But a trustee is bound to pursue the directions of him by whom the trust is created. An executor, therefore, is only to be regarded as a trustee in regard to such funds, committed to his management, as do *not* come under the character and description of *legal assets*, or personal estate. Over these a Court of Equity may exert its controul. It is, however, very true that the doctrine upon this head, as laid down in *Andrews* v. *Brown et ux.*(*a*) is that if a debtor make his will and direct that all his debts shall be paid, or made any provision for the payment of his debts in general; that would revive such debt, and bring it out of the statute, so that his executors would be liable to the payment of that debt, among the rest. But this seems only to be the reporter's own opinion; for that point was not in any manner before the Court.

(*a*) *Prec. in Cha.* 385.

The testator in the present case having disposed of, probably, the *whole* of his visible *personal* estate, among his wife and children; and the executor having, as he has confessed in his answer, distributed the same according to the directions of his will; the testator having, moreover, substituted a considerable *real* fund in lieu of the personal, for payment of his just debts; a creditor having a demand against his estate, had it in his choice to pursue either of three modes, to obtain payment of his demand. *First*, against the executors, at law, who could not discharge themselves from their liability, by shewing that they had distributed the slaves, and personal estate, according to the directions of the testator's will; but on the other hand, they were at full liberty, I conceive, to avail themselves of the lapse of time, by pleading the statute of limitations.

Secondly. They might in equity pursue the *personal* estate in the hands of the legatees;(*b*) in which case, they also might have availed themselves of the statute; or,

(*b*) 1 *Wash.* 312. *Burnley* v. *Lambert.*

Thirdly. They might have brought a suit in equity, as the plaintiffs have done, against the executors, as *trustees*, in respect to the *lands* directed to be sold for payment of

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debts; in which case, according to the established doctrines of Courts of Equity, that trusts are not within the statute of limitations,(*a*) it appears to me the defendant is precluded from the benefit of his plea, so far as relates to his charge of 1,500*l.* sterling, upon the lands devised to *John Lewis*, and as relates to the other lands directed to be sold for the payment of the *testator's* debts; but that the *personal* estate, not being properly the subject of a *trust* for the purpose, the plea is good as to that.

(*a*) 1 *Eq. Ca.* 303, 304. 2 *P. Wms.* 145. *Norton* v. *Turvill. Ibid.* 373. *Blakeway* v. *Earl of Strafford.*

The testator so far from creating, or intending to create a *trust* in respect to this part of his estate, having disposed of it to his family, and substituted another fund in its stead.

For these reasons I am of opinion that the Chancellor's decree ought to be reversed, and the cause to be sent back with directions to be there proceeded in according to the principles which I have already expressed.

Judge ROANE. The appellees in this case, having set down the cause for hearing, without excepting to the answer, which is evasive, and does not come up to the requisitions of the bill, will perhaps suffer by their injudicious course of proceeding: for I have no doubt but that a much larger debt was due from the testator of the appellant than the appellees have established by their testimony. This is entirely manifest from the whole tenor of the letter of *January* 24th, 1775: but, inasmuch as that letter does not ascertain the *ulterior* sum due to the appellees' testator, and as there is no other competent evidence to fix it, we must be content with decreeing the value of the three thousand bushels of wheat, spoken of in that letter, with legal interest; and as the parties have consented that the execution of the decree appealed from, should be suspended until the further order of the Court, as to the sum of 483*l.* 0*s.* 7*d.* with interest from the 1st of *April*, 1776, so as to let in the inquiry whether that sum (mentioned in the amended answer) was paid, or not, on account of the debt in question, I am of opinion that that inquiry should also be made, and, if found in the affirmative, that a deduction should be

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made thereof from the sum decreed: both inquiries to be made by an issue to be directed by the Court of Chancery.

As to the point of the act of limitations, it is unnecessary to inquire into the effect of the confession or acknowledgment of *J. Lewis*, proved by *Simms's* deposition. That point, as it relates to an acknowledgment by an EXECUTOR, is important, and will require due consideration. It is *unnecessary* to be decided, because I am clearly of opinion that the testator himself has waived the benefit of the statute of limitations, by creating a fund by his will, (from the sale of lands,) for the payment of his "*just debts.*" The doctrine on this subject, after some controversy in the Courts of Equity, seems at length to be fully settled; and goes on this ground, that a debt barred by the statute of limitations is, nevertheless, a *debt*, though the act takes away the remedy for the recovery of it.(*a*)

It has been established, (and, if it has not, it ought to be,) that an advertisement, by a debtor, notifying all those who have any just debts owing to them that they may apply at such a place and get payment, is such an acknowledgment as will bring a debt out of the statute. That case is analogous to the present, in which the testator manifests his desire that his just debts should be paid, and provides a fund for the purpose: a debt which is originally a *just* debt, does not cease to be so, in consequence of the lapse of five years since its creation.

(*a*) 5 *Burr.* 2630. *Cowp.* 548. per Ld. *Mansfield* in *Trueman* v. *Fenton.*

It is supposed by the Judge who preceded me, that a debt *revived*, by creating a trust-fund from real property, for its payment should be *confined* to that fund. I have found no case to warrant this restriction, and can see no ground on which it can be justified; at least where the created fund is additional to, and not in exclusion of the personal estate, which is the proper and natural fund for the payment of debts, and is never construed to be exonerated, but by *express* words, or a plain and necessary implication.

Where the real fund is *substituted* for the personal, and in lieu thereof, it might be *argued*, that there is not an ab-

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solute and unqualified waiver of the statute, but only a *conditional* one; and that, therefore, a party claiming the benefit of the waiver, can only claim it on the terms imposed by the testator; viz. by abiding by the exemption of the personal estate. In the case, however, of an *additional* fund, the waiver is without condition, and, the bar interposed by the statute being at an end, the creditor is restored to his original situation, and may seek payment as formerly, out of the personal estate.

The above *distinction* would seem to be reasonable; but I have met with no cases which have taken it, and I give no decided opinion, respecting it. I think it clear, however, that in the case of an *additional* fund, the creditor is not ousted of his recourse against the personal estate.

The question then recurs, is the fund from the real estate in this case, additional to, or in exemption of the fund of the personal estate? I infer the former. There is no express declaration that the personal estate is to be exempted; nor is there a strong and necessary implication to that effect; in which case, of a necessary implication, it is held that the personal estate should be specifically bequeathed to others.(a) It is true it appears that negroes and other personal estate, are bequeathed by the testator; but it does not appear that *all* the personal estate is bequeathed, either by particular legacies, or a general and sweeping bequest of the residue. What, then, is this but the ordinary case; for in most wills, the personal estate, or a great part thereof, is particularly bequeathed away; and yet that circumstance alone, does not operate an exemption from the payment of debts: the legacy is taken subject to the payment thereof. In this case, on the other hand, so far from there being an express or necessary exemption of the personal estate, a part thereof, viz. "monies arising from the sale of loan-"office certificates, or otherwise," is expressly recognised and relied on for the payment of the debts. This case, therefore, is too naked for us to infer an exemption of the personal fund, a fund which, between a debtor and his creditors, is not lightly to be withdrawn from the payment

(a) *Ambler's Rep. 37. Inchiquin v. Obrien.*

of the debts. I am, therefore, of opinion that the will in question amounts to an acknowledgment of the debt in controversy, and to a waiver of the statute of limitations: the consequence of which revival is, that the appellee's testator can charge the personal estate by the general law on this subject, and also charge the trust-fund, created by the will, by virtue of the provisions thereof.

The decree, however, is only against the goods, or personal assets of the testator: it ought further to have provided a recourse against the real assets, in the event of the personal assets proving deficient. It is true, the decree is not appealed from by the *appellees;* but that probably arose, both from their confidence in the sufficiency of the personal fund, and from the consideration that their adversary had appealed. The Court, however, ought to give a decree commensurate with the rights of the parties, and a correction, as to this point, ought now to take place. As to the objection that the personal estate has been *distributed*, there is nothing in it. The appellant had reason to know, and did know, from the books of his testator, that this debt was due; and he ought not to have distributed the estate before that debt was satisfied: besides, we are not told *when* the estate *was* distributed: and, although it was distributed, yet, until the whole amount is *applied*, the executor is considered as having *assets*, for the due production of which, when necessary, he has taken bond from the distributees.

Upon the whole, I am of opinion, that the decree should be reversed, and one rendered in lieu thereof, somewhat to the following purport: "This Court is of opinion that the "decree of the High Court of Chancery is erroneous, in "this, that there is no adequate testimony in the cause "warranting the same to the extent for which it is render-"ed; and also in this, that it does not provide a recourse "for the appellees, against the *real assets* set apart by the "will of the testator, *F. Lewis*, for the payment of his "debts, in the event of the personal assets proving insuf-"ficient for the payment of the debt in controversy: and "this Court proceeding, &c. is of opinion, and doth ar-

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"cordingly decree, that an issue be made up and tried, under "the direction of the Court of Chancery, to ascertain the "value, at *Fredericksburg*, in this State, of 3,000 bushels of "merchantable wheat when manufactured into flour, as of "the date of the 24th of *January*, 1775, which sum, with "legal interest from the said day until the 27th of *May*, "1803, ought to be decreed to the appellants; and that the "same be also charged upon the real assets created by the "will of the said *Fielding Lewis*, in the event of the per-"sonal assets proving insufficient, in such manner, and "under such conditions and restrictions, as the said Court "of Chancery shall prescribe and direct: Provided never-"theless, that if the appellant shall make application there-"for, within a reasonable time, to be limited by the said "Court, an issue shall be also directed to ascertain whether "any and what payments have been made on account of the "debt aforesaid, since the date aforesaid, and at what time "or times respectively; and, if any such be found to have "been made, that the several and respective amounts there-"of, with legal interest thereupon from the respective "times when made, until the said 27th of *May*, 1803, be "deducted from the sum hereby directed to be decreed: "and provided also, that there shall be deducted, in both "instances, (that is, both with respect to the sum hereby "directed to be decreed, and in respect of the payments "which may be found to have been made, on account there-"of, as aforesaid,) such and so much of the interest there-"upon, as may have accrued between the 19th of *April*, "1775, and the 19th of *April*, 1783; that, in the event of "such issue being required, within the time to be prescrib-"ed, as aforesaid, the decree before directed to be render-"ed be suspended, until the result thereof; and at the next "ensuing term of the Court of Chancery, or as soon as "may be thereafter, be permitted to take effect for the "whole, or a part of the sum hereby directed to be de-"creed, as the case may be: and, in the event of the whole "of the said sum, with interest as aforesaid, being found

"to have been paid, that then, and in that case, the bill of "the appellees to stand dismissed with costs."

Judge FLEMING. After a careful examination of the record in this cause, there appeared to me only one difficulty of importance, and that is, whether, and how far, the act of limitations, pleaded by the defendant, is properly a bar to the plaintiffs' demand, taking into consideration the trust created by the will of the testator, *Fielding Lewis*, for payment of his debts.

In examining the cases (as far as I have had access to books) where a trust created by will, for payment of debts, lets in such as are otherwise barred by the statute of limitations, there seems to have been some contrariety of opinions on the subject; but the result, upon the whole, appears to be, (and so it was said by Lord *Hardwicke*, in the case of *Lacon* v. *Briggs*, 3 *Atkins*, 107.) that "*there must* "*be a direct admission of the debt*, to take it out of the sta- "tute of limitations, though there have been several cases "at law, where this has not been held sufficient, unless it is "likewise attended with *an express promise to pay*;" but that (said his Lordship) may be rather too hard: and it has been truly said, that where *real estate* has been affected by such stale debts, it is in a plain and clear case, and not to be charged with a debt that must depend upon an account to be taken. "I am of opinion," said Lord *Hardwicke*, "*that* "*if I should decree an account to be taken in this case*," the account being of 17 years standing, "*I should make one of* "*the worst precedents that a Court of Equity can make, for* "*disturbing the peace of families.*"

There is, however, in the case before us, an acknowledgment under the hand of the testator, *Fielding Lewis*, in a letter to *Anthony Bacon*, (already noticed,) that he was manufacturing 3,000 bushels of wheat, the proceeds of which he promised to remit towards discharging his debts; and so far, the account between them seems to have been established; and to that amount, the trust, created by the will, lets

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in the debt otherwise barred by the act of limitations: but, in my conception, the plaintiffs must resort to the fund created by that trust for payment, as it is upon that ground, and upon that only, that they can be let in for any part of the debt. And I would still leave a door open to the plaintiffs to establish a further demand against the estate, by any legal or equitable means they may think fit to pursue, so far as there may yet remain unappropriated, any fund arising out of the said trust estate, but no further.

Judge FLEMING presented the following decree as the result of the opinions of the Judges.

This Court is of opinion that the decree is erroneous in this, that the Chancellor admitted an account stated, and an affidavit annexed thereto, to be evidence in this cause to charge the deceased *Fielding Lewis's* estate, with the amount of that account, although that affidavit was made in a foreign country, without the knowledge of the party, sought to be charged thereby nearly *seventeen* years before the commencement of the appellees' suit; and, although there is no proof that the said *Fielding Lewis* ever acknowledged the justice of that account, or promised payment thereof, or that the same was ever seen either by himself, or by his executors, or either of them, previous to the institution of the present suit, and although the two principal items therein, amounting respectively to the sum of 1,897*l.* 13*s.* 5*d.* and 2,565*l.* 6*s.* 6*d.* are severally stated as balances of other accounts, rendered and *agreed;* which accounts, so alleged to have been agreed, ought to have been produced, if still in existence, and proved as alleged; as also in this, that compound interest is charged in the account so stated and exhibited, and interest is also allowed by the decree upon that compound interest, from the time of the institution of the appellees' suit; as also in this, that the decree pronounced is for the aggregate amount of the account so stated, to wit, 2,488*l.* 12*s.* instead of 2,448*l.* 7*s.* the balance stated to be due, even if that account had been proper evidence in this

cause; therefore the said decree is reversed with costs: and this Court proceeding to make such order and decree as the said Superior Court of Chancery ought to have made, is of opinion, that the letter of the said *Fielding Lewis* to *Anthony Bacon*, dated the 24th day of *January*, 1775, acknowledging a debt due from him to the said *Anthony Bacon* in such terms, as shew it to have been very considerable, but without specifying the amount thereof, of which there is no evidence, affords sufficient reasons for retaining the cause in the said Superior Court of Chancery, for a year, or such further time as the said Superior Court of Chancery may think reasonable; to be further proceeded in, in such manner as the parties may be advised, for their benefit; and, on such further proceedings to be had in the cause, *a majority of the Court* is of opinion, that the estate of the said *Fielding Lewis* is to be charged with the value of three thousand bushels of wheat, which, in the said recited letter, he said he was manufacturing into flour, and promised to apply the proceeds thereof towards discharging the said debt, the value, or proceeds of which, to be ascertained in such manner as the said Superior Court of Chancery shall direct; and further, to inquire whether the same, or any, and what part thereof, hath been by the said *Fielding Lewis* so applied. And *a majority of this Court* is further of opinion, that the benefit of the appellant's plea of the act of limitations was, and is, proper to be reserved to him until the final hearing of this cause; and if, upon that occasion, it shall appear that there remains any surplus of the funds appropriated by the testator, *Fielding Lewis*, specially to the payment of his just debts, the said plea ought not to operate or be admitted by the said Court of Chancery to bar the appellees from a decree, for so much thereof as shall appear to remain in the hands of the appellant, after payment of other just debts of his testator: but as the appellees have not shewn themselves to be within any of the exceptions contained in the act of limitations, the appellant will be entitled to the benefit of the said act, in bar of a recovery against him, beyond the balance which may so appear, upon an account to be taken as to those funds, in such manner as

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the said Superior Court of Chancery shall direct. It is therefore decreed and ordered, that the cause be remanded to the said Superior Court of Chancery, for further proceedings to be had therein, agreeable to the foregoing opinion.

Monday, October 24, 1808. The following decree, in substance, was entered.

The *whole Court* was of opinion, that the decree of the Chancellor was erroneous, in this, that he admitted an account stated, and an affidavit annexed thereto, to be evidence in the cause, to charge the estate of *Fielding Lewis*, deceased, with the amount of that account, although that affidavit was made in a foreign country, without the knowledge of the party sought to be charged thereby, nearly seventeen years before the commencement of the appellees' suit; and although there is no proof that the said *Fielding Lewis* ever acknowledged the justice of that account, or promised payment thereof, or that the same was ever seen either by himself, or by his executors, or either of them, previous to the institution of the present suit; and although the two principal items therein, amounting respectively to the sum of 1,897*l.* 13*s.* 5*d.* and 2,565*l.* 6*s.* 6*d.* are severally stated as *balances* of other accounts *rendered* and *agreed*, which accounts so alleged to have been agreed, ought to have been produced, if still in existence, and proved as alleged. As also in this, that compound interest is charged in the account so stated and exhibited; and interest is allowed by the decree upon that compound interest, from the time of the institution of the appellees' suit: as also in this, that the decree pronounced is for the aggregate amount of the account so stated, viz. 2,488*l.* 12*s.* instead of 2,448*l.* 7*s.* the balance stated to be due, even if that account had been proper evidence in the cause.

Decree reversed, with costs, &c. And the Court proceeding to pronounce such decree as the Superior Court of Chancery ought to have pronounced, the *whole Court* was

of opinion, that the letter of *Fielding Lewis* to *Anthony Bacon*, dated the 24th of *January*, 1775, acknowledging a debt due from him to the said *Bacon*, in such terms as shew it to have been very considerable, but without specifying the amount thereof, of which there is no evidence, affords sufficient reason for retaining the cause in the Superior Court of Chancery for a year, or such further time as the said Court of Chancery may think reasonable, to be further proceeded in, in such manner as the parties may be advised for their benefit: and in such further proceedings to be had in the cause, a *majority of the Court* is of opinion, that the estate of the said *Fielding Lewis* is to be charged with the value of 3,000 bushels of wheat, which, in the said recited letter, he said he was manufacturing into flour, and promised to apply the proceeds thereof towards discharging the said debt; the value or proceeds of which to be ascertained in such manner as the said Court of Chancery shall direct; and further, that the said Court of Chancery direct an inquiry to be made, whether the same, or any, and what part thereof hath, by the said *Lewis*, been so applied. And a *majority of the Court* is further of opinion, that the benefit of the appellant's plea of the act of limitations was, and is proper to be reserved to him, till the final hearing; and if, upon that occasion, it shall appear that there remains any surplus of the *funds appropriated by the testator*, FIELDING LEWIS, *specially to the payment of his just debts*, the said plea ought not to operate, or be admitted by the said Court of Chancery, to bar the appellees from a decree for so much thereof, as shall remain in the hands of the appellant, after payment of other just debts of his testator: but as the appellees have not shewn themselves to be within any of the exceptions contained in the act of limitations, the appellant will be entitled to the benefit of the said act, in bar of a recovery against him, beyond the balance which may so appear upon an account to be taken as to those funds, in such manner as the said Superior Court of Chancery shall

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Lewis's Executor v. Bacon's Legatee.

direct. The cause was remanded to the Superior Court of Chancery, for further proceedings, agreeable to the foregoing opinion and decree.

Monday, October 24, 1808.

Robert and Samuel Terrell *against* Page's Administrator.

It is a good ground for arresting judgment and awarding a *repleader* after a general verdict for the plaintiff, that there were two counts in the declaration; the one, beginning in *covenant*, and concluding in *case*; and, the other, *entirely in case*. To which, the defendant pleaded only, "that he had not broken the covenants." (*a*) See 2 *Stra.* 814. *Moore* v. *Jones.* 2 Lord *Raym.* 1536. S. C.

THIS was an appeal from a judgment of the District Court of *Fredericksburg*.

Robert and *Samuel Terrell* brought an action of *covenant* upon a written agreement, but not under seal,(*a*) between *Mann Page*, of the one part, and *Robert* and *Samuel Terrell*, of the other, (as mentioned in the deed,) but signed only by *Mann Page* and *Samuel Terrell*, whereby "*Page* did bind himself to *let* and *grant* unto the said *R.* and *S. T.* a "*lease* of his mill, to have and to hold the same from *one to* "*three years*, as *they may chuse*;" "and further did bind "himself to keep the said mill in good order during the "above mentioned LEASE." And the plaintiffs say that, under the agreement aforesaid, they were possessed of the said mill for *one* year, and fully complied with every part of the aforesaid agreement, but that the defendant did not comply therewith on his part, for that the dam was broke by a violent flood of rain, and the defendant, although requested to repair it, had refused so to do, and the plaintiffs were obliged to do it, at the expense of 45*l.* whereby he became liable to pay the same to them, and assumed to pay the same, when thereto required. Then there follows a count for money laid out and expended to the defendant's use, which he assumed to pay. Nevertheless, not regarding his promises and undertakings so made as aforesaid, he had refused to pay the plaintiffs, &c. The defendant, after taking over of the agreement, pleads, "that he hath not broken