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ARGUED AND ADJUDGED

IN THE

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OF

VIRGINIA.

BY DANIEL CALL.

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

BY LUCIAN MINOR,

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LOMAX *v.* PENDLETON.

Wednesday, July 7th, 1790.

1. At what time the act of limitations begins to run.
2. The drawer of a protested bill of exchange conveys all his estate to one of two joint endorsers, in trust to pay all the drawer's debts. That endorser sells the property to pay the debts, advancing for some of them out of his own pocket, and giving his own bond for the amount of the protested bill. On settling up the trust fund, it proves inadequate to re-pay him what he had paid on the bill: and, twelve years after giving his bond, but only three years after the settling up of the trust-fund, he sues his co-endorser in chancery for his half of the debt; who pleads the act of limitations. HELD,—The Act began to run only from the settlement of the trust fund; and so was no bar.*
3. A trustee retaining money in his hands for an unreasonable length of time, shall pay interest.

This case was adjourned from the High Court of Chancery. The suit was instituted in the County Court of Caroline by Mr. Pendleton to recover contribution from Lomax as a co-surety, and the bill stated that Thomas Wyld, in order to discharge a debt due to Lidderdale & Co., drew on the first of May, 1753, a set of bills on Messrs. Chauncey, Barclay & Co., merchants of London, to whom he had before consigned a quantity of ginseng. The complainant and Lunsford Lomax, at the request of the said Wyld, agreed to become endorsers of the said bills; and, therefore, the bills were drawn in their favor.

The complainant endorsed for Wyld other bills to a considerable amount. In June, 1753, he received information that the bills would be protested; and, thereupon, he obtained a conveyance of the whole estate of the said Wyld to himself, in trust for the payment of his debts. The bills were returned protested, and payment of them demanded from the complainant, who, in the year 1753, sold the whole estate on six months credit, and set industriously about the collection of the debts. He discharged the debts due from Wyld, in the order of priority mentioned in the deed, as the money came to his hands, and as he could spare it from his own estate. The whole debts were paid by the month of October, 1762. It then appeared

* The Act begins not to run against a decedent's debt, till the qualification of his executor or administrator. *Haneford* v. *Elliott,* 9 Leigh, 79.

Where assignee of a bond was defeated in his suit *vs.* the obligor. by set-offs against the assignor. HELD,—The act began to run in assignor's favor, only from the time of judgment. *Scates* v. *Wilson, &c.,* id. 473.

In *assumpsit* for breach of contract in making a turnpike, defendant pleaded the statute of limitations. Plaintiff replied *fraud and deceit in the work,* not discovered till within six years before suit HELD,—A good replication, 3 Mass. Rep. 201.

that his payments had exceeded his receipts £402 16s. 9d.; which added to the expenses of sales and collection, left him in advance for Wyld the sum of £531 1s. 7d.; which must fall on the bills endorsed by the complainant and Lomax, as that was the last mentioned debt in the said deed. *In support of*
[539] *this statement an account ready to be produced was referred to by the bill; which account, when produced, shewed the trust estate not to have been closed until* 1765.

The bill further states, that, being much perplexed with business, the complainant did not apply to Lomax until some time in the year 1766; when he transmitted to him an account claiming a moiety of the money paid by him on the bill endorsed by them both, with interest from October, 1762. Payment was refused; and this suit was instituted in 1768.

The defendant pleaded the act of limitations; and, in his answer, stated that he did not recollect, or admit having endorsed the bill; that he had no notice of its protest or of its payment until 1766; and that he knew not whether the complainant had, or had not, expended the trust estate; or whether he had paid any part of the bill.

The accounts were referred to Commissioners; and the suit, which abated by the death of Lomax, was revived against his administrator, Thomas Lomax. It appeared on the report that Lunsford Lomax had, with the complainant, endorsed the bills; that the trust estate was exhausted; that the complainant had advanced the money stated in his bill; that the last receipts of the money had been in October, 1764; and that the last payment was in 1765.

It likewise appeared on the report that money had sometimes remained in the hands of the trustee which was not immediately applied in payment of the debts; but the Commissioners had not charged the trustee with interest thereon, although the debts carried interest. A larger sum was reported to be due than the plaintiff had claimed.

[540] It further appeared that the bill of exchange was taken up by the complainant, and his own bond executed for the amount thereof in November, 1756.

In 1786 the County Court of Caroline over-ruled the plea, and decreed the defendant to pay to the plaintiff a moiety of the money, stated in the report to have been paid by the plaintiff for Wyld on the said bill; from this decree the defendant appealed to the High Court of Chancery, by which Court the cause was adjourned to the Court of Appeals, where it was argued before Judge Lyons, Judge Carrington and Judge Fleming, by Nelson for the appellant, and Taylor for the appellee.

NELSON contended that the decree of the County Court was erroneous, 1. Because the complainant had no right to come into Chancery for contribution; 2. Because the suit was barred by the act of limitations; and 3. Because the account was erroneous.

1. The complainant had no right to come into Chancery for contribution, because they were not joint securities. The bill was not jointly endorsed by them, but separately, with the name of Lomax above that of Pendleton. Consequently Pendleton might have maintained an action at law against a prior endorser; and, having a complete legal remedy, his application to a Court of Equity is not proper.

2. The suit is barred by the act of limitations.

The right of action accrued in November, 1756, when the appellee took up the bill of exchange and executed his own bond for its amount. Without a question the bond discharged the bill; and, consequently, gave to Pendleton the same right to institute this suit thereon which he now possesses. If the right of action then accrued, the act of limitations then commenced its operation; and, as it will unquestionably run against a bill of exchange, the plaintiff's action on this bill was barred before the suit was instituted. [541]

To this operation of the act of limitations there can be no objection but the deed of trust. But the answer to this objection is, that the appellant was not a party to the deed; nor was he even named in it. The deed, therefore, although it might furnish an equity against the plaintiff could not arrest the act of limitations.

3. The account is improper.

The arrangement for the payment of the debts is, under the circumstances of the case, inadmissible. Pendleton, without consulting Lomax, takes to himself a deed of trust for the whole property of Wyld. In this deed those bills which he had endorsed singly are named, and the payment of that which was endorsed by Lomax is postponed, that the loss, should any exist, might fall on Lomax.

The account is erroneous too, in giving to the plaintiff more than he demands in his bill.

It is further erroneous in not charging him with interest on money in his hands. A trustee is accountable for interest. 2 Eq. Ca. Abr. 96. When he had money in his hands he ought to have stopped interest, and by not doing so he has made himself liable for it.

J. TAYLOR for the appellee.

On the arrangement of the debts in the deed of trust there can exist no substantial cause of complaint, because Wyld had the power and did himself make the arrangement.

[542] The original foundation of the demand is unquestionably that of a joint security, who has himself paid the debt. That the bill was made payable to both is proof that the endorsement was joint; and as the amount of the debt was fixed by auditors in presence of the parties who made no exception thereto, it is now too late to except; and mutual concessions may fairly be presumed to have been made so as to establish a balance satisfactory to both.

But the great question in the case is the act of limitations. This act bars the remedy and not the right. It enacts that all actions of trespass, &c., shall be brought within the time prescribed by law, and not afterwards. Suits in Chancery are not enumerated; and, therefore, are not literally within the act. Courts of Chancery, however, have adopted it by analogy, where a party may sue in either Court; but where the suit can only be brought in equity, as in cases of legacies, trust and fraud, the act does not run.

Here there was no remedy until the trust estate was settled. Till then he could not have maintained his suit in this Court. With the property of Wyld in his hands unexhausted, this Court would not have decreed him the property of Lomax likewise.

Equity will also regard great length of time, for it might produce loss of testimony, and affords a presumption of payment; but here there can be no such presumption, and the delay was favorable to Lomax, of whom less is now demanded than half the bill.

The act, then, cannot be considered as commencing till the trust was closed, which was in 1765, and in 1768 the suit was instituted.

But it may be objected that the bill states the trust estate to have been closed in 1762.

This was evidently the mere error of counsel in stating the [543] case, *currente calamo*. A judgment was obtained afterwards, which proves incontestably the mistake. Even in indictments a chronological error is not fatal. A bill ought not to be conclusive evidence against a plaintiff. Since the allegations cannot aid him, it would be strange if they should injure him when proved to be founded in mistake. At law, indeed, there may be a non-suit if the declaration is not sup-

ported, but this was never heard of in Chancery. Chancery is not governed by mistakes, but relieves against them. The replication, too, avers that the trust was not closed till within five years before the suit was instituted, and this cures the mistaken statement of the bill.

To the argument concerning the bond he answered, that it was a question not yet decided, and of great difficulty, whether the act of limitations would, under our acts of Assembly, run against a bill of exchange.

But admitting that it does run, and admitting that the bond did discharge the bill, yet the bond was given during the existence of the trust; till the settlement of which the plaintiff could not sue.

He might have given the bond as trustee, and the Court will not now presume otherwise.

To the exceptions to the amount of the decree he answered, that, as the account shewed more to be due than the plaintiff stated in his bill, the prayer for general relief, which was contained in the bill, would authorize a decree for the whole sum appearing to be really due. If more had been asked, the smaller sum actually due would have been decreed; and, therefore, when less was asked the greater sum actually due ought to be given.

The doctrine that trustees are liable for interest is only true in cases of misapplication. This is never to be presumed, and here is no proof of it. The contrary is presumable, and the presumption is supported by the report of the auditors. The suppositions against the report are not fair, now that they cannot be answered by shewing them to be illy [544] founded, which might have been done at the time if an exception had then been entered.

Here the cause is expected to come on upon its principles, not upon exceptions to an account; which exceptions were not brought forward or relied on when the account was made up.

Lyons, Judge, delivered the opinion of the Court.

After stating the case, he said that the suggestion concerning the preference given in the deed of trust to those debts for which Mr. Pendleton was alone accountable, was not well founded, and ought not to avail the appellant.

The important point in the case is, the time when the right of action accrued? It is contended by the appellant that the right accrued and the act of limitations began to run when the bill was taken in and the bond executed for its amount. The

Court consider all the circumstances of the case. The complainant ought not to be barred unless the execution of the bond was a payment, and gave him a complete right of action for the amount of the bills, for equity avoids circuity. It is then to be enquired whether Mr. Pendleton could, under the circumstances of the case, on the execution of the bond, have recovered from Mr. Lomax a moiety of the bill?* If he had instituted a suit at law, Mr. Lomax would have gone into Chancery and have claimed the benefit of the trust. The Court must have injoined the judgment at law until the trust was settled, or have divided the outstanding debts, which would have been of no service to Mr. Lomax; therefore, unless the bond be a payment, Mr. Pendleton could not have come into equity until the trust was finished. What is the nature of the bond? It stopped the interest of ten per cent.; and is given to serve the trust estate and relieve Mr. Lomax as well as Mr. Pendleton. The bond was to be discharged out of the [545] trust estate, and, therefore, ought not, in equity, to be considered as such a payment as to create a bar to a suit in equity for a moiety of the money, which, in fact, was afterwards paid.

The act of limitations, then, ought not to commence until the trust was concluded. The bill states this to have been in 1762, but the report shews that it was not till 1764; and from that time the act of limitations runs. This suit, therefore, having been brought in 1768, is not barred by the act of limitations.

It is objected that no interest is allowed on money collected from the bonds due the trust estate while the money remained in the hands of the trustee. The Court think this a good objection, and that an account ought to be taken to shew when the trustee received money, and whether he retained it in his hands an unreasonable length of time. Small sums should not be considered as being certainly to be accounted for and disposed of immediately, but large sums ought.

The certificate was as follows:

"The Court is of opinion that the act of limitations is no bar to the demand of the appellee under the circumstances of his case; but that he should account for interest on so much of the money received by him, under the deed of trust in the bill

[*See on this subject Pothier on Oblig. P. 2, c. 6, § 7, Art. 1. *Barclay et al.* v. *Gooch*, 2 Esp. Rep. 571; *Taylor* v. *Higgins*, 6 East, 169; *Maxwell* v. *Jameson*, 2 Barn. and Ald. 51; *Powell* v. *Smith*, 8 Johns. R. 249; *Cumming* v. *Hackley*, 8 Johns. R. 202; *Morrison* v. *Berkey*, 7 Serg. & Raw. 238.]

mentioned, as was not paid in a reasonable time after collection to the persons entitled to it by the said deed, if on an account to be taken or rendered it shall so appear, except on small or inconsiderable sums, that a reasonable allowance should be made to the appellee for his own trouble and expenses; and that the decree of the County Court of Caroline ought to be reversed, and auditors appointed to re-state and settle the accounts according to the foregoing opinion."

Broddus *v.* M'Call & Elliot.

Thursday, July 8th, 1790. [546]

If A. agree to furnish B. with goods at 85 *per cent.* on the prime cost, (to cover the difference of exchange between sterling and currency,) payable in cash, or in tobacco at the market price; and B. is informed of the prices, and takes some and rejects others; and several settlements are made, and a bond taken for the balance; yet, if B. afterwards discovers that A. laid an advance upon the goods before they were shipped, and that the tobacco was credited to him at 10 or 15 *per cent.* less than the selling prices; a Court of Equity will grant relief against the bond.

Some time in the year 1761, John & Robert Broddus, two planters in the county of Caroline, having determined to engage in trade, and to retail goods in partnership, and having no correspondent or acquaintance in Europe, applied to Archibald M'Call, the principal factor of a considerable Scotch house, carrying on trade and merchandise under the firm of John & William M'Call, and made a verbal agreement with him, the purport of which Broddus states to be, that they might take up what goods they wanted to be discharged at eighty-five *per cent.* on the first cost or sterling prices, either in cash or tobacco at the general market price, he, said Archibald M'Call, assuring them that they should not be imposed on, but dealt with fairly and honestly. Notice of this agreement was given to William Snodgrass, who kept a store for the M'Calls at Todd's; and he promised to conform to it. Archibald M'Call soon after quitted the business, and was succeeded by William Snodgrass; and the store at Todd's was conducted by Robinson Dangerfield. Goods to a considerable amount were taken up by the brothers, until some time in the year 1762, when William Broddus quitted the business, but John Broddus continued to carry it on as usual for nine years. Du-