Marsteller and others *v.* McClean. (*a*)

Statute of limitations.

In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary, to show that all the plaintiffs were under a disability to sue.
Marsteller *v.* McClean, 1 Cr. C. C. 579, affirmed.

Error to the Circuit Court for the district of Columbia. This was an action of trespass for mesne profits, after a recovery in ejectment by the present plaintiffs against the present defendant, who pleaded the statute of limitations, to which the plaintiffs replied, in substance, that Christiana, the wife of one of the plaintiffs, and Elizabeth, the wife of another of the plaintiffs, in whose rights they sue, "were *femes covert*, when the cause of action accrued, and have ever since continued *femes covert;*" and "that Kitty Hunter," one of the plaintiffs, "was a *feme covert*," and that the other plaintiffs, in whose right the suit was brought, were infants, at the time the cause of action accrued, and also at the commencement of the action. To this replication, there was a general demurrer and joinder, on which the court below rendered judgment for the defendant.

C. Simms and *R. I. Taylor*, for the defendant in error, contended, 1. That the replication was bad, because it did not show that all the plaintiffs were entitled to sue, notwithstanding the statute of limitations. It did not state that Kitty Hunter continued a *feme covert*, until less than five
*157] years next before the commencement of the *suit. If her disability of coverture was removed, five years before bringing the action, she was barred by the statute; and the replication, being joint, if bad as to one, is bad as to all.

2. That upon a demurrer the court will give judgment against that party who commits the first fault in pleading. The declaration states all the material allegations under a "whereas"—a *quod cum*. It is all recital, which is fatal, upon a general demurrer, or upon a motion in arrest of judgment.

The courts of Virginia follow the practice of the king's bench in England, where this exception has been always held good. *Amyon* v. *Shore*, 1 Str. 621; *Hord* v. *Dishman*, 2 Hen. & Munf., 595; *Moore's Adm'r* v. *Dauney*, 3 Ibid. 134; *Lomax* v. *Ford*, Ibid. 271; *Sym* v. *Griffith*, 4 Ibid. 277.

E. J. Lee, contrà.—The objection to the declaration is only an objection to form. The statute of *jeofails*, in Virginia, does not justify the cases cited from the court of appeals. Upon a demurrer to the replication, the defendant cannot take advantage of an error in the declaration.

As to the objection that the replication does not state that Kitty Hunter continued a *feme sole*, it is sufficient for us, if we show that some of the plaintiffs are not barred by the statute. Those who were under a disability are not to be prejudiced by the negligence of those who were not disabled. Joint-tenants cannot sue severally, they must join. 1 Tidd Prac. 7; *Cabel* v. *Vaughan*, 1 Saund. 294, note 4; 2 W. Bl. 1077. If the plea is bad as to some of the plaintiffs, it is bad as to all. 2 Saund. 49, 50; 1 Ibid. 28.

(*a*) March 2d, 1812. Present, all the judges.

Taylor, in reply.—The case of *Perry* v. *Jackson*, 4 T. R. 516, was the first in which it was decided that the statute runs against all the joint plaintiffs, if any of them were free from disability. In that case, it was replied, to the plea of limitations, that one of the plaintiffs was beyond seas, and the replication was adjudged bad.

**E. J. Lee.*—The declaration states that some of the plaintiffs are infants, the plea was no bar to those plaintiffs. In the case of *Perry* v. *Jackson*, the plaintiffs were partners in trade. It was a voluntary association ; but here the plaintiffs are joined by act of law. [*158

March 13th, 1812. All the judges being present, STORY, J., delivered the opinion of the court, as follows :—The plaintiffs in error brought an action of trespass *quare clausum fregit ;* to which the defendant in error pleaded the statute of limitations. The replication, in substance, states, that at the time when the cause of action accrued, Christiana, wife of one of the plaintiffs, and Elizabeth, wife of another of the plaintiffs, "were *femes covert*, and ever since have continued *femes covert*," and "that Kitty Hunter," one of the plaintiffs, "was a *feme covert ;*" and that the other plaintiffs, in whose right the suit was brought, at the time when the action accrued, and also at the commencement of the suit, were infants. To this replication, there is a general demurrer and joinder, on which the court below gave judgment for the defendant.

It is contended by the defendant, that this replication is insufficient, inasmuch as it does not allege that Kitty Hunter continued a *feme covert* until within five years, the time prescribed by the statute of limitations for the pursuit of this remedy. And it is further contended, that, even if the replication be good, yet the plaintiffs ought not to recover, because the declaration charges the trespass by way of recital—"for that *whereas*, the defendant, with force and arms," &c., and not by positive and direct allegations as the law requires. On this last exception, the court do not intend to give any opinion ; but unless the point were fully settled by authority, they would feel little inclination to sustain an objection which would seem directed more to the form than the merits of the action.

The objection to the replication deserves more consideration. It is certainly a rule of pleading, that a replication should of, itself, contain a full and complete answer to the bar, and that a joint plea which is bad, affects with its consequences all the parties joining in it. *In the present case, it may be true, that Kitty Hunter was a *feme covert* at the time when the action accrued ; and yet it may be equally true, that five years have elapsed since the disability was removed. It was, therefore, incumbent on the plaintiffs, not barely to show a coverture, but, by a proper averment, to show its continuance to a time within which it would have been a perfect avoidance of the bar. The objection then would have been fatal, in a several action brought by Kitty Hunter. [*159

But it is said, that though the replication be bad as to one of the plaintiffs, yet it can only bar her ; that the infancy or coverture of the other plaintiffs entitles them to a recovery in this action, for the injury done to them ; and that, as parceners and tenants in common are compellable to join in actions of this nature, it would be hard to affect them with the disability of a co-tenant. It seems, however, to be a settled rule, that all the plaintiffs

in a suit must be competent to sue, otherwise the action cannot be supported: and the case of *Perry* v. *Jackson*, cited from 4 Term Reports 516, decides, that a plea of the statute of limitations, which is good as to one partner, bars them both in a joint action. When once the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.

It is, therefore, the opinion of the court, that as this answer to the objection fails, the replication must be adjudged insufficient, and of course, the bar must prevail.

Judgment affirmed.

Welch *v.* Lindo. (*a*)

Promissory notes.

The mere possession of a promissory note, by an indorsee, who had indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a re-assignment or receipt from the last indorsee.

An indorsement "without recourse," is not evidence of money had and received by the indorser, to the use of the indorsee.

Error to the Circuit Court for the district of Columbia, sitting at Alexandria.

*160] *Welch brought an action of *assumpsit* against Lindo, upon his indorsement of a promissory note. The declaration contained two counts. The 1st count stated, that one John Kercheval, on the 25th of August 1796, made and delivered a promissory note to Lindo, payable to his order, on demand, for $246, for value received. That Lindo, on the 24th of January 1800, indorsed it to Welch (the plaintiff), in these words, viz: "Pay the within to James Welch, or order, without any recourse whatever on A. Lindo." That on the 30th of April 1800, Welch assigned the note to a certain William Hodgsett, by writing on the back thereof, the following words, viz: "I assign the within to William Hodgsett," and signed his name thereto, and delivered it to Hodgsett. That Kercheval failed to pay the money to Hodgsett, on demand, whereupon, Hodgsett, as assignee of the note, brought suit against Kercheval, the maker thereof, in the circuit court of Woodford county, in the state of Kentucky; in which suit Kercheval pleaded that he had paid the debt to Lindo; upon which plea, issue was joined, and the jury found a general verdict thereupon, for the defendant, Kercheval, upon which the court rendered a judgment, which still remains in full force; by reason of which premises, the plaintiff (Welch) became liable to pay to Hodgsett the $246, with interest, from the time the suit was brought (viz., the 11th of June 1803), until the 2d of November 1804, the time when he paid the same to Hodgsett, and the costs of that suit, amounting to $11.72, and did pay the same; of all which premises, the defendant had notice, and by reason whereof, he became liable to pay the said $246, with interest on the same, and the said $11.72, being the costs as aforesaid; and being so liable, the defendant, in consideration thereof, afterwards, &c., undertook, &c., to pay the same sum to the plaintiff, &c. The 2d count was for money had and received to the plaintiff's use.

(*a*) March 2d, 1812. Present, all the judges.