

WILSON v. KOONTZ. (a)

Statute of limitations.

The defendant to an attachment in chancery, in Virginia, may plead the statute of limitations, without supporting it by answer.

A defendant who removes from one county to another, in Virginia, is not thereby prevented from pleading the act of limitations, unless the plaintiff has been, by such removal, actually defeated or obstructed in bringing or maintaining his action.

THIS was an appeal from the decree of the Circuit Court for the district of Columbia, which dismissed the complainant's bill in equity.

Wilson filed a bill in equity, in the nature of an attachment in chancery, against Koontz, surviving partner of Koontz & Ober, as principal debtor, and Thomas Irvine and Joseph Mandeville, as garnishees. It *stated, [*203 that Koontz, a resident of Virginia, as surviving partner of the firm of Koontz & Ober, was indebted to the plaintiff by note, in the sum of \$1261, and had in the hands of Thomas Irvine and Joseph Mandeville goods and effects which were liable to be attached for the payment of the debt; and that unless he could make them liable by the intervention of the court below, he would be without any means of recovering his debt. In tender consideration whereof, and forasmuch as he had no remedy at law, and could only subject the effects and money in the hands of Irvine and Mandeville to the payment of his debt, by means of a court of equity, he prayed a discovery, and a decree that Koontz might pay the debt, and that Irvine and Mandeville might be restrained from paying away the effects in their hands, and that they might be applied to the payment of the debt; and for general relief.

Koontz having entered his appearance, gave security to perform the decree of the court, if it should be against him, thereby discharging the attached effects, and pleaded the statute of limitations in bar of the suit; to which the complainant replied, that on the 4th of August 1794, a suit was brought, by the orders of the complainant, in the name of the president, directors and company of the Bank of Alexandria, as nominal plaintiffs, in the district court, in the town of Winchester, in the state of Virginia, upon the note in the bill mentioned, against Koontz & Ober; and upon the writ the sheriff returned, that Koontz was not found, and that Ober was no inhabitant of that county. That in September 1794, it was agreed, that Koontz should place in the hands of the complainant sundry bonds towards the discharge of the note, and that he would pay the balance in 12 or 18 months; in consequence of which, the suit was dismissed; in pursuance of which arrangement, part of the money was paid, and the residue was still due, with interest. That afterwards, in the year 1794, Koontz removed into some other part of the state of Virginia, unknown to the complainant. That in 1803, the complainant having learned the residence of the defendant, in Rockingham county, 60 or 70 miles from his former residence, and more remote from the complainant, ordered a suit against him, which was brought, but not prosecuted, because the defendant required *security [*204 for costs from the complainant, who did not reside in Virginia.

To this replication, there was a general rejoinder and issue, and a general

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dedimus to take depositions. Upon the return of which, the cause came to hearing upon the pleadings and evidence. Whereupon, the court below decreed, that the bill should be dismissed, with costs; from which decree, the complainant appealed to this court.

E. J. Lee, for the appellant.—It was not necessary for the complainant to reply matter to bring himself within an exception to the statute of limitations; because the circumstances which take the case out of the statute are stated in the bill. Before the defendant can be permitted to plead the statute, he must, by answer, either deny the debt, or aver it to be paid. *Gilb. Chancery Practice* 61. The statute of limitations is not properly a plea in equity. The statute does not make it an absolute bar in equity. It is only under the equity (*i. e.*, the reason) of the statute, that courts of equity allow it to be pleaded. If it appear clearly that the debt has not been paid, the statute is no bar in equity. The questions put by Koontz upon the examination of the witnesses show that the debt was not paid. Less evidence than this has been held to take a case out of the statute. It would have been no bar for Ober, who never resided in Virginia: and if not a good bar for Ober, it was not for Koontz. The plea does not state that Ober, the other partner, did not promise within five years.

Taylor, *contra*.—There is nothing in the replication, or the evidence, to take the case out of the statute. The only question then is, whether the statute is a good plea in a suit in chancery? This is not properly a case of equity jurisdiction. It is simply an action at law upon a promissory note. Nothing gave jurisdiction to the court, as a court of equity, but the circumstance that the defendant was a resident of Virginia and had effects in the *205] hands of residents in this district. The defendant having appeared and given security, so as to discharge the attached effects, nothing remains to be decided, but the sheer law of the case; and when a court of equity gets possession of a case, which is a mere case at law, if it is allowed to proceed at all, it must decide the case as a court of law would decide it.

If a bill charge fraud or trust, it is admitted, that the defendant must answer to the fraud or trust, before he can plead the statute of limitations. But this bill charges no fraud nor trust, nor seeks any discovery from the defendant. He is, therefore, not bound to answer, but may rely entirely on his plea. *South Sea Company v. Wymondsell*, 3 P. Wms. 144; 2 Com. Dig. 261; 2 Atk. 51. If the complainant thinks the plea bad, he may demur, or except. But here is neither exception nor demurrer. *Laws of Virg.*, Rev. Code 73, § 40.

March 10th, 1812. All the judges being present, MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—This is a suit in chancery, and the defendant pleads the act of limitations. The plaintiff, by his replication, attempts to bring the case within the exception contained in the 14th section of that act; but it seems essential, under that section, that the complainant should have been actually defeated or obstructed in bringing his action, by the removal of the defendant. There is no evidence of his intention of bringing his action sooner than he did, or that he was delayed by the defendant's removal from the county. The court is, there-

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fore, of opinion, that the circumstance of removal is not sufficient to take the case out of the statute.

It is objected, that the plea of the statute of limitations is not good, unless the defendant answer also, and deny the debt, or aver it to be paid. But if this be a valid objection, it ought to have been taken, at the time of offering the plea, and before the issue was joined. It is now too late. If it be a good objection, in cases within the general *jurisdiction of a court of equity, yet it is not valid, in a case like the present, which is really a case at law as between the present parties. [206

The court is of opinion, that the plea is a good bar, and that the decree should be affirmed.

Decree affirmed.

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Competency of witness.

The principal obligor in a bond is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs, in case the judgment should be against him.

ERROR to the Circuit Court for the district of Columbia. This was an action of debt on a joint bond, given by John Welch, as principal obligor, and the defendant Moss, as his surety. The suit abated as to Welch, by the return of the marshal, that he was no inhabitant of the district. The defendant, Moss, pleaded specially certain facts in avoidance of the bond as to him alone; upon which issue was joined; and upon the trial, the defendant Moss offered as a witness the said John Welch, the principal obligor, who was permitted by the court below to testify for the defendant, and upon his cross-examination confessed, that he had made over to Moss all his property, as security to indemnify him against the event of this suit. The plaintiff took a bill of exceptions, and the verdict and judgment being against him, brought his writ of error to this court.

E. J. Lee and Jones, for the plaintiff in error.—Welch was clearly an interested witness. By relieving Moss from this suit, he would relieve his property from the lien which Moss held upon it. If the plaintiff recovered against Moss, the latter could immediately recover judgment against Welch for the whole debt, together with the costs of this suit. *Laws of Virg.*, Rev. Co. 292; *Buckland v. Tankard*, 5 T. R. 578; Bull. N. P. 283; 5 Burr. 2727; 3 Atk. 402; 1 Day 81. *Welch is also interested to the amount of his legal fees for attendance as a witness. It appears upon the record, that he was regularly summoned, and is by law entitled to demand of Moss one dollar and a quarter *per diem*. If the plaintiff should be defeated, he will retain this to his own use, but if the plaintiff should recover judgment, he will have to refund it to Moss. [297

C. Lee, *contra*.—The defence set up by Moss did not affect Welch's liability upon the bond. He was bound at all events. He was not a party to this suit. Neither the verdict nor judgment could affect him. He would be

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