happen, the heirs are not entitled to the relief they seek, as a resulting trust, which is at present vested in them, and which can only be displaced (if at all) by the actual occurrence of a marriage, which shall take place upon a future contingency.[1] We think, that they are entitled to the relief, leaving the case open for the rights of any person, who may hereafter rightfully claim title against them, under the devise over.

The decree of the district court is, therefore, affirmed, with costs, and the cause is remanded for further proceedings.

This cause came on to be heard, on the transcript of the record from the district court of the United States for the western district of Virginia, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said district court, in this *cause be and the same is hereby affirmed, with costs. *354] And it is further ordered and decreed by this court, that this cause be and the same is hereby remanded to the said district court, with directions that further proceedings be had therein, according to law and justice, and in conformity to the opinion of this court.

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*355] *Reuben Withers, Appellant, *v.* John Withers, Appellee.

Partnership.

Construction of articles of copartnership, as they related to the expenses of the copartners.

Appeal from the Circuit Court of the district of Columbia and county of Alexandria. The case, as stated in the opinion of the court, was as follows:

This case comes up on appeal from the circuit court of the United States for the county of Alexandria, in the district of Columbia. The bill filed by the appellee in the court below, alleges, that, on or about the 7th of March 1815, the parties to this suit entered into copartnership, as merchants in trade, in the town of Alexandria, under the firm and style of J. & R. Withers. That the complainant, John Withers, was to furnish to the firm $15,000, and to receive three-fourths of the profits of the business; and the defendant, Reuben Withers, was to furnish $5000, and receive one-fourth of the profits; and in case of loss, it was to be borne in the same proportion; and that each party was to pay his own individual expenses. That the business was continued, upon the same terms and conditions, in all respects (the name and style of the firm having been changed to that of John Withers & Co.), until the 13th of December 1819, when it was dissolved by mutual consent and upon certain terms, which need not be here stated. The bill then alleges, that the complainant, never having received a satisfactory account of the disbursements and transactions of the defendant, whilst in New York, as a member of the firm, they were excepted out of the settlement of the partnership concerns, and the defendant agreed to render a true, full and just account of all his purchases and transactions in

[1] There is no limitation of time, in law, as to the possibility of the birth of issue; so held, where the *feme*, tenant for life, had attained the age of 75 years. List *v.* Rodney, 83 Penn. St. 483.

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New York, as a member of the said firm, and that he should be exclusively liable for all debts and engagements which he might have contracted or made in the name of said firm, and for which they had not *received full benefit. And the bill charges, that the defendant had failed and [*356 neglected to render such account, and prays that an account may be taken of such disbursements, dealings and transactions; and that the defendant may be decreed to pay over to the complainant what, if any thing, upon the taking of such account, may be found due to him.

The defendant, in his answer admits the partnership was entered into upon the terms and conditions stated in the bill, and avers that he regularly transmitted to the house at Alexandria, invoices of all goods purchased in New York, and that the same were entered on the books of the firm, which are in the possession or under the control of the complainant. The defendant admits, that it was stipulated in the articles of copartnership, that each party was to pay his own individual expenses, which, as he alleges, was meant and intended to apply when the parties were at home, and not travelling on the business of the firm. And he expressly avers, that all the funds put into his hands were well and faithfully applied to the objects for which they were remitted and received. The defendant also admits, that upon the dissolution of the partnership, he did agree to render a full, true and just account of all his purchases and transactions in New York, as a member of, and on account of, said firm, and to be liable for all debts and engagements which he may have entered into (if any) on account of said firm, and for which the said firm may not have received full benefit and advantage. And avers that he has fully complied with his engagement to render such account, and submitted the same for examination; and that the account, when examined and corrected, was balanced, as he thinks, on the books of the company, which are in the possession or under the control of the complainant. And that there is no debt due in the city of New York, or elsewhere, from the said firm, contracted by him, the defendant; but that every such debt, contract or engagement, so far as he knows or believes, has been paid off, satisfied and discharged.

The cause afterwards being set down for hearing, was, on motion of the complainant, referred to a commissioner, to state and settle the partnership accounts between the parties. Upon the coming in of the report of the commissioner, sundry exceptions were taken, and argued by counsel; all of which *were overruled by the court, except one, which related to the [*357 defendant's charge for his expenses in New York, amounting to $1756. The exception to this charge was allowed, and the cause referred back to the commissioner, with directions to allow the defendant his reasonable travelling expenses to and from New York, and the necessary difference between the expense of living at New York and at Alexandria.

The case was argued by *Neal*, for the appellant; and by *Key*, for the appellee.

Neal claimed to reverse the decree of the circuit court, because the expenses of the appellant in New York, while engaged in the business of the firm, had not been allowed. On this point, he cited, 16 Johns. 15; 1 Atk. 7–8; 3 Atk. 176; Domat, Civil Law, 155, 158–9, art. 9, 11, 12; 1 Swanst. 465; 1 Pet. 383. The expenses were clearly chargeable to the firm, but if

they were not, there was a subsequent ratification of the charge. 9 Cranch 155, 160; 7 Ibid. 92; 2 Hen. & Munf. 544; 4 Ibid. 273. The bill and answer did not put these expenses in issue, and will not warrant the decree. 4 Munf. 273; 6 Johns. Cas. 559; 7 Pet. 130; Harr. Chan. 299.

Key, contrà:—The bill is for an account, by one partner against another. The agreement set out in the answer is the only evidence of it. He contended, that the agreement gave no claim to the expenses. The appellant would have been subject to expenses, had he remained in Alexandria, which would not have been a charge to the firm; those incurred in New York should be on the same footing.

Thompson, Justice, delivered the opinion of the court.—The question in relation to the expenses of the appellants in New York being the only one now in controversy between the parties, it is unnecessary to notice the proceedings in any other respect. *The rule laid down by the court in their direction to the commissioner, we think was entirely correct. The articles of copartnership are not in the record. But the allegation in the bill, and the admission in the answer, touching the agreement between the parties, in relation to their expenses, do not materially differ. The bill alleges that each party was to pay his own individual expenses. The answer to this allegation is, that although it was stipulated in the articles of copartnership that each party was to pay his own individual expenses, yet the same was meant and intended to apply when the parties were at home, and not travelling on the business of the concern. This was substantially the construction adopted by the court below, and which we think is the fair and reasonable interpretation of the argument, even standing alone upon the complainant's own statement. It was manifestly intended to apply to private or family expenses, not connected with the business of the partnership. But it would be an unjust and forced construction of the stipulation, to extend it to extra expenses, incurred when abroad on the business of the partnership. The stipulation in the memorandum of the 13th of December 1819, upon the dissolution of the partnership, does not embrace this item of expenses. The defendant, Reuben Withers, covenants to render a full, true and just account to the firm, of all his purchases and transactions in New York, as a member of, or for and on account of, the said firm; and to be liable for all debts or engagements which he may have entered into (if any), on account of said house, and for which the said firm may not have received full benefit and advantage. The disbursements of the defendant for his personal expenses cannot, with any propriety, be considered a debt or engagement, within the meaning of this stipulation. It was obviously intended to protect the complainant from all liability for any outstanding claims for goods purchased in New York, and for which the firm had not received the full benefit and advantage.

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The cause was afterwards referred back to the commissioner, to reform his report touching these expenses, according to the rule laid down by the court, viz., to allow the defendant his reasonable travelling expenses to and from New York, and the necessary difference between the expense of living at New York and at Alexandria. Upon the coming in of the commissioner's *report, an exception was filed, but overruled by the court, and a final decree entered against the defendant. The exception taken to the

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report was in these words: "The defendant excepts to this report, because it is contrary to evidence, and for other reasons, to be stated more particularly at the hearing."

The record only states generally that the exception was overruled. This does not warrant the conclusion that it was overruled for defect or insufficiency in point of form. For if this had been the ground of objection, it might have been, and doubtless would have been, amended. The latter branch of the exception may be objectionable. But the exception that the report was contrary to evidence, is good in point of form; and we must presume that the court overruled it upon the merits, or, in other words, decided that the report was not contrary to the evidence; and in this we think the court erred.

The commissioner, in his first report, had allowed the defendant, for his expenses in New York, $1756, because the charges were entered in the books of the company, of which entries all the parties were considered by him as having full knowledge. This undoubtedly is the *primâ facie* presumption; and if the complainant knew of the entries, and made no objection, his assent to their allowance would fairly be presumed. But the evidence in the cause is sufficient to rebut this presumption. John Washington, who was a clerk employed by the firm, swears, that he was intimately acquainted with the concerns of the copartnership, and with their mode of transacting business. That John Withers attended mostly to what is called the out-door business, and did not attend to the books of the firm. That he has good reason to believe, and does verily believe, that he was entirely ignorant of the state of the books between himself and copartner. That he never attended to or examined the books. That on his showing him an entry of $900, on account of those expenses, he said they were incorrect, and contrary to their agreement: and before the dissolution of the partnership, he objected to all the defendant's charges for expenses. This, so far as negative evidence can go, shows that the complainant was ignorant of the entries in the books, and ought not to be concluded by them.

*The commissioner, in his last report, has estimated the defendant's expenses in New York at one dollar per day; whereas, the positive proof, by the testimony of Gordon Miller, is, not only that the customary charge for board at the house where the defendant boarded was $10.87 per week, but that the defendant actually paid that sum, exclusive of extra fire at fifty cents per day. But there is no evidence showing the time he had an extra fire, or what he paid therefor. The report, therefore, cannot be said to be against evidence as to this item. But with respect to the allowance for board, the report is clearly against the evidence. [*360

The decree of the court below must accordingly be reversed, and the cause sent back with directions to reform the report of the commissioner, so as to allow the defendant at the rate of $10.87 a week for his expenses in New York, instead of one dollar per day.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Columbia, holden in and for the county of Alexandria, and was argued by counsel: On consideration whereof, it is considered, ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby

reversed, and that this cause be and the same is hereby remanded to the said circuit court, with directions to the said court to reform the report of the commissioner, so as to allow the defendant at the rate of $10.87 per week for his expenses in New York, instead of one dollar per day.

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*361] BANK OF THE UNITED STATES, Plaintiff in error, *v.* ANDREW DONNALLY, Defendant in error.

Pleading.—Statute of limitations.—Lex fori.

Action of debt, brought by the Bank of the United States, upon a promissory note, made in the state of Kentucky, dated the 25th of June 1822, whereby, sixty days after date, Campbell, Vaught & Co., as principals, and David Campbell, Steeles and Donnally, the defendant, as sureties, promised to pay, jointly and severally, to the order of the president, directors and company of the Bank of the United States, $12,877, negotiable and payable at the office of discount and deposit of the said bank, at Louisville, Kentucky, value received, with interest thereon, at the rate of six per centum per annum thereafter, if not paid at maturity. The declaration contained five counts; the fourth count stated, that the principal and sureties "made their other note in writing," &c., and thereby promised, &c. (following the language of the note), and then proceeded to aver, "that the said note in writing, so as aforesaid made, at &c., was and is, a writing without seal, stipulating for the payment of money; and that the same, by the law of Kentucky, entitled an act, &c. (reciting the title and annexing the enacting clause), is placed upon the same footing with sealed writings, containing the same stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes, having the same force and effect as a writing under seal;" and then concluded with the usual assignment of the breach, by non-payment of the note. The fifth court differed from the fourth principally in alleging, "that the principals and sureties, by their certain writing obligatory, duly executed by them, without a seal, bearing date, &c., and here shown to the court, did promise, &c.;" and contained a like averment with the fourth, of the force and effect of such an instrument by the laws of Kentucky. The defendant demurred generally to the fourth and fifth counts; and the district court sustained the demurrers.

We are of opinion, that the fourth and fifth counts are, upon general demurrer, good; and that the judgment of the court below, as to them, was erroneous; they set out a good and sufficient cause of action, in due form of law; and the averment that the contract was made in Kentucky, and that, by the laws of that state, it has the force and effect of a sealed instrument, does not vitiate the general structure of those counts, founding a right of action on the note set forth thereon; at most, they are surplusage; and if they do not add to, they do not impair, the legal liability of the defendant, as asserted in the other parts of those counts.

According to the laws of Virginia, the defendant had a right to plead as many several matters, whether of law or fact, as he should deem necessary for his defence, and he pleaded *nil debet* to the three first counts of the declaration, on which issue was joined; the defendant also pleaded the statutes of limitation of Virginia to the other counts. The court held the plea
*362] of the statute of limitations a good bar to all the counts, and gave judgment in favor *of the defendant. The statute of limitations of Virginia provides, that all actions of debt, grounded upon any lending or contract, without specialty, shall be commenced and sued within five years, next after the cause of such action or such suit, and not after; the act of Kentucky, of the 4th of February 1812, provides, "that all writings hereafter executed, without a seal or seals, stipulating for the payment of money or property, or for the performance of any act, duty or duties, shall be placed upon the same footing with sealed writings, containing the like stipulations, receiving the same consideration in all courts of justice, and to all intents and purposes having the same force and effect, and upon which the same species of action may be founded, as if sealed:" *Held*, that the statute of limitations of Virginia, precluded the plaintiff's recovery in the court where the action was instituted; the statute pleaded (the statute of Kentucky) not being available in Virginia.[1]

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[1] S. P. Townsend *v.* Jemison, 9 How. 407; Nash *v.* Tupper, 1 Caines 402; Lincoln *v.* Battelle, 6 Wend. 475.