*John Coulson, Appellant, *v.* James Walton and others.

Proof of execution of ancient deed.—Statute of limitations.

A bond was executed in 1787, by which the obligor bound himself to pay one hundred pounds for a horse, or to make over to the obligee his interest in a certain entry and warrant of land; and if the deed or grant for the land should issue to him, to transfer the land by deed, and to warrant and defend the said deed; the obligor elected to pay the bond, by giving the land for the same; he made no valid conveyance of the land, in his lifetime; but it was taken possession of by the obligee, and had ever since been occupied under the title so acquired by the obligee. After the son and sole heir of the obligor came of age, he commenced an action of ejectment for the land, and those who claimed title under the obligee filed a bill for an injunction, and that the defendant, the plaintiff in the ejectment, be decreed to convey the land according to the stipulations in the bond; this bill was filed in 1822.

The court said, in considering the question as to the genuineness of the bond on which this controversy is founded, the first important fact that occurs to the mind is, the remoteness of the transaction; nearly half a century has elapsed since this instrument purports to have been executed; the obligor and the obligee, and both the witnesses, are dead; the contract belongs to the past age; it was executed, if at all, when the country was new and unsettled, and the parties to it seem to have been illiterate men, and unacquainted with business transactions. These circumstances are referred to, not to show that this bond should be received without proof, but to show that as strict proof should not be required of its execution, as if it were of recent date; the law makes some allowance for the frailties of memory, and where a great length of time has elapsed since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question. Barr *v.* Gratz, 4 Wheat. 231.

Construction of the statutes of limitations of North Carolina of 1815 and 1819. Statutes of limitations are applied by courts of equity, in all cases where at law they might be pleaded; at law, to make the statute a bar, there must be an adverse possession, and by analogy, a court of equity, in a similar case, will hold the statute to be a good bar.[1]

But the statute insisted on as a bar in this case, does not depend upon possession; it bars a creditor who does not sue the heir within seven years. There can be no doubt, that the statute applies, where a creditor seeks to make the heir liable for the debt of his ancestor, on the ground that either personal or real property descended to him; and this appears to be the decision of the supreme court of Tennessee on the statute; there is nothing in their decisions referred to, which show that they have given effect to the statute beyond this. By the statute of 1819, which is wholly different in its language from the act of 1815, a bar is created, indiscriminately, to suits in equity, as well as at law. The statutes do not apply to this case.

*63] The instruments under which a part of the complainants set up an equity *derived from the heirs of the obligor, are proved, but they cannot be sanctioned by this court, except where such instruments were executed by heirs of full age. It is the duty of the court to protect the interests of minors, and the decree of the circuit court in this respect, as well as in every other, is correct.

Walton *v.* Coulson, 1 McLean 120, affirmed.

Appeal from the Circuit Court for the District of West Tennessee. The case is fully stated in the opinion of the court.

It was argued by *Bell*, for the appellant; and by *Key*, for the appellee.

For the *appellant*, it was contended, that, stripped of circumstances, the case is, that Payne held a title bond of Coulson, for 640 acres of land, dated in 1787. In 1781, Isaac Coulson, the obligee, died, leaving John Coulson, the appellant, his heir. This bill was filed for a specific decree, in 1822, more than thirty years after the ancestor's death. To the bill, John Coulson, the heir, pleaded in bar the act of limitations of 1715, ch. 48, § 9, declaring, "that creditors of any person deceased, shall make their claim

[1] See note to Elmendorf *v.* Taylor, 10 Wheat. 152.

within seven years after the death of such debtor, otherwise such creditor shall be for ever barred."

It is insisted by the appellees, that the word creditor does not embrace Payne, seeking the lands; but would, were he seeking damages. Had Payne attempted to enforce the bond at law, against Coulson's administratrix, and to recover damages, the act of 1715 would have barred him. 3 Yerg. 9. So, if the administratrix had been sued, had pleaded "fully administered," the damages had been found against her, but the plea for her; then a *scire facias* had been issued to subject the lands in the hands of the heir, he could have pleaded the act. Mart. & Yerg. 360. This is the only mode by which the heir can be reached in the state of Tennessee. The personal estate must be shown to have been exhausted, by the finding of the plea of "fully administered;" and it can be shown in no other form. Mart. & Yerg. 360; 1 Yerg. 40, 287.

In 1801, ch. 6, the courts of equity of Tennessee were *authorized to divest titles to lands by decrees; and enforce specific performance [*64
in this manner. Ever since, the common mode of enforcing contracts for lands, has been by specific decree against the obligor, or his heir. In the same year, 1801, ch. 25, the statute of frauds was enacted, requiring agreements for lands to be in writing, and to be signed by the party to be charged therewith. The form of contract has almost uniformly been a title-bond. Whether the obligee to such bond was a creditor, and his claim subject to be barred by the act of 1715, soon became a most important question; one of the most important, involving the protection of heirs, by the lapse of time, presented to the courts of chancery.

In 1809, the supreme court of Tennessee was established, consisting then of two judges, and having conferred upon it original chancery jurisdiction. In 1813, the court consisted of Hugh L. White and John Overton, men eminent in the distinguished class of ejectment lawyers of that day, who had the public confidence in a high degree, and especially, in matters affecting titles to lands. What they settled by a concurrence of opinion, has not been questioned in the state courts of Tennessee, up to this time. This is asserted with knowledge of its truth, that challenges contradiction. Before this court, was brought the cause of *Smith* v. *Hickman's Heirs*, in 1813; a bill for a specific decree on a title-bond. The title-bond had been executed by Edwin Hickman, in 1789. The report (Cooke 330) shows it to have been a naked case. The act of 1715, ch. 48, § 9, was pleaded in bar, that the suit had not been brought within seven years after the ancestor's death. And on the most mature consideration, the court decided, Judge Overton delivering the written opinion—"that it has been insisted, that the complainant is not a creditor, on account of the demand not being of a pecuniary nature; but, as it is the duty of this court to examine this point, they feel satisfied that, as to that, he is within the act. All persons are considered creditors, that have demands originating from contracts or agreements." The next year, 1814, *Lewis* v. *Hickman's Heirs* came before the same judges, 2 Overt. 317, when Judge White delivered the opinion of the court to the same *effect. These decisions have been followed in the state courts, [*65
with entire confidence of their correctness, ever since. Cases in confirmation cannot be adduced, as no lawyer would present such a case; but to show the sense of the supreme court on the subject, so late as 1832, a

year after the cause before the court was decided below, we quote a passage from the opinion of the chief justice in *Hooper* v. *Bryant*, 3 Yerg. 9.

"In 1814, the cause of *Lewis* v. *Hickman*, 2 Overt. 317, involved the question whether an heir or an administrator could defend himself by the plea of seven years, under the act of 1715, ch. 48, § 9. To a bill to enforce a title-bond, Edwin Hickman's heirs and his administrator relied upon the act of 1715, ch. 48, § 9, as a bar. The court went into an examination whether the act of 1715 was in force, it being insisted that the act of 1789, ch. 23, had repealed it. The court decided, that both the acts were in force, and barred the complainant. This was the only point made in the cause by the record, and has been followed ever since." And in delivering the opinion of the court, in *Peck* v. *Wheaton's Heirs*, Mart. & Yerg. 360, it is holden: "We are moreover of opinion, that the act of 1715, ch. 48, § 9, of seven years, will operate as a bar; and that that act is in force we consider one of the best-established positions litigated in our courts;" and Peck's claim was pronounced barred, in accordance to the decisions of 1813 and 1814.

But the federal circuit court disregarded these decisions, for the reason, in *Smith's Case*, that no particular tract of land was designated by the bond sued on, and no lien created; and therefore, the demand was in effect for damages. There is no such idea contained in the report of the case. The contract was made at a time, 1787, when no statute of frauds existed, nor any writing was required; and when proof could have been introduced to show the tract of land intended to be conveyed. The courts of Tennessee, the legal profession, and the country, have not now, nor have they ever had, an idea, that the bond formed no lien, and was not obligatory on Hickman's heirs. The distinguished counsel who argued the cause, and the court, so admitted; a new generation has grown up under the impression, governed by *the report of the case; and, as was holden by the supreme court *66] of Tennessee, in *Hooper* v. *Bryant*, 3 Yerg. 9, it is now too late to correct the error, if even error there be. It is the pride and pleasure of the courts of Tennessee, to follow and abide by the decisions of the supreme court of the United States, when construing the laws of the Union; as they have done us the honor of conforming to our decisions on our local statutes, especially, the seven years' act protecting possessions; and we earnestly insist, decisions of twenty years standing, whether made in mistake of the fact or the law, cannot now be overthrown, without great and manifest danger to our titles; without letting in upon our country evils little foreseen at this distance from it, and by strangers to it. If parol agreements for lands, for warrants, and for locating, made previous to 1801, are let in against the heir, and the agreements are enforced in the federal courts, the ligitation to enforce them may be appalling, especially, in the western part of our state.

The only objection made to the decision of *Lewis* v. *Hickman*, in the court below, was, that it did not appear whether the bill was filed to recover the land, or for damages. In the state of Tennessee, the heir cannot be sued for damages, in any kind of proceeding. There is no direct mode in which he can be sued, but for a specific decree to divest title. Further, no suit for damages is ever prosecuted with us in equity; there is no such

jurisdiction. It is idle to conceal it: if the decree below is affirmed, the two causes against Hickman's heirs will be flatly overruled.

But some stress has been laid upon a loose and obscure expression of Judge HAYWOOD, in *Haggard* v. *Mayfield*, 5 Hayw. 121. It was an action of ejectment. Mayfield died; his wife administered. A title-bond was produced, and she, under the statute of Tennessee, made a deed; but not for the land described in the bond; the heir sued for the land, and the deed was declared void. The act of limitations of 1715, ch. 48, could not have, and did not have, the remotest bearing on the cause. It is not possible to introduce it in the action of ejectment. But those acquainted with the legal ideas of that distinguished common lawyer, Judge HAYWOOD, well know what he meant. He was prosecuting a favorite theory, that *equitable titles were not barred by the acts of limitation. That [*67 neither an entry, nor title-bond was operated on by any statute, because courts of equity were not bound, and the remedy was open. And if the honorable court is curious to understand the paragraph referred to, and to see the plausibility that genius can confer upon error, they will read Judge HAYWOOD's dissenting opinion in *Gaither and Frost's Case*, 3 Yerg. 208; but fearing our client's cause will be endangered from its masterly ability, we must insist, the court read the concurrent opinion, preceding, of the three other judges, overruling Judge HAYWOOD's; and which declares equitable titles, equally with legal, subject to barred.

The heir must be at repose some time, so that he may say of his fireside —this is mine. We, of Tennessee, afford the same protection, by the act of limitations of 1819, to all others; we declare, that no suit in equity shall be brought, had or prosecuted, but within seven years next after the cause of action come, accrued or fallen; and all claims not sued within said seven years, shall be for ever barred. The courts have enforced the act to the letter. *Dunlap* v. *Gibbs and McNairy*, 4 Yerg. 94. The same act bars the ejectment in seven years, so that all stand on the same footing with the heir. The state of our titles, originating in land-warrants, required the protection; and the hundred thousand people drawn to our western district, within the last ten years, and their almost entire exemption from litigation, bespeak the wisdom of our seven years' policy, which we hope this honorable court will not disturb.

We apprehend it most difficult for the court to give specific relief on a title-bond of thirty-four years' standing, when sued upon; with the supposed obligor's name erased from it; after the death of the obligor, obligee and the witnesses; with the proof that no claim was set up under it by the obligee, in his lifetime, he averring no writing existed between him and Isaac Coulson: but this rests on facts, which we feel it our duty to leave with the court.

Key, in reply.—The facts show a possession of the land in controversy, on the part of the appellee and those under whom he claims, since 1788. It was held *under an agreement, dated in 1787, to convey the title, if 100 [*68 pounds was not paid within the year. The money was not paid, and the obligee held the land till the death of the obligor in 1791, and after his death, till ejectment was brought by his heir-at-law in 1814. On the recovery in ejectment, the bill was filed to enjoin the issuing of a writ of pos-

session and for relief; and the question is (and it seems to be now the only one insisted on in behalf of the appellant), is the statute of limitations a bar to the relief sought by the bill?

It is contended by the appellant, in the argument now submitted to the court, that this is settled by the Tennessee courts. *Smith* v. *Hickman*, Cooke 330, is the first case relied on. All that this case proves (the bond being for no specific land) is, that a party having a bond for so much land, may be considered a creditor, under certain circumstances, within the meaning of the statute of limitations. The observations of the court below on this case require nothing further to be said as to the effect of this decision. The case of *Hooper* v. *Bryant*, 3 Yerg. 1, has been mentioned. There is not a word in the opinion of the court touching the question; but the argument of the counsel in favor of the application of the statute to that case, pages 5, 6, very clearly shows, that no such doctrine as the appellant contends for, is considered as settled in the courts of Tennessee. Thus, he says, "it is admitted, that the act of limitations cannot be pleaded to an express and subsisting trust, as between trustees and *cestui que trust*. This rule only operates so long as the trust subsists between the parties." "When a trustee, who has trust property in his possession, dies, the trust is no longer a subsisting one; but if the trust property be specific or capable of being identified, &c., then it would not be assets in the hands of the executors, and the *cestui que trust* may follow it in the hands of the executor, and the act of limitations could not be pleaded, where the trust property in specie is sought to be recovered. But if it is not specific, and therefore, cannot be identified and followed, &c., it is then assets, &c. The *cestui que trust* in such cases becomes a general creditor," &c., page 7. "Where it is not
*69] capable of *being identified, as the *cestui que trust* is then only a creditor, his claim, like that of all other creditors, will be barred, unless prosecuted within the time limited by law." This argument is in accordance with *Smith* v. *Hickman*, and shows the distinction between that case and this. Here, the claim is for specific trust property, and therefore, *cestui que trust* is not a creditor, and the statute does not apply.

The next case relied on is *Le is* v. *Hickman*, 2 Overt. 317. The court below, in their opinion, have explained this case. There, the land could not be had; it was held adversely; the bond had been given up for a defective deed, and the object of the bill was, to set up the bond and relieve the plaintiff. It was, therefore, a claim for money; it was all the holder of the bond could get. It does not appear in the case, that the obligor ever got a patent, or had the legal title to the land. It was not, therefore, as here the case of a party in possession, claiming the protection of equity against the legal title of the obligor. *Peck* v. *Wheaton's Heirs*, Mart. & Yerg. 360, is cited. There, the claim was plainly for a debt; and, no doubt, the statute was a bar. 3 Yerg. 208, is also mentioned; but seems to have no application to the question. The case of *Haggard* v. *Mayfield*, 5 Hayw. 121, is not correctly understood by appellant. The heir was the defendant, not the plaintiff in the ejectment; and the judge decides against the legal title of the plaintiff, but admits his claim in equity, as not barred by the statute.

To show conclusively that no such doctrine as is contended for by appellant, is recognised in the Tennessee courts, the court is referred to the case of *Cocke and Jack* v. *Maginnis*, Mart. & Yerg. 361. It is there said, page

363, by the court, that "the true rule is, that courts of equity will apply the statute of limitations to all cases, unless it be such as are predicated upon a naked trust, in which courts of equity alone have jurisdiction, and of which courts of law have no cognisance." Is not this precisely such a case as the court here excepts from the operation of the statute? Payne is in possession of the land, under the agreement for the legal title; and the heir-at-law has only the naked legal title, and this he held in trust for *him who had the possession and the right to demand the legal title; no court of law could have cognisance of such a case. What remedy [*70 at law could Payne have? What could he claim as a creditor? The holding the legal title (Payne being in possession) could not be adverse, so as to put him on making a claim upon the trustee, within the time limited by the statute; as long as the trustee suffered him to be in possession, it was a recognition of a subsisting trust. The court is also referred to *Armstrong's Heirs* v. *Campbell*, 3 Yerg. 201. The marginal note at the head of the case, shows the points decided, and the opinion of the court, in pages 231 and 237, shows that such a trust as this is not barred by the statute.

In truth, the statute of limitations is attempted to be used in this case, not to protect, but to disturb a long-continued possession; the heir-at law wields it, not to protect *his* fireside, but to invade another's. With a naked legal title, he seeks to dispossess the party who has been allowed to hold possession under an agreement for a title, that allowed possession, confessing the right of the possessor; and when equity is invoked to prevent this injustice, he objects that the *cestui que trust* is barred by the trustee's acquiescing in his possession, and delaying to question his right. It is not easy to conceive, how the rejection of such a plea will overrule any doctrine of the courts of Tennessee, or disturb the repose of the possessor of lands.

McLean, Justice, delivered the opinion of the court.—This case is brought before this court by an appeal from the decree of the circuit court for the western district of Tennessee. In their bill, the complainants state, that on the 22d of February 1785, a certain entry in the land-office of North Carolina was made by Isaac Coulson, assignee of David Welles, for 640 acres of land; and that afterwards, on the 2d of January 1787, he executed a bond to one Josiah Payne, for the conveyance of said tract of land, agreeable to the terms therein expressed, to wit:

"Know all men, by these presents, that I, Isaac Coulson, of the state of North Carolina and county of Davidson, do oblige myself, my heirs and assigns, to pay to Josiah Payne one hundred pounds, in Virginia currency, in payment for a certain bay stud-horse I bought of him, within *twelve months from the date hereof, with lawful interest, otherwise, [*71 in lieu thereof, I do oblige myself to make over all my right and interest of a certain entry and warrant of land of six hundred and forty acres, lying on the north side of Cumberland river, on said river, about one or two miles above the mouth of the Caney fork, unto the said Josiah Payne, of the county and state aforesaid, or his heirs and assigns. And if a deed or grant should issue to me, before said entry or warrant should be transferred from me to said Payne, then and in that case, I do hereby oblige myself to make a transfer deed of all my right, title and interest of the aforesaid land, unto the aforesaid Josiah Payne or his assigns; which deed

and right, when made, is to be taken in full payment for the one hundred pounds and interest; and I do hereby oblige myself to warrant and defend said deed from me, my heirs and assigns, for ever, unto the said Payne and his heirs." Which bond purports to have been signed and sealed by the said Isaac Coulson, and witnessed by James Donelson and William Bush.

The complainants further state, that the obligor elected to pay the said sum of one hundred pounds, by giving the land, as expressed in the above recited bond; which mode of payment was assented to by the said Payne. That said Isaac Coulson died intestate, some time in the year 1791, leaving the defendant his only heir-at-law. That a grant was issued for the land, on the 15th of September 1787, but no valid conveyance was made to the said Payne for the land, although in his lifetime various means were tried to obtain a title. That possession was taken of the land in 1799 or 1800, and that it has been occupied ever since, under the title of Payne, and that the taxes have been paid. That since the defendant has arrived at full age, he commenced an action of ejectment, and recovered a judgment for the land; and the complainants pray an injunction, and that the defendant may be decreed to convey all his interest in the premises to the complainants.

In his answer, the defendant denies that the bond set forth in the complainant's bill, was ever executed by his father, Isaac Coulson, and states that it is a forgery; and he denies the other material allegations in the bill.

In considering the question as to the genuineness of the bond on which this controversy is founded, the first important fact *that occurs to
*72] the mind is, the remoteness of the transaction. Nearly half a century has elapsed, since this instrument purports to have been executed; the obligor and the obligee, and both the witnesses, are dead; the contract belongs to the past age. It was executed, if at all, when the country was new and unsettled; and the parties to it seem to have been illiterate men, and unacquainted with business transactions. These circumstances are referred to, not to show that this bond should be received without proof, but to show, that as strict proof should not be required of its execution, as if it were of recent date. The law makes some allowance for the frailties of memory, and where a great length of time has elapsed, since the signing of an instrument attempted to be proved, circumstances are viewed as having an important bearing upon the question.

In the case of *Barr* v. *Gratz*, 4 Wheat. 213, this court decided, "that where a deed is more than thirty years old, and is proved to have been in the possession of the lessors of the plaintiff in ejectment, and actually asserted by them as the ground of their title in a chancery suit, it is, in the language of the books, sufficiently accounted for; and it is admissible in evidence, without regular proof of its execution by the subscribing witnesses."

There is no proof of the handwriting of James Donelson, one of the subscribing witnesses to this bond; but it is proved, that he was supposed to have been killed by the Indians, many years ago. The handwriting of Bush, the other subscribing witness, is proved by three of his sons, who were well acquainted with his hand, one of them having administered on his estate. These witnesses, and especially two of them, speak with great confidence, not only as to the signature of their father, but they say, that the body of the bond appears to have been written by him. And they state, that

although, at the time the bond bears date, and for some years before and afterwards, until his death, his father lived in Clark county, Kentucky, yet he was absent the greater part of his time, on hunting expeditions ; and they understood, that he was several times in the western part of Tennessee. It appeared, that their father understood surveying, *was a pretty good [*73
scribe, and was frequently called on to write deeds and other instruments. Three witnesses testify to the original contract, and the circumstances which led to it. Payne sold to Coulson a valuable horse, in addition to the land, for which he agreed to pay one hundred pounds. Some time afterwards, Coulson, finding the horse did not suit his purpose, induced Payne, as his agent, to sell him ; which was done, for the tract of land now in controversy. It was after this sale, as these witnesses say, that they understood a bond was executed, by which Coulson was bound to pay to Payne one hundred pounds, or convey the land to him in lieu of the money. Two witnesses state, that Coulson agreed to pay Payne fifty dollars, in a horse. George Cumming, and the sister of Josiah Payne were acquainted with William Bush ; and the latter was also acquainted with the other witness, James Donelson.

Some time after the date of the bond, Coulson, it is proved, went to Virginia, under the expectation of obtaining money to pay off the bond, from the estate of his father ; but he found that the estate had been wasted ; and being disappointed in raising the money, he remained in Virginia, married, and afterwards died in 1791. In the year 1793, Payne went to Virginia, and obtained from the widow of Coulson a bond, in a penalty, dated the 6th of November 1793, with a condition to convey all her interest in the land in dispute ; and she authorized Payne to take possession of it. This bond was executed by the widow, on the advice of Jacob Coulson, her brother-in-law, that it was best to discharge the claim by the conveyance of the land. An attempt was made to obtain a conveyance, under the sanction of a county court in Virginia, and Mrs. Coulson attended the court for that purpose ; but the decision was, that it had no power to act on the subject. At another time, Payne made application to the widow, and said he ought to have something, as he should have to wait until the children became of age ; and she let him have a horse worth fifteen pounds. In 1797 or 1798, it appears, a man by the name of Johns was sent to Virginia for this title, and was informed by Payne that he would probably find it ready for him. At this time, Mrs. *Coulson, Jacob Coulson and [*74
Benjamin Johns went to the court in Grayson county, Virginia, and were three days in attendance on it, endeavoring to procure a title for the land, but failed.

Payne had then sold a part of this land to Johns, but as no deed could be obtained, Johns was unwilling to take the land, and he exchanged it with Walton, who, in 1799 or 1800, took possession of a part of the tract, and has ever since held it by himself and his heirs. At a subsequent period, he made other purchases of the tract. It was known as Payne's land, from the time Johns went to Virginia for a title. Payne died in 1805, and his heirs endeavored to obtain a title, by permitting the land to be sold for taxes, in 1806 ; and they became the purchasers. Shortly after this sale, George Payne, son and administrator of Josiah Payne, went to Grayson county, Virginia, and procured a release of all claim to the land, from the

representatives of Coulson ; and in which they stipulated not to redeem the land, under the sale for taxes. This instrument has been lost. George Payne was drowned, a few years after the writing was obtained by him. These are the material facts and circumstances relied on by the complainants, to prove the execution of the bond, and to lay the foundation to the equitable relief prayed for in the bill.

A great number of depositions were read by the defendants' counsel, to rebut the facts proved by the complainants, and show that they are not entitled to relief. Six witnesses state, that they were acquainted with William Bush, and several of them, with James Donelson. That they both came from the Indian nation, and were supposed to be tories and refugees. That Bush was a dissipated man, was occasionally deranged, and incapable of business. That he had a brother named Abner, who was a man of good capacity, and of respectable character ; that they were both hunters, and were well acquainted with the water-courses falling into the Mississippi river, south of the Tennessee. Donelson and William Bush were reported to have been killed by the Indians, in the years of 1786 or 1787.

The depositions of three witnesses were read by the defendant, who were well acquainted with William Bush, in Clark county, Kentucky, and who, from their intimacy with him and the short distance they lived from him, about the time the bond *bears date, seem to think he could not *75] have been absent from home at that time. And it is proved by Jeremiah Coulson, brother of Isaac, that when Payne was in Virginia, a conversation took place between him, the witness, and Jacob Coulson, at which time, Payne said he had no obligation or any instrument of writing from Isaac Coulson, respecting the land in dispute. And that Payne also said, he was to receive from Coulson a negro boy, under twelve years old, in discharge of the debt ; and at the same time, he agreed to pay the taxes on said land, and take care of it for the children of said Coulson ; and the witness was called on specially to remember the agreement. At this time Payne received a horse of Mrs. Coulson worth $50, in part payment of the claim.

The first inquiry which naturally arises in the mind, on reading the whole evidence, is, whether it may not be reconciled. Some parts of it, and especially those parts which relate to the subscribing witness, William Bush, would seem to conflict ; but this is susceptible of a most satisfactory explanation. There can be no doubt, from the fact stated by the witnesses, that there were two persons who bore the name of William Bush, and who were occasionally in the western part of Tennessee, about the same time. One of them, the Kentucky Bush, was a respectable man, a deacon in the Baptist church, a surveyor, wrote a good hand ; and he died in Clark county, Kentucky, about the year 1816. The other was believed to have come from the Indians, was an ignorant, dissipated man, incapable of business, accustomed to hunting in the country south of the Tennessee river, and was reported to have been killed by the Indians in 1786 or 1787. He had a brother named Abner, who is proved to have been in no way connected with the Kentucky Bush. The mere statement of these facts is enough to convince every one, that the different witnesses, in describing the character, capacity for business, pursuits, residence and death of William Bush, could not have referred to the same person. Even the witnesses examined by the defend-

ant, in proving the residence and death of the Kentucky Bush, proved enough to show that he could not have been the same person who was believed to have been a refugee and tory; and was suspected *of attacking boats on the Mississippi river, in connection with other [*76 persons, and of committing other depredations upon society.

The fact that there were two persons of the name of William Bush, may be safely assumed; and the question arises, whether the signature of the Kentucky Bush, as a subscribing witness to the bond, is satisfactorily proved? Some doubt is attempted to be raised as to this fact, from the statements of the witnesses who lived in the immediate neighborhood of Bush, and who have no recollection of his having been absent from home, about the time the bond bears date. But this evidence, at best, is of a negative character, and depends upon the memory of witnesses, for a great number of years, of a fact, not calculated to make any impression on the mind. No circumstances are related by the witnesses, which were calculated to impress upon their memories the absence of William Bush, in January 1787. What prudent person, in the absence of such circumstances, would undertake to state, positively, that his nearest neighbor was absent from home, any given month, some twenty-five or thirty years before? But the complainants have proved by the three sons of Bush and his widow, that he was from home hunting, the greater part of his time; and some of them say, that from his conversations and several facts, they believe he often visited Western Tennessee. And more than one witness, who lived in the neighborhood of Josiah Payne, became acquainted with Bush in his expeditions to Tennessee. From these facts, it would seem, that no presumption against the due execution of the bond can arise, from the statement of the witnesses who were the neighbors of Bush, and who could not recollect of his having been absent from home, about the time the bond is dated.

But how can the admissions of Payne, in the presence of Jeremiah and Jacob Coulson, that he held no instrument of writing on Isaac Coulson for the land in dispute, and that he had agreed to receive a negro boy in discharge of the claim, be explained; and also his agreement to pay the taxes on the land, and take care of it for the heirs of Coulson? And what *answer can be given, to his having received a horse worth $50, in [*77 part payment of the claim? The payment of the horse seems to have been in pursuance of the original agreement. Two of the witnesses state, that Coulson, in addition to the land, was to give Payne a horse worth $50. And it is not improbable, if the remarks were made by Payne, as stated by Jeremiah Coulson, that he held no written contract from Isaac Coulson, they must have referred to the fact, of there being no writing respecting the payment of this horse. That he agreed to pay the taxes, and preserve the land for the heirs of Coulson, is disproved, by the fact, that either then, or some time before, Payne procured a bond from Mrs. Coulson for the land. The language of this bond cannot be mistaken; and it goes to show, that instead of abandoning the land, and agreeing to pay the taxes for the heirs of Coulson, he was determined to perfect his claim to it, by the use of such means as he could resort to. By the statement of Mrs. Coulson, it appears, Payne complained that he should have to wait for a title, until her children became of age. This fact, as well as the deed and the whole

course of conduct of Payne, show, that he could not have made the remarks and agreement, as stated by Jeremiah Coulson.

From this view of the evidence, which has a bearing upon the fact of the contract and the execution of the bond, the proof is as clear and as satisfactory as could be reasonably expected, after the lapse of so many years. The handwriting of Bush is proved by the positive testimony of three witnesses, and the consideration of the bond is clearly proved by three other witnesses, all of whom stand without any impeachment of their credit. Conclusive as these facts would seem to be, as to the genuineness of the bond and the consideration on which it was given, there are others equally conclusive.

If no contract between Coulson and Payne had been made, what could have induced the latter to visit Virginia in 1793, and how can the conduct of Mrs. Coulson, in executing a bond to convey all her right in the land, with the advice of her brother-in-law, Jacob Coulson, be accounted for? This was about five years after the money was to have been paid, or the *78] *land conveyed. The circumstances were then known to the parties, and no objection seems to have been made, either by Mrs. Coulson, or the connexions of her deceased husband, to the claim set up by Payne. So far from any objections being made, everything was done, both by Mrs. Coulson and her friends, which they could do, to vest the title for this land in Payne. They applied to the court, and remained in attendance upon it for three days, at one time, under the hope of obtaining the necessary authority to execute the conveyance. And Payne complained of the hardship of being compelled to wait for a title, until the heirs of Coulson became of age.

These are facts established by the evidence, and do they not show beyond controversy, that there was a contract between Coulson and Payne respecting this land? and this important point being established, independent of the bond, the genuineness of that instrument must be extremely probable. Its language agrees with the contract as proved by parol; and several of the witnesses say, the contract was reduced to writing. And in addition to this, the clear proof of the handwriting of Bush, the subscribing witness, would seem to be conclusive. Taking into view all the facts and circumstances in favor of the due execution of this instrument, it has been as fully established as could be expected of any writing of so ancient a date.

But it is objected, that this bond has been multilated, and therefore, it must be rejected. It is true, that some alterations have been made on the face of the bond. The words North Carolina, or some other words, have been erased, and the word Virginia, in lieu thereof, has been inserted. This alteration would make the bond read Isaac Coulson, of the state of "Virginia," and county of Davidson, instead of the state of "North Carolina," &c. The signature of Isaac Coulson to the bond seems to have been scratched out and again written. That these alterations have been made since the death of Payne, is satisfactorily proved; and it is clear, that no one having any interest under the bond, could have had a motive to alter it, as seems to have been done. If, by the alterations, the obligation of Coulson had been increased, either as to the time of payment, the sum to be paid, or the number of acres to be conveyed, Payne or his heirs might have had *79] some *motive of interest to make them; but their interest was

directly opposed to any act, which would impair the validity of the bond, or cast suspicion upon it. It is proved, that after the death of Payne, the bond was in possession of those who claimed the land adversely to it; so that its destruction would have advanced their interests. It is fair, therefore, to presume, that if the alterations were made by design, they could not have been made by any one claiming under the bond, but must have been made by some one who had an interest in destroying it.

By this bond, Coulson agreed to pay to Payne one hundred pounds, in twelve months, or, in lieu of the money, to convey the land. It is alleged in the bill, that Coulson elected to pay the one hundred pounds, by a conveyance of the land, and that Payne agreed to receive it. This is a clear case of election by the obligor; and a conveyance of the land, or the payment of the money, within the time specified, would have discharged the obligation. The money has not been paid; and although there is no positive proof that an election was made, during the life of Coulson, to pay the land, yet, from the facts and circumstances of the case, and the condition of the obligation, there can be no doubt, that those who claim under it have a right to consider it now as an absolute bond for the conveyance of the land.

The statute of limitations is set up as a bar to the relief sought by the bill; and as this is a ground more relied on by the counsel than any other, it requires a most careful examination. In the ninth section of "an act concerning proving wills and granting letters of administration, and to prevent frauds in the management of intestates' estates," enacted by North Carolina, in 1715, and which is now in force in Tennessee, it is provided, "that creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise, such creditor shall be for ever barred." Under this statute, the question arises, whether the representatives of Payne, in asserting their claim to the land in controversy, can be considered creditors? Whether, in a case where the relation of vendor and vendee exists, the consideration having been paid, and a naked trust only has descended to the *heir, he can protect himself, under this statute, after the lapse of seven years, against a bill for a specific performance. [*80

It is insisted by the defendant's counsel, that this is not considered an open question in Tennessee; and that in pursuance of the rule of decision in this court, to adopt the construction given to its statutes by the supreme court of a state, the question must be considered here also as settled. The first case (*Smith* v. *Hickman's Heirs*) referred to, is in Cooke 330. In this case, the reporter says, "the bill states that the ancestor of the defendants, some time in the spring of 1789, executed an obligation to the complainant, binding him to convey six hundred acres of land, within a reasonable time; that the said ancestor died intestate, in the year 1791, leaving the defendants his heirs-at-law; and that administration of the personal estate was committed to his wife and two other persons. That the obligation has not been complied with; and that the defendants refuse to satisfy the same, although there is a large estate descended to them, both real and personal. The bills prays for a specific performance." To this bill, the statute of limitations was pleaded in bar. In their opinion, the court say, "it has been insisted, that the complainant is not a creditor, on account of the

demand not being of a pecuniary nature; but, as it is the duty of this court to examine this point, they feel satisfied that, as to that, he is within the act. All persons are considered creditors that have demands originating from contracts or agreements." And in answer to the arguments of counsel, that the statute could have had no reference to heirs, but to the personal representatives and the personal estate, the court remark, "the only inquiry is, whether it were reasonable that the legislature should think of the situation of heirs, in respect to the debts of their ancestors;" and again, "if no lapse of time can secure the estate thus descended, the peace of society would be much disturbed. Recoveries might be made of one, of many heirs, and suits for contribution must take place." And further, "it is admitted, in argument, that it is reasonable, legatees and distributees should know when they may be at rest."

From the statement in the bill, it does not appear, that the conveyance of any specific tract of land was prayed for, and it would seem, from the fact of
*81] the personal representatives being *named in the bill, and an averment that a large estate, both real and personal, descended to the defendants, that the object of the suit could not have been a title, but to subject the property descended to the heir to the payment of the claim. On no other supposition, can the language of the bill receive a sensible construction. If the bill had been filed to obtain a decree for a title to a specific tract of land, would the administrators have been named in it; and could it have been thought necessary to aver, that a large estate, both real and personal, descended to the defendants? Whether the heirs inherited any estate, or not, beyond the particular tract, was wholly immaterial. If they were naked trustees, they could be held responsible as such; and the administrators were neither necessary nor proper parties to the suit. It is true, the language used by the court in the first quotation above made, is general, and would embrace a case of trust; but such does not appear to have been the case before them. And this fact seems to be clear of doubt, when the language of the court, from other parts of their opinion, as above quoted, is considered in connection with the case made in the bill.

The case of *Lewis* v. *Hickman's Heirs*, 2 Overt. 317, is also relied on. In this case, the bill stated, that Hickman, for a valuable consideration, executed a bond to Hughes for 500*l.* with condition for the conveyance of a tract of 274 acres of land, &c. Hickman died intestate, and his administrator, under a statute authorizing administrators to make deeds, executed one to the plaintiff's testator, in discharge of the bond. It was charged, that the deed was not in compliance with the statute, and therefore void. That a certain Roberts took possession of the land; and that, on account of the defect in the title, a recovery could not be had against Roberts. The object of the bill was, that the bond might be set up, and the plaintiff relieved. The statute was pleaded in bar, and the defendant stated also, "that he had distributed the estate among those entitled agreeable to law; and from length of time, he was not able to produce his vouchers," &c. This was
*82] clearly not a case where the plaintiff prayed a *specific performance; and yet it was admitted by the counsel to be the same in principle as the one above referred to, of *Smith* v. *Hickman's Heirs*.

In *Peck* v. *Wheaton*, Mart. & Yerg. 353, the supreme court of Tennessee say, "we are moreover of opinion, that the act of 1715, above quoted,

will operate as a bar ; and that that act is in force, we consider one of the best-established positions litigated in our courts." This bill was brought to subject the lands which had descended to the defendants, to the payment of the debts of their ancestor ; and the court very properly held, that the statute was a good bar. The complainants were, substantially and technically, creditors. This shows, too, that it was the ordinary course in Tennessee, by bill in chancery, to make the lands descended to heirs liable to the debts of the ancestor. The case of *Armstrong* v. *Campbell*, 3 Yerg. 208, is cited. In the margin, the reporter says, that the only exception to the operation of the statute of limitations is, where the trust is created by express contract, and where the relation of trustee and *cestui que trust* exists in fact, and not by implication. But in this case, the question did not come directly before the court.

That the statute of limitations is applied, by courts of equity, in all cases where at law it might be pleaded, is a well-settled principle. At law, to make the statute a bar, there must be an adverse possession ; and by analogy, a court of equity, in a similar case, will hold the statute to be a good bar. But the statute insisted on as a bar in this case, does not depend upon possession. It bars a creditor who does not sue the heir within seven years. There can be no doubt, that the statute applies, where a creditor seeks to make the heir liable for the debt of his ancestor, on the ground that either personal or real property descended to him. And this appears to be the decision of the supreme court of Tennessee, on the statute. There is nothing in their decisions referred to, which show that they have given effect to the statute, beyond this. By the statute of 1819, which is wholly different in its language from the act of 1715, a bar is created, indiscriminately, to suits in equity as well as at law. But this statute does not govern the case under consideration.

In the case of *Haggard* v. *Mayfield*, 5 Hayw. 121, the court *say, [*83
"as to the act of limitation of 1715, where is the obligee in such a case as the present barred as against the heir? He has no demand against the executor, when he elects the land ; and cannot, therefore, be barred as to him. His demand is only against the heir, and that too in equity, upon a trust to be performed by the heir, who, until performance, holds the land for the obligee ; and is only barrable, as in a case of equities, by the lapse of twenty years unaccounted for." This point was not involved in the case, but the question shows the view of the court.

From a careful examination of the cases in which the ninth section of the act of 1715 has undergone a judicial construction by the supreme court of Tennessee, we are satisfied, that the question raised in the present case has not been decided. And this court can have no hesitation in saying, that the complainants in this suit can, in no correct sense, claiming, as they do, a specific execution of the contract, be considered creditors, within the meaning of the statute. They do not seek to subject the lands which descended to the defendant, to the payment of debts contracted by his ancestor, but to divest a naked legal title in favor of an equity clearly established—an equity founded upon a contract which acknowledged the receipt of the consideration in full, in 1787 ; and, as is proved, the same consideration which was paid by the defendant's father for the land in question—an equity accompanied by a possession of more than twenty years.

Can lapse of time operate to the prejudice of the complainants? Have they slept upon their rights? In about five years after the conveyance should have been executed, we find Payne in Virginia, endeavoring to procure a title. And at that time, he did prove a recognition of his claim by the widow of the obligor, who was the only person, according to the views then entertained, that had an interest in the land, and was capable of entering into a legal obligation. Payne's visit is repeated to Virginia, for the same object, and he sends an agent at another time. In 1798, he sells a part of this land; and in the following year, or in 1800, possession is taken under this purchase, and subsequently, other purchases are made; and the possession of the land under Payne and his representatives, has been continued to the present time. In *1805, Payne died, and this land descended to his heirs-at-law, several of whom were infants; and it is admitted, that until the year 1801, there was no court of chancery in Tennessee, through which the specific execution of a contract could be enforced. And it is proved, that this land has been called Payne's land for thirty-five years.

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These facts being proved, does the case come within any decision by the courts of this country, or of England, where the specific execution of a contract has been refused, on the the ground of lapse of time? When the condition of the parties, their remote residence from each other, their death, the state of the country and its tribunals, are considered; it would seem, that instead of being negligent in the prosecution of the claim for a title to this land, Payne and those who claim under him, have shown more than ordinary diligence. Even after the death of Payne, we find his son and administrator in Virginia, endeavoring to procure the title. And at this time, as well as at all times previously, when application was made, the right of Payne was acknowledged. Under such circumstances, this court cannot consider the lapse of time as operating against the right set up by the complainants.

The instruments under which a part of the complainants set up an equity derived from Payne's heirs are proved; but they cannot be sanctioned by this court, except where such instruments were executed by the heirs of full age. It is the duty of the court to protect the interests of minors; and we think the decree of the circuit court in this respect, as well as in every other, is correct; and it is, therefore, affirmed, with costs.

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 West Tennessee, and was argued by counsel: On consideration whereof, it is decreed and ordered by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.