Thompson *v.* Jameson.

Debt on decree in chancery.— Variance.

An action of debt for 860*l.* 12*s.* 1*d.*, founded on a decree in chancery, is not supported by a decree for 860*l.* 12*s.* 1*d.*, with interest from a certain day to the day of rendering the decree; but the variance is fatal.

Upon an attachment in chancery, under the laws of Virginia, the record stated that "I. T., in open court, became security that I. H. (the absent debtor) shall perform the decree of this court if against him:" *Quære?* Whether an action of debt will lie against I. T., for the amount decreed against I. H.?

Thompson *v.* Jameson, 1 Cr. C. C. 295, reversed.

Error from the Circuit Court of the district of Columbia, sitting in Alexandria.

*Thompson, in the year 1795, being indebted to Hadfield, a person residing out of the jurisdiction of the commonwealth of Virginia, [*283 and Hadfield being indebted to Jameson & Brown, as partners in merchandise, the latter obtained from the county court of Fairfax, an attachment in chancery, in the nature of a foreign attachment, to stay the effects of Hadfield, in the hands of Thompson, under an act of assembly of Virginia, entitled "An act directing the method of proceeding in courts of equity against absent debtors, or other absent defendants, and for settling the proceedings on attachments against absconding debtors." (Rev. Code, p. 122, c. 78.) This act directs, "that if in any suit which hath been or hereafter shall be commenced for relief in equity, in the high court of chancery, or in any other court, against any defendant or defendants who are out of this country, and others within the same, having in their hands effects of, or otherwise indebted to, such absent defendant or defendants, and the appearances of such absentees be not entered, and security given, to the satisfaction of the court, for performing the decrees; upon affidavit that such defendant or defendants are out of the country, or that upon inquiry at his, her or their usual place of abode, he, she or they could not be found, so as to be served with process; in all such cases, the court may make an order, and require surety, if it shall appear necessary, to restrain the defendants in this country from paying, conveying away, or secreting the debts by them owing to, or the effects in their hands, of such absent defendant or defendants; and for that purpose, may order such debts to be paid, and effects delivered, to the said plaintiff or plaintiffs, upon their giving sufficient security for the return thereof, to such persons, and in such manner, as the court shall direct." It further provides, that the court shall appoint some day in the succeeding term, for the absent defendant to enter his appearance, and give security for performing the decree; and shall order notice to be published, &c.; and if the absent debtor shall not appear and give such security, within the time limited, the court may proceed to take such proof as the complainant shall offer; and if they shall thereupon be satisfied of the justice of the demand, they may order the bill to be taken as

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ation is allowed to it, beyond the original territory of the grant, is mere matter of courtesy. Vaughan *v.* Northup, 15 Pet. 1. If an administrator desire to prosecute a suit in another state, he must first obtain a grant of administration therein, in accordance with its laws. Noonan *v.* Bradley, 9 Wall. 394; Brownson *v.* Wallace, 4 Bl. C. C. 465. And see Graeme *v.* Harris, 1 Dall. 456; Sayre *v.* Helme, 61 Penn. St. 299.

confessed, and make such order and decree therein, as to them shall seem just, and may enforce due performance thereof, &c.

*284] *In the record of that case, in Fairfax county court, it is stated, "that at a court continued and held for the said county, on the 18th day of June, in the year last mentioned, came the complainants aforesaid, by their attorney, and thereupon, Jonah Thompson, in open court, became security that the said Joseph Hadfield shall perform the decree of this court, if against him; and on motion of the said defendant, Joseph Hadfield, by his attorney, the attachment is discharged as to the effects in the hands of the other defendants." The court, at a subsequent term, on the 19th of November 1799, decreed, that "it having appeared to the satisfaction of the court, that the complainant's bill hath been duly taken for confessed, after his appearance by attorney, and giving security for performing the decree against him, the court doth adjudge, order and decree, that the complainants do recover against the said Joseph Hadfield, the sum of eight hundred and sixty pounds, twelve shillings and one penny, sterling (to be settled in Virginia currency, at the rate of twenty per cent. exchange), together with interest on the same, at the rate of five per cent. per annum, from the 8th day of March 1795, until the day of pronouncing this decree, and also his costs by him expended in the prosecution of his bill here."

Hadfield having failed to perform this decree, and Brown, the partner of Jameson, being dead, Jameson brought the present action of debt, in the circuit court of the district of Columbia, against Thompson, founded upon his responsibility as security for Hadfield's performing the decree. The declaration was "of a plea that he render unto him the sum of eight hundred and sixty pounds, twelve shillings and one penny, sterling, of the value of one thousand thirty-two pounds, fourteen shillings and six pence, Virginia currency, equal to three thousand four hundred and forty-two dollars and forty-one cents, United States currency, which to him he owes, and from him unjustly detains; for this, that whereas," &c., setting forth the substance of the proceedings on the attachment in Fairfax county court; "and whereas, afterwards, that is to say, at a court held for the said county of Fairfax, on the 18th day of June 1795, at the county aforesaid, the said Jonah, in open court, became security that the said Joseph would perform

*285] the decree of the said court in the said suit, if against him; *in which said suit, such proceedings were had, that the said court of the county of Fairfax, on the 19th day of November, that is to say, at the county of Alexandria aforesaid, did adjudge, order and decree, that the said Robert B. Jameson & Co. should recover from the said Joseph, the said sum of 860*l.* 12*s.* 1*d.*, sterling (to be settled in Virginia currency, at the rate of twenty per cent. exchange), together with interest on the same, at the rate of five per centum per annum, from the 8th day of March 1795, until the day of pronouncing the said decree, and also their costs by them expended in the prosecution of the said bill. All which, by the record thereof, now remaining in the office of the county court of Fairfax, will more fully and at large appear. And the said Robert B. Jameson, in fact avers, that the said Joseph has not in any manner performed the decree of the said court of Fairfax county, in the cause aforesaid made, in this, that he has not paid to the said Jameson & Co., in the lifetime of the said Brown, nor to the said Jameson, who has survived the said Brown, the said sum of 860*l.*

12*s.* 1*d.*, sterling, or the value thereof in Virginia currency, at the rate of exchange in the said decree mentioned, with interest thereon, as awarded by the said decree; which said decree, in form aforesaid, yet remains in full force and effect, not reversed or satisfied; by reason whereof, action accrued to the said Jameson & Co. to demand and have from the said Jonah, the said sum of 860*l.* 12*s.* 1*d.*, sterling, of the value aforesaid. And the said Jameson further avers, that the said Brown, on the ——— day of ———, in the year———, departed this life, to wit, at the county of Alexandria aforesaid, whereby the said cause of action survived to the said Jameson. Nevertheless, the said Jonah, the said sum of 860*l.* 12*s.* 1*d.*, sterling, of the value aforesaid, or any part thereof, to the said Jameson & Co., in the life-time of the said Brown, or to the said Jameson, since his death, has not paid, &c.; to the damage of the said Jameson, five hundred dollars, and therefore, he brings suit," &c.

There was an office judgment, at the rules, in November 1801, which was not set aside at the next succeeding court, in January 1802. At April term 1802, the defendant's counsel moved to set aside the office judgment on *pleading *nil debet.* The court being divided on the propriety of that plea to an action founded on the record of a court of one of the [*286 states, the plea was not received, and a bill of exceptions was taken by the counsel for the defendant, and signed by the judge who was against the admission of the plea. The pleas of *nul tiel record,* and payment, were then filed, and issues made up, on which the cause went to trial. The verdict upon the issue of payment was in these words: "we of the jury find for the plaintiff the debt in the declaration mentioned, and one cent damages, to be discharged by the payment of $2544.49.

And the defendant moved in arrest of judgment for the following reasons: 1st. Because the action is brought for sterling money, when it appears by the plaintiff's own showing in the declaration, that the original sterling debt has been changed by the decree of the county court of Fairfax, into the current money of Virginia. 2d. Because the plaintiff in his declaration, declares for a sterling debt, and lays his damages in current money. 3d. Because the jury have found their damages in current money, and have fixed the sum in current money, at which the said sterling debt might be discharged. 4th. Because it doth not appear by the plaintiff's declaration, what was the nature of the defendant's undertaking as security, whether it was by record, by bond, or by parol. 5th. Because the whole proceedings are irregular, informal and erroneous.

These reasons not being deemed sufficient by the court below, judgment was rendered for the plaintiff for "860*l.* 12*s.* 1*d.* sterling, of the value of 1032*l.* 14*s.* 6*d.*, Virginia currency, equal to $3442.41, United States currency, [*287 *the debt in the declaration mentioned, and one cent damages, by the jurors aforesaid, in form aforesaid assessed, and also his costs by him about his suit in this behalf expended; and the said defendant in mercy, &c. But this judgment (damages and costs excepted) is to be disharged by the payment of $2544.49." To reverse this judgment, the defendant below sued out the present writ of error.

Swann, for the plaintiff in error. *E. J. Lee* and *Key,* for the defendant.

Swann.—1st. The declaration does not show any obligation on Thompson,

upon which this or any other action will lie. 2d. If it does, it is not such a this one as will support an action of debt. 3d. If an action of debt will lie, still this action will not, because it is brought for part of the debt only. 4th. The action is brought for sterling money, whereas it ought to have been brought for Virginia currency. 5th. If properly brought for sterling money, the court below ought to have rated the exchange.

1st. The record simply states, that "the said Jonah (Thompson) in open court became security;" but does not state how; whether by bond, by parol, or by matter of record. It is only a record declaration, that he became security.

2d. The record states, that he became security that Hadfield would perform the decree of the court, if against him; and not that Thompson would pay the debt, or that he undertook to pay any sum of money whatever. Nor does it state that he became bound in any particular sum. It does not state
*288] that he undertook to pay the debt, *if Hadfield did not. There is nothing to support an action of debt. It is, if anything, a collateral undertaking; and if any action will lie, it must be covenant. To support an action of debt, there must be a direct obligation on the part of the defendant, moving to the plaintiff, to pay a certain sum, or a sum which may be rendered certain.

3d. The declaration is for 860*l.* 12*s.* 1*d.* sterling, of the value of 1032*l.* 14*s.* 6*d.*, Virginia currency, equal to $3442.41, United States currency. This is not the whole debt due by the decree. You must sue for the whole debt, or, if you sue for a part, you must state the residue to be satisfied. The decree of the court of Fairfax was rendered on the 19th of November 1799, and was, that the complainants recover against Hadfield the sum of 860*l.* 12*s.* 1*d.* sterling (to be settled in Virginia currency at the rate of 20 per cent. exchange), together with interest on the same at the rate of five per cent. per annum, from the 8th of March 1795, until the day of pronouncing that decree (19th November 1799), and also his costs by him expended in the prosecution of his bill. The debt was composed of the principal sum, reduced to Virginia currency at 20 per cent. exchange, and interest thereon, at five per cent. per annum, calculated from 8th of March 1795, to the 19th of November 1799, and costs. But the declaration is only for the principal. It is, therefore, only for a part of the debt, and does not state the residue to be satisfied. A debt cannot be divided, and the reason of the law is, that a multiplicity of actions may be prevented. *Marsh* v. *Cutler*, 3 Mod. 41; *Pemberton* v. *Shetton*, Cro. Jac. 498–9.

4th. The debt was originally due from Hadfield in sterling money, but the debt due by the decree is a current-money debt. The decree has changed it from sterling to currency. It is an express command that it shall be settled in current money, at a certain rate. It is no longer a sterling debt. If an action of debt will lie for it, it must be laid as a debt due in Virginia currency.

5th. But if it is a sterling debt, then the court below ought, under the
*289] act of the Virginia assembly (Rev. Code, *p. 121, c. 77, § 6), to have fixed the rate of exchange. The verdict ought to have been simply for the sterling debt and damages; but the jury have gone on and said that the debt should be discharged by the payment of $2544.49: and the court

have rendered judgment in the same manner, without fixing the rate of exchange.

6th. The declaration states the decree to have been made on the 19th of November, but does not say in what year. This omission was fatal on the plea of *nul tiel record.*

E. J. Lee, for the defendant in error.—1st. The record states the obligation of Thompson, in the very words of the act of assembly. It is the highest obligation which he could have entered into. It is an acknowledgment on record, and is stronger than his bond. Its meaning is evident, from the intention of the act of assembly; and is simply this, that Hadfield should pay the money decreed to be due, and if he did not, that Thompson would pay it for him.

2d. To the objection that this is not such an obligation as will support an action of debt, the answer is, that it is in the nature of a recognisance in chancery, and an action of debt will lie on such a recognisance. 1 Esp. N. P. 216.

3d. The case in 3 Mod. does not apply to the present. There, the action was upon a judgment. Here, it is upon the obligation or recognisance of Thompson. We have declared for as much as was due from Hadfield, and no more. The obligation of Thompson was to pay what Hadfield should fail to pay. Our action is for this. The record of Fairfax court, which is made part of the declaration, shows how the residue was discharged.

4th. The court of Fairfax did not convert the debt into Virginia currency. They only fixed the principles on which the exchange should be made. The decree is for sterling, to be discharged in current money, at a certain rate of exchange.

*5th. It is the province of the jury, and not of the court, to fix the value of sterling money. *Barnet* v. *Watson*, 1 Wash. 373, 378. [*290

6th. Although the year of the decree is not stated in the declaration, yet enough is stated to render it certain.

Key was to have argued on the same side, but on examination of the record of the decree in Fairfax, and comparing it with the declaration; and finding the decree to be for 860*l.* 12*s.* 1*d.* sterling, with interest from a certain day to the day of passing the decree, and the declaration being only for the principal, he considered the variance as fatal. He had not before noticed accurately the words of the decree, but had supposed the interest did not stop at any certain day, but was, by the decree, to run until the time of payment. He did not understand that this point had been made in the court below, and therefore, had not before examined the record with a view to it.

The Court gave no opinion upon the other points, but, considering this variance as fatal—

Reversed the judgment.

The Chief Justice observed, that there was no clause in the declaration, stating that Thompson undertook to pay, if Hadfield did not, and therefore, an action of debt would not lie.