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*Whyte v. Gibbs et al. Gibbs et al. v. Whyte.*

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was disposed of in the case when before us on the merits, and was not reserved for the hearing on the adjustment of the accounts before the court below, on the coming down of the mandate. (17 How., 257.)

An objection has been made by the counsel for the appellant, Williams, in respect to the order of the court below, permitting a supplemental answer. We suppose this question rather a matter of practice than otherwise, resting in the discretion of the court below, and as a matter of convenience preparatory to the taking of the account before the master. The answer—and, for aught we see, the object in view might as well have been attained by a petition to the court, stating the facts—was put in for the purpose of bringing to the notice of the court the matters relied on in the adjustment of the accounts, and by way of charges to be deducted from the amount claimed. The proceeding enabled the court to give in advance directions to the master in making the settlement, and thereby narrow the grounds of controversy before him, and facilitate the hearing. It could work no prejudice to either party, for no claim by way of abatement of the account thus set up in the answer or petition should be allowed by the court, but what was pertinent to the subject of examination before the master.

Upon the whole, we are satisfied the decree of the court below was right, and ought to be affirmed.

Mr. Justice GRIER dissented.

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WILLIAM PINKNEY WHYTE, ADMINISTRATOR DE BONIS NON OF JOHN GOODING, DECEASED, APPELLANT, *v.* ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED; AND ROBERT M. GIBBES AND CHARLES OLIVER, SURVIVING EXECUTORS OF ROBERT OLIVER, DECEASED, APPELLANTS, *v.* WILLIAM PINKNEY WHYTE, ADMINISTRATOR DE BONIS NON OF JOHN GOODING, DECEASED.

Where the defendant appeared to a bill in chancery, and defended the suit, and no want of jurisdiction appeared in the record, and then the complainant died, an objection that the defendants were citizens of another State comes too late when made to a bill of revivor, which is only a continuance of the suit. Moreover, a plea to the jurisdiction comes too late after a mandate has gone down from this court to the court below.

THESE were cross appeals from the Circuit Court of the United States for the District of Maryland, and were argued together with the preceding case by the same counsel.



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*Whyte v. Gibbes et al. Gibbes et al. v. Whyte.*

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Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland.

The case in principle is similar to the case of *Williams v. The Executors of Robert Oliver*, in which the opinion has just been delivered, with the exception of a question made upon a bill of revivor.

The suit was originally brought by John Gooding, jun., administrator *de bonis non* of the estate of John Gooding, sen. After the determination of the cause by this court, reversing the decree below, and sending it back with directions to enter a decree for the complainant, and to take an account, the complainant died. Thereupon, Whyte, the present complainant, was appointed administrator *de bonis non*, and filed a bill of revivor of the original suit, and presented a petition to the court, praying that, as the defendants were residents of the city of New York, the subpoena may be served upon the counsel of the defendants in the original suit, which was granted. The defendants appeared, and filed an answer to the bill of revivor under protest, and insisted that the court had not jurisdiction of the original suit, as the complainant in that suit was a citizen and resident of Virginia, and the defendants were residents of New York. There does not appear to have been any order of the court upon the question presented in this answer; but the cause proceeded before the master, where it was pending at the time of filing the bill of revivor and answer to the same.

The point is now taken, that as it appears the defendants were citizens and residents in New York at the time of the filing of the original bill, and also the bill of revivor, the court below had no jurisdiction in the case.

The answer to this objection is, that no want of jurisdiction appeared on the face of the original bill, and the defendants appeared and defended the suit; and, as the bill of revivor is but a continuance of that suit, the residence of the parties at the time it was filed is altogether immaterial.

This question arose in the case of *Clarke v. Matthewson et al.*, (12 Peters, 164,) and was decided in conformity with the rule above stated.

In respect to the other objection, that the court had not jurisdiction in the original suit, we may add, in addition to what we have said, it comes too late after the mandate has gone down to the court below. (3 How., 413.)

The decree of the court below affirmed.

Mr. Justice GRIER dissented.