Case No. 9,941.

MURDOCK ET AL. v. HUNTER.

{1 Brock. 135.}

Circuit Court, D. Virginia. May Term, 1808.

EVIDENCE—PROOF OF HANDWRITING—COURTS—ENGLISH ADJUDICATIONS MADE PRIOR TO THE REVOLUTION—ADMINISTRATOR—RIGHTS OF CREDITOR.

1. The subscribing witness to a bond being dead, proof of the handwriting of the attesting witness, if unaided and unopposed by other evidence, is sufficient to establish the execution of the bond.

2. The decisions of the courts of England, made prior to the Revolution, are of binding authority on the courts of Virginia. Those made since have not that character, but when they are reasonable, conformable to general principles, and do not change a rule previously established, they will not be entirely disregarded.

{Cited in Brewer v. Harris, 5 Grat. 293; Moon v. Stone's Ex'r, 19 Grat. 263.}

3. A bond creditor is not bound to pursue the personal assets of his debtor in the hands of others than his personal representative, if such pursuit threatens to be tedious, intricate, and unproductive. But if the personal estate is in the hands of legatees, who may be easily brought before the court, they ought to be made parties to the suit. See Corbet v. Johnson {Case No. 3,218}.

{Cited in McLaughlin v. Bank of Potomac, 7 How. (48 U. S.) 229.}

This was a bill in chancery, filed in August, 1805, by the plaintiffs {J. Murdock & Co.}, partners in trade, and subjects of the king of Great Britain, to subject certain lands in the county of Princess Anne, in Virginia, of which William Hunter died seized, in the hands of devisees, to the payment of a bond, purporting to be executed by one Thomas Claiborne, and the said Hunter. The bond was in the penalty of £316 9s., to be discharged by the payment of £158 4s. 6d., and bears date the 23d of September, 1774,

payable on the 23d September, 1775, to Archibald Govan, and was attested by Andrew Ronald. At the period of the institution of this suit, both the obligors and the attesting witness were dead, and the plaintiff's adduced proof of the handwriting of Ronald, which was the only evidence offered of the execution of the bond. William Hunter died in 1777, having first made his will, appointing executors, who refused, or failed to qualify, and Elizabeth Tenant took out letters of administration, with the will annexed, of William Hunter; and after her death, Thomas Wishart qualified, as administrator of the estate of Hunter unadministered by Elizabeth Tenant. Wishart died, and Hancock qualified, but before this suit was brought, Hancock was also dead, and no subsequent administration was granted: so that at this period, there was no personal representative of Hunter.

William Hunter devised a tract of land in fee to James Tenant, lying in Princess Anne county, and containing by estimation, 517 acres, who died seized thereof. James Tenant devised the said land to Elizabeth Tenant, his mother, for life, remainder to his eldest sister, living at her death. At the death of Elizabeth Tenant) Elizabeth White, the wife of William White, became entitled to the Princess Anne estate, under the will of James Tenant, and when this bill was filed, the said Elizabeth and William White, the only defendants in this cause, were seized and possessed thereof. The plaintiffs in their bill, allege that the personal estate of William Hunter, deceased, was either exhausted, or could not be reached by the death of his administrators and their sureties, and the insolvency of some of them, and pray a decree for the sale of the said land, to satisfy their debt.

In their answer, filed in 1807, William and Elizabeth White say, that William Hunter died, possessed of a large personal estate, more than sufficient for the payment of all his debts, and refer

to an inventory and appraisement of his estate, (which is made a part of their answer,) taken on the 15th day of September, 1777, by which the personal estate of William Hunter is estimated to have been worth £2468 3s.: that many of the negroes of the estate were carried away by the British troops, during the Revolutionary War, and have never since been heard of, and that the residue of the personal estate has been long since distributed among the legatees of William Hunter. They deny the sufficiency of the proof adduced, to establish the execution of the bond by William Hunter. But if the court should be of a different opinion, they insist, that after the lapse of thirty years, the plaintiffs have no right to subject the real estate of which Hunter died seized, to the payment of this bond, since, at the time it became payable (September, 1775,) there was no legal impediment to the prosecution of this claim, Great Britain and her colonies 1014 in America being then politically united, and ever since the termination of the Revolutionary War, the courts of Virginia have been open to the prosecution of suits by British subjects, against citizens of Virginia: that there is now no legal representative of William Hunter, nor can any of his papers or books be found, from which a correct statement of his affairs can be made out; whereas, had the present demand been exhibited in due time, the responsibility now sought to be fixed on these defendants, would have attached to others. They admit, that the real estate which the plaintiffs now seek to subject to the satisfaction of this claim, was derived from William Hunter.[1]

MARSHALL, Circuit Justice. In this case, two points are made at the bar: 1st. That the bond on which the suit is instituted, is not sufficiently proved. 2d. That the proper parties are not made.

1st. The bond purports to have been executed by Thomas Claiborne and William Hunter, is attested by Andrew Ronald, who is since dead, and the only proof offered, is that of the hand-writing of the subscribing witness. The question, whether this testimony is sufficient to establish the execution of the bond, without any proof of the handwriting of the obligor, has been argued on principle and on authority, and is of considerable importance in those old cases, which are frequently brought before this court. The general principle is, that the best evidence of which the nature of the ease will admit, ought to be adduced. The subscribing witness himself being dead, the best proof that he attested the bond is, that the signature, purporting to be his, is in his hand-writing. This testimony, therefore, proves, that he subscribed his name to the obligation; but whether its execution shall be inferred from this fact, or must be proved by other testimony, so that proof of the death and handwriting of the subscribing witness, simply dispenses with the necessity of producing that witness, is a question, which, on principle alone, might be decided the one way or the other, and the decision would be supported by almost equal strength of reasoning. Positive proof of the execution of a bond is required, where that proof is attainable. Where it is unattainable, the law must be satisfied with circumstantial evidence. If the plaintiff, by proving the death and handwriting of the subscribing witness, was only let in to prove the execution of the bond by other testimony, it would seem to be sufficient to prove the death of the subscribing witness, and to identify his person by any other proof than that of his hand-writing, as, for instance, that he was the only person of that name, in a situation to render it probable that he could have attested the bond. Since it is not only necessary to prove the death, but to prove the hand-writing, of the subscribing witness, it would seem that something

further than the mere permission to establish the execution of the bond by other testimony, was gained by this proof. This can only be the inference which is drawn by 1015 the law, that if the person who attested the bond was present, he could and would prove its execution. This, however, is only circumstantial proof, and may certainly he strengthened by other circumstances, as by proof of the hand-writing, or the acknowledgment of the obligor. I was, myself, at first, inclined to think that, on principle, this additional proof was indispensably necessary, but an observation made by the plaintiff's counsel in argument has considerable influence. It is, that if the obligor acknowledges, and thereby adopts the signature as his, in the presence of the subscribing witness, he is as much bound as if his name had been written by himself. It would seem, then, that the positive necessity of proving the hand-writing of the subscribing witness, although he be dead, would justify the opinion, that the law infers from this proof, that the subscribing witness would, if present, prove the execution of the bond, and that a naked case, standing singly on this proof, would be in favour of the plaintiff. But this evidence, which is merely circumstantial, may be met by other circumstantial evidence. Whatever deducts from it, may, and ought to be, weighed against it. It is, therefore, always advisable to support it by other testimony, if such other testimony be in the power of the plaintiff.

On passing from principle to authority, it may not be improper to premise, that as the common law of England was, and is, the common law of this country, and as an appeal from the courts of Virginia lay to a tribunal in England, which would be governed by the decisions of the courts, the decisions of those courts, made before the Revolution, have all that claim to authority, which is allowed to appellate courts. Those made since the Revolution, lose that title to authority,

which was conferred by the appellate character of the tribunal which made them, and can only be considered as the opinions of men distinguished for their talents and learning, expounding a rule, by which this country, as well as theirs, professes to be governed. An opinion, avowedly changing a rule, would certainly deserve much less consideration, than one declaring the rule on a point which appears not to have been well settled.

The first decision of this question, which has been cited at the bar, is that reported by Viner, which appears to have been made at nisi prius, and is in favour of the opinion, that the proof of the hand-writing of the subscribing witness, who is dead, is sufficient, if unopposed, to establish the execution of the bond.[2] Previous to this, however, the point would seem to have been noticed by Lord Holt, at nisi prius, in a case reported in 1 Ld. Raym. 734. "A deed was produced, to which there were two witnesses, one of whom was blind. It was ruled by Holt, that such deed might be proved by the other witness and read, or might be proved, without proving that the blind witness is dead, or without having him at the trial, proving only his hand. And so it was done in this case." Wood v. Drury, 1 Ld. Raym. 734.

This report is too indistinct, and too short, to be satisfactory. It would rather seem, however, that the deed was proved, by proving the hand-writing of the blind witness. Perhaps, in addition to this, the execution of the deed was proved by the other witness, and that which would indicate the contrary, may be ascribed to the inaccuracy of the reporter. I am inclined to think it is. In the cases cited from Strange, Peere Williams, Atkyns and Douglass, supplemental proof was offered and received, but the question, whether without that supplemental proof the execution of the bond would be established, by proving the death and hand-writing of the subscribing witness, was

not made to the court, nor decided. It would seem that considerable weight was given to this additional testimony. In 1790, in the case Wallis v. Delancey,[3] at nisi prius, Lord Kenyon decided this question directly, and decided it against the sufficiency of the proof of the hand-writing of the subscribing witness, if unaided by other testimony. The case of Barnes v. Trompowsky, 7 Durn. & E. {7 Term. R.} 265, which was decided in 1797, while Lord Kenyon was on the bench, turned upon the necessity of proving the handwriting of the subscribing witness, not on the sufficiency of that proof; for in that case, the hand-writing of the obligor was proved. The case of Adam v. Kerr, 1 Bos. & P. 360, was decided in 1798, and dispenses with other proof than that of the handwriting of the subscribing witness. Such proof was declared to be evidence of every thing on the face of the paper. In this case, the rule for a new trial was refused by the court of common pleas, so that the point was not permitted even to be argued. The case of Prince v. Blackburn, reported in 2 East, 250, and decided in 1802, was upon the question of the admissibility; not of the sufficiency of the proof. But Judge Le Blanc, before whom the cause was tried at nisi prius, reported the testimony, and takes no notice of any supplemental evidence. If none was given, this case confirms that of Adam v. Kerr. Whether it was given or not, does not certainly appear. In his Law of Evidence, Mr. Peake supposes the law to be now settled in England, in conformity with the decision of Adam v. Kerr. He states the determination 1016 to have been made in a case where the subscribing witness was dead; but does not say the law would be otherwise in any other case, where the disability of the subscribing witness was permanent, nor is there any reason for distinguishing such a case from one where he was actually dead.

From this review, the law appears to be now settled in England, that if the subscribing witness be dead, proof of his hand-writing is sufficient to establish the execution of the paper he has attested; but it has been decided by cases since the Revolution, which are not authority in the United States. When, however, they are reasonable, are conformable to general principles, and do not change a rule previously established, such decisions cannot be entirely disregarded. The decisions upon this point appear to be of this character, and the court is inclined to the opinion, that in a case unsupported and unopposed by any other circumstance whatever, this proof would be deemed sufficient to establish the execution of the bond.[4]

In the case formerly decided in this court, there were circumstances which rendered the proof of the hand-writing of the witness unsatisfactory. It (was proved that there were two men of the same name, and it could not appear from the hand-writing of the witness, by which of them the bond was executed. That there are in this case two obligors, does not seem sufficient to take it out of the rule. It is, however, possible, that a signature may have been added after the attestation, and consequently, circumstances less decisive may outweigh the inference drawn from the hand-writing of the subscribing witness, than would be required in the case of a single obligor. The face of the paper is not absolutely free from suspicion. The signature of Hunter bears such a resemblance to the character of the writing in which the bond is filled up, and with which the name of Claiborne is signed, as to excite some suspicion. If this circumstance stands alone, it cannot be much regarded, but if it should be aided by others, it may deserve consideration. In a case where the parties originally managing the cause are dead, and the person now looked to for testimony has been induced by his counsel to suppose that

his testimony would not be required at this term, such light suspicion may induce a suspension of the decision until another term.

The second point is, that proper parties are not made in this cause. In the case of Corbet v. Johnson [Case No. 3,218], it was decided in this court, that a bond creditor was not bound to pursue the personal assets into the hands of others than the representative of the debtor, if such pursuit threatened to be tedious, intricate, and unproductive. This case is supposed to have established the principle, that in no case whatever, is the bond creditor bound to go beyond the legal personal 1017 representative of the debtor. In support of this construction of that opinion, the plaintiff relies on these expressions. "With respect to the creditor, unless it be for his advantage, the personal estate may be said to be exhausted, when there are no longer assets in the hands of the executor." These words are used with reference to general dicta, found in cases cited by the heir, which declare, that the personal estate must be first exhausted, before the creditor would receive the aid of a court of equity against the real assets, and are intended to show the sense in which those dicta ought to be understood. They do not lay down a substantive, independent principle. If, in the case of Corbet v. Johnson [supra], the personal estate, instead of being wasted, had been in the hands of legatees, who could with ease have been brought before the court, I should have directed them to be made parties to the suit, and if such was the fact in this case, the opinion delivered on that occasion, would not be considered as opposed to a similar direction. But such does not appear to be the fact. The answer of the heir does not allege personal property in the hands of the legatees. On the contrary, it seems to rely on the waste of that property, as an objection to the recovery of the plaintiff; because, the resort of the heir against the personal fund is lost.

The fact of an existing personal fund is not proved, and if it was proved, we are not sure that the court could notice it, in contradiction to the allegations of the parties. The case then, appears to stand on the same principles in this particular, with that of Corbet v. Johnson, and the court adheres to the opinion given in that case. But no decree will be given at this term, because the court is not satisfied under the particular circumstances of the parties, to declare, that this is the deed of William Hunter, although, perhaps, the difficulty will not be deemed sufficient at the next term, to prevent a termination of the suit.

There is at present certainly one conclusive impediment to a decree, which has not been mentioned, because it is presumed, that the plaintiff is able to remove it, and because, should it be removed, the court would still suspend its decision on the obligation, for further proof from the defendants. That impediment is the want of title in the plaintiff. There is no evidence, that the bond was taken for his benefit.[5] An issue may be directed, if the plaintiff has no objection. If he has, it will probably be directed at the next term, provided the defendant then exhibits circumstantial testimony against its being the deed of William Hunter.

[1] No lapse of time bars actions upon instruments, under seal, for the payment of money; but the lapse of twenty years creates a presumption of payment, which may be repelled like: any other presumption. Jackson v. Pierce, 10 Johns. 414; Bailey v. Jackson, 16 Johns. 210. An acknowledgment of the debt within twenty years, or a demand of payment, or circumstances explaining satisfactorily why the demand was not made sooner, will repel the presumption; so, where for the portion of the time, the plaintiff was disabled to sue, that portion will be deducted. Id. This doctrine of presumption of payment, arising from the lapse of twenty years,

is a very familiar one in our courts. Mr. Robinson has examined the Virginia cases on this subject, in his valuable work. 1 Rob. Prac. 113, 114, q. v. If a shorter period is relied on, the presumption must be corroborated by circumstances. Gordon v. Kerr [Case No. 5,611]. In Dunlap v. Ball, 2 Cranch [6 U. S.] 180; 1 Conn. 383, which, as regards the question of presumption of payment, is identical with the above case of Murdock v. Hunter, the suit was brought in 1802, upon a bond executed in 1773, by the defendant, a citizen of Virginia, to the plaintiffs, British merchants, residing in Great Britain. The case went to the supreme court, on a bill of exceptions to the opinion of the court below, instructing the jury, that from the length of time, stated in the facts agreed on, the bond in law, was presumed satisfied; unless they should find from the evidence, that interest was paid on the bond, within twenty years from the 5th of September, 1775, (the time of the last payment;) or that a suit or demand was made, on the said bond, within twenty years from the last mentioned time, exclusive (in both cases,) of five years, five months, and twenty days, taken out of the act of limitations. The supreme court said (Marshall, C. J., delivering the opinion of the court,) that the only circumstance which could create a question in the case was, that twenty years had not elapsed, exclusive of the period, during which the plaintiffs were under a legal disability to recover before the action was brought: that the doctrine of the presumption of payment arising from lapse of time, was a reasonable one, and might be rebutted by any facts that would destroy the reason of the rule. That no presumption could arise, during a state of war, in which the plaintiff was an alien enemy, was too clear to admit of doubt. But it was not so clear, that upon a bond so old as this, the same length of time, after the removal of the disability, was necessary to raise the presumption of payment, as Would be

required if the bond had borne date at the time of such removal. It being satisfactorily shown to the court, that it was the general understanding in Virginia that British debts could not be recovered there, earlier than 1793, when the first decision of the superior courts, establishing the right of recovery was rendered; the only question was, whether, in case of an old debt, the same time was required to raise the presumption, as in the case of a debt accruing since the impediments had been removed? In such a case, it was not easy to establish a new rule, and the court thought it best to adhere to the old decisions, that twenty years must have elapsed, exclusive of the period of the plaintiff's disability, and were of opinion, that the court below erred, in directing the jury, that payment ought to be presumed. The cause was remanded to the circuit court, to be there tried, with directions, that there was no presumption of the payment of the said bond, as directed by the said circuit court.

[2] "Where there are two witnesses to a deed who are dead, if there be full evidence to prove one of their hands, and any evidence that endeavours have been used to find one to prove the other's hand, it is sufficient; for perhaps the witness might be a stranger, and it would be a hard task to prove his hand; per cur. Comb. 248; Pasch. Term 6 W. & M. in B. R., in case of Smart v. Williams," 12 Vin. Abr. 223, § 3, tit. "Evidence."

[3] Reported in a note to Barnes v. Trompowsky, 7 Durn. & E. [7 Term R.] 266.

[4] The cases cited by the chief justice, with some more modern English decisions, have all been reviewed by Mr. Starkie, in his treatise on the Law of Evidence. 1 Starkie, Ev. (Metcalf's Ed.) 337–343, inclusive. He lays down the general rule, as deduced from that review, to be, that where there have been sufficient attesting witnesses, whose absence is

satisfactorily accounted for (as that they are dead, out of the country, infamous, have become interested, &c.) the proper proof is by giving evidence of the hand-writing of the attesting witnesses; and it is usual, he says, in such cases, to give evidence also of the hand-writing of the obligor. And where there are two attesting witnesses, one of whom is dead, and the other out of the country (as in the case of Adam v. Kerr, supra), proof of the hand-writing of the deceased witness is sufficient evidence of the execution of the paper, without proof of the hand-writing of the absent witness, or of the obligor; so, where one of the attesting witnesses, after diligent inquiry made, could not be found, and the other had become interested since the attestation, it was held that evidence of the hand-writing of the latter witness was sufficient proof (Cunliffe v. Sefton, 2 East, 183); and where one was dead and the other denied his signature. Lord Holt admitted evidence of the hand-writing of the former (Blurton v. Toon, Skin. 639). For a reference to the leading American decisions, as to the proof of hand-writing of the subscribing witness, where he is dead. &c. and its sufficiency, see Mr. Metcalf's note 1, 1 Starkie, Ev. 342. See, also, opinion of Carr, J., in Gilliam's Adm'r v. Perkinson's Adm'r, 4 Rand. {Va.} 327, and of Green, J., in Gregory v. Baugh, Id. 636. and the authorities there cited. It is said in Spring v. South Carolina Ins. Co., 8 Wheat. {21 U. S.} 268, 5 Pet. Cond. R. 434, to be the practice of that court, to require proof of the hand-writing of both the dead or absent witness, and of the obligor. That this has not been, however, the invariable practice of that court, at least in the case of old bonds, is obvious, from the case of Coulson v. Walton, 9 Pet. {34 U. S.} 62. In that case the genuineness of a bond thirty-five years old at the filing of the bill was drawn in question. The obligor and obligee, and one of the attesting witnesses were certainly dead, and the other attesting witness

was supposed to have been killed by the Indians many years before. Three witnesses deposed to the hand-writing of the first mentioned witness, but no proof was offered of the hand-writing of the obligor, or of the other witness. The court cited the doctrine laid down in Barr v. Gratz, 4 Wheat. [17 U. S.] 231, "that where a deed is more than thirty years old, and is proved to have been in 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:" and held the bond sufficiently proved, by the proof of the hand-writing of the deceased attesting witness. See, also, Winn v. Patterson, 9 Pet. [34 U. S.] 663; where, under the circumstances of the case, even a copy of a recorded power of attorney, forty years old when it was offered as evidence, (the loss of the original having been accounted for), was admitted on proof of the hand-writing of one of the attesting witnesses, the other being presumed to be dead after thirty years. The proof of the hand-writing was the deposition of the deputy clerk of the court where the power was recorded. The deponent stated that he was familiar with the hand-writing of the witness (who was a justice of the peace, and who signed it as such); that he was dead; that he must have believed the official signature of the witness to have been genuine at the time, or he would not have admitted the paper to record, and that the paper offered was a true copy from the record, he having compared it with the record of the original made by himself.

[5] The bond purports to have been executed by Thomas Claiborne and William Hunter, in favour of Archibald Govan, and there is no assignment endorsed

upon it to the plaintiffs, or to any other parties whatsoever.