

Case No. 17,843.

WILSON v. TURBERVILLE.

{1 Cranch, C. C. 512.}¹

Circuit Court, District of Columbia.

Nov. Term, 1808.

LIMITATIONS—CLAIM AGAINST DECEDENT'S ESTATE.

A clause in a will directing all the testator's debts to be paid, and appropriating the rents of his real estate, does not take the case at law out of the statute of limitations, when the plaintiff does not seek his remedy under the will.

Special assumpsit by defendant's testator to sell all his crops for several years at a certain price; breach, that he did not sell and deliver, &c. Pleas, non assumpsit and limitations.

To rebut the plea of limitations, E. J. Lee, for plaintiff, produced a copy of the will of the defendant's testator, in which he directs all his just debts to be paid, and directs that the rents of his real estate shall be applied, in case certain parts of his personal estate should not be sufficient; and contended that this clause of the will took the case out of the statute. *Jones v. Strafford*, 3 P. Wms. 89; *Gofton v. Mill*, 2 Vern. 141; *Andrews v. Brown, Finch*, Prec. 385; *Anon.*, 1 Salk. 155; *Catling v. Skoulding*, 6 Term R. 193; *Trueman v. Fenton*, Cowp. 548.

Mr. Swann, contra. If the plaintiff claimed under the will, the cases might apply; but if he will avail himself of that clause of the will he must confine himself to the provision made by the will. All the cases are in chancery. No case where at law such a will takes it out of the statute. If the plaintiff in a suit at law could avail himself of this equitable evidence, he might perhaps gain a priority which would exclude other creditors who have as good a right in equity as himself.

THE COURT (nem. con.) directed the jury that that clause of the will was not an acknowledgment of the cause of action.

CRANCH, Chief Judge, suggested that there was a difference between a debt liquidated and a claim for uncertain damages upon a breach of such a contract as this.

Upon this ground, as well as upon those urged by Mr. Swann, the court founded its opinion; but told the plaintiff's counsel that they would hear any cases which he might cite upon a motion for a new trial if the verdict should be against his client upon the plea of limitations.

{See Cases Nos. 17,842 and 17,844.}

¹ [Reported by Hon. William Cranch, Chief Judge.]