

1905-008

Nansemond Co (Suffolk)

Chancery Causes: Virginia C. Royster et al vs Clarence R. Hatton et al

Smith, Mann

Folder 1 of 2

Memorandum of an agreement made and entered into this seventeenth day of January A.D. 1883, between Daniel H. Hutton of the first part, and his wife Cornelia R. Hutton of the second part, both residents of Suffolk, County of Nansemond, in the State of Virginia:

Whereas the said Daniel H. Hutton has sold to John T. Brockwell Eight hundred and eighty acres of land, a part of the "Stockley" farm, (in which the said Cornelia Hutton has a contingent right of dower) and is desirous of conveying the fee simple title thereto to the said Brockwell.

Now therefore this indentured witnesseth that the said Daniel H. Hutton in consideration that the said Cornelia R. Hutton will join him in the execution of the deed to the said Brockwell and will relinquish her contingent right of dower in the said land to the said Brockwell in due form of law, does by these presents give, grant assign, transfer and set over unto the said Cornelia R. Hutton the sum of Four thousand one hundred and seven Dollars (\$4107.⁺) in money, as and for her sole and separate estate, absolutely free and clear from the debts, demands, marital rights, or control of himself, or of any future husband. And the said Daniel H. Hutton binds himself to pay the

said sum of \$4107 into the hands of the said
Cornelia N. Patton or her duly authorised agents
for the purpose, so soon as the said contingent
right of dower is relinquished and the purchase
money for the said land is received from the
said John T. Brockwell.

And the said Cornelia N. Patton binds herself to
execute a will in due form of law bequeathing
whatever may remain of the money settled upon
her by these presents to her grand-children, and
this settlement is made with this distinct mutual
understanding.

Witness the following signatures and seals.

J. H. Patton (Seal)

Cornelia N. Patton (Seal)

State of Virginia,
County of Hanover

} To wit:

I, Rob: R. Prentis, a Commissioner in Chancery of the Circuit Court in and for
the said county, in the State of Virginia, do certify that Daniel J.
Patton — — — whose name is signed to the writing above,
bearing date the seventh day of January 1883, has
acknowledged the same before me in the county aforesaid.

Given under my hand this Eighteenth day of January 1883.

Rob: R. Prentis.
Comm: in Chancery.

State of Virginia,
County of *Nansemond*

} To wit:

I, *Robt. R. Prentiss*, a Commissioner in Chancery
of the Circuit Court, — in and for the county aforesaid
in the State of Virginia, do certify that *Cornelia R. Nation* the
wife of *Daniel R. Nation* — whose names are

signed to the writing above, bearing date the *17th* day of *January*
1883, personally appeared before me in the county aforesaid, and being duly
examined by me privily and apart from her husband, and having the writing
aforesaid fully explained to her, she the said *Cornelia R. Nation*
acknowledged the said writing to be her act, and declared that she had willingly
executed the same, and does not wish to retract it.

Given under my hand this *18th* day of *January* eighteen
hundred and *Eighty-three*.

Robt. R. Prentiss —

Comm. in Chancery. —

In the Clerk's Office of *Nansemond* County Court the
27th day of *November* *1901*

This agreement was presented with the certificates
annexed and admitted to record.

Teste: *A. J. Somers* Deputy
for *R. R. Smith* Clerk

Saml. H. Nutton

with 3 Contracts of
3 Settlement.

Cornelia R. Nutton.

Admitted to record
the 27th day of
November 1901

Recorded in D. B. 50
Page 511.

1902 Jan'y. 22nd
Examined, verified and
delivered.

SM Lawrence D.C.

Tax \$ 4.20

Fee 1.25

Paid \$ 5.45

IN THE CIRCUIT COURT OF NANSEMOND COUNTY, IN VACATION, ON TH
4th day of February, 1905.

Virginia C. Royster and Granville
Royster, her husband,

v.

Clarence R. Hatton, John G. Hatton,
Juliett R. Smith, Clarence R. Hatton, Jr.,
and Lillie Cornelia Hatton, the last two
being infants under the age of twenty one
years.

} Complainants

} Defendants

This day this cause came on again to be heard upon the
papers formerly read, upon the amended and supplemental bill
with exhibits, upon ^{of Clarence R. Hatton and John G. Hatton} the demurrer thereto and the plea of the
statute of limitations of Clarence R. Hatton and John G. Hat-
ton, upon demurrer and special replication ^{of the complainants} to said plea, upon
demurrer and rejoinder of Clarence R. Hatton and John G. Hat-
ton pleading laches, and was argued by counsel.

On consideration whereof, without passing upon the de-
murrer to the said amended and supplemental bill, the court,
being of the opinion that the cause of action, if any ever
existed, is barred by the statute of limitations and laches,
doth adjudge, order and decree that the pleas of the defend-
ants, Clarence R. Hatton and John G. Hatton, be sustained
and the bill of the plaintiffs be dismissed, and that the
plaintiffs pay unto the defendants their costs by them about
their defense in this behalf expended. And it appearing to
the court, that, by agreement of the parties, there is in the
hands of J. Walter Hosier, chosen as trustee, the proceeds
arising from the sale of a part of the real estate in the
bill mentioned, the court doth further adjudge, order and
decree that the said J. Walter Hosier, Trustee, pay over all
of said funds to the defendant, Clarence R. Hatton, or his
attorneys. And ~~with~~ it is ordered that the

Cause be stricken from the docket...
all of which is hereby certified
to the Clerk of this Court to be
~~certified to the Clerk of this~~
~~Court~~ to be entered in the
Chancery order book.
To the Clerk of the Probate & Admiralty
Court of the County of
Hampden County.

Entered July 4, 1905
Robert H. Hentis

Entered in Chy Order
Book No. 3. Page 691

IN THE CIRCUIT COURT OF NANSEMOND COUNTY.

Clarence R. Hatton & Others

vs.

Virginia C. Royster & Others.

)
)
)
(IN CHANCERY
)
)

The separate plea of Clarence R. Hatton in his own right, and as executor of Daniel H. Hatton, deceased, and as trustee for Clarence R. Hatton, Jr., Lillie Cornelia Hatton, to a bill of complaint exhibited against him and others in the Circuit Court for the county of Nansemond by Virginia C. Royster and others.

The said defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in manner and form as same are therein set forth, for plea, nevertheless, to said bill, doth plead and aver, that if the complainants ever had any cause of action or suit against this defendant, for or concerning any of the matters in the said bill mentioned, which the defendant doth in no wise admit, such cause of action or suit did not accrue within ten years before the filing of said bill, or before suing out or serving process against this defendant to appear at and answer the said bill; nor did this defendant at any time within ten year next before the institution of this suit aforesaid, promise or agree to come to any account for, or to make any satisfaction, or to pay any sums of money for or by reason of the said matters charged in said bill.

Wherefore the said defendant prays judgment whether he shall be compelled to make any other or further answer to the said bill, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

some and applied to his property and accordingly secured
said bill and made so he made cleared with his country
which he considered so was with others in foreign country so the
apartment the said defendant made telephone apartment he

bill.

of much for as he learned of the said agents applied in said
account for as he made with application of so he was with
from of this said apartment. Because of where so some so the
defendant of the said within the last and before the last
leading to where of and where the said bill; now did this
bill of before said one as before before the said bill de-
and did not secure within the last before the bill of no
the defendant took in no also said; some some of action of
action one of the said in the said bill mentioned; after
some of action as well stated with defendant; for as con-
doubt by said and said; that is the defendant over and said
and should not keep; for by; nevertheless; so said bill;

and bill of defendant so he fine in which and how as some
mentioned all of one of the before and said; in the
the said defendant in defendant; the defendant in
action.

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of defendant mentioned before the said and before in the said
for defendant of defendant; little defendant; before; so a bill
and as mentioned in before of before; and as before
the defendant of the defendant of before in the said

*Plen
Stat. Law.*

Allyson G. Sawyer & O'Brien.

as:

Allyson G. Sawyer & O'Brien.

IN CHANCERY

IN THE CIRCUIT COURT OF HAMILTON COUNTY.

IN THE CIRCUIT COURT FOR THE COUNTY
OF NANSEMOND.

Clarence R. Hatton, John G. Hatton,
Juliatt R. Smith, Clarence R. Hatton, Jr.,
and Lillie Cornelia Hatton, the last two
being infants under the age of twenty-one
years,

adv.

Virginia C. Royster and Granville Royster.

The demurrer of Clarence R. Hatton and John G. Hatton to
a bill of complaint of Virginia C. Royster and Granville Roys-
ter.

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The defendants say that the bill is not sufficient in
law -

First: For the reason that a court of equity will not
entertain jurisdiction for the specific performance (or its
equivalent) of an agreement respecting "money" as set forth
in the bill and exhibit since damages furnish a complete and
satisfactory remedy.

Second: Forasmuch as it does not appear by the said bill
and exhibit that at the death of Mrs. Cornelia R. Hatton there
was left remaining any of the money settled upon her according
to said exhibit, hence her failure to leave a will was in no
wise a breach of her covenant.

Third: Forasmuch as it appears by said bill and exhibit
that it is beyond the power of the court to decree a specific
performance of the contract as it was originally made, which
it must do if it decrees specific performance at all.

Fourth: Forasmuch as it appears by said bill and exhibit
that the property described therein attempted to be reached
is in its nature real estate which could in no manner be con-
strued as being affected by the covenant, "to execute a will
. bequeathing whatever may remain

of the money."

Fifth: Forasmuch as it appears by the said bill and exhibit that the money settled upon Mrs. Cornelia R. Hatton was made her equitable separate estate over which she had unlimited power of disposition during her natural life, and this power granted her by her ~~xxx~~ husband, Daniel H. Hatton, is repugnant to any covenant on her part "to execute a will in due form of law bequeathing whatever may remain of the money settled upon her to her grand-children", and any such covenant is, therefore, void.

Sixth: Forasmuch as it appears by the said bill and exhibit that at the time the alleged contract was made, to-wit, on the 17th. day of January, 1883, Mrs. Cornelis R. Hatton was a feme covert, and therefore, the covenant "to execute a will bequeathing whatever may remain of the money"settled upon her and made her equitable separate estate , being executory, was void, she being unable to bind herself personally, and unable to bind said estate by an executory contract, and also void as applying to any statutory separate estate owned at the time of the contract, she being unable to bind herself personally, and able to contract in relation thereto, or for the disposal thereof, only in case her husband join in said contract and be bound with her to some third party.

Seventh: Forasmuch as it appears by said bill and exhibit that the plaintiffs cannot maintain this suit against the defendants, they not being proper parties, for the reason that if Mrs. Cornelia R. Hatton could make an executory contract at all, it was only with relation to, or for the disposal of, her statutory separate estate, in which contract her husband must join and be bound, and any suit brought upon said contract could only be brought against Mrs. Cornelia R. Hatton and

Daniel H. Hatton (husband and wife) jointly.

Eighth: Forasmuch as it appears by said bill and exhibit that the plaintiffs were not parties to the contract set forth in exhibit "A", nor privies to any party to said contract, nor was either of the plaintiffs plainly designated by the instrument as the sole beneficiary, *nor has any consideration passed on the part of the plaintiff.*

Ninth: Forasmuch as it appears by the said bill and exhibit that the contract as alleged cannot be enforced by suit for specific performance (or its equivalent) because it is uncertain and indefinite what property ^{*each of*} the grand-children were to receive.

Tenth: Forasmuch as it does not appear by said bill and exhibit that the contract made by Mrs. Cornelia R. Hatton during coverture was made under a statutory power to contract, the common law disability of married women to make contracts remaining in full force in Virginia, except so far as it has been modified by statute.

IN THE CIRCUIT COURT FOR THE COUNTY
OF MANSELOD.

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#-----
Clarence R. Hatton, Clarence R. Hatton,
Exor. of D. H. Hatton, deceased; Clarence
R. Hatton, Trustee for C. R. & L. C. Hatton,
John G. Hatton, Juliette R. Smith, Clarence
R. Hatton, Jr., and Lillie Cornelia Hatton,
the last two being infants who were represent-
ed by J.U. Burgess, their guardian ad litem,
A. H. Baker, Sheriff and Administrator d. B.n,
of Cornelia R. Hatton, deceased,

adv.

Virginia C. Royster and
Granville H. Royster.

The demurrer of Clarence R. Hatton, Clarence R.
Hatton, Executor of D. H. Hatton, deceased, Clarence R.
Hatton, Trustee for C. R. & L. C. Hatton and John G.
Hatton to the amended and supplemental bill of complaint
of Virginia C. Royster and Granville H. Royster.

The defendants say that the bill is not sufficient
in law-

First: Forasmuch as it does not appear by said bill
and exhibit that either of the plaintiffs has any rights
under the alleged sealed contracts dated the 17th day of
January, 1883, setnforth as exhibit "A", or that either
plaintiff has any interest in the subject matter, or that
there is any liability on the defendants, neither of the
plaintiff's being party to the said contract, nor privy
to any party to same, nor has any consideration passed
from, or on the part of either plaintiff, the law applying
to said contract being the law as it stood at the date
the contract was executed.

Second: Forasmuch as it appears by said bill and exhib-

its that the alleged sealed contract marked exhibit "A" was made the 17th day of January, 1883, between Daniel H. Hatton and Cornelia R. Hatton, that neither of the plaintiffs is party to the contract, nor is either plaintiff privy to either party to same, that no consideration has passed on the part of either plaintiff, nor even furthermore is either of the plaintiffs plainly designated by the aforesaid alleged contract as the sole beneficiary.

Third: Forasmuch as it appears by the original bill and exhibit, and by the amended and supplemental bill and exhibit that the alleged sealed contract marked exhibit "A" was made on the 17th day of January, 1883, between Daniel H. Hatton and Cornelia R. Hatton, his wife, at the instance and request of Daniel H. Hatton, and no consideration passed from either of the plaintiffs, that Cornelia R. Hatton died the 9th day of December, 1889, intestate, that Daniel H. Hatton, the sole distributee of his wife Cornelia R. Hatton, died the day of 1898, having previously published and declared his last will and testament, that Daniel H. Hatton the sole distributee of his wife, Cornelia R. Hatton, and the only person having rights under said contract, had ample opportunity after the death, intestate, of Cornelia R. Hatton, his wife, to carry out as he might wish the terms of the said contract made at his instance and request, and to provide for his grandchildren all he should desire, that he did, in fact, by his last will and testament provide for certain of his grandchildren, among them being the plaintiff, Virginia C. Royster, as will be readily seen by an examination of the copy marked exhibit "B" of the last will and testament referred to.

And neither of the plaintiffs can now complain of any, or the construction put upon said contract by Daniel H. Hatton, himself, at whose instance and request the alleged

contract was made, nor can either plaintiff complain of the provision made for his grandchildren in his last will and testament.

Fourth: Forasmuch as it appears by the said bill and exhibits that the plaintiffs have no right under the alleged contract marked exhibit "A", that can be enforced by suit for specific performance (or its equivalent) because it is uncertain and indefinite under said contract what, if anything, the plaintiff, Virginia C. Royster, was to receive. If the contract were binding on Mrs. Hatton at all and she had left a will, she had the power to bequeath everything she possessed to her other grandchildren, and to bequeath plaintiff nothing. The plaintiff was not named in the contract as the sole beneficiary, nor was it stipulated that she was to have any certain, definite sum, nor was she in fact named at all.

Fifth: Forasmuch as it appears by the bill and exhibits that the sealed contract marked exhibit "A", was an entire thing ----- i. e. Mrs. Cornelia Hatton did not take the \$4107.00 mentioned under one contract, and then under a second contract attempt to bind herself "to execute a will etc."-----and the money settled upon Mrs. Hatton was her Equitable separate estate over which she had unlimited power of disposition during her natural life, which power granted by her said husband, Daniel H. Hatton, is repugnant to any covenant or restriction in said contract of settlement "to execute a will in due form of law bequeathing whatever may remain of the money settled upon her----- to her grandchildren", and any such covenant or restriction is therefore, void.

(If it be contended that the contract marked exhibit "A" is not an entire thing, but that Mrs. Hatton took the money under one contract and the covenant "to execute etc."

was a second contract, it must follow that the second contract would be void for lack of consideration).

Sixth: Forasmuch as it appears from the bill and exhibits that the contract set forth in exhibit "A" between Daniel H. Hatton and Cornelia R. Hatton, was entered into for the sole reason that the said Daniel H. Hatton was desirous of conveying the fee simple title to a part of the "Stockley" farm to one John T. Brockwell, and that the consideration paid by the said Daniel H. Hatton to the said Cornelia R. Hatton was paid solely for the relinquishment of Mrs. Hatton's contingent right of dower in the said land, the said Daniel H. Hatton binding himself to pay the said sum of \$4107.00 so soon as the contingent right of dower was relinquished and, which under the contract, he was bound to do so soon as the said dower right was relinquished, without anything further to be done on the part of Mrs. Hatton; and that the supposed covenant reading "And the said Cornelia R. Hatton binds herself to execute a will in due form of law, bequeathing whatever may remain of the money settled upon her by these presents to her grandchildren, and this settlement is made with this distinct mutual understanding" was not in fact a part of the contract, the consideration paid Mrs. Hatton being solely for the relinquishment of her dower right, and no consideration passing for the said supposed covenant, the same being nudum pactum, cannot be specifically enforced.

Seventh: Forasmuch as it appears from the bill and exhibits if, as claimed by the plaintiffs in their bill, the ^{alleged} covenant set forth in exhibit "A" "to make a will etc." was made and entered into "at the instance and request of Cornelia R. Hatton, who desired to bind her separate estate to her grandchildren", then the said ^{alleged} covenant on the part of Mrs. Hatton was a nudum pactum, inasmuch as she received no consideration for making same, but made same voluntarily, and the plaintiffs cannot bring suit for specific performance, or its equivalent.

Eighth: Forasmuch as it appears by the said bill and exhibits that at the time the alleged sealed contract was made, to-wit, on the 17th day of January, 1883, Mrs. Cornelia Hatton was a feme covert, and therefore, the covenant "to execute a will.....bequeathing whatever may remain of the money" settled upon her and made her equitable separate estate, being executory, was void, she being unable to bind herself personally, and unable to bind said estate by an executory contract, and also void as applying to any statutory separate estate owned at the time of the contract, she being unable to bind herself personally, and able to contract in relation thereto, of for the disposal thereof, only in case her husband join in said contract and be bound with her to some third party.

Ninth: Forasmuch as it appears by said bill and exhibits that the plaintiffs cannot maintain this suit against the defendants for the reason that if Mrs. Cornelia R. Hatton could make an executory contract at all, it was only with relation to, or for the disposal of her statutory separate estate, in which contract her husband must join and be bound, and any suit brought upon said contract could only be brought against Mrs. Cornelia R. Hatton and Daniel H. Hatton (husband and wife) jointly.

Tenth: Forasmuch as it does not appear by said bill and exhibit that the contract made by Mrs. Cornelia R. Hatton during coverture was made under a statutory power to contract, the common law disability of married women to make contracts remaining in full force in Virginia, except so far as it has been modified by statute. If she became bound by virtue of any statute, removing her common law disability, it was essential to allege the facts by which, under the statute, her disability was removed, in order to show a good cause of action.

Eleventh: Forasmuch as it does not appear by the said bill and exhibits that at the death of Mrs. Cornelia R. Hatton there was left remaining any of the "money" settled upon her according to said exhibit, hence her failure to leave a will was in no wise a breach of her ^{alleged} covenant.

Twelfth: Forasmuch as it appears by said bill and exhibits that it is beyond the power of the court to decree a specific performance of the contract as it was originally made, which it must do if it decrees specific performance at all.

Thirteenth: For the reason that a court of equity will not entertain jurisdiction for the specific performance (or its equivalent) of an agreement respecting "money" as set forth in the bill and exhibit since damages furnish a complete and satisfactory remedy.

The defendants further say that so much of said bill as seeks to charge the real estate mentioned therein, is not sufficient in law forasmuch as it appears by said bill and exhibits, the covenant set forth in exhibit "A" was "to execute a will bequeathing whatever may remain of the money, which covenant could, in no sense, apply to real estate.

The defendants further say that so much of said bill as alleges that "Cornelia R. Hatton undertook, promised and covenanted that she would execute her will in due form of law, and bequeath and devise her certain separate statutory estate unto your oratrix, her brother John, and her sister, Juliette" is not sufficient in law forasmuch as it appears that said allegation is contradictory of, and not the same as the covenant set forth in exhibit "A" to "execute a will in due form of law bequeathing whatever may remain of the money.....to her grandchildren".

The defendants further say that so much of said bill as alleges that the contract set forth in exhibit "A" "was made and entered into at the instance and at the request of Cornelia R. Hatton, who desired to bind her separate estate to her grandchildren, and to prevent her son from it's enjoyment after her death", is not sufficient in law forasmuch as said allegation is contradictory of the admission in the plaintiffs bill that "it appears from the face of said contract that it was made at the instance and request of D. H. Hatton, which said allegation contradictory of the contract as set forth in exhibit "A", and also contradictory of the said admission in the said plaintiffs bill, should not be allowed, but should be stricken out, and furthermore to vary the terms of a written contract, parol testimony will not be allowed.

The defendants further say that so much of said bill as makes allegations with reference to what is known as "Purdies Farm", is not sufficient in law inasmuch as said allegations are superfluous, irrelevant and impertinent, and should be stricken from said bill.

The defendants further say that so much of said bill as alleges that Daniel H. Hatton, by his last will and testament, "bequeathed his personal property absolutely to Clarence R. Hatton" is not sufficient in law forasmuch as said allegation is contradictory of, and not in accordance with the express declarations in the certified copy, marked exhibit "B" of said last will and testament.

Demarest

IN THE CIRCUIT COURT FOR THE COUNTY
OF NASEMOND.

Virginia C. Royster and
Granville H. Royster.
vs.

Clarence R. Hatton, Clarence R. Hatton, Exor. of D. H.
Hatton, deceased, Clarence R Hatton, Trustee for C. R. &
L. C Hatton, John C. Hatton,
Juliette R. Smith, Clarence R. Hatton, Jr., and Lillie
Cornelia Hatton, the last two being infants who were
represented by J. U. Burgess, their guardian ad litem,
A. H. Baker, Sheriff and Administrator d. b. n. of
Cornelia R. Hatton, d ceased.

The demurrer of Virginia C. Hatton and Granville H. Royster,
to the special plea of the statute of limitations of the
defendants.

The complainant says that the plea is not sufficient in
law. Because;-

First:- for as much as there is no statute of limitation
applicable to courts of equity and such courts do not apply
a statute of limitation to suits upon matters which are
purely equitable and the subject of equity jurisdiction
exclusively.

Second:- for as much as it appears by the bill and exhibits
that the subject of this suit is trust funds and it is
against public policy to permit trustees to plead the statute
of limitations.

Third:- for as much as it appears that the statute of
limitations, if any, applicable to the recovery of real estate
is fifteen years not ten years.

Fourth; for as much as it appears that the suit as to personally
is against a personal representative who has never settled his
accounts, and there is no limitation to the right to recover
from such fiduciaries

Robt. H. Hatton pg

Answer to
Hae.

IN THE CIRCUIT COURT FOR THE COUNTY
OF NASEMOND.

Virginia C. Royster and
Granville H. Royster/

vs.

Clarence R. Hatton, Clarence R. Hatton, Exor. of D. H. Hatton,
deceased, Clarence R. Hatton, Trustee R. Smith, Clarence R. Hatton,
Jr., and Cornelia Hatton, the last two being infants who were rep-
resented by J. U. Burgess, their guardian ad litem, A. H. Baker,
Sheriff and administrator d. b/ n. of Cornelia R. Hatton, deceased.

The replication of the above complainant to the special plea of
the statute of limitation of the defendants.

These repliants saying and reserving into themselves all and
all manner of benefit and advantage of exception which may be had
and taken to the manifold errors, uncertainties, and insufficien-
cies of the plea of said defendants, for replication thereunto
saith that they do and will aver, maintain, and prove their said
bill to be true, certain, and sufficient in the law to be answered
unto by said defendants, and that the plea of said defendants
is uncertain, evasive, and insufficient in law to me replied unto
by these repliants, without this, that any other matter or thing
in the said plea contained material or effectual in the law to be
replied unto, confessed, avoided, traversed, or denied, is true;

And the complainant say that ~~there-to-fore~~ to-wit, on the-day
of April, 1898, D. H. Hatton, departed this life and that a few
weeks prior to his death, to wit: on about the first day of Feb.
1898, he handed to Virginia C. Royster, ~~his~~ grand daughter and one
of the complainants in this suit a package of papers, saying to her
at the same time, the following words, to wit " here is the will
of your Aunt Kate", meaning the will of Miss. Katherine Corbell:
upon the inspection of the said bundle of papers your complainants
found not only the will of the said Katherine Corbell, but also, the
original of the contract ~~or~~ agreement between D. Hatton and
Cornelia R. Hatton, and a copy of which is ^{filed} ~~found~~ ^{marked} ~~wered~~ exhibit A.
These complainants cannot say whether the said D. H. Hatton intended

to deliver the said contract, or instrument last mentioned to the said Virginia C. Royster or not, but they believe that he adopted this method of informing the said complainants of their rights in the property of which the said Cornelia R. Hatton died, seized and possessed. And they firmly believe that he desired said Virginia C. Royster and her brother and sister John and Juliette to recover said property. And these complainants deny all knowledge or means of knowledge of the existence of the said paper writing marked exhibit A. and entered into between the said Daniel and Cornelia R. Hatton on the 13th day of January 1883, until the said Daniel H. Hatton delivered the same into the hands of Virginia C. Royster, to wit, on or about February 1st, 1898.

These repliants charge that Clarence R. Hatton did not know of the existence of the said paper writing marked exhibit A. nor did any of the other defendants in this suit have knowledge of the existence of said paper; the complainants or either of them and the defendants or either of them not knowing of the existence of the said paper writing at the time the estate of Cornelia R. Hatton, deceased, was distributed among her nearest kin and heirs at law under a common or mutual mistake of fact, and complainants charge that the said mistake was unknown to them or either of them until the discovery of the said paper writing as aforesaid, to wit; on or about Feb. 1st, 1898, and within ten years before the institution of this suit. But if the defendants or either of them had knowledge or means of knowledge of the existence of the said paper writing they suppressed such knowledge or means of knowledge from the complainants and the defendants are guilty of fraud, ^{upon complainants, and complainants so charge;} and complainants say that the defendants ought not to have or maintain their plea as aforesaid, all which matters and things these repliants are ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays as in and by their said bill they have already prayed.

Repl. H. Hatton
J. J.

Application
to plea

IN THE CIRCUIT COURT OF NANSEMOND COUNTY, NANSEMOND COUNTY, TO-WIT: -

Virginia C. Royster, et al.,

vs.

Answer of Guardian ad litem for
infant defendants.

Clarence R. Hatton, et al.,

C.

The joint answer of Clarence R. Hatton, junior and Lily Cornelia Hatton, infants under the age of twenty-one years by James U. Burges, their guardian ad litem, assigned to defend them in this suit, to a bill of complaint exhibited against them and others, in the circuit court for the county of Nansemond, by Virginia C. Royster and others.

These respondents reserving to themselves the benefit of all just exceptions to said bill, for answer thereto, or to so much thereof as they are advised that it is material they should answer, by their said guardian ad litem answer and say:

That they are infants of tender years, and by reason of their infancy, are incapable of understanding, or of taking care of their rights and interests. They, therefore, by their said guardian commend themselves and their rights and interests to the protection of the court, and pray that no decree may be pronounced which will tend to their prejudice.

And having fully answered, the said respondents pray to be hence dismissed with their reasonable costs in this behalf expended, and they will ever pray, etc.



Guardian ad litem for Clarence R. and Lily
Cornelia Hatton, infant defendants.

Virginia, Nansemond County, to-wit:-

This day personally appeared before me, *Robt. W. H. Hethers*
a Notary Public for the County and State aforesaid, James U. Burges,
guardian ad litem for the infant defendants Clarence R. Hutton, jr.
and Lily Cornelia Hutton, whose answer is above written, and made
oath that the statements, contained in the said answer, so far as
made of his own knowledge are true; and so far as made from know-
ledge or information derived from others, they are believed to be
true.

Given under my hand this 4 day of May, 1902.

My term of office expires April 6, 1904.

Robt. W. H. Hethers
N. P.

Royster, et al
vs
PS
Hutton et al

*Answer of guard-
ian ad litem of
infant defendants.*

Continued from the preceding page.

"B"

In the name of God, Amen.

I, Daniel Herring Hatton of the town of Suffolk, County of Nansemond, State of Virginia, do make this my last will and testament hereby revoking all other or former wills made by me

I direct that my body be buried in a manner corresponding to my estate and situation in life.

After the payment of all of my just debts including my funeral expenses, for the payment of which I charge my whole estate, I give, devise and bequeath my estate in manner following,-

Item 1. I devise unto my son Clarence Riddick Hatton that certain piece, parcel or lot of land together with the appurtenances belonging to the same situated on the east side of Church or Back Street in Suffolk, Virginia, conveyed unto me by William A. Bond by deed dated 24th November 1883, and recorded in the Clerk's Office of the Nansemond County Court in Deed Book No. 12, at page 505 and that certain piece, parcel or lot of land together with the appurtenances belonging to the same situated on the east side of Church or Back Street in Suffolk, Virginia, conveyed unto me by Josiah H. Mann and wife by deed dated 8th september 1883, and recorded in the Clerk's office of the Nansemond County Court in Deed Book No. 12, at page 502 (now devised subject to the right of over ten feet of the said lot named in a certain deed made by me unto Clarence R. Hatton dated 22nd December 1894 and recorded in the Clerk's Office of the Nansemond County Court in Deed Book No. 34 at page 593) in trust nevertheless for his the said Clarence Riddick Hatton's children, Clarence Riddick Hatton Junior and Lillie Cornelia Hatton, with the power and authority unto the said Clarence Riddick Hatton as trustee aforesaid to rent, lease, encumber, mortgage or sell as in his judgment may seem best the said real estate and the rents

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profits, revenues or proceeds of sale (if sold) to be used by him in his discretion, in and about the maintenance, support and education of the said children with authority to him to invest and re-invest the rents, profits, revenues or proceeds of sale of said real estate at pleasure and the principal of said rents, profits, revenues or proceeds of sale the said Clarence Riddick Hatton as trustee aforesaid shall have the right and authority to employ, if necessary, in the maintenance, support and education of the said children. I direct that no security shall be required of the said Clarence Riddick Hatton for the faithful performance of the trust hereby imposed upon him. In the event of a sale of the said real estate the said Trustee is authorized to make either public or private sale, receive the purchase money and execute and deliver good and sufficient deed or deeds to the purchaser or purchasers thereof. At the maturity of the youngest of said children if the said real estate shall be then unsold I devise or give the same in fee simple to them share and share alike, but if the same shall have been converted into money and the trust fund so created be in existence at the maturity of the older of said children he shall then be entitled to one half thereof and the remainder shall be held until the maturity of the other child who shall then be entitled to the remaining one half.

Item 2. Being possessed of three Town of Suffolk five per cent coupon bonds of the face value of Five Hundred Dollars each, the same having been bought in greater part with the proceeds of certain bonds of the City of Portsmouth named in the will of Catharine Hatton Corbell, said City of Portsmouth having redeemed the said bonds at their maturity and the proceeds of said bonds having been invested by me in the purchase of the said Town of Suffolk bonds to substitute and take the

place of the said City of Portsmouth bonds, I bequeath the said Town of Suffolk bonds as follows, one to my grandson John Goodrich Hatton, one to my grand-daughter Virginia Cocke Royster and the other to my grand-daughter Juliet Riddick Hatton, subject to this express proviso and condition to wit: that the receipt of said bonds as now bequeathed shall be and constitute a full discharge and acquittance to my estate of all and every liability arising from my position as executor of the will of Catharine Hatton Corbell and the rights of said legatees under and by virtue of the provisions of the will of the said Catharine Hatton Corbell.

Item 3. I bequeath unto my grand-daughters Virginia Cocke Royster and Juliet Riddick Hatton one set of chamber furniture each to be selected by them, the first choice to be Virginia Cocke Royster's from my household furniture, each set to consist of one bed, one bedstead, with necessary bedding for said bed and bedstead, six chairs, one ewer and basin, six towels, one bureau and one mirror.

Item 4. After the discharge of the legacies hereinbefore provided for I bequeath unto my son Clarence Riddick Hatton the remainder of my personal estate of every sort and description of which I may die seized and possessed.

Item 5. I nominate and appoint my son Clarence Riddick Hatton executor of this my last will and testament and request that no security be required of him as such executor by the Court in which he shall qualify.

In Witness Whereof I have set my hand and seal to this my last will and testament this 18th day of May A.D. 1896.

Daniel Herring Hatton (SEAL)

Signed, sealed published and declared by Daniel Herring Hatton for and as his last will and testament before us, who, in his presence and the presence of each other have set our

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hands as witnesses at his request this 18th day of May, 1896.
Wallace Kilby. E. K. Channell.
G. S. P. Holland.

Virginia:

At a County Court held for the county of Nansemond
at the courthouse in the town of Suffolk on Monday
the 9th day of May, A. D. 1898.

The last will and testament of Daniel Herring Hatton late
of this county deceased, was this day produced in court and ~~pro~~
proved according to law by the oaths of Wallace Kilby, G. S. P.
Holland and E. K. Channell the three subscribing witnessess
thereto and is ordered to be recorded.

And on the motion of Clarence Riddick Hatton the ex-
ecutor named in said last will and testament who made oath
according to law and entered into and acknowledged a bond in
the penalty of Three thousand dollars conditioned according
to law, but without security, (the said last will and testament
directing that no security be required of him) certificate is
granted him, the said Clarence Riddick Hatton for obtaining a
probate of said last will and testament in due form.

And it is ordered that said bond be recorded as
prescribed by law.

Teste; A. P. Gomer, D. C.

A copy- *Teste; M. Lawrence DC.*
May 12, 1904

Daniel H. Hatton's Will-

Recorded in Will Book
No. 5, page 548.

A C O P Y .

AMENDED AND SUPPLEMENTAL BILL.

IN THE CIRCUIT COURT OF NANSEMOND COUNTY, NANSEMOND COUNTY TO-WIT:-
IN VACATION: December, 15, 1902.

VIRGINIA C. ROYSTER AND GRANVILLE H. ROYSTER, her husband, who sue for themselves and all others lawfully entitled who will share the expense of the suit-----COMPLAINANTS.

vs. IN CHANCERY.

Clarence R. Hatton, Clarence R. Hatton, Exor. of D. H. Hatton, deceased, Clarence R. Hatton, Trustee for C. R. & L. C. Hatton, John G. Hatton, Juliette R. Smith, Clarence R. Hatton, jr., and Lily Cornelia Hatton, the last two being infants who are represented by J. U. Burges their Guardian ad litem,-----DEFENDANTS.
A. H. Baker, Sheriff, and Administrator d. b. n. of Cornelia R. Hatton, deceased,-----DEFENDANTS.

To the Honorable Robert R. Prentiss,

Humbly complaining, your oratrix, Virginia C. Royster, of the County of Nansemond, sheweth unto your honor the following case:-

Your oratrix is a grand-daughter of the late Cornelia R. Hatton and Daniel H. Hatton her husband, late of the county of Nansemond, with whom she lived the greater part of her life and by whom she was loved, cherished and cared for; your oratrix has one whole brother name John G. Hatton and one whole sister name Juliette R. Smith, formerly Hatton; these three grand children of the said D. H. Hatton and Cornelia R. Hatton lived with and were reared by them, and the said grand children, and particularly your oratrix, were greatly loved by their grand parents aforesaid, who, being childless, save Clarence R. Hatton, the father of these grand children, bestowed every affection upon and were dearly loved and respected by their three grand-children aforesaid.

Your oratrix avers that because of the love borne by her grand parents to their grand children, her grandmother, Cornelia R. Hatton, on the 17th. day of January, in the year 1883, while your oratrix and her brother and sister were yet infants, entered into a written contract, under her hand and

seal, with her grandfather, Daniel H. Hatton, whereby the said Cornelia R. Hatton undertook, promised and covenanted that she would execute her will, in due form of law, and bequeath and devise her certain separate statutory estate unto your oratrix, her brother John and her sister Juliette; that ~~the~~ said promise and covenant was made for the sole benefit of the said Cornelia R. Hatton's grandchildren, of whom your oratrix is one, and said promise was based upon a good and valuable consideration which was paid over to the said Cornelia R. Hatton by Daniel H. Hatton, to-wit, \$4107.00; and the said Cornelia R. Hatton intended to bind and did bind her separate estate thereby. Your oratrix files herewith a copy of the said written contract and covenant marked "Exhibit A.", and prays that it be read as a part of this bill.

Your oratrix avers that while it appears from the face of said contract that it was made at the instance and request of D. H. Hatton, yet, in fact, it was made and entered into at the instance and request of Cornelia R. Hatton, who desired to bind her separate estate to her grandchildren and to prevent her son from its enjoyment after her death.

Your oratrix charges that the said Cornelia R. Hatton, on April, 25, 1883, with a part of the fund settled upon her by her husband, the said Daniel H. Hatton, to-wit, \$2,500.00 thereof, purchased certain real property in the town of Suffolk, County of Nansemond, State of Virginia, bounded and described as follows: Fronting on the West side of Main Street 99 feet and running back or westwardly between parallel lines 245 feet, being bounded on the North by the lands of Ida P. Harper, formerly the Murray lot; on the East by said Main Street; on the South by the lands of Ophelia Cooper and others; and on the West by lands of which Daniel H. Hatton died seized and possessed. Said real property was purchased wholly with the money settled upon the said Cornelia R. Hatton by Daniel H. Hatton under the instrument aforesaid. Your oratrix further charges that the said Cornelia R. Hatton, on November, 27th, 1887 lent a large part of the residue of the ~~sa~~ said fund of \$4107.00, to-wit, \$1,000.00 thereof, to R. W. Helms and took his bond therefor payable four years after date and bearing interest at 6% per annum, the payment of said bond being secured to the said obligee therein by a deed of trust on certain real estate in the town of Suffolk, and the said Cornelia R. Hatton invested the residue of said fund in other

real and personal property, which to your oratrix is at present unknown; that the said Cornelia R. Hatton died seized and possessed of the above described real property and bond and of other property, real and personal to your oratrix unknown.

Your oratrix avers that on the 9th. day of December, in the year 1889, her grandmother, the said Cornelia R. Hatton, was suddenly stricken with death and that she died intestate, altho she often declared her purpose and intention of executing her will and bequeathing and devising her property, real and personal, to your oratrix and her brother John and her sister Juliette; that the said Cornelia R. Hatton at her death left one son, to-wit Clarence R. Hatton, who is the father of your oratrix; that the said Clarence R. Hatton still lives and claims the property of which the said Cornelia R. Hatton died seized and possessed as heir at law.

Your oratrix charges that sometime prior to the year 1883, Daniel H. Hatton and Cornelia R. Hatton, gave to their son Clarence R. Hatton, by way of advancement, a certain tract of land in Mansfield County, known as "Purdies Farm", valued at \$4000.00; and while no deed for the same was made to the said Clarence R. Hatton, yet he received the rents, issues and profits from the said farm as fully as if the same had been lawfully conveyed to him; that said tract of land called "Purdies" was, by joint conveyance of D. H. Hatton, Cornelia R. Hatton, Clarence R. Hatton and Lily A. Hatton, his wife, sold to C. C. Thompson for the sum of \$4,000.00 and that all of the said purchase price was delivered to and received by the said Clarence R. Hatton by way of advancement.

Your oratrix charges that the said Cornelia R. Hatton received full consideration for her contract to ~~execute~~ make her will bequeathing to your oratrix and her other grandchildren what ever remained of the money settled upon her by her husband, the said Daniel H. Hatton; that she did so contract, promise and covenant to bequeath whatever should remain at her death of the fund settled upon her as aforesaid, to your oratrix and her other grandchildren; that she invested this fund or a large part thereof, in the real property and bond above referred to and in other property to your oratrix unknown; that the above described real property, bond and other property to your oratrix unknown remained undisposed of at her death; and that she, the said Cornelia R. Hatton, by reason of her sudden death, never

made a will.

By agreement of all parties interested, a part of the above described real estate has been sold for the sum of \$1,400.00, which amount, less selling commissions, has been placed in the Bank of Suffolk, Suffolk, Va., to the credit of J. Walter Hosie~~t~~, trustee, there to remain until the adjudication of this case and the determination of the rights of your oratrix in the premises.

Before the death of the said Cornelia R. Hatton, in the year 1889, her son, Clarence R. Hatton re-married and had issue, to-wit, Clarence R. Hatton jr., who is an infant and alive; and after the death of the said Cornelia R. Hatton, the said Clarence R. Hatton, had born unto him yet another child, to-wit, Lily Cornelia Hatton, who is an infant and alive.

Your oratrix charges that both Cornelia R. Hatton and R. W. Nelms died before the debt owed by the latter to the former became due and payable, to-wit, before November, 27th. 1891. That in the year 1890 Daniel H. Hatton qualified as the Administrator of Cornelia R. Hatton deceased, in the County Court of Jamesmond, and gave bond with Clarence R. Hatton as surety. That as Administrator of Cornelia R. Hatton, the said Daniel H. Hatton collected the debt aforesaid and interest thereon from E. E. Holland, Admr. of R. W. Nelms, ~~and others~~ ^{and others} deceased, as follows, to-wit: Jan'y., 12, 1891, \$60.00; June, 17, 1892, \$420.26; Sept. 10, 1891 \$30.00; April, --, 1894, \$697.16; making a total collected, as interest and principal, \$1107.42. That Daniel H. Hatton never settled his accounts as administrator of Cornelia R. Hatton, deceased. That Daniel H. Hatton used the said \$1107.42 collected by him as such administrator, probably believing it his own, and either consumed it or invested it in his own name.

Daniel H. Hatton died on the day of 1898, having previously published and declared his last will and testament, ^{a certified copy of which marked "B" is herewith filed as part of this bill.} by which he devised his real property, to-wit, two certain houses and lots in the town of Suffolk, lying to the West of and adjoining the lands of Cornelia R. Hatton above described, to Clarence R. Hatton, Trustee for Clarence R. Hatton, jr. and Lily Cornelia Hatton, and bequeathed his personal property absolutely to Clarence R. Hatton; among other personalty he bequeathed to Clarence R. Hatton a bond of the Town of Suffolk of \$500.00. In the year 1898 Clarence R. Hatton qualified as the Executor of Daniel H. Hatton deceased, and as such executor has never settled his accounts.

In the year 1902 Clarence R.Hatton collected the Town of Suffolk Bond aforesaid ,in his own name. A.H.Paker,qualified as Administrator d.b.n. of Cornelia R.Hatton,deceased,on the 8th.day of December,1902.

Your oratrix is advised that she is entitled to have the contract to make a will for her benefit between the said Cornelia R.Hatton and Daniel H.Hatton as aforesaid,specifically performed and enforced,or, its equivalent,to compel Clarence R.Hatton,upon whom the legal title to the land has descended,to convey or deliver unto your oratrix and such others as are entitled,what ever remained at her death of the property of the said Cornelia R.Hatton derived from the fund settled upon her by her husband as aforesaid,in accordance with the terms of the said contract.

Your oratrix is further advised that the true intent and meaning of the word "grandchildren" as used in the last clause of the contract between Cornelia R. and Daniel H.Hatton as aforesaid,is "Grandchildren living at the time of the execution of the instrument,to-wit,Jan'y.17th.1883"; that is to say,your oratrix,her brother John and her sister Juliette.

To the end,therefore,that justice may be done,and for as much as your oratrix is remediless in the premises save in a court of equity wher all such matters are alone and properly cognizable,she prays that Clarence R.Hatton,Clarence R.Hatton,trustee for Clarence R.Hatton,jr,and Lily Cornelia Hatton, Clarence R.Hatton,Executor of D.H.Hatton,deceased, John G.Hatton,Juliette R.Smith,Clarence R.Hatton jr.,Lily Cornelia Hatton and A.H.Baker,Administrator d.b.n. of Cornelia R.Hatton,deceased,may be made parties defendant to this bill and required to answer the same,tho not under oath,the oath being expressly waived; that Clarence R.Hatton may be compelled,by a decree of this honorable court,to specifically perform the contract made and entered into on the 17th.day of January,1883 between Cornelia R.Hatton and Daniel H.Hatton whereby the said Cornelia R.Hatton undertook and promised to convey by will to your oratrix and others all that might remain of certain property settled upon her; that this court by its decree will compel Clarence R.Hatton,upon whom the legal title has descended,to convey or deliver to your oratrix one third part,or,if it be held by this court that your oratrix is entitled to only one-fourth part, then one-fourth part,of the real property described in the bill as the property bought by Cornelia R.Hatton with a part of the fund settled upon

her as aforesaid, the same proportion of the money heretofore described as being in the Bank of Suffolk to the credit of J. Walter Hosier, trustee and which was derived from a sale of a part of the real estate aforesaid, and the same proportion of such other property, real or personal, as shall be found to have been a part of the estate of the said Cornelia R. Hatton and which was purchased by her with the money settled upon her by her husband as aforesaid; that Clarence R. Hatton Executor of D. H. Hatton, be compelled to settle his accounts as such executor before a commissioner of this court; that a decree be entered by this court, with the force and effect of a judgment, requiring Clarence R. Hatton, Executor of D. H. Hatton to pay to your oratrix one-third part of the money collected by his testator as administrator of Cornelia R. Hatton from the estate of R. W. Nelms, deceased, upon the bond as set forth in this bill, with interest thereon from the ~~se~~ several dates of collection as herein set forth; that it be decreed by this honorable court that whatever remained undisposed of at the death of Cornelia R. Hatton of the money settled upon her by her husband as aforesaid, be charged with a trust in the hands of her heir at law or personal representative, as the case might be, in favor of your oratrix and all others entitled; that such trust be executed and enforced; that all proper and necessary ^{accounts} be taken and references made as shall seem proper to the court in the premises; that a reasonable attorney's fee be allowed your oratrix's counsel; but if the court is of opinion that the complainant is not entitled to specific performance of ^{the} a contract to make her will entered into between the said Cornelia R. and Daniel H. Hatton as aforesaid, then that the court enter a decree, which will have the force and effect of a judgment, decreeing this complainant entitled to damages in the sum of \$1367.00 against the estate of the said Cornelia R. Hatton, as for a breach of contract; that all such other relief, general and special, be allowed your oratrix as she may be entitled to in the premises or to equity seems meet. And your oratrix will ever pray, etc.

Robt. W. Withers p.q.
Suffolk, Va. 12/15/02.

Virginia C. Royster
Graville H. Royster
By counsel

NOTE.

The amendments to the original bill made by the amended bill are as follows:-

The amended bill charges:-

1. That the contract dated Jan'y, 17, 1883, was made at the request of Mrs. Cornelia R. Hatton.

That Clarence R. Hatton was given by his parents a farm worth \$4000.00 by way of advancement.

3. That Cornelia R. Hatton lent R. W. Nelms \$1,000.00 of the fund settled upon her and took his bond for same payable 4 years after Nov. 27, 1887.

(This is an enlargement of the allegations of the original bill, but not strictly an amendment, as the same is charged in general terms in the original).

4. That both Mrs. Hatton and R. W. Nelms died before the debt between them became due.

5. That D. H. Hatton qualified as Admr. of Cornelia R. Hatton, and as such collected the debt and interest aforesaid from the Admr. of R. W. Nelms and others. The dates and amounts of the several collections are set forth

6. That D. H. Hatton never settled his accounts as admr. of Cornelia R. Hatton.

7. That D. H. Hatton used the money collected by him as aforesaid. That his estate is properly accountable for it to complainant.

8. That D. H. Hatton died in 1898, leaving a will by which he devised his realty to Clarence R. Hatton, trustee for C. R. & J. R. and J. C. Hatton, and his personalty to Clarence R. Hatton; that among other things devised to Clarence R. Hatton was a Town of Suffolk Bond for \$500.00, which has been paid to said Clarence.

9. That Clarence R. Hatton qualified as Exor. of D. H. Hatton, and as such has never settled his accounts.

10. That A. H. Baker, on Dec. 8, 1902, qualified as admr. a. b. n. of Cornelia R. Hatton, deceased.

The amended bill adds the following prayers for relief:-

1. That Clarence R. Hatton Trustee for C.R., jr. and J.C. Hatton, Clarence R. Hatton, Executor of D.H. Hatton, deceased, and A.H. Baker, Admr. d.b.n. of Cornelia R. Hatton, deceased, be made new parties.

2. That Clarence R. Hatton, Executor of D.H. Hatton be required to state and settle his accounts before a commissioner of this court.

3. That Clarence R. Hatton, Executor of E.H. Hatton, be required to pay over to complainant $1/3$ of the money collected by his testator from the estate of R.W. Nelms, with interest thereon from the several dates of the collections.

4. That if the court is of opinion that the complainant is not entitled to specific performance of the contract to make a will entered into by Cornelia R. Hatton, that a decree be entered against her estate, in favor of Complainant for \$1367.00 as for a breach of contract..

R.H. W. Wither, p.g.

EXHIBIT "A".

"Memorandum of an agreement made and entered into this seventeenth day of January, A.D. 1883, between Daniel H. Hatton of the first part, and his wife Cornelia R. Hatton of the second part, both residents of Suffolk, County of Nansemond, in the State of Virginia.

Whereas the said Daniel H. Hatton has sold to John T. Brockwell Eight hundred and eighty acres of land, a part of the 'Stockley' farm (in which the said Cornelia R. Hatton has a contingent right of dower) and is desirous of conveying the fee simple title thereto to the said Brockwell, -

Now therefore this indenture witnesseth that the said Daniel H. Hatton in consideration that the said Cornelia R. Hatton will join him in the execution of the deed to the said Brockwell and will relinquish her contingent right of dower in the said land to the said Brockwell in due form of law, does by these presents give, grant, assign, transfer and set-over unto the said Cornelia R. Hatton the sum of Four thousand one hundred and seven Dollars (\$4107) in money, as and for her sole and separate estate, absolutely free and clear from the debts, demands, marital rights or control of himself, or of any future husband. And the said Daniel H. Hatton binds himself to pay the said sum of \$4107.00 into the hands of the said Cornelia R. Hatton or her duly authorized agent for the purpose, so soon as the said contingent right of dower is relinquished and the purchase money for the said land is received from the said John T. Brockwell.

And the said Cornelia R. Hatton binds herself to execute a will in due form of law bequeathing whatever may remain of the money settled upon her by these presents to her grand children, and this settlement is made with this distinct mutual understanding.

Witness the following signatures and seals.

D. H. Hatton SEAL.

Cornelia R. Hatton SEAL.

State of Virginia, :
County of Nansemond : To-wit:-

I, Rob. R. Prentis, a Commissioner in Chancery of the Circuit Court in and for the said County, in the state of Virginia, do certify that Daniel H. Hatton whose name is signed to the writing above, bearing date the seventeenth day of January, 1883, has acknowledged the same before me in the county aforesaid.

Given under my hand this eighteenth day of January, 1883.

Rob. R. Prentis,
Commr. in Chancery.

State of Virginia, :
County of Nansemond: To-wit:-

I, Rob. R. Prentis, a Commissioner in Chancery of the Circuit Court in and for the county aforesaid in the State of Virginia, do certify that Cornelia R. Hatton, the wife of Daniel H. Hatton, whose names are signed to the writing above, bearing date the 17th. day of January, 1883, personally appeared before me in the county aforesaid, and being duly examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she the said Cornelia R. Hatton acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 18. day of January, eighteen hundred and eighty three.

Rob. R. Prentis,
Commr. in Chancery.

CIRCUIT COURT OF NANSSEMOND.

VIRGINIA C. ROYSTER, ET AL.

VS. IN CHANCERY.

CLARENCE R. HATTON, ET AL.

AMENDED AND SUPPLEMENTAL BILL

1902 Dec 13th Filed
AP Gomer & Co

ROBT. W. WITHERS,

ATTORNEY AT LAW,

SUFFOLK, VA.

PRACTICING IN ALL COURTS IN
FIRST JUDICIAL CIRCUIT.

JEWELL & COMPANY, PHILADELPHIA.

IN THE CIRCUIT COURT OF WANSEMOND COUNTY, WANSEMOND COUNTY TO-WIT:-
Second January Rules, 1902.

and Granville Royster, her husband,
VIRGINIA C. ROYSTER, who sues for herself and all others lawfully
entitled that will come in and share the expense of this suit.

vs. IN CHANCERY.

Clarence R. Hatton, *John G. Hatton & Juliette R. Smith* Defendant.
and Clarence R. Hatton, jr and Lily Cornelia Hatton, the last two being
infants under the age of 21 years.
To the Hon. Robert H. Prentiss,

Humbly complaining, your oratrix, Virginia C. Royster, of the
County of Wansmond, sheweth unto your honor the following case:-

Your oratrix is a granddaughter of the late Cornelia R. Hatton
and Daniel H. Hatton her husband, late of the County of Wansmond,
with whom she lived the greater part of her life and by whom she
was loved, cherished and cared for; your oratrix has one whole brot-
her name John G. Hatton and one whole sister name Juliette R. Smith,
formerly Hatton; these three grandchildren of the said Daniel H.
Hatton and Cornelia R. Hatton lived with and were ~~raised~~ ^{reared} by them, and
the said grandchildren, and particularly your oratrix, were greatly
loved by their grandparents aforesaid, who, being childless, save
Clarence R. Hatton, their father, bestowed every affection upon and
were dearly loved and respected by their three grandchildren afore-
said.

Your oratrix avers that because of the love borne by her grand
parents to their grandchildren, her grandmother, Cornelia R. Hatton,
sometime in the year 1883, to-wit, on the 13th. day of January, 1883,
while your oratrix and her brother and sister were yet infants,
entered into a written contract, under her hand and seal, with her
grand father, Daniel H. Hatton, whereby the said Cornelia R. Hatton
undertook, promised and covenanted that she would execute her will,
in due form of law, and bequeath and devise her certain separate

estate unto your oratrix, her brother John and her sister Juliette; that said promise and covenant was made for the sole benefit of the said Cornelia R. Hatton's grandchildren, of whom your oratrix is one, and said promise was based upon a good and valuable consideration which was paid over to her the said Cornelia R. Hatton by Daniel H. Hatton, to-wit, \$4107.00. Your oratrix files herewith a copy of said written contract and covenant, marked "Exhibit A.", and prays that it be read as a part of this bill.

Your oratrix charges that the said Cornelia R. Hatton with a part of the fund settled upon her by her husband, the said Daniel H. Hatton, to-wit, \$2,500.00 thereof, purchased certain real property in the Town of Suffolk, County of Nansemond, State of Virginia, bounded and described as follows: Fronting on the West side of Main Street 99 feet and running back or westwardly between parallel lines 245 feet, being bounded on the North by the lands of Ida P. Harper, formerly the Murray lot; on the East by said Main Street; on the South by the lands of Ophelia Cowper and others; and on the West by lands formerly belonging to J. H. Mann and Wm. A. Bond; Said real property was purchased wholly with the money settled upon the said Cornelia R. Hatton by Daniel H. Hatton under the instrument aforesaid. Your oratrix further charges that the said Cornelia R. Hatton invested a large part of the residue of the said fund of \$4107.00 in other real and personal property, which to your oratrix is at present unknown; that the said Cornelia R. Hatton died seized and possessed of the above described real property and of other property, real and personal, to your oratrix unknown.

Your oratrix further avers that on the 9th. day of December, in the year 1889, her grandmother, the said Cornelia R. Hatton, was suddenly stricken with death, and that she died intestate, although she often declared her purpose and intention of executing her will and bequeathing and devising her property to your oratrix and her brother John and her sister Juliette; that the said Cornelia R. Hatton,

at her death, left one son, to-wit, Clarence R. Hatton, who is the father of your oratrix; that the said Clarence R. Hatton still lives and claims the property of which the said Cornelia R. Hatton died seized and possessed as heir at law.

Your oratrix charges that the said Cornelia R. Hatton received full consideration for her contract to make her will bequeathing to your oratrix and her other grand children what ever remained of the money settled upon her by her husband, the said Daniel H. Hatton; that she did so contract, promise and covenant to bequeath what ever should remain at her death of the fund settled upon her as aforesaid to your oratrix and her other grand children; that she invested this fund, or a large part thereof, in the real property above described and in other property to your oratrix unknown; that the above described real property and other property to your oratrix unknown remained undisposed of at her death; and that she, the said Cornelia R. Hatton, by reason of her sudden death, never made a will bequeathing any part of her estate to you oratrix or her other grandchildren.

By agreement of all parties intersted a part of the above described real property has been sold for the sum of \$1,400.00, which amount, less selling commissions, has been placed in the Bank of Suffolk, Suffolk, Va., to the credit of J. Walter Hosier, trustee, there to remain until the adjudication of this case and the determination of the rights of your oratrix in the premises.

Before the death of the said Cornelia R. Hatton, in the year 1889, her son, Clarence R. Hatton re-married and had issue, to-wit, Clarence R. Hatton, jr., who is an infant and alive, and after the death of Cornelia R. Hatton, the said Clarence R. Hatton, had born unto him yet another child, to-wit, Lily Cornelia Hatton, who is an infant and alive.

Your oratrix is advised that she is entitled to have the contract to make a will for her benefit between the said Cornelia R. and Daniel H. Hatton as aforesaid, specifically performed and enforced, or,

its equivalent, to compel the said Clarence R. Hatton, upon whom has descended the legal title, to convey or deliver unto your oratrix and such others as are entitled, whatever remained at her death of the property of the said Cornelia R. Hatton derived from the fund settled upon her by her husband as aforesaid, in accordance with the terms of the said contract.

Your oratrix is further advised that the true intent and meaning of the words "her grandchildren", as used in the last clause of the contract between Cornelia R. Hatton and Daniel H. Hatton aforesaid is, "her grandchildren living at the time of the execution of the instrument, to-wit, Jan'y. 17th. 1883"; that is to say, your oratrix, her brother John and her sister Juliette.

To the end therefore that justice may be done, and for as much as your oratrix is remediless in the premises save by the aid of a Court of Equity, where all such matters are properly cognizable, she prays that Clarence R. Hatton, John G. Hatton, Juliette R. Smith, Clarence R. Hatton, jr. and Lily Cornelia Hatton, the last two being infants under the age of twenty-one years, may be made parties defendant to this bill and required to answer the same, tho not under oath, the same being expressly waived, but with leave to the last ^{four} ~~two~~ defendants named, should they choose, to become plaintiffs; that James U. Burges, an attorney at law, may be appointed guardian ad litem to defend the infant defendants in this suit; that Clarence R. Hatton may be compelled, by a decree of this honorable court, to specifically perform the contract made and entered into on the 17th. day of January, 1883 between Cornelia R. Hatton and Daniel H. Hatton, whereby the said Cornelia R. Hatton undertook and promised to convey by will to your oratrix and her brother John and her sister Juliette all that remained of certain property settled upon her, by her husband; that this court by its decree may compel Clarence R. Hatton, upon whom the legal title has descended to convey or deliver to your oratrix one-third part, or, if it be held that your oratrix be entitled to only one-fourth part, then one-fourth part of the real property before described in this bill; the same proportion of the money heretofore described as being in the Bank of Suffolk to the credit of J. Walter Hosier, Trustee, and which was derived from the sale of a part of the real estate purchased by Cornelia R. Hatton with money settled upon her as aforesaid, and the same proportion of such other

property, real or personal, as shall be found to have been a part of the estate of the said Cornelia R. Hatton and which was purchased by her, the said Cornelia R. Hatton with the money settled upon her by her husband as aforesaid; that it be decreed by this honorable court that whatever remained undisposed of at the death of Cornelia R. Hatton of the money settled upon her by her husband as aforesaid, ^{or the property purchased with said money,} be charged with a trust in the hands of the heir at law of the said Cornelia R. Hatton in favor of your oratrix and all others lawfully entitled; that such trust be executed and enforced; that all proper and necessary accounts be taken references and inquiries made as ^{that all of said property be partitioned by commissioners, appointed by this court, or sold and the money divided, if partition in kind be deemed} shall seem proper to the court in the premises; that a reasonable attorney's fee be allowed your oratrix's counsel; that all such other relief, general and special, be allowed and given your oratrix as she may be entitled to in the premises or to equity seems meet. And your oratrix will ever pray etc.

Virginia B. Royster,

Robert W. Withers, p. q.

Suffolk, Va., 1/21/02.

EXHIBIT "A".

"Memorandum of an agreement made and entered into this seventeenth day of January, A.D. 1883, between Daniel H. Hatton of the first part, and his wife Cornelia R. Hatton of the second part, both residents of Suffolk, County of Nansemond, in the State of Virginia.

Whereas the said Daniel H. Hatton has sold to John T. Brockwell Eight hundred and eighty acres of land, a part of the 'Stockley' farm (in which the said Cornelia R. Hatton has a contingent right of dower) and is desirous of conveying the fee simple title thereto to the said Brockwell, -

Now therefore this indenture witnesseth that the said Daniel H. Hatton in consideration that the said Cornelia R. Hatton will join him in the execution of the deed to the said Brockwell and will relinquish her contingent right of dower in the said land to the said Brockwell in due form of law, does by these presents give, grant, assign, transfer and set-over unto the said Cornelia R. Hatton the sum of Four thousand one hundred and seven Dollars (\$4107) in money, as and for her sole and separate estate, absolutely free and clear from the debts, demands, marital rights or control of himself, or of any future husband. And the said Daniel H. Hatton binds himself to pay the said sum of \$4107.00 into the hands of the said Cornelia R. Hatton or her duly authorized agent for the purpose, so soon as the said contingent right of dower is relinquished and the purchase money for the said land is received from the said John T. Brockwell.

And the said Cornelia R. Hatton binds herself to execute a will in due form of law bequeathing whatever may remain of the money settled upon her by these presents to her grand children, and this settlement is made with this distinct mutual understanding.

Witness the following signatures and seals.

D. H. Hatton

SEAL.

Cornelia R. Hatton

SEAL.

State of Virginia, :

County of Nansemond : To-wit:-

I, Rob. R. Prentis, a Commissioner in Chancery of the Circuit Court in and for the said County, in the state of Virginia, do certify that Daniel H. Hatton whose name is signed to the writing above, bearing date the seventeenth day of January, 1883, has acknowledged the same before me in the county aforesaid.

Given under my hand this eighteenth day of January, 1883.

Rob. R. Prentis,

Commr. in Chancery.

State of Virginia, :

County of Nansemond: To-wit:-

I, Rob. R. Prentis, a Commissioner in Chancery of the Circuit Court in and for the county aforesaid in the state of Virginia, do certify that Cornelia R. Hatton, the wife of Daniel H. Hatton, whose names are signed to the writing above, bearing date the 17th. day of January, 1883, personally appeared before me in the county aforesaid, and being duly examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she the said Cornelia R. Hatton acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 18. day of January, eighteen hundred and eighty three.

Rob. R. Prentis,

Commr. in Chancery."

Virginia L. Royster
vs } In Chq.

Clarence L. Hatton

2d Jury Rules, 1902

Bill =

Robt W. Hatton, Jr.

Virginia L Royster & others
against } In Chancery
Clarence R Natton & others
Chancery Notes

1901 Nov 29th Process issued returnable
to December Rules Third
Monday.

" Dec 16th. Process returned unexecuted
Order of Publication waived
Bill filed.

1902 Jan 6th. } Docketed by Consent.

1904 Mar 31. Process issued for defts to
answer an amended and Supple-
mental bill

" Apr 4 Process returned accepted by
C R Natton Trustee, C R
Natton Exor. and A H Baker
Shff Admr. d b. n

Chancery Notes

Costs

G Clerk 4.78
S " 4.37

\$ 9.15

Day 15 0

ally 15 00

• 25.65 •

ing. to norpster & others
In Chancery
C R Natton & others

1905

February 4th
Final Decree.

Albion Corbett ^{May} Royster vs Hatton.

190 ⁴

To R. R. SMITH, County Clerk of Nansemond County, Dr.

May 12

~~Tax and Recording~~

Fee

for certified copy

\$

of will of Daniel H. Hatton

1.50

Clerk.

Circuit Court.

Tuesday after the Second Monday in
April and October.

HON. ROBERT R. PRENTIS, Judge.
AZRA P. GOMER, Clerk.

County Court.

Second Monday in each month.

HON. WILBUR J. KILBY, Judge.
ROBERT R. SMITH, Clerk.
E. E. HOLLAND, Commonwealth's Attorney.
ALEX. H. BAKER, Sheriff.
SYDNEY T. ELLIS, County Treasurer.
JOHN B. PINNER, Commissioner of Accounts.

Nansemond County Clerks' Office.

Suffolk, Va., ... *190*.....

VIRGINIA, NANSEMOND COUNTY
to wit:

In the Clerk's Office of the Circuit Court
of Nansemond, in vacation of said court
on Saturday the 3d day of May, 1902.
Virginia C. Royster and Granville Royster
her husband, who sue for themselves
and all others entitled who will come in
and share the expense of this suit—
Complainants.

AGAINST—In Chancery,

Clarence R. Hatton, John G. Hatton, Ju-
liette R. Smith, Clarence R. Hatton Jr.
and Lily Cornelia Hatton, the last two
being infants under the age of twenty
one years..... Defendants.

The object of this suit is for the specific
performance of a certain contract in writ-
ing, made between Cornelia R. Hatton
and Daniel H. Hatton, on the 17th day of
January, 1883, whereby the said Cornelia
R. Hatton bound herself to execute her
will and bequeath certain property (of
which certain real estate in the town of
Suffolk is a part) to her grandchildren, of
whom the complainant is one.

And it appearing by proper affidavits
filed that all of the said defendants, the
last two being infants under the age of
twenty-one years are non-residents of the
State of Virginia, it is ordered that they do
appear here within fifteen days after the
due publication of this order in the *SUF-
FOLK HERALD* and do what is necessary to
protect their interest in this suit, but leave
is reserved to all of the defendants save
Clarence R. Hatton should they choose to
become parties complainant in this suit;
and that this order be published and
posted according to law.

A Copy—Teste:

A. P. GOMER, Clerk.
ROBERT W. WITHERS, p. q.

*I A P Gomer Clerk of the Circuit Court of Nansemond County
do certify that the above order of Publication was posted at the front
door of the Courthouse of Nansemond County Court on Monday the
12th day of May 1902 it being the first day of the May term
of said County Court—*

A. P. Gomer Clerk

Royce
vs
Hallen
Order of Publication

Virginia, Hansemond County, to wit
In the Clerk's office of the circuit
court of Hansemond, in vacation
of said court, on Saturday, the
3rd day of May 1902 -

Virginia C. Royster, and Granville
Royster, her husband, who sue for
themselves and all others entitled who
will come in and share the
expense of this suit -

Complainants.

vs

Clarence R. Katon, John P. Katon,
Jaliette R. Smith, Clarence R.
Katon, jr. and Lily Cornelia Katon,
the last two being infants under
the age of twenty one year -

Defendants -

In Chancery.

The object of this suit is
for the specific performance
of a certain contract in writing
made between Cornelia R. Katon
and Daniel H. Katon, on the
17th day of January 1883, whereby

the said Cornelia R. Halton
bound herself to execute her
will and bequeath certain
property (of which ^{certain} real estate in the
Town of Suffolk is a part) to her
grandchildren, of whom the
complainant is one.

And it appearing by proper
affidavits filed that all of
the said defendants, the last
two being infants under the
age of twenty one years, and
non residents of the State of
Virginia, it is ordered that
they do appear here within
fifteen days after the due pub-
lication of this order in the
Suffolk Herald, and ^{as} what is
necessary to protect their
interest in this suit, but
leave is reserved to all of the
defendants, save Clarence R.
Halton, should they choose, to
become parties complainant in
this suit; and that this
order be published and posted according
to law.

Robt. W. Wilkes, P. J.

Order of
Publication

Issue Summons to Clarence R
Hallon Exor of D^H Hallon decd
& Clarence R Hallon Trustee for
G R Hallon Jr & L C Hallon.
and A H Baker Shff & Admr. ^{at m} of
Bernelia R Hallon decd. ~~at~~

1st Apr Rules to cause and
Amended and Supplemental Bill
within 10 days.

Memorandum

In the Circuit Court of
Nausemond County, Nausemond County to-wit:

Virginia C. Royster and Granville Royster,
her husband ----- Complainants.

vs } In chancery

Clarence R. Hatton, John G. Hatton
and Juliet R. Smith ----- Defendants.

The object of this suit is to
compel the defendant Clarence R.
Hatton to specifically execute
a contract to devise certain real
property on Main St. in the town
of Suffock, made by Cornelia
R. Hatton for the benefit of
the complainant and others of her
grand children; to compel the
defendant Clarence R. Hatton
to treat the said property as
a trust fund for the benefit
of the complainant and others
entitled and of other relief.

Issue summons to 2^d Dec.
Rules 1901. Damages \$3,000.00
Say \$150 pd Robt. W. Withers,
R. g.

Order of Publication

Virginia Royster to her
V. J. Subaucens

Clarence R. Natton to her

Memorandum

CHANCERY SUMMONS.

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON

Clarence R. Natton
John G. Natton and Juliet Natton

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
for the said Court, on the *Third* Monday in *December 1901*, to answer

a Bill in Chancery, exhibited against *them*
in the said Court by *Virginia C. Royster and*
Granville Royster her husband

and have then and there this summons.

Witness, A. P. GOMER, Clerk of our said Court, at his office, this *29th* day of
November 1901, in the *126*th year of the Commonwealth.

A copy—Teste:

A. P. Gomer, CLERK.

Teste:

A. P. Gomer, CLERK.

R W Withers

p. q.

*A copy for
John G Natton*

vs.

} In Chancery.

1901

December

Rules.

Third

Monday.

Nansemond Circuit Court.

Process Book No. 21

Page 218

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON

Clarence R. Nutton
John G. Nutton and Juliet R. Smith

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held for the said Court, on the *Third* Monday in *December 1901*, to answer

A Bill in Chancery, exhibited against *them*

in the said Court by *Virginia L. Royster and*
Granville Royster her husband

and have then and there this summons.

Witness, A. P. GOMER, Clerk of our said Court, at his office, this *29th* day of

November 1901, in the *126*th year of the Commonwealth.

Attest—Teste:

A. P. Gomer, CLERK.

Teste:

A. P. Gomer, CLERK.

R W Wither

p. q.

*A copy for
Clarence R. Natton*

vs.

} *In Chancery.*

1861

December Rules.

Third Monday.

Nansemond Circuit Court.

Process Book No. 2

Page 218

CHANCERY SUMMONS.

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON

Clarence R. Natton
John G. Natton and Juliet R. Smith

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
for the said Court, on the *Third* Monday in *December 1901*, to answer

a Bill in Chancery, exhibited against *them*
in the said Court by *Virginia L. Royster and*
Granville Royster her husband

and have then and there this summons.

Witness, A. P. GOMER, Clerk of our said Court, at his office, this *29th* day of
November 1901, ~~189~~, in the 12^{*6*}th year of the Commonwealth.

A copy—Teste:

A. P. Gomer, CLERK.

Teste:

A. P. Gomer, CLERK.

R. W. Withers p. q.

*A copy for
Juliet R. Smith*

vs. } *In Chancery.*

1901

December Rules.

Sherid Monday.

Nansemond Circuit Court.

Process Book No. 21

Page 218

CHANCERY SUMMONS.

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY, GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON

Clarence R. Nutton
John G. Nutton and Juliet R. Smith

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
for the said Court, on the *Third* Monday in *December 1901*, to answer

a Bill in Chancery, exhibited against *them*

in the said Court by

Virginia L. Royster and
Granville Royster her husband

and have then and there this summons.

Witness, A. P. GOMER, Clerk of our said Court, at his office, this *29th* day of
November 1901, in the 12^{*6*}th year of the Commonwealth.

A copy—Teste:

Teste:

CLERK.

CLERK.

Not found in my
County Nov 21 1901
A. W. Zuber
Shuff

We and each of us, hereby accept full, legal and
sufficient service of the within process, and waive
any order of publication or personal service which might
have been made.

William
p. 9.

Augusta Rogers
and husband

vs.

In Chancery.

Lawrence R. Walton
and others

1901

December Rules.

Church Monday.

Nansenond Circuit Court.

Process Book No. 21

Page 218.

CHANCERY SUMMONS.

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON

Clarence R Natton
Executor of O N Natton deceased and
Clarence R Natton trustee for L R Natton
Jr. and L C Natton and A H Baker Sheriff
and Administrator d b n of Cornelia R
Natton deceased

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
 for the said Court, on the *21st* Monday in *April 1904*, to answer

~~Bill in Chancery, exhibited against~~

~~in the said Court by~~ *an amended bill and supplemental*
bill in Chancery exhibited against them
and others in the said Court by Virginia
C Royster and others

and have then and there this summons.

Witness, *R R Smith* Clerk of our said Court, at his office, this *31st* day of

March, 1904, in the 12⁸th year of the Commonwealth.

A copy—Teste:

Teste:

A. P. Gomer }
 CLERK.

A. P. Gomer }
 CLERK.

Executed this 2nd day of April 1904 by delivering a true copy of the within
process, for Clarence R. Hatten trustee and Clarence R. Hatten
Executor of D. H. Hatten deceased, to J. M. Corbitt Attorney, in person.

A. W. Byrnes
Shuff

I hereby accept legal service of the within process, this 2nd April 1904.

A. W. Byrnes
Shuff

R. W. Withers p. q.

A copy for
A. H. Baker Sheriff
Admr. d. b. n.

vs. In Chancery.

1904

April Rules.

First Monday.

Nansemond Circuit Court

Process Book No.-----

Page-----

CHANCERY SUMMONS.

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON

Clarence R Natton
Executor of D N Natton deceased and
Clarence N Natton trustee for C R Natton Jr
and L C Natton and A N Baker Sheriff
and Administrator d b n of Cornelia R
Natton deceased

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
 for the said Court, on the *First* Monday in *April 1904*, to answer

~~Bill in Chancery, exhibited against~~

~~in the said Court by~~ *an amended and supplemental*
bill in Chancery filed against them and
others in said Court by Virginia C
Royster and others.

and have then and there this summons.

Witness, *R R Smith* ~~A P GOMER~~, Clerk of our said Court, at his office, this *31st* day of

March, 1904, in the 128th year of the Commonwealth.

A Copy—Teste:

Teste:

A P Gomer, CLERK.

A P Gomer, CLERK.

I acknowledge sufficient and legal service of the
within summons.
April 8th 1904
Clarence R. Natton Trustee for
C R Natton Jr and E B Natton

R W Withers p. q.

A copy for
Clarence R. Natton
Trustee &c
vs. In Chancery.

1904
April Rules.
First Monday.

Nansemond Circuit Court.

Process Book No.-----

Page-----

JAMES L. MELEMORE.

JAMES H. CORBITT.

MELEMORE & CORBITT,
ATTORNEYS AT LAW,
SUFFOLK, VA.

April 20th., 1904.

Mr. R. R. Smith, Clerk,
Suffolk, Virginia.

Dear Sir:-

I herewith enclose summonses upon which service has been acknowledged by Clarence R. Hatton, Trustee for Clarence R. Hatton, Jr. and L. C. Hatton, and by Clarence R. Hatton, Executor of D. H. Hatton, deceased.

Please file these with the papers in the case, and oblige,
Yours very truly,

Dic. J. H. C.

James H. Corbitt

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON *Clarence R Natton*
Executor of D N Natton deceased and Clarence
R Natton trustee for C R Natton Jr and L C
Natton and A H Baker Sheriff and Admin-
istrator d. b. n of Cornelia R Natton deceased

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
 for the said Court, on the *First* Monday in *April 1904*, to answer

~~Bill in Chancery, exhibited against~~
~~in the said Court by~~ *an amended and supplementat*
bill in chancery filed against them, and others
in said
Court by Virginia K Royster and others

and have then and there this summons.

Witness, *R R Smith*
A P GOMER, Clerk of our said Court, at his office, this *31st* day of

March, 1904, in the 128th year of the Commonwealth.

A copy—Teste:

A P Gomer CLERK.

Teste:

A P Gomer CLERK.

R. W. Withers p. q.

A copy for
Clarence R. Hatton
Executor &c
vs. In Chancery.

1904
April Rules.
First Monday.

Nansemond Circuit Court.

Process Book No.-----

Page-----

I acknowledge sufficient and legal service of the
within summons.
April 8th 1904
Clarence R. Hatton Executor
of Hatton dec'd

CHANCERY SUMMONS.

The Commonwealth of Virginia,

TO THE SHERIFF OF NANSEMOND COUNTY—GREETING:

YOU ARE HEREBY COMMANDED TO SUMMON *Clarence R Natton*
Executor of D N Natton deceased and
Clarence R Natton trustee for C R Natton Jr and
L C Natton and A H Baker Sheriff and
administrator d.b.n of Cornelia R Natton
deceased

to appear at the Clerk's Office of the Circuit Court of Nansemond County, at the Rules to be held
for the said Court, on the *First* Monday in *April 1904*, to answer
an *amended and Supplemental* Bill in Chancery, exhibited against *them and others*
in the said Court by *Virginia C Royster and others*.

and have then and there this summons.

Witness, *R R Smith* ~~A P GOMER~~, Clerk of our said Court, at his office, this *31st* day of

March, 1904, in the 128th year of the Commonwealth.

A copy—Teste:

Teste:

, CLERK.

, CLERK.

R W Withers p. q.

Virginia Royster
and others

vs.

In Chancery.

Clarence R. Watton
and others

1904

April Rules.

First Monday.

Nansemond Circuit Court.

Process Book No.-----

Page-----

IN THE CIRCUIT COURT OF NANSEMOND COUNTY, NANSEMOND COUNTY TO-WIT:-

In Vacation, on the 30th day
of March 1904.

VIRGINIA C. ROYSTER, ET AL.-----Complainants.

VS. IN CHANCERY.

Clarence R. HATTON, ET AL.-----Defendants.

Interlocutory Decree.

It appearing that the Complainants have proceeded against the Defendants in the mode prescribed by law as to absent defendants, this cause came on this day to be heard in vacation upon the bill, the demurrer thereto of Clarence R. Hatton and John G. Hatton, in which demurrer the complainants joined, the answer of J. U. Burges, the guardian ad litem who is this day assigned by the court to defend Clarence R. Hatton, jr and Lily Cornelia Hatton, the infant defendants in this suit, which was this day filed, with general replication to such answer; thereupon, on motion of the complainants leave is given them to file an amended and supplemental bill, and the same is accordingly this day filed, and the complainants are directed to mature the same according to law as to the new parties. And this cause is continued.

Robert W. Smith

To the Clerk of the Circuit court of Nansemond County.

ROYSTER, et al.

vs.

HATTON et al.

Interlocutory Decree.

Enter, this 30 day of
March, 1904.

Robert R. Hunt

Entered in chancery
Order Book No 3 Page 572

and Granville Royster, her husband,
Virginia C. Royster, who sues for herself and
all others lawfully entitled that will come in
and share the expense of this suit,

v.

Clarence R. Hatton,

John G. Hatton and Julia R. Smith

and Clarence R. Hatton, jr and Lily Cornelia
Hatton, infant defendants -

RECEIVED
CLARENCE R. HATTON
1912
~~This day this cause by consent of parties is duly deek-~~
~~eted, and came on to be heard upon the bill and exhibits filed,~~
and *By* ~~like~~ *here* ~~consent of parties given in open court,~~ *vacation, entered of record* no rights
being waived, it is ordered that this cause be submitted to
the Judge of this court for such decision and decrees therein
in vacation as might be made in term, and *adult* ~~the~~ *defendants* ~~are~~
allowed ninety days within which to plead answer and demur.

B

Virginia C. Royster } Husband

v.

DECREE

Clarence R. Hatton et al.

Enter Oct 24, 1902.

Robert M. Smith

We consent to this decree.

Robt. M. Smith
Counsel for Complains

McLennore & Co. Pitt
Counsel for Clarence R.
Hatton & Jno. J. Hatton.

J. H. Duggs, Guardian ad
litem for *Virginia C. Royster*
Juliette R. Smith

Entered in Chancery
Order Book No 2 Page 474.

and upon the expense of this suit,
all costs taxed and satisfied and all come in
Virginia C. Royster, who must be present and

Virginia C. Royster, and Cranville H. Royster, her husband, who sue for themselves and all others lawfully entitled that will come in and share the expense of this suit,

v.

Clarence R. Watton, John G. Watton, Juliette R. Smith, Clarence R. Watton, jr. and Lily Cornelia Watton, the last two being infants under the age of 21 years

IN CHY.

This day this cause, by consent of parties, is duly docketed, and came on to be heard upon the bill and exhibits filed, and by consent of parties, given in vacation and entered of record (no rights being waived) it is ordered that this cause be submitted to the Judge of this court for such decision and decree therein in vacation as might be made in term, and the defendants are allowed ninety days within which to plead, answer and demur.

copy for R. M. Whitney, Esq.

1861

1861

IN THE CIRCUIT COURT OF THE COUNTY OF HANSEMOND.

Jennie Royster et als.

Plaintiffs.

vs.

C. R. Hatton et als.

Defendants.

BRIEF FOR DEFENDANTS.

Statute of Limitations.

13 Jan^y. 1883 - Date of contract under seal shown as Exhibit A, the alleged breach of which is the basis of this suit, i. e. it is a suit for money, on a sealed contract.

1889 - Mrs. Hatton died, leaving no will "bequeathing whatever may remain of the money settled upon her" by the above mentioned sealed contract.

1890 - D. H. Hatton qualified as Administrator of the estate of Mrs. Cornelia R. Hatton.

About 1 Feb. 1898 - Plaintiff knew of sealed contract dated 13 Jan^y. 1883.

April 1898 - D. H. Hatton died, leaving a will, copy of which is filed with bill as Exhibit B.

29 Nov. 1901 - Suit instituted, process returnable to 2nd Dec. 1901 Rules, which suit is essentially against Mrs. Hatton's estate to recover money claimed by the plaintiff, Mrs. Royster, to be due her under the sealed contract dated 13 Jan^y. 1883.

Section 2920 Va. Code 1887 provides the time within which every action to recover money which is founded upon an award, or on any contract other than a judgment or recognizance shall be brought after the

right to bring the same shall have first accrued, and says if the case be upon a contract by writing under seal, it must be brought within ten years,

"Provided, that the right of action, against the estate of any person hereafter dying, on any such award or contract, which shall have accrued at the time of his death, or the right to prove any such claim against his estate in any suit or proceeding, shall not in any case continue longer than five years from the qualification of his personal representative, or if the right of action shall not have accrued at the time of the decedent's death, it shall not continue longer than five years after the same shall have so accrued."

In the case at bar the right to bring suit first accrued day of 1889 when Mrs. Hatton died without leaving a will.

On the day of 1890 Daniel H. Hatton qualified as Administrator of the estate of Mrs. Cornelia R. Hatton, deceased.

The statute above cited states that the right of action shall not continue longer than five years from the qualification, and as this suit was instituted on the 29th day of Nov. 1901 more than ten years from the date of the qualification of Mrs. Hatton's Administrator we think beyond all question the plea of the statute of limitations should be sustained.

HATTER OF EXCLUSIVE EQUITY JURISDICTION - SPECIFIC PERFORMANCE
OF A CONTRACT TO MAKE A WILL.

Counsel for plaintiff contends:

1. That the case at bar is one for the specific performance of a contract to make a will.

2. That suits for specific performance are matters of exclusive Equity Jurisdiction.

3. That in all matters over which equity has exclusive jurisdiction no statute of limitations is applicable, therefore, no statute of limitations is applicable to this suit.

The fallacy in this logic consists, first, in premising that Equity is able to decree specific performance of a contract to make a will. As Equity cannot decree specific performance of such a contract counsel's conclusion is false.

In *Burdine v. Burdine* 98 Va. 519 the court said: "an agreement to dispose of property by will cannot be specifically enforced, not in the lifetime of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will."

Furthermore, the particular contract to make a will sought to be enforced was a contract relating solely to money - "whatever may remain of the money" - and it is well settled that there can be no specific performance of a contract to pay money or to devise money, for specific performance is decreed only where pecuniary compensation is inadequate.

Campbell v. Rust 85 Va. 667, 670.

Bispham's Eq. Section 375.

Hissam v. Parrish 41 W. Va. 686, 24 S. E. 600, 56 Am. St. Rep. 892.

Furthermore, the particular contract which is sought to be enforced lacks the necessary element of mutuality. In *Cox v. Cox*, 26 Gratton, 305, on p. 311 Judge Staples says: "It has been settled

by repeated decisions, that in applications for specific performance the remedy must be mutual, and that where a bill will lie for one of the parties it will lie for the other. Courts of Equity, as a general rule, will not decree in favor of a plaintiff who is himself not bound by the agreement." Fry, Spec. Perf. p. 198, Sec. 236, upon this question, states the law thus: "A contract, to be specifically enforced by the court, must be mutual; that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." See also Hissam v. Parrish (W. Va.) 24 S. E. 600. Story's Eq. Jurisprudence, Sec. 723, Bispham's Eq. Sec. 377, and ca. ci. in Note 3 Gratt. (Anno.) 641 under head "Mutuality".

It is well to note, too, that in all the cases cited by plaintiff, viz: Burdine v. Burdine, 98 Va. 515; Hale v. Hale, 90 Va. 728, etc., the contract was to dispose by ^{will} ~~law~~ of real estate as well as personal estate, hence equity jurisdiction, attaching on account of the real estate, the court gave complete relief, although in no case was specific performance decreed, the court in Burdine v. Burdine saying it was impossible.

but there is one view of the case at bar that is sufficient to make it absolutely convincing that the statute of limitations is

applicable. We wish to call particular attention to it, that is: If the alleged sealed contract by Mrs. C. R. Hatton to bequeath "whatever may remain of the money" to her grandchildren was valid and Mrs. Hatton died without making a will, after Daniel H. Hatton qualified as her Administrator, during his life certainly the proper remedy open to Mrs. Royster would have been an action for damages, for the violation of the contract, against the personal representative of Mrs. Hatton. In such case the statute of limitations in Section 2920 Va. Code would have been applicable, and surely the death of Mrs. Hatton's Administrator before the bringing of the suit could not change the applicability of the statute. In *Rice v. Hartman*, 84 Va. 251 on page 257 Judge Lewis says: "So, in *Frost v. Tarr*, 53 Ind., 390, it was decided by the supreme court of Indiana that where a person's contracts that, at his death, he will leave a certain share of his estate to another, in consideration of certain service to be performed by the latter, an action for damages will lie for the violation of the contract, against the personal representative of the former - the service having been performed under the contract; and that the damages may be measured by the value of the portion promised, and not limited to the value of the service performed. See also, *Patterson v. Patterson*, 13 Johns., 379; *Robinson v. Raynor*, 28 N. Y., 494; *Shakespeare v. Markham*, 10 Hun., 311, 322; *Schouler, Wills, sec's 453-4.*" If a bill in equity would lie it would necessarily be substantially a creditor's bill, as was decided in *Rice v. Hartman*, 84 Va. 251 on page 252, and it needs no citation of authorities to show that the Statute of Limitations is applicable to claims set up

in a creditor's bill.

Another fallacy in plaintiff's logic is in the premise: "That in all matters over which equity has exclusive jurisdiction no statute of limitations is applicable."

The law is:

1. Where the demand is one over which courts of law and courts of equity have concurrent jurisdiction the court of equity is bound by the statute of limitations in such cases. *Fore v. Foster*, 86 Va. 106.
2. Where the demand is one for which the remedy is necessarily in equity, a court of equity follows the law and applies in analogous cases limitation set forth in the statute, whether the demand is a purely legal one or one purely equitable and one over which equity has exclusive jurisdiction. *Switzer v. Noffsinger*, 82 Va. 518; *Redford v. Clark*, 100 Va. 121; *Story's Eq. Jurisprudence* sec. 529, note 12 Am. Dec. 368, 371; *Harshberger v. Alger*, 31 Gratt. 52, 67.
3. In cases of purely equitable jurisdiction, such as restraining proceedings at law, cancellation of securities, the correction of mutual mistake of fact, the prevention of fraud, where, from the nature of the case, there is nothing analogous in courts of law, of course, the statute of limitations is not applicable, but in such cases equity applies the well-known doctrine of laches.

As an illustration of the first proposition Judge Lacey in *Fore v. Foster*, on page 106, says: "And as to the statute of limitations, in equity it is considered as much a bar as in a court of law to a

demand for the recovery of which the jurisdictions of the two courts are concurrent. For, as is said, it would be absurd that for the same subject there should be different and conflicting rules in the two tribunals."

As an illustration under the second head we will take the case of *Switzer v. Noffsinger*, 82 Va. 518. Judge Lewis, on page 521, says: "There is no doubt that the written order of the 22d of April, 1872, was a valid equitable assignment of the debt due by Thomas Switzer's estate to Peter Deisher. * * * * * It is clear, however, that the debt assigned in the present case, being of a strictly legal nature, is as much subject to the operation of the statute of limitations in a court of equity as in a court of law, for, in such cases, the statute virtually includes courts of equity." The claim made in the present case of *Royster v. Hatton* is based on a written contract and is of a strictly legal nature, even if remedy be in equity.

In *Marshberger v. Alger*, 31 Gratt. 52, on page 67, Judge Burks says: "In demands strictly legal, of which equity has jurisdiction concurrent with the law courts, equity follows the law literally in applying the statute of limitations, acting according to what would seem to be the better opinion, in obedience to the requirements of the statute; while in cases of claims of an equitable nature, it acts by analogy; that is, it applies the same bar to such claims that would be applied at law, under the statute, to legal claims of analogous character. To some cases this rule has no application. It is never

applied to controversies between trustee and cestui que trust in cases of subsisting technical trusts cognizable only in courts of equity; and in cases of concealed fraud or mistake, the act is not allowed to run except from the discovery of the fraud or mistake."

Judge Whittle in *Redford v. Clark*, 100 Va. 121, says: "In respect of the statute of limitations, equity follows the law, and a demand that would be barred if asserted in a legal forum would be equally barred in equity. *Rowe v. Bentley*, 29 Gratt. 756, 759; *Cole v. Ballard*, 78 Va. 139; *Hutcheson v. Crubbs*, 80 Va. 251, 257; *Switzer v. Hoffeinger*, 82 Va. 518; *McCarty v. Hall*, 82 Va. 372."

In *Rowe v. Bentley*, 29 Grattan 756, on page 759, Judge Burke says: "The general rule undoubtedly is, that in the application of statutes of limitation equity follows the law, and wherever a demand would be barred at law an equitable demand of the like character will be barred in equity. The bar is applied by analogy, or, according to some authorities, by obedience to the statutory enactment; or, in other words, after a bar has been fixed by statute to the legal remedy, the remedy in a court of equity has, in analogous cases, been confined to the same period. *Cholmondely v. Clinton*, 2 Jac. and Walk. Ch. R. 1; *Kane v. Bloodgood*, 7 John. Ch. R. 99; 1 Call, 419, 428."

In Story's *Eq. Jurisprudence*, sec 64 a, we find: "So, in many cases, equity acts by analogy to the rules of law in relation to equitable titles and estates. Thus, although the statutes of limitations are in their terms applicable to courts of law only; yet

equity, by analogy, acts upon them, and refuses relief under like circumstances. Equity always discountenances laches; and holds that laches is presumable in cases where it is positively declared at law."

The case of *Redford v. Clark* (*supra*) could not, under any circumstances, have been brought as an action at law, and yet equity followed the statute.

In *Perry on Trusts and Trustees*, Sec. 855, we find: "Where there is a statute bar at law, the same period, in analogy or obedience to the statute, is adopted in equity as a bar to equitable claims."

In the well-considered case of *Wagner v. Baird*, 40 U. S. 234, discussing the authorities on page 258, the court says: "In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes, than by analogy. In many other cases they act upon the analogy of the limitations at law."

In *Frane v. Kenney* (Ky.), 12 Am. Dec. 367 a bill was filed to obtain a conveyance or compensation in damages for 200 acres of land. The court dismissed the bill and said: "Although the words of the statute apply to actions at law only, yet, as equity follows the law, a court of chancery considers itself bound by the statute." This case was a suit for the specific performance of a contract to convey land, and the court held that equity follows the law.

In *Johnson v. Toulmin* (Ala.), 52 Am. Dec. 212 on page 215 the court says: "It is well settled, that although the statute of limitations does not apply to any demand purely equitable, yet courts of equity, acting according to legal analogies, adopt it in cases analogous to those in which it applies at law: *Stackhouse v. Barnston*, 10 Ves. 43; *Cholmondely v. Clinton*, 2 Meriv. 173. But where the remedy at law and in equity is concurrent, the statute of limitations applies alike to both forums: *Wood v. Wood et al.*, 3 Ala. 756; *Johnson v. Johnson*, 5 Id. 90, and cases cited."

See also, *DeCordova v. Smith* (Tex.), 58 Am. Dec. 137.

Counsel for defendants maintains that the agreement upon which the bill is filed is a legal one, consequently equity follows the law and applies the statute.

Another case in point is *Johnson v. Hubbell* (N. J. Eq.), 66 Am. Dec. 773, where a father made an agreement with his son to devise to him one-half (1/2) of his estate. Upon the death of the father, without carrying out his agreement, the son brought suit for specific performance. On page 781 the court says: "Now, although the agreement upon which the bill is filed is a legal one, it does not follow that a court of chancery will decree its specific performance."

Lastly, as a matter of fact all suits for specific performance must be based on a legal contract, one to which statute of limitations is always applicable. For breach of this legal contract the injured party may bring an action at law and, in some cases, may bring a suit for specific performance, but his choice

of forums in no wise affects the bar prescribed by the statute.

As an illustration of the third head is the case of *Fore v. Foster*, 86 Va. 104, so strongly relied on by counsel for the plaintiff. This was not a case at all of specific performance, but a suit brought for the correction of a mutual mistake. In his opinion on page 107 Judge Lacey says: "In this case no neglect or any degree of what is termed laches appears. The bill was filed shortly after the mistake was discovered, within the year, and it could not be reasonably considered that it ought to have been filed before it was discovered."

IGNORANCE.

Mere ignorance on the part of Mrs. Royster is not sufficient to suspend the operation of the Statute of Limitations. To be effective it must proceed from fraud.

Judge Staples in the chancery suit of Bickle v. Christman, 76 Va. 673 on page 686 says: "I have not been able to find any authority, and none was cited at the bar, to the effect that the mere want of knowledge on the part of the creditor is sufficient to suspend the operation of the statute of limitation. There are numerous decisions which hold to the contrary. In Foster v. Nison 17 Gratt. 345, the court said: 'The mere fact that Harston Foster was ignorant of the existence of any debt which may have been due him by J. W. Foster, until within five years before the institution of the suit, will not be sufficient to repel the bar of the statute. To have that effect, such ignorance must proceed from the fraud of J. W. Foster, which ought to be plainly charged by the pleadings and clearly shown by the proofs.' This principle is so well established it is unnecessary to do more than refer to some of the authorities. Short v. McCarthy, 5 Barn. and Al. 686; Granger v. George, 5 Barn. and Cress. 145 (11 Eng. C. L. R.); 5 Parsons on Contracts, new ed., p. 91; 1 Robinson's Prac. 685. In the case before us the fact of a fraudulent or wilful concealment, or even an intention to conceal, is not averred in any of the pleadings, and is entirely unsupported by the evidence."

In Vashon v. Barrett, 99 Va., 344 on page 346 Judge Buchanan

says: "The mere fact that the complainant did not know, as he alleges, that the conveyance was without consideration until the year 1897, cannot repel the bar of the statute of limitations. To have that effect such ignorance must proceed from the fraud of the grantee, and this should be plainly charged in the pleadings. *Poster v. Rison*, 17 Gratt. 322, 345; *Bickle v. Chrisman*, 76 Va. 678, 686. There is no such charge in the complainant's bill."

In the case at bar, *Royster v. Hatton*, there is no charge of fraud on the part of Daniel H. Hatton, Administrator of Mrs. Cornelia R. Hatton, in the complainant's bill nor in any of the pleadings. The bill, on the contrary, reciting that the complainant, Jennie S. Royster, was greatly loved by her grandparents, who bestowed their affection upon her, which would certainly overcome any suggestion of fraud on the part of Daniel H. Hatton. The replication filed by the plaintiff to the special plea of the statute charges that Clarence R. Hatton did not know of the existence of the said alleged contract marked Exhibit A, nor did any other of the defendants of this suit have knowledge of the existence of said paper. This being the case, there has, in fact, been no charge of fraud even against any of the defendants. Certainly Clarence R. Hatton could not conceal the contract from Mrs. Royster, since he did not know of the existence of same.

The case of *Craufurd v. Smith*, 93 Va. 623, so much relied on by plaintiff, in which was involved a mutual mistake, is in no wise in conflict with the case of *Bickle v. Chrisman*. In the former case Judge Buchanan, on page 629, simply held that: "The remedy in a case

of mutual mistake, so far as affected by the statute of limitations, seems to be governed by the same principle as in a case of fraud." The court on page 629 also saying: (Smith) "Having received from Craufurd's estate by mutual mistake of fact money and slaves."

The case of Hall V. Watts, 95 Va. 14, relied on by plaintiff, is a case of mutual mistake as to the acreage of a quantity of land sold.

Plaintiff's counsel has cited numerous cases under the heading Ignorance, not one of which from a careful reading will be found to sustain his contention. It is everywhere held that mere ignorance without fraud is no bar to the running of the statute. It has been held that laches cannot be imputed to one ignorant of his rights, but laches and a statutory bar are very different. Most of the cases cited by plaintiff would come under the head of laches or acquiescence.

TRUSTS, MISTAKE AND FRAUD.

It is true that cases of direct and express trusts, mutual mistake and fraud are not within the statute of limitations. But the case at bar comes under neither of these heads.

TRUST.

We have shown that when the contract to bequeath money has been broken the proper remedy is an action of damages against the personal representative of the person who failed to make the will as agreed and if equity has jurisdiction at all it must be because the complaint is substantially a creditor's bill. This applies strictly to the case at bar and is a sufficient answer to the contention that the statute of limitations of section 2920 of the Code does not apply.

To meet plaintiff's contentions, however, we will go further into the question than appears to us necessary in this case.

We have also seen that a court of equity cannot enforce the specific performance of a contract to devise realty by will, and we will now observe that, even in the case of realty, the most the court can do is to consider it as held in trust, which is what is known in law as a constructive trust.

In *Burdine v. Burdine*, 98 Va. 515 on page 519 Judge Buchanan says: "yet courts of equity can do what is equivalent to a specific performance of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in

accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser, with notice of the agreement, as the case may be. 5 Parsons on Contracts, sec. 406 (6th Ed.); Hale v. Hale, 90 Va. 722, 730." It should be borne in mind, however, that in all of the cases of this nature cited by plaintiff's counsel real estate was involved and equity assumed jurisdiction on that account.

The most that the court can do would be to create a constructive trust, and it is expressly held in Redford v. Clark, 100 Va. 115, page 120, that the act of limitations does run as to constructive trust, the court saying: "Again, it is said that the act of limitations does not run between trustee and cestui que trust. This is generally true as to express trusts, but the rule is otherwise as to constructive trusts. In the case of *Shepherds v. Turpin*, 3 Gratt. 375, this court said at page 324: 'Though there is no express decision of this court upon the exact question before us, authorities, English and American, are abundant to show that the only trusts which are excepted from the operation of the statute of limitations are the technical trusts which fall peculiarly and exclusively within the cognizance of a court of equity; that the equitable exception taking trusts out of the operation of the statute extends only to actual and express trusts as between cestui que trusts and trustees properly so called; and does not embrace those trusts which are matters of implication and construction.' "

Counsel for plaintiff has used a single sentence taken from

Judge Cabell's opinion in *Williams v. Lewis*, 5 Leigh 686, citing from page 692, in an effort to maintain that in all trusts if the proper remedy to recover the alleged fund is by a bill in equity, not by an action on the case at law, a statute of limitations is not applicable. The decision cited sustains no such proposition. The court will see from reading the facts in this case and the opinion of Judge Cabell that if there was a trust at all it was a direct or express trust, and the remarks made by Judge Cabell relate solely to direct and express trusts and in no way whatsoever to constructive trusts. It is well settled in *Redford v. Clark* and *Shepherds v. Turpin* that in all cases of constructive trusts the statute of limitations does run. In *Williams v. Lewis*, 5 Leigh 686, on page 692, Judge Cabell says: "But it is not true, that every case, even of direct and express trusts, is withdrawn from the operation of the statute." What Judge Cabell meant can be more clearly shown by simply inserting the words "direct and express", and the quotation cited by plaintiff's counsel will then read: "I take this to be the true ground of distinction between those (direct and express) trusts which are, and those which are not, exempted from the operation of the statute."

See to same effect *Beecher v. Foster* (W. Va.) 9 Va. L. Reg. 15.

MISTAKE.

DOCTRINE IN VIRGINIA.

Mistakes of Law cannot be relieved against, even in equity.
Zollman v. Moore, 21 Gratt. 313.

Mistakes of Fact, if mutual, upon a proper case being shown may be relieved against in equity.

Counsel for defendant insists that in the case at bar there arises no question of Mistake. There has been no mistake, the trouble is not due to a mistake. There may have existed unconsciousness or ignorance on the part of Mrs. Royster of the existence of the alleged contract, but unconsciousness or ignorance is not mistake. Moreover, equity requires mistake of fact to be mutual. There surely is here no mutual mistake of fact.

The case cited by plaintiff's counsel of Crauford v. Smith, 93 Va. 623, was one of mutual mistake. Mrs. Smith received a distributive share of Crauford's estate on account of its being mutually understood between Crauford's Administrator and all parties interested that Mr. Crauford died leaving no will. Here was a mutual mistake of fact as to the existence of a will. Mrs. Smith was mistaken, Crauford's Administrator was mistaken, everybody was mistaken, the mistake was mutual. We have quoted above under the head of Ignorance sufficiently from Judge Buchanan's opinion in this case.

In the case at bar, Royster v. Hatton, D. H. Hatton took, as sole distributee of his wife, whatever money she left, she having made no will. He knew of the existence of the alleged sealed con-

tract, whether Mrs. Royster knew of it or not. There was no mutual mistake of the fact of the existence of that alleged sealed contract. Whether Clarence R. Hatton did know or did not know of the existence of the contract makes no difference, his father, D. H. Hatton, and not he, received what money Mrs. Cornelia Hatton failed to devise, and the suit of Royster v. Hatton is against the estate of Mrs. Cornelia R. Hatton.

FRAUD.

Counsel for Mrs. Royster endeavors to stand on both sides of an exceedingly high dividing fence. In his replication to the plea of the statute he first maintains that "Clarence R. Hatton did not know of the existence of the said paper writing marked Exhibit A, nor did any of the other defendants in this suit have knowledge of the existence of said paper." He uses this want of knowledge on the part of C. R. Hatton in an effort to bring this case under the ruling of Craufurd v. Smith, which we have shown involved a different question - one of mutual mistake.

Counsel for Mrs. Royster next says: "But if the defendants, or either of them, had knowledge or means of knowledge of the existence of the said paper writing, they suppressed such knowledge or means of knowledge from the complainants and the defendants are guilty of fraud." Plaintiff's counsel uses this allegation of knowledge and fraudulent concealment thereof to help him in an effort to repel the bar of the statute on the ground of Fraud.

Now C. R. Hatton could not both not know and know. The plain-

tiff must make her allegation specific, if she is charging fraud she cannot in the same breath charge fraud to one and the want of knowledge necessary to commit the fraud. It has been repeatedly held that fraud ought to be plainly charged in the pleadings. *Vashon v. Barrett*, 90 Va. 344.

We have heretofore maintained and still insist that ~~that~~ ~~fact~~ Clarence R. Hatton's want of knowledge or knowledge of the existence of said contract has nothing to do with this case. The one about whose fraud the plaintiff could complain, if any had been committed, is Daniel H. Hatton, and with reference to him surely no fraud has been or can be claimed.

If Clarence R. Hatton had knowledge of the existence of the alleged contract there was no duty upon him to see that Mrs. Royster had knowledge, and where there is no duty there can be no fraud. Daniel H. Hatton took as distributee whatever remained of the money and it cannot be said that there was any obligation upon Clarence R. Hatton to tell Mrs. Royster anything. Furthermore, Mrs. Royster was equally as capable of getting information as her father, Clarence R. Hatton, she being constantly with her grandfather, while it is claimed by plaintiff's counsel that her father, Clarence R. Hatton, had been continually outside of Virginia since the year 1905 and long prior thereto.

LACHES.

Counsel for plaintiff has insisted that from the inherent nature of the case at bar no statute of limitations is applicable. He now cites as authorities cases of such nature that the statute of limitations is applicable, but in which the statutory time has not elapsed. In one of the cases cited, Cottrell v. Watkins, 89 Va. 801, on page 810 it is said: "Inasmuch, therefore, as the plaintiffs' right to maintain this suit was not barred by the statute of limitations, 'it follows, as a necessary consequence, that laches and lapse of time constitute no such bar.' Foster v. Rison, 17 Gratt. 335; Coles v. Ballard, 78 Va. 149; Rowe v. Bentley, 29 Gratt. 759." We have underscored the words "to maintain this suit" for the very good reason that plaintiff's counsel, in attempting to quote from this case, left out these very important words. The court did not hold that laches and lapse of time constitute no bar in any case in which the statute does not constitute one. The case of Cottrell v. Watkins was one of gross fraud and the court held that as that particular suit involving gross fraud was not barred by the statute of limitations, laches and lapse of time constituted no bar.

In Foster v. Rison, 73 Gratt. 321, on page 335 Judge Moncure says: "Of course I do not mean to say that laches and lapse of time constitute no bar in any case in which the statute does not constitute one. When the statute is a bar there is no need of any bar from laches or lapse of time. The latter bar peculiarly applies

where the former does not. What I mean to say is, that if the cause of action be one to which the statute applies, but the lapse of time since it accrued be not such as to bring the case within the statute, laches and lapse of time cannot in themselves constitute a bar to the suit." We think the law is very clearly stated by the court. If the case at bar were one of fraud and mistake, as claimed by plaintiff, we would have a case to which the statute does not apply and one in which laches is a bar to the suit.

Our Virginia courts have gone still further. In *Wiseler v. Craig*, 80 Va. 22, on page 29 it is said: "though the period during which a party neglects to assert his rights does not constitute a statutory bar to the claim asserted, yet the attending circumstances may justify the dismissal of the plaintiff's bill. *Foster's curator v. Rison*, 17 Gratt. 335; *Harrison v. Gibson*, 23 Gratt. 212; and *Godden v. Kimmell*, 99 U. S. R. 201." In *Burnham v. James*, 100 Va. 493, on page 496 it is said "Equity will some times refuse relief where a shorter term than that prescribed by the statute of limitations has elapsed without suit."

We insist that even if the case at bar were one involving gross fraud and mistake, the plaintiff has been guilty of laches, for it is admitted that plaintiff knew of the alleged contract (the fraud and mistake) about February, 1898, and this suit was not instituted until about four years after the discovery. It has been repeatedly held that a party should bring the suit as soon as the fraud or mistake is discovered. In *Persinger v. Chapman*, 93 Va. 349, on page 351 it is said: "It is a significant fact that,

although Persinger lived nearly two years after the bond was executed, there is not the slightest evidence that Chapman ever suggested the mistake that he now claims was made." In *National Mutual Building and Loan Association v. Blair*, 98 Va. 490, on page 494 Judge Harrison says: "It is well settled that where a party desires to repudiate a transaction upon the ground of mistake or fraud, he must, upon the discovery of the fraud, or upon the discovery of facts and circumstances from which such knowledge would be imputed to him, assert his remedial rights with diligence and without delay. To delay instituting judicial proceedings, although for a less period than that prescribed by the statute of limitations, may be, and generally will be, regarded as acquiescence, and this may be, and generally will be, a bar to any equitable remedy. Great punctuality and promptness of action by the deceived party, upon his discovery of the fraud, is required."

In *Hurt v. Miller*, 95 Va. 32, on page 40 the court says: "In the case of *Hudson v. Waugh*, 93 Va. 518, * * * * the vendee waited only a few months after discovering the fraud or mistake before instituting his suit for rescission of the contract, this court held that he was not entitled to a rescission; that he had not acted with that promptness in discovering the fraud or mistake, or in repudiating a contract after he had made the discovery, that was required to entitle him to rescission of his contract * * * . A party who intends to repudiate a contract on the ground of fraud, should do so as soon as he discovers the fraud." In *Hudson v. Waugh*, 93 Va. 518, on page 524 Judge Keith in commenting upon the necessity for prompt

action says: "This duty is perhaps, more imperative in the case of a mutual mistake."

It is true that laches cannot be predicated of those who are ignorant of their rights, but the rule is subject to the qualification that the ignorance of the party complaining must not be due to his own negligence and subject to the further qualification that the party complaining to be entitled to relief must not have slept upon his rights after he has acquired knowledge of them. We insist that the case at bar is one to which the statute of limitations is applicable, and we have shown under the heading "IGNORANCE" supra that mere ignorance of one's rights will not bar the running of the statute. Even if the case at bar be not one to which the statute of limitations is applicable, the plaintiff has slept upon her rights after she had acquired knowledge of them and is guilty of laches in not promptly bringing her suit. Laches and a statutory bar are different and are applied in accordance with different principles.

CODE -SECTION 2933.

This does not apply, as the suit is not against Clarence R. Hatton, but is against Mrs. Cornelia R. Hatton's estate, consequently the fact (if it be a fact) of Clarence R. Hatton's having been continuously out of the State has nothing to do with this case - it cannot affect the running of the statute.

Furthermore, if any statute at all were applicable it would be the law as it stood at the time the right of action accrued, which time plaintiff's counsel insists was about February 1st, 1898, it being the time of her discovery of the agreement. The amendment to Section 2933 of the Code did not go into effect until July 1st, 1898, consequently, from the plaintiff's own statement of the case, the amended statute would not apply. It is claimed by plaintiff's counsel that at the time the right of action accrued Clarence R. Hatton was a non-resident, and continues to reside without the state. Under this state of facts plaintiff's counsel himself insists, under Section 2933, until amended, prior residence was necessary to bar the running of the statute.

"IN CONCLUSION."

Plaintiff's counsel in his "In Conclusion" simply touches on questions fully discussed, and we will not enter into them again.

Respectfully submitted,

Pigg

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On page five of the defendants brief it is contended that Mrs. Royester had an action for damages for the violation of the contract against the personal representative of Mrs. Hatton and cites ~~the~~ on the case of Rice vs. Hartman, 84 Va. 251. The case of Rice vs. Hartman and Frost vs. Tarr are very unlike the case at bar. Judge Lewis in delivering the opinion of the Court in Rice vs. Hartman said, " The bill alleges that, by a contract between the complainant and the intestate, Peter Hartman, the latter bound himself to make provision ⁱⁿ ~~of~~ his will for the complainant or his family, and that he died without doing so. By reason whereof, it is further alleged, the complainant is a creditor of the estate in a large sum, which he puts at Fifteen Thousand (\$15000) Dollars. The administrator and the widow and heirs at law are made defendants to the bill, and its prayer is that the amount of the complainant's debt be ascertained by a master commissioner; that an account of the assets real and personal and of the debts of the estate, and their priorities, by payment, and for general relief.

¶ The bill in the present case was not filed for the specific performance of the contract nor for the recovery of any specific property, but for an account in a settlement of the estate and for payment of the demand asserted in the bill; that is to say, for the payment of such a sum as it is claimed the intestate ought, in pursuance of his contract to have devised or bequeathed the complainant, or, in other words, a sum adequate to the comfortable maintenance and support of the complainant and his family. In a case of this sort a Court of Equity has jurisdiction, not only because matters of account are involved and because of the existance of a construction trust in the personal representative which a Court of Equity will execute and also because in the present case the real estate in possession of the heirs is sought to be subjected. And in order to ascertain what, if anything, ought to be allowed the complainant in such a case, the chancellor, in the exercise of a sound discession, may direct and issue, as an incident of the suit, to be tried by the jury."

It thus appears that there was grave doubt in the mind of the Court as to whether or not equity had jurisdiction in that case. Certainly it was not a suit for the specific performance of a contract, it was a creditors suit in which the complaining creditor failed to establish his claim. *The action was on quantum meruit for unliquidated damages.*

Mrs. Royester never could have brought an action against the estate of Mrs. Hatton upon the contract in question for the simple reason that Mrs. Hatton's promise was not to pay money generally but to make a will in which she was to bequeath certain specific property or money to the complainant. In other words, in order for the complainant to win even in this chancery suit she must show that there was money "remaining of the funds settled upon Mrs. Hatton" after her death. In other words, the complainant is following a trust fund. It is needless to cite authority to show that a common law action of assumpsit would not lie to recover specific money or money flowing from a particular fund. An action ^{of} detinue would not lie, since the complainant has no legal title to the property sought to be recovered, in short the complainant could not recover in a common law action at all.

without passing upon the
merits of the cause being
of the opinion that the cause for
action if any were taken
is bound by the statute
& limited in the place to
some extent of the cause
the result is

Brief for Complainants in

Royster vs. Hatton.

Statute of Limitation.

In 1883, Mrs. Cornelia R. Hatton, entered into a contract, whereby she promised to make her will and bequeath whatever may remain of certain money settled upon her, to her grand children. The plaintiff is one of the grand children. Mrs. Hatton died in 1889, with out having made her will. In 1898, the plaintiff for the first time learned of the existance of such a contract, and in 1901, files her bill praying the specific performances of the said contract to make a will, and charges among other things that Mrs. Hatton, left certain real estate which was bought solely with money gotten by her in the said settlement; this real estate has descended to her heirs at law; that she left certain personal property, to wit; a bond due her by Robert Nelms; that after her death D. H. Hatton, qualified as Mrs. Hatton's administrator, and collected the said bond with interest and appropriated it to his own use. The bill prays that the heir at law may be compelled to deliver to Complainant her just proportion of the real estate, and that the estate of the administrator, D. H. Hatton, be charged with the money collected by him from Robert Nelms, upon the bond aforesaid. To this bill the defendants plead the statute of limitation, and rely upon the last proviso in Sec. 2920, of the Code.

Matters of Exclusive equitable jurisdiction.

In answer to the plea, Complainants say that this a matter in which equity has exclusive jurisdiction and that there is no statute of limitation applicable to such matters, either in terms or by analogy. This is a suit for the specific performances of a contract to make a will and it requires no citation of authority, to show that suits for the specific performances of a contract can only be brought in a court of equity. That such suits to compel performances of a contract to make a will can be maintained see, Rice vs. Hartmans, 84 Va. 257, Cox vs. Cox, 26 Gratt. 305 311, Hale v. Hale, 90 Va. . . .

. 728, Burdene v. Burdene 98, Va. 513. In Burdene v. Burdene, 98, Va.. at P. 519, the court said, "strictly speaking an agreement to dispose of property by will cannot be specifically enforced, not in the life time of the party, because all testamentary papers are from their nature revocable; not after his death, because it is no longer possible for him to make a will; yet courts of equity can do what is equivalent to specific performances of such an agreement by compelling those upon whom the legal title has descended to convey or deliver the property in accordance with its terms, upon the ground that it is charged with a trust in the hands of the heir at law, devisee, personal representatives, or purchases, with notice of ^{the} agreement, as the case may be. 3 Par. on Con't. Sec. 406 Hale vs. Hale, 90 Va/ 728-730 " The Complainant has adopted this case ^{as her guide} in fashioning her bill and has used it as a ^{guiding} ~~granting~~ star in her prayer. It will be noticed that the Complainant is seeking to follow trust funds in the hands of the heir at law and the personal representative; that she is seeking to prove this trust and to compel, " those upon whom the legal title has descended to convey or deliver the property in accordance with terms of the contract." Equity alone can follow trust funds and ^{can} alone compel the defendants in this case to perform the contract to make a will. These matters are within the exclusive jurisdiction of a court of equity; and in such courts, when dealing with such matters, there has never been applied a statute of limitation. It is true that where a matter is brought in a court of equity which could also have been brought in a court of law, that equity applies the statute of limitation applicable to courts of law by analogy, and the matter if barred at law will be barred in equity. Switzer v. Hoffminger 82 Va. 521. Rowe v. Bentley 29 Gratt. at p. 759. But where the matter is within the exclusive jurisdiction of a court of equity, such courts are not only not bound by the statute, but they do not follow it by analogy and the only bar to such matter is the equitable bar of laches.

In Switzer v. Hoffminger 82 Va. at p. 521, it is said; " It is clear however, that the debt (a bond) assigned in the present case,

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being of a strictly, legal nature, is as much subject to the operation of the statute of limitation in a court of equity as in a court of law at all events the bar of statute is applied, if not in obedience, at least in analogy, to the statutory enactment".

Says Wood on Limitations, Sec. 59, " . As to matters of equitable cognizance merely, ~~in less~~ ^{unless} in express terms it is made applicable thereto, the statute does not apply. In other words, the statute is not binding on courts of chancery in cases of exclusive equitable cognizance.)))))) ^{And} ~~But~~ where the claim is purely equitable, unless expressly so provided, the statute does not apply there to, and lapse of time, however long, will not deprive the party of his remedy there on if there is a reasonable excuse for the delay; as the court will not allow a just claim to be defeated, simply because of the lapse of time, if the party has not, in view of the circumstances, being guilty of unreasonable delay."

In a note ^{to the} annotated editions of 1st Rob. at p. 385; it is said " The statute of limitation is not binding on courts of chancery in matters which are exclusively within chancery cognizance?

Huskell v. Power 23 W. Va. 717. Where the suit is founded on a right purely equitable in its nature and without a corresponding legal rights, there exists ^{to} no analogy by which the statute of limitations may be applied, but it must be determined entirely upon equitable principles and rules, regardless of the statute of limitations. Crammar/McWards 24 W. Va. 594."

On partition, part of a tract was set off to one of two equal joint owners, and the remainder belonging to the heirs of the deceased joint owner was sold to the Complainant. After 9 years it was discovered that the part sold ^{to} ~~by~~ the Complainant contained less than his just proportion. He then filed his bill against the devisees, legatees and personal representative of the other joint owner, and prayed for the correction of the mistake in his allotment, his lot having fallen short 200 acres by mistake of the surveyor. The court said, " As to the statute of limitations in equity it is considered as much a bar as in a court of law as to ~~the~~ demands

for the recovery of which the jurisdiction of the two courts are concurrent. For, as is said, it would be absurd that for the same subject there should be different and conflicting rules in the two tribunals. But as it respects mere equitable demands, length of time cannot be set up as an absolute bar: for, in relation to them, length of time operates as a bar, not ex jure, but as a fact showing acquiescence and furnishing evidence that the claim has been adjusted. Equity always refuses its aid to stale demands when the party has slept upon his rights and the other party may have lost his evidence. Nothing can call that court in activity but conscience, good faith and reasonable diligence. Where these are wanting it is passive. Laches and neglect ^{are} always discouraged, and it has always since the establishment of its jurisdiction had its limitation to suits, recognizing the statute of limitation in its application to cases of a legal character, and according great weight to length of time in those which are merely equitable. In this case no neglect nor any degree of what can be termed laches appears. The bill was filed shortly after the mistake was discovered, within the year, and it could not be reasonably considered that it ought to have been filed before it was discovered." Fore v. Foster 86 Va. 104.

" A suit for the specific execution of a contract, or to enforce an equitable lien, is not within the statute of limitation."

Mayo V. Covington 19. Gratt. p. 125.

I think it can be fairly concluded that this case is a matter of exclusive equitable jurisdiction, and that the statute of limitation is inapplicable, and it must be governed entirely by the equitable doctrine of laches. If lapse of time is to bar the remedy of Complainant, whether or not a delay of only three years after the discovery of a mistake is such a delay as will bar Complainants remedy will be discussed in a subsequent paragraph of this note;

Trusts Funds;

As was said in Burdene v. Burdene, supra, the property which forms the subject of an agreement to make a will, " is charged with a trust in the hands of the heir at law devisee, personal representa-

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tive, or purchase with notice of the agreement, as the case may be." Both the money in the hands of D. H. Hatton, and the real estate in the hands of C. R. Hatton, are charged with a trust, and the prayer of this suit is to compel these parties to deliver the money and property in accordance with the terms of agreement. And these parties pleaded the statute of limitation. The Complainants rely upon the case of *Hunter v. Spottswood* 1 Wash. 145, as authority that the statute does not apply to such trustees. "As a rule, trusts are not within the statute of limitation. But ⁱⁿ direct trusts as resulting, implied and constructive trusts, are subject to the laws of limitation." 1 Bart's Chy. Pr. 117, 9 V. L. R. 15, Wood on limitation 200, see also Id. section 219, *Barlo v. Whitlock* 4 Munford 180.

"A trust in order to be exempt from the operation of the statute must be direct or express, and of a nature not cognizable at law, but solely in equity." Wood on limitation p. 251.

If the proper remedy to recover the alleged fund is by a bill in equity, not by an action on the case at law a statute of limitations is not applicable. "I take this to be the true ground of distinction between those trusts which are and those which are not, exempt from the operation of the statute." *Cabell J., Williams vs. Lewis* 5 Leigh at p. 692. Tested by this rule the trust in this case is an express trust ~~contained~~, and the statute of limitation has no application. For certainly an action at law could not lie to compel Clarence Hatton, to deliver possession of the land (ejectment) nor could an action at law lie to compel Mr. Daniel H. Hatton, to specifically deliver the money he collected for Mrs. Hatton's estate, to Complainants. This is not an action upon a bond nor is it an action for a breach of contract. And as was said by our court of appeals in *Moorman v. Arthur*, 90 Va. p. 471, "it is sufficient to say that the title of Complainants, if any they have, is equitable, not legal, and that they seek to set up and enforce a trust of which a court of equity alone has jurisdiction."

Even if it be held that this trust is implied not express trust; the statute begins to run only from the discovery of Complainants rights. 9 V. L. R. 21. 80 Va. 804. W. C.

Ignorance of rights;

If the Complainant with-out fault on his part is ignorant of his right the statute of limitation in a court of law and the bar of laches in a court of equity will not begin to run until the discovery of his rights.

Rowe v. Bentley 29 Gratt. 756; Jameson v. Rixey 94, Va. 346; Craufurd v. Smith 93 Va 629; Moorman v. Arthur 90 Va. 455; Cottrell v. Watkins 89 Va 810; Tunstall v. Withers 86 Va. 900; Shedgrick v. Taylor 84 Va. 825; Lamar v. Hale, 79 Va. 165; Hirshberger v. Alger 31 Gratt 67; Bart. Chy. Pr. (2d ed.) 98, 100, 101, 121. Jones v. Lemon, 26 W. Va 635; VanWinkle v. Blackford 33 W. Va. 573 11 S. E. Rep. 26.; Masie V. Heiskell, 80 Va. 789. *Jone v. Foster, 86 Va 104;* Mayo V. Covington, 19 Gratt. 125.

Mistake or Fraud.

The replication to the plea charges fraud or mistake. It alleges that Clarence R. Hatton did not know of the existance of the contract between Mr. and Mrs. Hatton, a copy of which is filed with the bill as exhibit "A"; that Complainants did not know of such paper until about February 1st, 1898, and that the estate of Mrs. Cornelia R. Hatton was distributed among her distributees under the mutually mistaken belief that no such paper existed. That this amounts to a mutual mistake of fact, see Craufurd v. Smith, 93 Va. 625, a case in many particulars strikingly like this. In Craufurd v. Smith, A. of Prince George County Maryland, died in 1861. His personal estate was distributed among his next of kin, one of whom was the wife of S. of Clark county, Va. S. received in right of his wife about \$6300. S. died in 1873. In a creditors suit growing out of a settlement of his estate, a decree was entered in 1881, referring the cause to a commissioner to ascertain debts of S. etc. In 1881, and after the institution of creditors suit, but before the decree of 1893, the ~~wife~~ ^{will} of A. was found and probated in Maryland. On December 12th/ 1881, an authenticated copy of the will was probated in Clark county, Va. and B. qualified as administrator of A. with the will annexed. Mrs. S. the wife of S. was not one of

the beneficiaries under the will of A. In 1883, the administrator of A. laid before the commissioner his claim against the estate of S. for the value of the money and slaves he had received in right of his wife from A's estate. The lower court allowed the claim as to the money but denied relief ^{to} ~~as~~ the slaves received by S. The court of appeals in reversing the trial court said: " Having received from A's estate by mutual mistake of fact money and slaves to which he was not entitled, and having sold some of the slaves and converted the money to his own use, his (S.) estate upon the discovery of the mistake, became accountable to the estate of A. therefore both in morals and in law." And in reply to a plea of the statute of limitation, the court said: " The personal estate of A. deceased, having been distributed amongst his next of kin as distributees, under a common or mutual mistake as to the rights of the parties, the statute of limitation did not begin to run until the mistake was made known by the discovery of the will. The remedy in a case of mutual mistake, so far as affected by the statute of limitations, seems to be governed by the same principle as in a case of fraud; viz., that the rights of the parties to such mistake are not affected by the lapse of time, or generally speaking by anything done, or omitted to be done, so long as the parties remain, without any fault of their own, in ignorance of the mistake which has been committed. Rowe V. Bentley, 29 Gratt. 763; Massie's Adm'r v. Haskell's Trustee 80 Va. 789/ 805; 2 Story's Eq. Jur., section 1521a (13th ed). -----" " The claims of appellant were not barred by the statute of limitation ----- . Neither has there been such laches in the prosecution of the appellant's claim as should deprive him of the right to recover. No lapse of time, no delay in bringing the suit, however long, will defeat the remedy in case of fraud or mutual mistake, provided the injured party, during all this interval, was ignorant of the fraud or mistake without fault on his part. The duty to commence proceedings to assert his rights can only arise upon the discovery of the fraud or mistake; and the possible effect of his laches will begin to operate only from that time. 2 Pom. Eq. Jur., sec. 917 and note 2 (2d ed.); Rowe v. Bentley, 29 Gratt. 762-3, Massie's Adm'r v. Haskell's Trustee.

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80 Va. 789, 790, 805; 1 Dan. Chy. Pr. 645 (4th ed.); Kerr on Fraud and mistake, 435-6."

The replication to the plea of the statute further charges that Clarence R. Hatton, ~~he~~ knew of the existence of the contract and concealed the same from Complainants. That this amounts to legal fraud-suppressio veri- is well settled. 2 Wall 87; Bisph. Esq. 213. And cases of fraud, trust and mistake are not within the statute of limitation. 1 Wash. 145; 4 Munf. 222; 80 VA. 804; 31 Gratt. 67.

" At all events in cases of mistake like cases of fraud the statute does not begin to run until after the discovery of the mistake."

Massie v. Heiskell 80 Va. 804. See also 9 V. L. R. 21, and the cases cited above in this note under the head, "Ignorance of rights," especially 19 Gratt. 125; 93 Va. 623; 95 Va. 10, *86 Va 104*.

Since the statute of limitation only began to run against Complainants after February 1st, 1898, and ceased to run in November 1901, when this suit was brought, it follows that the proviso to section 2920, of the Code which allows five years within which to bring an action will not bar Complainants remedy.

Laches

" In as much, therefore, as the plaintiff's right is not barred by the statute of limitations, it follows as a necessary consequence, that laches and lapse of time constitute no such bar." Court in Cottrell v. Watkins, 89 Va. p. 810, citing Foster v. Rison 17 Gratt. 335; Coles v. Ballard, 78 Va. 149; Rowe v. Bentley 29 Gratt. 759.

" It is well settled that laches cannot be predicted of those who are ignorant of their rights. Rowe v. Bentley, supra. Such defence is in equity, only permitted to defeat an acknowledged right on the ground of its affording evidence that the right has been abandoned" Court in Massie v. Heiskell, 80 Va. 805. See also the same effect 4 Munf. 332, 343; 78 Va. 149; 101 Va./ 308-317; 9 ~~Q~~to 201.

" Judge Moncure says in Foster v. Rison, 17 Gratt. 321-335; What I mean to say is, that if the cause of action be one to which the statute applies, but the lapse of time since it accrued be not such as to bring the case within the statute, laches and lapse of time cannot in themselves, constitute a bar to the suit." Coles v. Ballard 78 Va. 149, where the doctrine is approved and followed. In other words, a lapse of time short of the statutory period is never, of itself, such laches as to bar Complainants remedy.

Code Section 2933.

Section 2933 as amended by the acts of 1897-8 p. 441 reads," When any such right as is mentioned in this chapter shall accrue against a person who by departing without this state or by absconding or concealing himself, or by continuing to reside without the state, or by any other indirect ways or means shall obstruct the prosecution of such right the time that such obstruction may have continued shall not be ~~computed~~ as any part of the time in which the said ~~rights~~ might or ought to have been prosecuted ~~to~~-----."

The words underscored constitute the amendment to the Code. Prior to the amendment, the court of appeals repeatedly held that prior residence in Virginia of the defendant was essential to bring the case within the saving provision of section 2933. Ficklin v. Covington, 31 Gratt. 222; Dorr v. Rohr 32 Va. 361; Brown v. Butler

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87 Va. 625; 98 Va. 604; 100 Va 473, 764; 101 Va. 742.

In 1898 the amendment above quoted was passed by the legislature and it is to be presumed that the legislature had knowledge of the state of the law and intended by the amendment to dispense without a prior residence. And it has been expressly so stated by Whittle J. in Griffin v. Woolford 100 Va. 473-479. Also Kesterson v. Hill 101 Va. 734-742.

It is clear therefore, that a person who resides without the state at the time the right of action accrues and continues to reside without the state, cannot plead the statute of limitations successfully. As we have shown above the complainants cause of action accrued, so far as the running of the statute of limitation is concerned, at the time of her discovery of the agreement, to-wit, about February, 1st, 1898. *But this is immaterial as the replication charges non-residence since 1883* On July, 1st, 1898, the amendment to section 2933 went into effect. Since which time Clarence R. Hatton, has been a non-resident. It is respectfully submitted that Clarence R. Hatton, cannot plead the statute at all, nor can any other of the non-resident defendants.

In Conclusion.

It would seem that this is peculiarly a case to which the statute of limitation is inapplicable.

It is an equitable suit to enforce a trust, which has been concealed from Complainant either through fraud or mistake. And in such cases it has been held by so high an authority as the Supreme Court of the United States that no length of time is a bar to the c. q. t. Badger v. Badger 2 Wall 87. This suit is brought to enforce an equitable lien on certain definite property, to-wit, the money collected by D. H. Hatton, on Robert Nelms' bond - it is not like an action at law to recover money for a breach of contract from the estate of Mrs. Cornelia R. Hatton, - an action for damages. If the subject of Mrs. Hatton's promise to make a will had been to devise certain lands, instead of bequeathing certain money, there would have been little difficulty in enforcing the equitable title held by Complainants.

The meat in the case is here:

The Complainant is the owner of an equitable title ^{to} money, the legal title of which is in Clarence R. Hatton, ^{Exor.} of D. H. Hatton, who the law declares holds such legal title as trustee for Complainants. "A trust, in its technical sense, is the right, enforceable solely in Equity, to the beneficial enjoyment of property of which the legal title is in another." Bisph. Eq. sec. 49.

That the trust funds are money and have been derived from Mrs.

Hatton's estate, cannot be a valid objection to the enforcement of the trust, and surely cannot bring a trust within the statute of limitations that would not be therein if the trust funds had been land or other property.

I use the words "derived from Mrs. Hatton's estate", advisedly in the preceeding sentence, because, we are not seeking to recover a judgment against Mrs. Hatton's estate for a breach of contract, and then to enforce its collection from her distributees. If such had been the object of Complainants they have no right in a court of equity at all, the court of law gives an ample remedy, and they would have had different parties defendant to the action. The right of Complainant is to enforce her trust quoad the money derived from the Robt. Nelms' bond in whosoever hands she can trace it. She is following ~~the~~ trust funds. And the fund is thoroughly indentified and specific. The suit is in the nature of an action ⁱⁿ rem, the object being to recover specific personal property, the legal title of which is in defendants, and the equitable title in Complainants.

This is not a claim against Mrs. Hatton's estate generally, such as contemplated ^{by} 2920 of the Code. If D. H. Hatton, had never collected the Nelms bond Complainants would have had no case for specific performance against him. But when he collected the Nelms bond, the money came to his hands charged with a trust of which he cannot rid it by remaining silent until his death: Even if D. H. Hatton were alive to-day and was being sued for this money, he could not plead the statute of limitation, because;

1. He has kept the defendants in ignorance of their rights for nine years.
2. He thereby obstructed the prosecution of the plaintiffs rights.

3. He is a trustee for the fund and cannot when called upon by the cestui que trust hide behind a statute of limitations.
4. The naked legal title only passed to him as administrator of Cornelia R. Hatton, and he held that not for the benefit of the estate or distributees of Cornelia R. Hatton, but for the benefit of the holders of the equitable title. - The Complainants-hence; the estate of Mrs. Hatton had no interest in the fund, and that estate is not being sued to-day. Mr.. Hatton's, estate is being sued because he who held the naked legal title to the money, instead of delivering it to the beneficial owners - Complainants - appropriated it to his own use. Hence the suit against him. If he had never collected this money, but the debt was still due by Robert Nelms, estate, Mr. Hatton, or his estate would not be parties to this suit, but the administrator of Robert Nelms.

It is only because he used this trust fund, not because he was administrator of Cornelia R. Hatton, that Mr. Hatton's estate is sought to be charged with it. It is in no sense an action against Mrs. Hatton's, estate for a judgment to be collected out of her estate generally.

Respectfully submitted.
Robt. W. Whetters, p. q.

Royster v. Halton

*Note of argument against
Statute of Limitations.*

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