REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

THIRD EDITION.

TO WHICH, BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

C. H. WYNNE, PRINTER.

MAUPIN *v.* WHITING.

Wednesday, April 25th, 1798.

The answer of the defendant, when responsive to the bill, is conclusive, unless disproved.*

If the defence be purely legal, it should be made on the trial at law.†

This was an appeal from a decree of the High Court of Chancery. The bill stated, that a replevy bond, purporting to be entered into by the plaintiff, as security for John Whiting, (and which had been assigned to Maupin,) was not the act of the plaintiff. That, about fifteen months after its date, Maupin informed the plaintiff that he had such a bond. That the plaintiff, with astonishment, informed Maupin that he had never executed it, or heard of the execution before. That, about two months afterwards, he met with the Deputy Sheriff, by whom the execution and bond were returned, and was persuaded by him not to mention the transaction, as he said that he would not have such an affair to come before the Court for an hundred pounds; that the plaintiff told him, he would not make any stir in it, unless an execution should come against him. The bill, therefore, prayed an injunction to the bond; and the Deputy Sheriff was made a defendant to the suit. The answer of Maupin stated, that, not fifteen months after date, he shewed the bond to the plaintiff, who said it was not his hand-writing; but, from the manner of expressing himself, he did not suppose the plaintiff would contest it, or deny that the subscription was with his consent and approbation. That he was the more induced to think so, as the plaintiff was the only son of the principal obligor, who was wealthy and of a fair character. The answer of the Deputy Sheriff stated, that the commissioners having approved of the plaintiff as security for his father, and the defendant reposing confidence in the father, entrusted him with the bond to get the signature of the plaintiff, who was absent. That the father afterwards returned the bond to the defendant, with the plaintiff's name subscribed.

*Cases confirming this,—Post, 390, and *Buck et al.* v. *Copland,* 2 Call, 229; *Beatty* v. *Smith et al.* 2 H. & M. 395; *Heffner* v. *Miller et al.* 2 Munf. 43; *Lenox et al.* v. *Prout,* 3 Wheat, 520, 4 Cond. Rep. 311.

But an evasive answer, though not excepted to, is outweighed by one witness, and circumstances. *Wilkins* v. *Woodfin, adm'r,* 5 Munf. 183. And an answer is not evidence, where it asserts a right *affirmatively,* in opposition to the plaintiff's demand; but the defendant must sustain it by proof. *Paynes* v. *Coles, &c.* 1 Munf. 373.

†See *Spotswood* v. *Higginbotham,* 6 Munf. 313.

That, the plaintiff afterwards denying the signature, the defendant said he would sue the father in order to secure himself. Whereupon, the plaintiff said it might hurt [225] his father's feelings, and that he supposed he must be his security. On which, he acknowledged the signature to be his hand and seal. The cause was heard on the bill and answers in the Court of Chancery; where the injunction was made perpetual. From which decree Maupin appealed to this Court.

WICKHAM, for the appellant.

The plaintiff, indeed, states that he did not subscribe the bond; but, Maupin says, he did not appear to dispute his liability; and, the Deputy Sheriff says he acknowledged it, which is responsive to the allegations of the bill. The Deputy Sheriff's testimony is admissible, because he has no interest in questions of this kind. It is his duty to take the bonds, and in practice, he is generally the only witness to them. But, the conduct of the plaintiff charges him, because he did not give fair warning. He should have denied it at once; but he did not, and from his own shewing, he intended to conceal it. This might have been no objection at law, but it certainly is in equity; for, it was a fraud upon the defendant. The plaintiff had no pretext for applying to a Court of Equity. He should have pleaded *non est factum*, and submitted the legal question to the Court of Law. It is analogous to a case in this Court, in which a *supersedeas* from this District Court, to an execution in a County Court, was quashed; because, the County Court might have given redress.

PER CUR. The cause having been heard in the High Court of Chancery, on the bill and answers, and those answers, which are responsive to the bill, stating that, although the appellee might not have originally put his name to the bond, yet he afterwards acknowledged the signature to be his hand and seal, by which he was bound at law; or, if he was not bound at law, it was a legal defence of which he should have availed himself upon the motion for judgment on the bond, and not have resorted for relief, on that ground, to a Court of [226] Equity, where the case is to be decided upon its real justice, and not on the omission of strict legal ceremonies, the appellee, in that view of the case, had no pretense of equity; especially against Maupin, the innocent purchaser of the bond, without notice of the alleged defect. Consequently, the decree of the High Court of Chancery is erroneous, in affording the relief sought by the appellee. It must, therefore, be reversed, and the bill dismissed with costs.