REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME IV.

BY WILLIAM MUNFORD.

PHILADELPHIA:

PUBLISHED BY JAMES WEBSTER.

W. Brown, Printer, No. 52, Prune-street.

1817.

sentations, which now appear to us to have been unfounded and delusive.

NOVEMBER, 1814.

Parker v. Carter and others.

On these grounds the court is of opinion to affirm the decree before us. I am also instructed to say, that the judges are unanimous in the opinion now delivered; with the exception, that one of them does not, on the testimony, consider the disclosure, made to Mr. *Parker*, to have been confidential. That judge, however, authorizes me to say, that if Mr. *Parker's* deposition had been sustained by the court, he would, nevertheless, have been of opinion to affirm the decree.

Spottswood *against* Dandridge and others.

Argued November 26th, 1814.

THIS was a suit in the late High Court of Chancery, in behalf of *Alexander Spottswood*, eldest son and heir at law of *John Spottswood*, deceased, also administrator with the will annexed of the goods, &c. of said decedent, unadministered by *Bernard Moore*, only acting executor of said will, and grandson, heir at law, and administrator, with the will annexed, of the goods, &c. of Major General *Alexander Spottswood*, deceased, unadministered by his executors, and *John Spottswood*, son and devisee in the will of the said *John Spottswood*, deceased, plaintiffs, against *William Dandridge*, and others, executors of *Nathaniel West Dandridge*,

1. Under what circumstances a suit in equity may be brought against the securities of an executor, administrator, or guardian, without any previous judgment or decree against their principal.

☞ See *Bacheldor* vs. *Elliot's Administrator and others*. 1 *H. & M.* 10.

2. Where an executor dies without any personal representative, a Court of Equity may, at the suit of a legatee, and *without any previous suit* having been brought against the executor to convict him of a *devastavit*, convene the securities of the executor, or their representatives, and the persons who would be interested in any estate which the executor may have left, and make the securities liable for any misapplication or wasting of the assets which shall be established in the progress of such suit in Chancery.(1)

3. Under like circumstances, a Court of Equity will give relief against the securities in a guardian's bond; and if the executor of the decedent was also guardian to the legatee, the two sets of securities, and their representatives, may be jointly sued.

(1) Note. See *Clarke* vs. *Webb and others*, 2 *H. & M.* 8.

NOVEMBER, 1814.

Spottswood v. Dandridge and others.

and of others who were securities for the faithful administration of the estate of *John Spottswood*, deceased, by *Bernard Moore*, his executor, and also securities for the same *Bernard Moore*, in the bond given by him as guardian of the plaintiffs.

The bill charged a variety of acts of mal-administration and violations of duty, committed by *Bernard Moore* in both capacities; and alleging that he had died insolvent, without making up a fair account of his transactions; that the plaintiffs, in consequence of their infancy at the time, and other causes, had not sufficient information to enable them to state and prove their claim fully: and that the defendants, or some of them, were in possession of important books and papers relating to those transactions, called upon them to render such accounts, and to produce such books and papers, as were in their power, and would enable the court to ascertain the amount for which the estates of the said securities ought in equity to be responsible to the plaintiffs.

Edmund Pendleton and *Peter Lyons*, administrators of *John Robinson*, and *Peter Lyons*, *William Dandridge Claiborne*, and *Carter Bruxton*, executors of *Philip Whitehead Claiborne*, and *John Baylor*, surviving executor of *John Baylor*, the said *John Robinson*, *Philip W. Claiborne*, and *John Baylor*, deceased, (having been three of the said securities,) demurred to the bill, on the ground that its object was to subject them to the penalties of a *devastavit*; that the remedy of the plaintiffs, if they had any, was at law, and not in a court of equity, "which will not interpose *its aid*, in any case, to charge an innocent surety farther than the law will charge him."

Chancellor WYTHE, on the 4th day of October, 1793, overruled the demurrers, and (the defendants having filed their answers,) directed an account to be taken, (in obedience to which decree, a report was made by a commissioner;) but afterwards, on the 13th day of March, 1806, he permitted the demurrer to be re-argued, and, retracting his opinion, dismissed the bill with costs; whereupon the plaintiffs appealed.

The cause was argued before a *special* court of appeals, (consisting of Judges CABELL, COALTER, WHITE, TAYLOR, BROCKENBOROUGH, and RANDOLPH,) by *George K. Taylor* and *Williams*, for the appellants, and *Wickham* and *Wirt* for the appellees.

Monday, *December 5th*, 1814, Judge CABELL pronounced the court's opinion as follows:

John Spottswood, son and heir of Major-General *Alexander Spottswood*, deceased, made and published his last will and testament, containing, *inter alia*, certain devises and legacies in favour of his sons *Alexander*, *John* and *Robert*, and constituted *Bernard Moore* and others, his executors. Of the persons thus named, *Moore* only qualified. He also became the guardian of the two sons *Alexander* and *John*; and having, as the bill alleges, greatly misapplied and wasted the assets in his character of executor, and greatly violated his duty as guardian, he died, without having rendered any account as guardian or executor, insolvent, and without any personal representative:—whereupon, this suit was brought, in the late High Court of Chancery, by the late *Alexander Spottswood*, eldest son and heir at law of the said *John Spottswood*, deceased, and also as administrator *de bonis non* of his grandfather Major-General *Alexander Spottswood*, deceased, and as administrator *de bonis non* of his father *John Spottswood*, deceased, and by the said *John Spottswood*, son of *John Spottswood*, deceased, against the representatives of the securities of the said *Bernard Moore*, as guardian and executor as aforesaid, and against one of the sons of the said *Moore*, and the representative of another son, who was his oldest son and heir at law, seeking a discovery of assets, calling for a settlement of the accounts of *Moore* in both characters, and praying to subject the defendants to the payment of whatever should appear to be due, according to the respective claims of the complainants as legatees, administrators *de bonis non*, and as wards, and in such proportions from the defendants as to the court should seem proper. To this bill the defendants demurred, assigning, as

NOVEMBER, 1814.

Spottswood v. Dandridge and others.

the cause of demurrer, that the remedy of the complainants, if they had any, was at law, and not in equity. These demurrers were over-ruled by the Chancellor in 1793, who directed the accounts to be taken and reported by a commissioner. At a subsequent term, however, (March 1806,) after the accounts had been taken and reported, he changed his former opinion, sustained the demurrer, and dismissed the bill; and from that decree an appeal was taken to the Court of Appeals.

The case will be examined, first, in relation to the securities of *Moore* on his bond as executor. The argument mainly relied on by the counsel for the appellees, in support of the decree, is understood by the court to be essentially this; that, by the death of *Moore*, under the circumstances of this case, before a *devastavit* had been actually fixed on him by a verdict, although a *devastavit* might in fact have been committed, the securities were discharged at law; and that being securities, they could not be farther charged in equity than at law. To ascertain the extent and duration of the obligations and liabilities of securities for executors, it will be necessary to advert to the act of assembly requiring such securities, and prescribing the form and effect of their bonds: and it is readily admitted that these obligations and liabilities, whatever they may be, grow out of, and defend upon, the bonds so executed by them, and not upon any pre-existing equitable or moral consideration whatever. The rights and interests of creditors and legatees were the objects which the legislature had in view. The confidence reposed in executors by their testators did not afford a sufficient guard. That confidence was often abused by executors, whose own estates were not always found sufficient to indemnify creditors and legatees for the loss which they thereby sustained. As a farther indemnity against any misapplication or waste of the assets, executors are not permitted to qualify until they give bond for the faithful discharge of the duties of their office.(a) The form of the penalty of the bond is not prescribed, but it usually is, and certainly ought to be, joint and several; and it is so in the case now

(a) Vir. Laws, ed. of 1769, p. 162, 3.

before the court. The condition is, that the executor shall make and exhibit an inventory of the goods, chattels and credits of the deceased—shall administer them according to law—shall make a just and true account of his actings and doings therein, when required, and shall pay and deliver all the legacies contained in the will, as far as the estate will extend, and as the law shall charge him. This bond is made payable to the sitting justices and their successors;—shall not become void on the first recovery, but may be put in suit and prosecuted, from time to time, by and at the cost and charge of any party or parties injured. In considering, on general principles, independently of adjudicated cases, the rights and obligations of the parties growing out of these bonds, it may be asked, when, in the eye of the law, do the obligations of the securities commence? They commence whenever the executor breaks the condition of the bond; as, for example, in the case of a legacy, whenever the executor has received assets sufficient, after the discharge of debts, for paying the legacy, or so much thereof, and has wasted those assets:—at the same instant, also, commence the rights of the legatee as against the securities; for rights and obligations are convertible terms. So soon, then, as the *devastavit* is in fact committed, he acquires a right to compensation as against the securities. The obligation on the one hand, and the right on the other, once existing, what is to extinguish them? Is there any thing in the act of assembly which countenances the idea, that the death of an executor, insolvent, and without personal representatives, absolves his securities from their liability for a *devastavit* previously committed?

Every principle of construction applied to that act forbids such a conclusion. It is very different from the case of a *joint obligation*;—for there, both parties enter into the contract, with the full knowledge of the legal principle that, by the death of one obligor, the whole obligation devolves on the survivor or survivors. But, in this case, the legislature intended to provide a perfect and permanent safeguard and indemnity for the rights of the creditors and le-

November, 1814.

Spottswood v. Dandridge and others.

gatees; the securities, their heirs, executors, and administrators being jointly and severally bound, and the bond being suable, "from time to time," by any party or parties injured. The very thing which the law so anxiously intended to guard against, the *devastavit* by the executor has been committed; and yet those who undertook that he should not commit it,—those, without whose intervention he would not have had the power to commit it, and who might, at any time, have arrested him in his progress—seek to absolve themselves from their liability, upon no other ground than that he died before he was *convicted* of the fact. The court can perceive no principle of justice, or of law, on which such claim to be discharged can rest. It therefore concludes, that the obligation continues, as does also the correspondent right of those who have been injured by a breach of the bond. But, to the successful prosecution of that right in a court of justice, it is necessary that the party shall *prove*, at the trial, all the circumstances which shew that the right exists. And if this cannot be done in one tribunal, owing to its particular forms of proceeding, it may be done in another; for it is a fundamental principle that there is no *right* without a *remedy*.

But it is objected by the counsel for the appellees that several adjudicated cases (*a*) shew that, under the circumstances of this case, the securities are discharged at law; or, in other words, as the court understands the objection, that the right of the appellants, as against the securities, is extinguished. The court has examined all those cases with great attention. One general remark is applicable to them all. They went off, not on the ground of a want of *right* in a case like the present, shewn to exist; but on the ground of a want of *evidence* to make out such a case. A *right*, recognized by law, is one thing:—the *proof* of the circumstances, necessary to shew that that right exists in a particular individual, is another. This distinction may be well elucidated by the case now before the court. According to the express words of the act of assembly, any party or parties *injured* may put the executor's bond in suit from time

(*a*) *Braxton* v. *Winslow*, 1 *Wash.* 31; *Gordon's administrator* v. *Frederick Justices*, 1 *Munf.* p. 1; and *Catlett and others* v. *Carter's executors*, 2 *Munf.* p. 24.

to time, and as often as the occasion may occur. This is a right as eternal as the principles of justice, and knowing no limitation except that prescribed by the amount of the penalty of the bond. Any person may institute a suit on the bond, on the mere allegation that he is a party injured; but, before he can have the substantial benefit of the act, before he can recover from the securities, he must *prove* all the circumstances which *shew him* to be *a party injured.* And this is believed to be the amount of the decision in *Braxton* v. *Winslow*, the first case on the subject, and the foundation of all the subsequent cases. In that case, the court says, "the true question is this; has the relator *Waller* brought himself within the act?—or, in other words, does it appear from the record that he is a party injured, within the words and meaning of the act? A man who claims as a creditor, and means to take the benefit of the act, must shew himself to be a creditor; that the testator left assets; that they came to the hands of the executor; that there was a sufficiency to discharge his demand, or so much thereof, after payment of debts of higher dignity; and that the executor has wasted the assets. Without this concurrence, there is no injury done him." If, however, this concurrence be established, an injury has been done, and he will recover accordingly. But how is this concurrence, and particularly the *devastavit*, to be established? In a *court of law*, (and it is proper to observe that all the cases relied on by the appellees are cases at law,) there is no form of proceeding, pending the action, by which the *devastavit* can be established. If, therefore, it has not been established *before*, the party cannot recover, because he fails to *prove* that which is necessary to entitle him to a recovery. But widely different is the mode of proceeding in a court of equity. Wherever a case occurs, over which it has jurisdiction, it may, at once, convene all the parties, however remotely concerned in interest, and, pending the same suit, and by a proceeding forming a part thereof, may ascertain the fact whether the *devastavit* has been committed, or not; and if it shall appear, by that procedure, that a devastavit

NOVEMBER, 1814.

Spottswood v. Dandridge and others.

has been committed, then, and not before, will it subject the securities; although they have all along been held in court, for their own benefit, to attend to investigations in which they were so materially interested. There is, however, no difference in this respect, between courts of law and courts of equity, except in the forms of their proceedings, and the ability which is thereby afforded to courts of equity to give relief in some cases where courts of law could not. In deciding on the *rights* of the parties, they proceed on principles common to both courts; for a court of equity will no more subject a security before a *devastavit* is established, than a court of law.

It was said by the counsel for the appellees, that the decision in *Braxton* vs. *Winslow*, was always considered as having established the law, that, under the circumstances of that case, the creditor had forever lost his debt; and that, had the court not so considered, they would have intimated an opinion that relief might have been obtained in equity. The answer to this is, that the Special Court was sitting as a *court of law*, deciding a *legal* question, on the case, as *then* presented, and had nothing to do with what a court of equity might do, in a case rendered different in its circumstances by the forms peculiar to such a court. It is worthy of remark, however, that in less than three years after that decision, (in October, 1793,) Chancellor WYTHE, who formed one of the Special Court in *Braxton* vs. *Winslow*, overruled the demurrers in the very case now before the court; thereby deciding that the court of equity, in the case of a legatee, could give relief, even against securities, under the circumstances alleged to exist; and, as far as relates to the *devastavit*, there is no difference between creditors and legatees. As he, afterwards, in March term, 1806, sustained the demurrers, the fact of his having at first overruled them is mentioned with no other view than to repel the presumption which is said to arise from the silence of the court in *Braxton* vs. *Winslow*; for it is probable that Mr. WYTHE remembered the grounds, and the extent of the decision in that case, as well in 1793, as he did in 1806.

But that the death of an executor, under the circumstances of this case, before a *devastavit* has been fixed on him, does not discharge his sureties, no longer rests on reason only. The point has been decided in the Court of Appeals, in the case of *Taliaferro and Gaines* vs. *Thornton and wife*, (*Call's M. S. Reports*, spring term, 1806.) In that case a bill was brought by *Thornton and wife*, to recover a legacy due to the wife, under the will of *Philip Rootes*, her father, against the representatives of the securities of *Philip Rootes* and *Thomas Reed Rootes*, as executors of the said *Philip Rootes*, their father, deceased. The bill states that one of the executors had died insolvent, without saying whether any person had qualified as his executor or administrator; and that the other had died intestate, and that no person had taken administration of his estate. Although the bill made the representatives of both the sureties parties, yet no subsequent proceedings were had against the representatives of one of them; nor were any persons made parties as heirs or descendants of the two sons the executors. There was a demurrer filed by the representatives of the surety against whom the proceedings were had; for that the complainant's remedy, if any, was at law. The demurrer was overruled, and a decree entered against them. On an appeal to the Court of Appeals, it was decided that the demurrer was properly overruled; it being a case in which equity had jurisdiction, and, having jurisdiction, should go on to determine the disputes between the parties; and it was, moreover, expressly decided, that the representatives of the securities of the executors should be made liable, *in that suit*, (there had been no previous suit, and it was declared to be unnecessary,) for the misapplication and wasting of the funds on which the legacy had been charged, in case the executors, their heirs or representatives, or those into whose hands those funds should be found to have been taken, should be unable to make good the same. But it appearing from the answers that many necessary parties had been omitted, and the decree being in other respects erroneous, it was reversed, and the cause remanded to the Court of Chancery.

NOVEMBER, 1814.

Spottswood v. Dandridge and others.

On a full view of the principles growing out of that case, this court is clearly of opinion, that, where an executor dies without any personal representative, a court of equity may, at the suit of a legatee, and without any *previous suit* having been brought against the executor to convict him of a *devastavit*, convene the securities of the executor, or their representatives, and the persons who would be interested in any estate which the executor may have left, and make the securities liable for any misapplication or wasting of the assets which shall be established in the progress of the suit above mentioned. Not to afford relief in such case, would be to leave a right without a remedy. The forms of the Court of Chancery are commensurate to the purpose; and equity will not insist on any parties but those who are concerned in interest. Judge TUCKER, in the case of *Gordon's Administrator* vs. *the Frederick Justices*, 1 *Munf.* p. 1. where he reviews and approves of the decision of *Braxton* vs. *Winslow*, refers to the case of *Taliaferro and Gaines* vs. *Thornton and wife*, and so far from thinking there is any inconsistency in the two decisions, seems to extend the principles of the latter case, beyond legatees, to all persons who, from any cause, may be entitled to come into a court of equity.

The claim of the complainant, *Alexander Spottswood*, as administrator *de bonis non*, is considered as standing on the same ground as that of a legatee. It necessarily involves a discovery of assets and settlement of accounts, good grounds for equitable interference; and, when the court is once in possession of the case, it may go on and determine the disputes between the parties.

The court also considers the case of *Taliaferro* vs. *Thornton and wife*, as conclusive authority to shew that a court of equity may give relief against the sureties on the guardian's bond. A bill in equity will unquestionably lie against the guardian himself, notwithstanding he has executed a bond on which he might also be sued at law. And if, in the case of an executor's bond, (as is proved by *Taliaferro* vs. *Thornton and wife*,) the securities, whose responsibility cannot be brought to bear upon them until the inability of the princi-

pal be established, may be joined as defendants in the same suit with their principals, or their representatives, *a fortiori* may the securities of the guardians, whose responsibility is direct and immediate even in a court of law.

As to the propriety of joining the two setts of securities, the court is equally clear. For, wherever there is a doubt as to who is to pay, justice to all concerned requires, that the persons as to whom the doubt exists should be made parties.

On these grounds, (without deciding any other point, made in the argument, but not necessarily growing out of the pleadings,) the court is unanimously of opinion that the demurrers were improperly sustained. The decree appealed from is therefore reversed, the demurrers overruled, and the cause remanded to the Court of Chancery for the Richmond District, to be farther proceeded in.

Cropper *against* West.

Argued Tuesday March 22d, 1814.

SEVERAL points were argued in this case by *Wirt* for the appellant and *Upshur* for the appellee; but one only was decided by the court.

A decree was rendered, on the 2d day of September 1801, by the County Court of Accomack, in favour of *Cropper* against *West*, from which the latter appealed to the late High Court of Chancery. The suit was, according to the law, transferred to the Superior Court for the Williamsburg District; and, on the 21st of April 1803, "*the appellant being solemnly called and not appearing*," his appeal was ordered to be dismissed.

Afterwards, on the 12th of March 1804, he made oath, "that he did not know that his suit with *Cropper* was removed from Richmond to Williamsburg, until the 15th or 16th day of last October, at which time, residing above Accomack Court-house, he had not even heard of any alteration in the Court of Chancery; that having employed Mr. *John Wick-*

1. After regularly dismissing an appeal for want of prosecution, the Appellate Court cannot re-instate the same at a subsequent term, without a rule having been made upon, or due notice given to, the adverse party to appear and contest the motion.

☞ See the 9th rule of Practice in the Superior court of Chancery for the Richmond District. 1 *H.* & *M.* VI.