# REPORTS

OF

# CASES

ARGUED AND DETERMINED

IN THE

# COURT OF APPEALS

OF

# VIRGINIA.

BY

*BUSHROD WASHINGTON.*

VOL. II.

*RICHMOND:*
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# To The PUBLIC.

THE caſe of *Maze* and *Hamilton*, with one other, I had intended to publiſh in an appendix to this volume. But the manuſcript having been unfortunately depoſited in a houſe which was lately conſumed by fire. I have great reaſon to apprehend that it was either burnt, or by ſome other means deſtroyed.

| PAGE. | LINE. | |
|---|---|---|
| 11 | 41 | *For* hinder *read* hinders. |
| 54 | 26 | *Inſert* by *before the words* the owner. |
| 66 | 4 | *Strike out the comma after* mother *and put a period.* |
| — | 12 | *Strike out the ſemicolon after* it *and put a comma.* |
| 68 | 5 | *For* empowed *read* empowered. |
| 69 | 36 | *For* 1 *read* 3. |
| 70 | 17 | *For* appellant *read* appellee. |
| 71 | 2 & 3 | *For* appellant *read* appellee. |
| 87 | 8 | *After* teſtimony *inſert* of. |
| 98 | 17 | *After* regarded *inſert* it. |
| 99 | 31 | *After* rule, *ſtrike out the mark of interrogation and put a period.* |
| 106 | 12 | *For* lands *read* land. |
| 122 | 44 | *For* forfeiled *read* forfeited. |
| 139 | 7 & 14 | *For* ſecurity *read* ſurety. |
| 140 | 4 | *For* principal *read* plinciple. |
| 163 | 32 | *Before* ſuperior *read* the. |
| 182 | 21 | *For* laws *read* law. |
| 206 | 4 | *After* it *inſert* to. |
| — | 21 | *For* principal *read* principle. |
| 209 | 14 | *For* determination *read* termination. |
| 212 | 11 | *After* but *inſert* where. |
| 224 | 37 | *After* idea *put a ſemicolon.* |
| 225 | 40 | *After* that *inſert* of. |
| 227 | 3 | *Strike out* not. |
| — | 34 | *After* endorſer, *ſtrike out a period and put a comma, after* 443 *ſtrike out the comma and put a period.* |
| 242 | 14 | *Strike out the ſemicolon after* fault. |
| 243 | 24 | *After* not *inſert* an. |
| 244 | 41 | *Strike out the ſemicolon after* declarations. |
| 249 | 2 | *For* is *read* as. |
| 255 | 10 | *For* prices *read* price. |
| — | 12 | *After* Johnſon, *ſtrike out the ſemicolon and put a comma.* |
| 261 | 19 | *Strike out the comma after the word* Stockdell, *and put a period.* |
| 263 | 37 | *For* law *read* all. |
| 266 | 25 | *For* points *read* point. |
| 270 | 27 | *Strike out the comma & put a period after the word* plea. |
| 278 | 9 | *For* 2 *read* 1. |
| 288 | 40 | *For* ſurvices *read* ſervices. |
| 289 | 1 | *For* ſtronger *read* ſtrong. |
| — | 14 | *For* centinental *read* continental. |

39 *For*

| Page | Line | |
|---|---|---|
| 289 | 39 | *For* colluſion *read* colliſion. |
| 292 | 22 | *For* deciſſion *read* deciſion. |
| —— | 30 | *Strike out* of *after the word General.* |
| —— | 31 | *For* Hooker *read* Hocker. |
| 293 | 19 | *After the word* intended *inſert* ) |
| —— | 21 | *For* legal *read* regal. |
| 295 | 23 | *After* Carolina, *put a comma inſtead of a ſemicolon, and ſtrike out the ſemicolon after the word* loci. |
| —— | 38 | *For* deſribed *read* deſcribed. |
| 296 | 8 | *Strike out the comma after* bills. |
| —— | 35 | *For* there *read* theſe. |
| 300 | 11 | *For* legal *read* regal. |
| 301 | 26 | *After* damages, *put a period.* |
| 302 | 8 | *For* is due *read* iſſue. |
| —— | 22 | *After* verdict *inſert* ought. |

Judgment reverſed with coſts, and entered for 1460001bs of tobacco, the debt in the declaration mentioned, and the coſts of the appellee in the Diſtrict Court expended to the time of entering the firſt judgment, but to be diſcharged by the payment of 49,085 ½ lbs of ſound merchantable tobacco inſpected either at *Frederickſburg*, *Falmouth*, *Port Royal or Hobſ hole* warehouſes with intereſt &c. and the coſts of the firſt judgment.

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## HARRISON Executor of MINGE;

*againſt*

## Margaret Field Executrix of James Field.

THIS was an appeal from the High Court of Chancery. The caſe was.—The teſtator of the appellee having loaned to *William Claiborne* a ſum of money, he, together with *Minge* as his ſurety executed a *joint bond* to the teſtator for payment thereof. The bill ſtates, that the teſtator of the appellee did not diſcover until after the death of *Minge*, (who was ſurvived by *Claiborne*) that the bond was *joint* inſtead of *joint and ſeveral*. That *Claiborne* was at that time and is now inſolvent; that the loan was made entirely on the credit of *Minge*, and that the bond was executed at a time when *Field* was not preſent. The object of the bill was to recover the debt from the executor of *Minge*.

The apellant demurred to the relief ſought, and aſſigned as cauſe thereof, that by the appellees own ſhewing, the bond was joint, and that *Minge* died in the lifetime of the other obligor. He alſo anſwered, aſſerting that *Claiborne* was in good circumſtances when the loan was made; and avers that he neither knows nor believes that the loan was made on the credit of *Minge*, or that the bond was made a joint one by miſtake or fraud.

The demurrer coming on by conſent to be argued was overruled, and commiſſions for taking depoſitions were awarded. But the cauſe being brought on during the ſame term for a hearing upon the bill, anſwer, and bond, a decree was pronounced that the appellant out of the eſtate of *Minge* in his hands to be adminiſtered ſhould pay to the appellee, the principal money due by the bond (reduced according to the ſcale of depreciation) with intereſt and coſts. From

From this decree *Harrison* appealed.

COPLAND for the appellant. The appellee having lost her remedy at law, a Court of Equity can upon no principle revive the duty, unless the bond were made joint by fraud, mistake or the like. If a Court of Equity can do this, it can supply the want of a seal, or bind heirs tho' not named in a deed; in short I know not what the omnipotence of that court may not do. Except cases, in which trust, accident or fraud are mingled, a Court of Equity cannot change the settled principles of law.

STARK for the appellee. The relief afforded by the Chancellor in this case, is founded upon well established principles which prevail in Courts of Equity. Though the *remedy* be gone, the *duty* in conscience still exists, and a Court of Equity will look back to the contract which preceded the evidence of it, and give it validity. The moral obligation to pay, cannot be done away by any accident destroying the evidence of that obligation, or which discharges the party from the *legal remedy* against him. The claim of a *surety* to be freed from this relief is not well founded, since in all cases the loan is made, or will be presumed to have been made upon the faith and credit of the surety. Questions of this sort in the courts of England seldom occur, since almost all bonds in that country are accompanied with letters of attorney to confess judgment, and disputes like the present are never heard of, but when applications are made to correct irregularities in entering up the judgments. The bill states that the bond was drawn by *Claiborne*, in the absence of *Field*, and this is not denied in the answer. The case of *Acton* and *Peirce* 2 *Vern.* 480, affords an instance where a Court of Equity will grant relief, tho' the remedy is gone at law. In this case, it was even afforded against an *heir* who was not bound at law. The case of *Simpson* and *Vaughan* 2 *Atk.* 32, seems to be in point, and it establishes the principle I contend for, namely, that the court consider the *contract* as distinct from the *evidence of it*. In that case, a joint bond was given which does not appear to have been so made by fraud, or accident, and yet the executor of the deceased obligor was bound. The Chancellor presumed the bond was drawn by an unskilful hand; in this country it is notorious that they are generally drawn by such persons. *Bishop* and *Church* 2 *Vez.* 101, tho' it differs from the present case in one circumstance viz. that the obligatory part is *joint*, and the condition *joint and several*, yet it establishes the principle laid down in *Simpson* and *Vaughan*. *Probart* and *Clifford*, cited in 2 *Vez.* 102, is also a strong case.

We know that equity will set up a lost bond even against a surety, tho' the remedy be gone at law. So if A and B were bound in a bond to C, who should make the wife of one of the obligors his executrix, this would at law be a release to both obligors, yet a Court of Equity would relieve. But if I am wrong upon this point, the court will, if the decree be reversed, send back the cause, that the parties may have liberty to take depositions, as the case was heard at the same term when the demurrer was over-ruled, so that the plaintiff below had not an opportunity to prove such facts as might give a different complexion to his case.

COPLAND in reply. It is not true that a Court of Equity will afford relief in cases where the remedy is gone at law, merely because there exists a moral obligation on the party to pay. Thus, where there is a deficiency of personal estate, that court, no more than a court of law can subject the real estate to the payment of a debt however justly due. The case of *Acton* and *Peirce* is unlike the present, because in that, the intention of the parties and the mistake in the deed were apparent. *Simpson* and *Vaughan* is bottomed upon *the loan having been made to both obligors*, and consequently, the contract, which preceded the execution of the bond, was equally obligatory on both, and imposed on both a moral obligation to pay. This is the very ground of the Chancellor's opinion. In that case, the survivor became a bankrupt; and tho' in this case it is charged in the bill, that *Claiborne* was at the time insolvent, or afterwards became so, the fact is neither admitted in the answer, nor established by proof. The case of *Heard* and *Stamford*, *Forrest* 174, is in principle very much like the present.

As to Mr. *Stark's* expectation, that if this court should reverse the decree, the cause will be sent back for depositions to be taken, it need only be remarked that the hearing of the cause without depositions was by consentof parties.

ROANE, J.—In this case there is no evidence that the bond was made a joint bond by fraud or mistake, or if any such did exist, that *Minge* was privy to the same. The chance of survivorship was equal, and *Minge* was willing to submit to the legal consequences of such a bond. There may possibly exist reasons with an obligor for prefering a joint, to a joint and several bond, and it is impossible for this court to decide whether such reasons did, or did not prevail with *Minge*. The law is laid down in the case of *Towers* and *Moor*, 2 *Vern.* 99, that in a joint bond, the duty survives against the surviving obligor.

The

The case of *Simpson* and *Vaughan* goes expressly upon *the lending being to both of the obligors.* A moral obligation therefore was imposed upon both by the contract, to pay the debt, and if by the form in which the bond was drawn the remedy was gone at law, the court thought it equitable to relate back to the moral obligation which was equally strong on both of the obligors. But in this case, the security was under no moral obligation, not having been a borrower of the money, and was only bound *by the bond itself*; no antecedent contract therefore subsisted between him and *Field* whereon to found an equity for the extraordinary interposition of the Court of Chancery. The case of *Bishop* and *Church* also goes upon the lending being to both of the obligors. I will not say that there may not be circumstances which would subject even a security to the relief now sought for, but I am clear that the present case is totally destitute of them, and therefore I am of opinion that the decree is erroneous.

FLEMING, J.—In the cases of *Simpson* and *Vaughan*, and *Bishop* and *Church*, the obligors were partners in the business; both had the benefit of the money lent, and the survivor became bankrupt. A stronger case could not have occurred to warrant the equitable relief granted by the court. In the latter case, the Chancellor postponed a decision of the cause, that enquiry might be made into the neglect suggested against the obligee, and it is highly probable that if it had been proved, he would have dismissed the bill. In this case *Field*, if he could upon any ground have been entitled to the relief he now asks for, would come into a Court of Equity with a very bad grace, after lying by so long as he has done, until *Claiborne*, the principal, has been reduced in his circumstances, and as the answer suggests is now unable to pay. Upon the whole, I am of opinion, that *Minge* was a mere surety, not bound at all in conscience, and his executor being exonerated at law ought not to be charged in equity.

THE PRESIDENT. The case of *Aeon* and *Peirce* in principle has no application to the present. A husband upon his marriage agreed to leave his wife £1000 if she survived him; a bond for this purpose was drawn by an unskilful hand, and was made *payable to the wife*, with condition to leave her the £1000. In this case, the husband was by his agreement, and for a consideration deemed valuable in law, a debtor to the wife, and under a moral obligation to pay. Tho' the remedy was gone

at

at law by the intermarriage, and that, in consequence of the unskilfulness of the drafts-man, yet the husband's conscience was bound, and therefore the court very properly considered him as a trustee for the wife. The principal contended for by Mr. *Stark*, that a loan creates a moral obligation to pay, which being a duty antecedent to, and independant of the bond, cannot be discharged by the loss of the bond, or by other accident is true, *as to the borrower*, and the cases of *Simpson* and *Vaughan*, and *Bishop* and *Church* are decided upon this ground only.

The Chancellor indeed in *Simpson* and *Vaughan* is made to say, that no stress was laid upon the circumstance of the obligors being partners. But this is certainly a mistake of the reporter, for in the case of *Bishop* and *Church*, the counsel, speaking of *Simpson* and *Vaughan* says, "the consideration your lordship "went upon, was, that it was a sum lent to both, of which "both had the advantage, and a debt arose against both from the "nature of the transaction." In this assertion he is not contradicted by the Chancellor, which would seem to prove that the lending and borrowing was the ground upon which the decision in that case was bottomed. The principle then of these cases has no application to the present. The surety received no benefit from the loan; he was bound by no contract express or implied, antecedent to the bond; he was under no moral obligation to pay, and of course equity would not bind him farther than he was bound at law.

It is a maxim, that where equity is equal, he shall prevail who has the law in his favor, and the cases cited in Francis's maxims of equity p. 71, as an illustration of the principle are very strong indeed, to shew that a surety has equal equity with the obligee, and being discharged at law, equity will not charge him.

It is true a Court of Equity will set up a lost bond against a surety, but the reason is, that the surety is not discharged by the loss of the bond, and the court only relieves against the accident by setting up the *evidence* of the debt.

It was argued that it did not appear that *Minge* was a surety. This is a fact not to be disputed, since the bill itself so states it. Bonds are sometimes so drawn that it is impossible to distinguish the surety from the real debtor, but when distinguished by proof, the uncertainty arising from the face of the instrument can make no difference in the principle. Since the act of Assembly which gives to sureties a summary remedy against their principals, it might be well to distinguish in the bond, the one from the other.

It

It was contended that the demurrer admitted the truth of the allegations in the bill. It is true that a demurrer without an anſwer does admit the facts charged on the other ſide, but if the defendant alſo anſwers and denies the allegations of the bill, as the defendant has done in this caſe, it cannot be ſaid that they are acknowledged. When the demurrer was overruled, general commiſſions for taking depoſitions were awarded, of which the plaintiff might have availed himſelf if he had wiſhed to eſtabliſh any facts important to his cauſe. But inſtead of this, he appears to have conſented to bring on the cauſe for a hearing without teſtimony, and therefore there is no ground for giving him an opportunity now of taking depoſitions.

THE OPINION of the COURT is, "that the teſtator *David Minge* having been neither the borrower, nor the uſer of "the money lent to, and uſed by *Claiborne*, but a ſecurity only, "ought not in equity to be further or otherwiſe bound than he "was bound by the contract at law; and no fraud or miſtake "appearing to have occurred in the writing of the bond, "it is to be conſidered as a joint obligation and ſubject to the "legal conſequence of *Minge* and his repreſentatives being diſ-"charged by the death of him in the life time of *Claiborne*, "and that the ſaid decree is erroneous."

Decree reverſed with coſts and the bill diſmiſſed.

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## COLE,

*againſt*

## SCOT.

THE only queſtion in this cauſe was, whether the vendor of land ſold and in poſſeſſion of the vendee, but not conveyed, has a lien on it, ſo as to ſecure the payment of the purchaſe money. In this caſe, the Chancellor diſmiſſed the plaintiff's bill which was brought to ſubject the land to the payment of the money for which it had been ſold.

STARK for the appellant. I conſider this queſtion as compleatly ſettled by the caſes of *Chapman vs Tanner*, 1 *Vern.* 267. *Pollexfen* and *Moore*, 3 *Atk.* 272—*Walker* and *Preſwick*, 2 *Vez.* 622—*Cator* and *Earl of Pembroke*, 1 *Brow. Ch. Rep.* 301—*Blackburn* and *Gregſon*, *Ib.* 420. *In Hanſon and King's heirs*,

in