REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR THE RICHMOND DISTRICT.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)

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1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. The second edition, revised and corrected by the "authors. Volume I. By William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie-"tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

" and *Martin Key*, the defendant to the original bill, being " dead; by which the original suit abated as to him; that " his heirs and devisees, and all other persons holding, " claiming, or in any manner interested under him, in the " lands mentioned in the original bill ought to have been " made parties defendants to the bill of revivor filed in this " cause, before a final decree was pronounced therein; and, " that not having been done, this Court, without giving any " opinion on the merits of the said cause, considers the de- " cree as erroneous," &c. Decree reversed, and cause remitted to the Superior Court of Chancery for the *Richmond* District, with leave to the appellee to amend the bill of revivor, and add proper parties, and for further proceedings, &c.

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*Nicholas's Executors *against* Tyler.

Friday, June 19.

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced by the late Chancellor.

A bond given in the paper money times is not subject to the scale of depreciation, if it can be shewn by circumstances, though not appearing on its face, that the debt out of which it grew was originally payable in specie.

The case was this. Before the revolution, certain property of *Philip Johnson* was vested by an act of Assembly in trustees, of whom *Robert Carter Nicholas*, the testator of the appellants was one, for the purpose of being sold; and after certain specific appropriations, the residue of the money arising from the sales was to be lent out on such security as the General Court should direct. The trustees were authorised to sell on credit. In *November*, 1771, *Robert C. Nicholas*, as the principal and acting trustee, sold part of the property (consisting of houses and lots in *Williamsburg*) to *Mann Page*, for 803*l.* and took his bond for that sum. *Page* sold a part of this same property to *John Hatley Norton*, for 600*l.* at what precise time does not clearly appear; but on the 6th of *March*, 1777, *Norton*, with *Robert C. Nicholas* his surety, executed a bond to two other of *Johnson's* trustees, for the said sum of 600*l.* and, in an account rendered, on the 2d of *April*, 1778, by *Robert C. Nicholas*, between "*Mann* " *Page*" and " *Philip Johnson's* trustees," *Page* is credited " by *John H. Norton*, for his bond of 600*l.*" and by " ditto " for two years interest on it." On the debit side of the account, *Page* is charged with his bond of 803*l.* in *November*, 1771; and annually, in *January*, 1773, 1774 and 1775, he is charged with interest on the whole amount; but, in 1776 and 1777, he is charged with interest on 203*l.* only. At the closing of the account in 1778, he is charged with

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"two years interest on 600*l.* the sum Mr. *Norton* was to "pay;" but he is, at the same time, credited by *John H. Norton* for his bond of 600*l.* and for two years interest on it as above mentioned.

In a former suit, brought for the purpose of settling the above trust, and of determining the proportion to which each claimant was entitled, in which suit the representatives of *Philip Johnson* and the executors of *Robert Carter Nicholas* were parties, it was decreed that this bond executed by *John H. Norton* and *Robert Carter Nicholas* should be assigned to *Tyler*, the present appellee. *Nicholas's* executors and *Tyler*, differing in opinion, as to the mode in which this bond should be settled, whether it was subject to the
* 333 scale of depreciation or not, the executors *gave their own bond to *Tyler* on the 11th of *February*, 1801, for the full amount of principal and interest; but, by a stipulation in writing endorsed thereon, they reserved the right to discuss the question whether the bond in which their testator was surety for *Norton*, and which was the foundation of this bond, was liable to the scale of 1777; and it was further stipulated that *Tyler* should be at liberty to avail himself of any facts (not set forth in the bond of *John H. Norton* and *Robert Carter Nicholas*, to *Johnson's* trustees) which, according to law and the practice of the Courts, might affect the decision.

The Chancellor was of opinion, that the bond of *Norton* and *Nicholas*, though executed in 1777, was not, from the peculiar circumstances of the case, liable to the scale of depreciation; and decreed accordingly.

The *Attorney General*, for the appellants, after stating the case, observed, that the only question was, whether the bond executed by *Norton* and *Robert Carter Nicholas*, the testator of the appellants, in 1777, was liable to the scale of depreciation; and, if liable, at what time the scale should be applied. He contended that there were no circumstances in this case which exempted the bond from the general operation of the scale as of the date when it was given. The presumption is, that *Page* and *Norton* were in treaty for the property some time before the bond was executed; that *Norton* was to have it, if he could obtain a credit with the trustees for the amount of the purchase money; but that, until the credit was actually obtained, he was not entitled to it. This appears, from the date of the bond, to have been done in 1777; of course, the credit is to be entered under that date. It is true that, in 1778, *Page* is credited by two years interest paid by

Norton; but the probability is, that *Norton*, having previously made the contract with *Page*, advanced the interest from the time when it was first entered into.

It will not be denied that the trustees had power to sell on credit; and that *R. C. Nicholas* had full powers from the other trustees to act. If a bond as good as *Page's* were offered to him, he had a right to take it. What difference is there between receiving the money and loaning it out, and taking a bond bearing interest? The effect would be the same. If he had taken a bond for money loaned, there would have been no question but that it would have been liable to the scale. *Robert C. Nicholas* was substantially performing what was required by the act of Assembly. *It made no difference that he was a party to the bond, because the security was not lessened. It has not been, nor can it be alleged, that he was not perfectly solvent. * 334

The decree of the Chancellor, by which this bond is directed to be assigned to the appellee, recognizes it as a proper transaction of the trustees. It may be said that it grew out of another which existed anterior to the scale of depreciation. But, if the power of the trustees to loan the money be admitted, then we must look at the date of the bond for the time when the scale is to be applied. Suppose the suit had been brought against the executors of *John H. Norton*, could it be said that the debt would not have been subject to the operation of the scale? If this would have been the case as to his executors, the same rule ought to be observed with respect to his security. Suppose the estate of *Robert C. Nicholas* should be compelled to pay the debt, as the security of *John H. Norton*, could his executors recover more than according to the scale?

The decree of the Chancellor is founded on a very extraordinary exposition of the statute. The law lays it down as a general rule, that the scale is to be applied as of the date of the contract; but the 5th section authorises the Court to judge from the whole circumstances of the case, whether a determination according to the scale would be just or not.(a) The Chancellor completely reverses the act of Assembly, and makes the exception the general rule, and the general rule the exception. He says that no contract shall be intended to fall within the operation of the scale, unless it shall appear that the parties so contemplated: thus throwing it on the debtor to prove that the scale was not intended to operate; whereas the statute expressly says that, except where the payment was to be

(a) See *Laws of Virg. Chan. Rev.* 147.

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made in specific articles, or the operation of the scale, from all the circumstances, would be unjust, it shall be applied. In the case of *Ambler* v. *Wild*,(a) it is said by the President, in delivering the opinion of the Court, (p. 42.) that "it was not the intention of the Legislature to let "men loose from their contracts, but to allow a departure "from the established scale, in cases where it was neces- "sary, in order to meet the real contract of the parties."— *Bogle*, &c. v. *Vowles*,(b) is analogous to this case. There a party was indebted in 1776, and in 1777 executed a bond for the amount. Yet the Court would not let in evidence to prove the origin of the transaction. In *Call* v. *Ruffin*,(c) the *penalty of a guardian's bond was scaled. The Chancellor, in the case before us, goes upon the supposition that it was a specie debt due from *Page*. But this is mere supposition. It is true, the contract was entered into before the scale of depreciation. But, if a man owed a debt before the scale, he had a right to pay it in paper money; and if a party gave a new bond, it was still liable to the scale. This circumstance, on which the Chancellor seems to have relied, is stated by this Court to have no influence.(d) Notwithstanding the hardships complained of in all these cases, yet the scale has been invariably applied, unless it appeared that the parties contemplated a specie transaction.

(a) 2 *Wash.* 36.

(b) 1 *Call*, 244.

(c) 1 *Call*, 334.

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(d) See *Wilson* and *M'Rae* v. *Keeling*, 1 *Wash.* 194. *Taliaferro* v. *Minor*, 1 *Call*, 524. and *Walker*, &c. v. *Walker*, 2 *Wash.* 195.

Call, for the appellee. If the transactions which occurred in this case had appeared upon the face of the bond itself, there could have been no doubt on the subject. So, if it can be shewn from the circumstances, that the debt out of which the bond grew was originally payable in specie, it is equally clear that it is not subject to the scale of depreciation. Cases innumerable have been decided on this point. They began with *Pleasants* v. *Bibb*,(e) and ended with *The Commonwealth* v. *Walker's ex'r*.(f) The case of *The Commonwealth* v. *Walker's ex'r* is very peculiar. There the money was paid into the treasury in 1777 and 1778; and the certificate of those payments carried to the Governor in 1779, who gave a different certificate for the amount, as for so much paid in discharge of a *British* debt. A new document was given by the Governor, and the old document was no longer in the power of *Walker*, or his executor. It was then argued, as it is now, that the date of the last instrument should alone be regarded as the time of the contract. But the Court decided that the scale was to be applied as of the date of the payments into the

(e) 1 *Wash.* 8.

(f) 1 *Hening* and *Munford*, 144.

treasury, not of the Governor's receipt for the certificates of those payments.

It is taken for granted, that, if it had appeared on the face of the instrument that this debt was originally payable in specie, there would have been no pretext for applying the scale to it. This equally appears from the proceedings in the cause. The answer of the appellants has relieved us from all difficulty with regard to the testimony out of the papers. It confesses the contract between *Page* and *Norton*, and the consequent transfer of bonds. As the defendants *did not choose to rely on the estoppel created by the bond of *Norton* and *Robert Carter Nicholas* to the trustees of *Johnson*, (if, indeed, it would have availed them,) but submitted the whole case to the Court; we are only to inquire what that case was. The contract between *Page* and *Norton* was entered into in 1776; in consequence of which, two years' interest from that date was paid by *Norton* to *Robert Carter Nicholas;* and, in 1777, a bond was given by *Norton*, with the same *R. C. Nicholas* his security, for the amount of the sum which he agreed to pay on account of *Page*, to *Johnson's* trustees, of whom it is admitted *Nicholas* was the acting one. It was acknowledged on all hands to be a specie contract, which was only meant to be secured by a bond. The agreement between the parties to this suit, endorsed on the bond, expressly enabled the appellee to insist on any circumstance which belonged to the case. If, then, the parties were to inquire into the nature of the contract, it would at once be perceived that it was a contract made in 1776, which was clearly for specie.

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But there are other points of view in which this case may be considered, which make it equally clear that the scale ought not to be applied. In the account exhibited by the testator of the appellants, it appears that he contemplated this as the debt of *Norton*, in 1776; because it is brought into the account and interest charged as of that date. Shall a trustee be allowed to change the nature of a contract in which he is a party? *Robert Carter Nicholas* (knowing all the circumstances) ought either to have taken the bond from *Norton* in lieu of *Page's*, as of the date of 1776, or recited the transfer on the face of the bond itself. He, as trustee, has surely been guilty of a fault; and if a prejudice has been produced, it ought to fall on him alone.

In another point of view, this transaction affects him as a trustee. This was a voluntary act on his part. When a trustee receives *money* on account of the trust estate, it is a

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different thing. The debtor has a right to make a tender of the money due; and the trustee, in receiving it, is merely a passive instrument. But in this case, *R. C. Nicholas* was an active agent. Instead of receiving *money* from *Norton*, he accepted a bond, in which he himself became a party, and exonerated *Page*, who was clearly bound to pay specie. It was, in fact, a continuation of the old contract.

This case falls completely within the reason of the case of *Skipwith* v. *Clinch*.(a) There a lease was entered *into in 1777, which not being recorded, another lease, with the same covenants, was executed in 1778. It was decided that the rents should be settled by the scale of 1777. The present case is to be considered as if the second bond was only a guarantee of the old debt, and the trustee himself a security. It is the same thing in a Court of Equity, as if the new bond had recited the old one, and *Nicholas's* guaranty of the payment of it.

(a) 2 *Call*, 253.

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The case of *Bogle* &c. v. *Vowles*,(b) on which the *Attorney-General* seems principally to rely, has no resemblance to this. In that case there were no circumstances to guide the judgment of the Court; and it might be presumed that the parties contemplated a depreciation, and made provision for it in the bond. But, in this case, no such idea can be entertained. The nature of the transaction shews that nothing like depreciation was contemplated.

(b) 1 *Call*. 244.

We are entitled to the relief sought for, from *Nicholas's* executors, on the ground of the fiduciary character of their testator. His estate is liable for the full amount of the old bond, because he improperly converted it into the new one.

Botts, in reply. It will be admitted by the counsel on the other side, that, from the face of the bond, if nothing else appears, the scale of depreciation ought to be applied. This being the general rule, if there be any ground for an exception, it behoves the appellee to bring his case within it. The date of the bond is explicit. The ground taken by the counsel for the appellee seems to resolve itself into this idea; that *Robert Carter Nicholas* being a trustee ought not to have taken *Norton's* bond with himself security in part payment of *Page's* specie debt. It would seem, however, from the record, that the bond was not taken by *Nicholas*, but by the other gentlemen who were associated with him in the trust. No blame can therefore attach to *Nicholas*. The trustees might undoubtedly have received the money; or, if *Norton* had become indebted to *Page*, in consequence

of the purchase of any property, he might have paid the money to *Nicholas*. So, after the execution of the bond by *Norton* and *Nicholas* to the other trustees, the money might have been paid; and, as it respected *Nicholas*, he being both a trustee and a security in the bond, a payment by him would have been merely a transfer of the money from the right hand to the left. Such idle formality could not have been expected.

*Had the money been paid in any form, it must either have been lent out or retained in the hands of the trustees. Had it been retained, it would have depreciated to nothing. No fault could have been found with *Nicholas* for lending it out, if it had been paid to him by *Page*. The caution of the Legislature, in directing that the money should be lent out upon such security as the General Court should approve, related only to the solvency of the obligors. If there existed no Court at the time the payments should be made, and the trustees nevertheless took upon themselves to make a loan without the intervention of any Court, all that they could be called on to do, would be to guaranty the ultimate payment of the debt then legally contracted. To that extent there would be no question as to the liability of *Nicholas*. * 338

It was impossible to foresee the future events which took place. It was impossible to foresee the depreciation of the paper money; nor could it have been supposed that another bond with one of the trustees as security was not better than the bond of *Page* himself.

Surely, *Robert Carter Nicholas* having acted fairly as a trustee, ought to be protected in the same manner as any other innocent security, who could not have been liable beyond the scale at the date of the bond, although it might have been given for a preexisting debt: but, in this case, there was not sufficient evidence that the contract between *Page* and *Norton* was consummated till 1777; and therefore, the scale should be applied as of that date.

Randolph, on the same side, observed, that he understood all the cases decided by this Court to go upon the principle, that, if there were a general bond for the payment of money, and nothing on the face of it leading to an anterior date of the transaction, no evidence should be received to shew it. Nor was the case of *Skipwith* v. *Clinch* an exception. It is true the Court, in that case, carried back the transaction to 1776, although the deed on which the suit was brought was dated in 1778. But it was on the ground that the subsequent deed was a mere transcript

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of the former, and had been executed because the first had not been recorded. To be within the spirit of the case of *Skipwith* v. *Clinch*, this should have been a new bond executed by *Page*, with *Nicholas* his security.

But it is supposed by Mr. *Call* that the agreement of the appellants endorsed on their bond operates as an estoppel.

* 339 *This cannot be inferred. All that they meant was, that the case should be decided, according to *law*.

If *Norton* alone had been before the Court, there could have been no doubt: and what can make a difference as to *Nicholas*, a party in the same bond? If such a difference is to be made, it must be on the ground that some improper act is imputed to *Nicholas*, in his character of trustee. But how is he justly chargeable with any impropriety of conduct? Is there any difference between *Page's* paying the money, and doing what he did? He paid *value*. And the question is, whether *Nicholas* shall be liable as a trustee, when he did not dream, at the time, of depreciation?

What a phenomenon in jurisprudence would it be, to say that *Norton* would not have the benefit of the scale, and yet that *Nicholas's* executors (if he had paid the money as security for *Norton*) could only recover of *him* by the scale!

A trustee can never be liable to a penalty unless it appears that he meditated a fraud. In this case, *Nicholas* (having acted fairly and honestly, and under the advice of the other trustees) ought to be protected.

Curia advisare vult.

Monday, June 22. The decree of the Chancellor was unanimously affirmed: the Court considering *Nicholas* to stand in the same situation as *Page*, and liable to pay the full amount of the bond without depreciation, in the same manner as *Page* would have been bound.

Meek and others *against* Baine.

Saturday, June 20.

Where two terms of this Court have elapsed, since the appeal, and before the record is brought up, the administrator of the appellee may have the appeal dismissed, on motion, without resorting to a *scire facias*.

THE appellee obtained a judgment against the appellants, on a forthcoming bond, at the District Court, held at *Washington Court-House*, on the 4th of *October*, 1805: