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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) 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.

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PRICE AND OTHERS v. CAMPBELL.

Friday, November 15, 1799.

In order to constitute usury, both parties must be consenting to the unlawful interest; that is to say, the lender to ask, and the borrower to give.*

Therefore, if a bill of exchange is drawn upon an obscure man in Scotland, although the payee may expect it will be protested, yet if there was no agreement between him and the drawer that it should be protested, the transaction is not usurious. Accordant, *Call* v. *Scott*, 4 Call, 402.

There must be proof of a lending and borrowing, to constitute usury.

This was an appeal from a decree from the High Court of Chancery, where Campbell, as assignee of his father Robert Campbell, brought a bill, stating, that the said Robert Campbell purchased divers bills of exchange drawn by Carter Braxton on sundry persons in Britain, payable to the said Robert Campbell, to wit: one for £200 sterling, drawn [111] on ; one drawn on Edward Harford for £200 sterling; another on Robert Young for £1811 3s. 11d. sterling; another on Robert Cary & Co. for £400 sterling; amounting in the whole to £2611 3s. 11d. sterling; and as great part of Campbell's fortune, who was about to return to Great Britain, depended upon payment of the bills, and that drawn on Young was for so large a sum that a failure would have been ruinous, it was stipulated that the amount of it, in case of protest, should be ultimately secured in Virginia. That in pursuance of that stipulation, a deed was given by Braxton to the said Robert Campbell, for a tract of land called Broadneck, and another called Fosters, with sundry slaves, with proviso that if the bill for £1811 3s. 11d. should be protested, and Braxton

[* See *Smith et al.* v. *Beach*, 3 Day, 268; *Pollard* v. *Baylors et als.*, 6 Munf. 438: a case held to be one *not of usury*.

To constitute usury, there must be an intention to take more than legal interest. *Childers* v. *Deane*, 4 Rand. 406. For another case, held to be not of usury, see *Campbell* v. *Shields*, 6 Leigh 517. And for another, very like it, held to be one of usury, see *Toole* v. *Stephen* 4 Leigh, 581.

Other cases held usurious, —— *post*, 421; *Stribbling* v. *Bank of the Valley*, 5 Rand. 132; *Whitworth* v. *Adams*, 5 Rand. 333; *Smith* v. *Nicholas*, 8 Leigh, 330; *Raynolds* v. *Carter, adm'r, &c.*, 12 Leigh, 166; *Bank of Washington* v. *Arthur et al.*, 3 Gratt. 173; *Hopkins, &c.* v. *Koonce*, 6 Gratt. 387; *Bell, &c.* v. *Calhoun*, 8 Gratt. 22.

Other cases held *not* usurious: *Hansbrough* v. *Baylor*, 2 Mun. 36; *Bull* v. *Douglas*, 4 Mun. 303; *Pollard* v. *Baylors*, 6 Mun. 433; *Greenhow's adm'x* v. *Harris*, 6 Mun. 472; *Selby* v. *Morgan*, 3 Leigh, 577; *Steptoe's adm'rs* v. *Harvey's ex'ors*, 7 Leigh, 501; *Crump* v. *Nicholas*, 5 Leigh, 251; *State Bank of N. Carolina* v. *Cowan, &c.*, 8 Leigh, 238; *Parker* v. *Cousins*, 2 Gratt. 372; *Porterfield* v. *Coiner*, 4 Gratt. 55; *Law's ex'ors* v. *Sutherland, &c.*, 5 Gratt. 357.]

should afterwards pay the amount with interest, that the deed should be void. That the bill on Cary & Co. for £400, and that on Young for £1811 3s. 11d. were protested for non-payment; of which Braxton had notice. That he made some payments towards the same, reducing the balance to £1960 0s. 3d. sterling, as appears by an account made up, by two persons for that purpose chosen; who have subscribed their names to their award or report thereon. That the said Robert Campbell afterwards being dissatisfied with the security, and requiring other, Aylett and Brooke entered into an obligation in writing, as securities for whatever sum Braxton might then owe Campbell: That this obligation was by some accident destroyed, and that Aylett and Brooke, being informed thereof, afterwards gave a writing, acknowledging the former, and obliging themselves anew. That for reasons unknown to the plaintiff, Robert Page afterwards placed himself in Aylett's stead, by an endorsement on the said last named writing. That, the securities afterwards growing uneasy, Braxton, for discharging the debt and indemnifying the securities, gave a deed to Drury Ragsdale and George Braxton, for a tract of land in Halifax, two lots at West Point, and sixty slaves, in trust, to sell the same if necessary, for satisfying that and other debts, and indemnifying the securities aforesaid. That Braxton, for further securing Page, and for securing White, who was his security in a debt due Govan, gave another deed to Page and White for seventy-six negroes and other property in trust, to sell them, if necessary, for their indemnity. The bill therefore prays relief against Price, executor of Brooke, George Braxton, Drury Ragsdale, Carter Braxton, the administrator of White, and the other creditors stated in the first of the above mentioned deeds of indemnity; and that the lands, slaves, and property in the said trust deeds contained, might (except the lands released by Robert Campbell,) be sold for satisfaction of the plaintiff's claim.

The answer of Braxton states, that Robert Campbell, then of Virginia, was possessed of two bonds, the one for £1335 sterling, the other for £1200, liable to a deduction of £61. That the first he was not likely to receive for a long time, and the second was not to be paid till the estate of the obligor could raise it. That the defendant negotiated for those bonds, and purchased them, without recourse on Campbell. That this purchase was the only consideration for the bills. That Robert Campbell demanded interest at the rate of ten per cent. upon the loan of the two debts, and took the bills of exchange to legalize the transaction, if he could. That Young, the

drawee of the bill for £1811 3s. 11d., was a friend and relation of Campbell's in Scotland, a clergyman, not engaged in commercial business, and unknown to the defendant, who had never heard of him before; that the defendant does not recollect when he received notice of the protests. That Campbell, not content with the mortgage, made the defendant give the personal security mentioned in the bill; upon which he engaged to relinquish the mortgaged premises. After which the defendant sold the mortgaged lands and most of the slaves. That Campbell, in July, 1777, wrote a letter in which he declares the defendant is to pay 6 per cent. interest, from the expiration of the deed to that time; but, notwithstanding this, he afterwards stated his account at 10 per cent. That the settled account stated in the bill was not intended to be conclusive, but was done merely to ascertain the payments made by the defendant. Insists that the contract is usurious; and claims the benefit of the act of limitations. [113]

The answer of Price insists on the usury, and claims the benefit of the act of limitations; prays, that if his testator should be considered as liable, the mortgaged property may be first applied.

The commissioner reported, £2498 1s. 2½d. sterling, to be due in March, 1784; of which £1547 17s. 6d. to carry 10 per cent. interest until paid.

The suit abated as to Page, and was revived against his administrators; who insist on the usury and act of limitations, and suggest the uncertainty of assets.

The answer of George Braxton says, he never was in possession of the trust property.

The deposition of a witness says, that he heard Robert Campbell say, he had lent Braxton a large sum of money, but does not know whether it was in bonds or money; thinks, as well as he can recollect, that he has heard the said Robert Campbell say, the debt due him from Braxton was in bills of exchange, but does not know it was for the sake of obtaining 10 per cent. interest, although that was a mode much practised in those days of obtaining 10 per cent. interest. That he knows Broadneck and some slaves were mortgaged to Campbell; and believes it was on account of the said loan. Has understood that Campbell released part of the mortgaged premises, and took personal security. Being interrogated, says, that he is not positive, whether the debt was contracted by loan or otherwise. [114]

A second witness says, that he understood Campbell had let Braxton have the bonds, and that bills of exchange were given;

but knows not the terms as to either. That he understood a plantation was mortgaged to secure the debt. That Campbell soon after went to Scotland.

Two other depositions speak of taking slaves in execution; and the sales being forbid by White and Page.

There are among the papers the several exhibits spoken of in the bill and answer, to wit: the mortgage, the two deeds of indemnity, the second obligation of Aylett and Brooke, with Page's endorsement. Campbell's settled account, spoken of in the bill, charged Braxton with the two bonds, and credited the bills of exchange; but debited him anew with the bills, and credited the payments, leaving the alleged balance of £1960. 0s. 3d. In this settlement, the amount of the bonds at the time of the transaction, is made to be £2551. 2s. 11d. And the amount of the bills of exchange is made to be £2611. 3s. 11d. which makes a difference of £60. 1s. And this, the referees credit as a balance due to Braxton at the time of giving the bills; and the commissioner in his report charges it thus: "To balance overpaid at this date £60. 1s." There are several letters in the record between Braxton and Campbell, on the subject of payment; and particularly that spoken of in Braxton's answer: which appears to have been written after November, 1778, instead of July, 1777, as Braxton's answer supposes; wherein, after some remarks on the subject of a tender by Aylett, Campbell adds "to put an end to the most troublesome affair, ever man was concerned with, I now inform you that if you will bring the money to New Castle or to Hanover Town, the day of Mr. Jones's sale, will receive it, you [115] paying the six *per cent.* from the expiration of the deed, the above is a just and true state of the affair between you and your humble servant."

There is another letter, nearly in the same words, not directed to any person, or dated; to which there is a postscript in these words: "Instead of bringing or sending the money you sent Mr. Clark for my answer, which was, that as you had not complied in bringing or sending the money to the time, but desired I might call or send some person in my stead for it, I was now of another opinion, for that as I intended home first opportunity, in that case this currency could be of no use to me, but would take it in different payments, two, three or four years hence—interest, to which no answer."

In a letter from Campbell to Braxton, dated in July, '67, which was prior to the assignment of the bonds, in July, 1768, Campbell says, "Being obliged to separate my bonds, thought myself under an obligation in consequence of what

had passed between us on that subject, to reserve one until your return; and shall want to know by the bearer if I am to dispose of it or not."

In another, of the 6th of August, '67, he says, "I suppose you know by this time that it is Major Gaines' bond, I have still by me."

In another of the 29th October, '67, he says, "I shall send down by Mr. Sample, Major Gaines' bond, and if you can get the late speaker's administrators in the humor to discount, I am willing to transfer the same, though am well satisfied that money cannot be better secured."

In another of the 17th of February, '68, addressed to Carter Braxton, esq., Williamsburg, he says, "I received yours last night, which shall fully answer in a few days, probably call on you to have the affairs finished one way or other, I do not want any advance so much as the [116] money, and that in good bills, or could have disposed of the bonds without asking consent of any person before this time.

"Should you hear of my purchasing Boss's land, which I hope will go no further, until that affair is over and the old informer cast up, it shall in no ways affect your bargain, as to the gentleman not making himself liable to me on your account, I knew that some time ago, but there are many I should prefer to him on sundry accounts, the exchange falling will certainly be an advantage to you, and whether my notions may be chimerically founded or not, time only can tell, though I think and wish should we agree that you may come off with paying 2½ *per cent.* instead of I have had no account from your quarter for a long time, nor can I tell whether London is in being or not. I am, sir, your humble servant,

ROBERT CAMPBELL.

February 7, '68.

"You may depend on the affair transpiring from.

R. C."

The Court of Chancery decreed payment of £2,498. 1s. 2d. *currency*,* with interest at the rate of 10 *per cent.* to the time of pronouncing the decree, and five *per cent.* interest on both from the time of the decree until payment, and in default

[* The decree should have been for *sterling* money. This mistake was not discovered until the Chancellor's decree had been confirmed by the Court of Appeals, and certified to the Chancery Court. The error was so palpable, that the Chancellor corrected it, on motion, (which afterwards took the form of a bill of review;) from which an appeal was taken, and the Court of Appeals were of opinion, that after a decree of the Court of Chancery has been affirmed by the Court of Appeals, a bill of review cannot be received, on the ground of any error in the decree, which is apparent on the face of the record. *Campbell* v. *Price* et al. 3 Munf. 227. And see *White* v. *Atkinson*, post, p. 376.]

thereof, that the mortgaged slaves should be sold for satisfaction, and if they should prove insufficient, that the administrator of Brooke, and the executors of Page, should out of the estates of their decedents pay the balance; and dismissed the bill without costs as to the other defendants. From which decree, Braxton and the other defendants against whom the decree for payment was made, appealed to this Court.

WARDEN and MARSHALL, for the appellants, contended:

[117] 1. That the contract was usurious; for, the real substance of the agreement was a loan, and the bills were but a mere device to take the case out of the statute. Every circumstance shews that it was clearly understood betwixt the parties, that the bills would come back protested. That on Young, was not drawn on a merchant of character, trading to America, and therefore likely to have funds in his hands to answer it; but, upon an obscure Clergyman, not even inhabiting in a trading town, but residing in the interior of Scotland, and not shewn to have had any connexion whatever with Braxton. The bills were given for bonds at *par*. The mortgage is for the payment of the money by instalments; which would not have been the case, if it had been a purchase, instead of a loan. Neither would it have been the case in a security for a bill expected to be paid; but, it was very likely to be done, in the case of a bill which it was supposed would not be paid.

2. That Campbell's claim was barred by the statute of limitations; for, Braxton's letters were not written within five years; and Page's engagement was not under seal.

3. That the debt, at most, ought only to carry simple interest; for, the bill was merged in the mortgage; and, if a suit was brought at law, upon the covenants, a jury would only give 5 *per cent.* The securities were bound for a sum certain, and not as endorsers of the bills; on which no action can be maintained against them.

RANDOLPH and WICKHAM, contra,

Contended, that the contract was not usurious. That there was nothing which shewed Campbell's knowledge that the bills would be protested when he took them; and, although privately there might have been such an expectation in the parties, these circumstances will not affect the case, unless it was part of the agreement that there were no funds in the drawee's hands, and

[118] that the bills should be protested. That the person on whom they were drawn afforded no knowledge of any such agreement; because Braxton might have money in his hands to answer the demand, by remitting in time, or by vari-

ous other means: So that it was contingent whether they would be protested or not, and Braxton had it in his power to avoid the ten *per cent.* which took it out of the statute. That it did not appear that he affected to assert that the contract was for a lending and usurious, until long after the transaction. That the mortgage was taken merely in the room of an endorser, which was the customary mode; and therefore, no unfavorable inference could be drawn from that circumstance. That the act of limitations did not apply, as the deeds of trust protected the claim. That the deed being a collateral security for the money due on the bills, it was the bills themselves which were to ascertain the amount due to the creditor; and, as they bore ten *per cent.* interest, that rate of interest was to be paid out of the trust property.

Cur adv. vult.

ROANE, Judge. This case, viewed in its proper light, is really a very short one; and, as I think, a very plain one. It has but two real questions in it: 1. Whether the contract was usurious? 2. Whether the claim is barred by the statute of limitations?

In order to simplify the case, I may throw out of it some points which are too plain for discussion: As first, whether the mortgage extinguished the bill of exchange? 2. Whether the securities, Brooke and Aylett, became bound by their agreement, to pay 10 *per cent.* interest, in the event of the bills being or having been protested? As to the first, it is clear that the mortgage recognized the bill of exchange, as an existing one; and, so far from extinguishing it, creates an additional security for its payment. The bill of exchange, therefore, and not the mortgage, is the contract which determines the rate of interest to be paid, and is the contract really sued upon. As to the second, the general agreement of the parties will extend as well to the nature as to the amount of the debt due from Braxton to Campbell: and the nature of the debt due by bill of exchange, determines the rate of interest to be paid by them on protest to be 10 *per cent. per annum.* [119]

The question of usury is rather more difficult; but I think, nevertheless, is sufficiently clear. I admit that, on questions of this kind we are at liberty to infer usury from the circumstances of the transaction itself. Otherwise, it would be generally impossible to detect it. But, in making this inference, we are confined to the enquiry, whether there is a corrupt con-

tract or agreement for usurious interest? Now, such a contract or agreement pre-supposes the consent of both borrower and lender to this effect; and without it there is no usurious contract; whatever may be the hopes, wishes, or expectations of either party. Thinking this principle to be almost self-evident, I shall proceed to examine the present question by it.

The contract, by which Braxton transferred a right to money in Scotland, to Campbell, for a valuable consideration, as evidenced by the bill of exchange, was a lawful contract; and it had the concurrence of both parties thereto. It is no objection to the legality of such contract, that the drawee is a stranger to the drawer; that the latter has no funds in the hands of the former: or that the drawee is in a line of life other than commercial. This contract is for the payment of money in another country, (not in this;) and for the injury arising from a disappointment, the law has allowed an interest of ten *per cent. per annum;* and so far operates as an exception to the general act of usury.

This contract is to be considered as the real contract be-
[120] tween the parties, unless it be subsequently changed, or it has been previously agreed that the bill is not to be paid, but to be protested, and the money paid here. In the last case, the bill would be considered as a shift to evade the statute of usury, and conceal the real agreement of the parties.

However strong the answer of Braxton is to shew an usurious tendency and disposition in Doctor Campbell, as evidenced by the unusual circumstance of his procuring Braxton to draw on a stranger, a clergyman, and a person having no funds of the drawer: Yet, he does not state any consent on his part to waive his right to consider this as a legal bill and to procure it to be honored. He does not state any agreement on his part, subsequent to the drawing of the bill, that it should not be paid; or any previous agreement that the money was really to be paid here; and, consequently, that the bill is a mere shift to evade the statute.

The question, then, is reduced to this short point: There is a complete agreement of both parties evidenced by the bill of exchange, that the money should be paid in Scotland. There is a hope, an expectation, and even a contrivance in the party, and probably an expectation in both, that the money should not be paid in that country, but in this; but there is no agreement, carrying this expectation into effect, barring the right of Braxton to consider the contract as a real bill of exchange

and to procure a payment in Scotland, and converting the contract into an usurious one.

With respect to the plea of the act of limitations, there is no doubt, that laying out of the case the previous acknowledgments, but the deed of Braxton to Page and White, is an acknowledgment which will prevent its operation. That deed refers to the debt to Campbell as an existing one; and when it speaks of £2000, it is only as being the amount of it as supposed by Campbell's representatives; and the license [121] of Page and White, of the 14th of April, 1793, to the Sheriff, to sell some of the negroes, recognizes and refers to that mortgage.* I think, therefore, the decree ought to be affirmed.

But, Mr. Randolph asks to correct it. 1. In decreeing that the slaves sold to Adams by Page's consent should be accounted for. And 2. That liberty should be reserved to the appellee to proceed against the distributees of Brooke's property.

As to the first, I answer that such of Brooke's slaves mortgaged to Page and White, as were comprehended in the deed of mortgage from Brooke to Campbell, are now liable to Campbell, by the decree, into whose hands soever they may have come, and that Campbell has no lien upon the slaves not so comprehended, but the lien as to them was only in favor of Page and White, who have released it.

As to the second, that the distributees of Brooke having given or being liable to give bond to the executor to refund, are completely entitled to their distributory shares exempt from any claim, except such as is supported by a specific lien on such property, which in this case is not, I believe, pretended.

FLEMING, Judge. The counsel for the appellant made three points in this case. 1. They contended that the contract was usurious, and, therefore, void. 2. That the act of limitations applied in favor of the securities. 3. That the nature of the debt was altered, by security being given; from which time the contract was changed, and carried only 5 *per cent.* interest.

As to the first, I observe, that in order to constitute usury, there must be a borrowing and a lending, with an intent to exact exorbitant interest beyond what is allowed by law, or a forbearance in consideration of such interest being paid. But,

[*See *Mountstephen* et al. v. *Brooke* et al. 3 Barn. and Ald. 141.]

there appears no conclusive evidence, that such was the case in the contract now under consideration. There are, [122] indeed, several suspicious circumstances respecting the bill drawn on Young; but it is unnecessary to repeat them, as they are not sufficient, in my mind, to bring the case within the statute of usury.

As to the point of the act of limitations, I think the undertaking of the securities in December, 1775, under seal, excludes them from the benefit of that act; and that Page's undertaking to stand in the place of Aylett and to perform every engagement of his (although not under seal,) bound him to abide by every consequence, which was to follow from Aylett's suretyship. In addition to this, Page afterwards accepted a deed of trust from Braxton as an idemnity: which, with the other circumstances just mentioned, certainly removes all pretence for the plea.

With respect to the third point, that the taking of the mortgage for security of the debt, changed the nature of the contract, and made the debt bear five *per cent.* interest only, it is sufficient to observe, that the consideration of the mortgage expressly is, to secure the re-payment of the money *paid by the mortgagee* for a set of bills of exchange therein described, if they should be protested; which, in that case would by law carry an interest of 10 *per cent. per annum.* So, that Campbell's accepting the mortgage did not change the nature of the debt, but was considered merely as an auxiliary security for the payment.

Mr. Randolph thought there was error in the decree, in not allowing the appellee to proceed against the legatees of Mr. Brooke for the slaves in their possession, and to pursue the mortgaged slaves purchased by Adams. But, besides the answer already given to these objections, it is sufficient to observe that those parties are not before the Court, and, consequently, we can make no decision affecting them. I am, therefore, for affirming the decree altogether.

CARRINGTON, Judge. Three exceptions have been [123] taken to the decree of the Court of Chancery in this cause. 1. That the contract was usurious and void. 2. That the plaintiff's claim was barred by the statute of limitations. 3. That the ten *per cent.* ceased on taking the mortgage, and that only five *per cent.* could be demanded after that period.

As to the first, it is said, that the contract is usurious, and, therefore, void. But, to constitute usury, there must be a

loan or forbearance; and there are no features of either discoverable in this cause. Braxton, in his answer, calls the transaction a sale and purchase of two bonds, for which the bills in question were drawn; and, although he afterwards speaks of them as a loan, yet from the nature of the thing in question, (namely bonds,) they could not have been intended to be returned: Because, in that case, they would have been of no use to the borrower; who contracted for them for the purpose of negotiating them in payment of his debts to others; and they were certainly drawn as a consideration for the purchase. As to the shift, which has been alleged, it is, possible, that the intention of Campbell was to make greater profit than five *per cent.;* but such intention is not proved. Braxton, indeed, states it in his answer; but, the answer is not responsive to the bill, and is unsupported by testimony. Besides, although Braxton states that to have been Campbell's intention, he does not say that he himself consented to it, which was necessary to form the contract between them. In short, I discover no trace in the transaction, so conclusive as to justify me in criminating Campbell, and depriving his representatives of their debt. For, there is nothing in the case out of the usual course of that kind of business; which was thus, the debtor drew bills of exchange payable to his creditor; but, in case of the possibility of non-acceptance, an endorser was generally required. In the present case, however, in lieu of an endorser, Braxton conveyed an estate as a security for the large bill on Young. In this view, it was a [124] fair transaction and not justly liable to any objection. But, added to this, Braxton's defence is materially weakened by his lying quiet so long, and making considerable payments, without any complaint.

Upon the whole, I consider the case as not coming within the statute of usury; and that the security taken was intended to strengthen and not injure the plaintiffs' legal rights under the bills of exchange.

The second exception was, that the claim is barred by the act of limitations. But, there is no ground for the objection; because the claim has been preserved from the operation of that act, by various transactions, down to the year 1792, when the suit was brought.

The third exception taken by the appellant's counsel, has been already anticipated; and I shall only add that I think there is no weight in it.

As to the corrections asked for by the appellee's counsel, it is sufficient to observe that Brooke's representatives are not

before the Court, and, therefore, we can make no decree against them.

Upon the whole, I concur in opinion with the other Judges, that the decree was pronounced on just principles, and ought to be affirmed.

EPPES AND OTHERS EX'RS OF WAYLES *v.* RANDOLPH.

[125]

Saturday, November 9th, 1799.

Deed re-acknowledged within eight months from its date, and recorded within four months from the re-acknowledgment, is good from the date of the re-acknowledgment, although there are more than eight months between the time when the deed was first executed, and the day of recording it.*

Although the deed does not mention that it was made in consideration of a marriage contract, the party may aver and prove it.†

Judgments do not bind lands after twelve months from the date, unless execution be taken out within that time, or an entry of *elegit* be made on the record.

[A surety in a bond who discharges the debt, has a right to be placed in the shoes of the obligee, and considered a bond-creditor of the obligor.]‡

This was an appeal from a decree of the High Court of Chancery, in a suit wherein the executors of Wayles were plaintiffs, against David Meade Randolph, Richard Randolph, Ryland Randolph and Brett Randolph, sons and devisees of Richard Randolph, deceased; the bill stated, that in December, 1772, the said Richard Randolph, deceased, being indebted to Bevins in £740 sterling, executed his bond, binding himself, his heirs, &c., for payment of the same; that Wayles

* For the statute under which this was decided, see Pleasants' edition of Rev. Code, p. 157, ch. 90, § 1, 4, and note to 4 Leigh, 551.

A like decision, *Roanes* v. *Archer*, 4 Leigh, 550.

By 1 R. C. of 1819, p. 364, § 12, every conveyance, &c., except trust-deeds and mortgages, properly proved or certified and delivered for record within eight months from its execution, was valid as to all persons from the time of its execution; but trust-deeds and mortgages were valid as to subsequent purchasers, without notice, and as to all creditors, only from the time of delivery to the clerk for record.

The Code of 1849, p. 508–'9, § 4, 5, 6, substitutes *sixty days* for *eight months*, and gives to trust deeds or mortgages made *in consideration of marriage*, the same privilege (of sixty days' relation) that other conveyances have.

† See *ante*, p. 5, and note there.

‡ Other cases of *substitution* or *subrogation*: 3 Leigh, 272; Id. 695, 700; 2 Rand. 428; 4 Rand. 458 (*Enders* v. *Brane*); 10 Leigh, 382; 2 Gratt. 178; 2 Gratt. 419; 4 Gratt. 81; 6 Gratt. 320; 8 Gratt. 140, 533, and 496.

Cases of substitution refused: 8 Leigh, 588; 1 Rob. 461; 2 Gratt. 419; 3 Gratt. 493.