REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
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M,DCC,XCIX.

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.

" and discount against the debt claimed by the appellee as assignee " of *George Anderson*, the other defendant in the decree named, " any equitable demand respecting the said debt, which he had " a right to claim from the said *George Anderson*, the original " obligee." Decree reversed with costs, and the cause remanded to the High Court of Chancery for further proceedings to be had therein, according to the principles of this decree.

PICKET,

against

MORRIS.

IN the year 1785, *Morris*, purchased from *Littlepage*, the moiety of two thousand acres of land in *Kentucky*, at the prices of £ 600, and gave his bond for £ 400, payable at a future day, and a note of hand for £ 200, which has been discharged. *Johnson*; had an equitable title to the other moiety of this land, under a former contract, but upon this condition, that he should allow *Littlepage*, or those claiming under him, to take choice of either of the two tracts on paying the difference in value between them. In 1786, *Littlepage*, assigned this bond to *Stockdell*, at which time, *Morris*, was a creditor of *Stockdell* by bond, in a sum, very little short of the amount of the one which he had given to *Littlepage*. *Stockdell*, proposed a discount of the two bonds to *Morris*, which the latter refused, in consequence of the pendency of a suit against him, *Littlepage* and others, by *Johnson*, in the state of Kentucky, claiming a conveyance of an *undivided moiety of the* 2000 *acres of land*, instead of a *separate tract*, with the difference in value between such tract, and the first choice which *Morris*, by his contract with *Littlepage* had a right to make. After this refusal, *Morris* instituted suit against *Stockdell* upon his bond, and recovered a judgment. *Stockdell*, assigned *Morris's* bond to *Picket*, but whether before, or after the judgment obtained by *Morris*, does not certainly appear.

Picket, instituted a suit upon this bond against *Morris*, in the County Court of *Henrico*. At the trial of that cause, the counsel of *Morris* offered *Stockdell's* bond as a discount, and moved the

the court to inſtruct the jury upon the law ariſing from the facts in evidence before them, or by other means to reſerve the points for their future deciſion, and for this purpoſe, tendered a ſtatement of the facts, requeſting the court to alter them if neceſſary, ſo as to reſerve the caſe. The court declined, or neglected giving any opinion upon either point.

The legality of the diſcount; the equity of *Morris* againſt the bond in queſtion; and the ſubject of notice to *Picket* of both or either of thoſe objections, were ſubjects diſcuſſed before the jury; and the court refuſing to interfere, they found a verdict for *Picket*, the plaintiff at law.

The defendant *Morris*, moved for a new trial, (this being the ſecond trial of the cauſe,) but the court were divided in opinion. Afterwards, a fifth magiſtrate, who had ſat during the trial, came upon the bench, and the motion was renewed, but was ſoon afterwards dropt. The defendant then exhibited a bill to the ſame court praying for an injunction, at which time, *Picket*, agreed to ſtay execution for a month, that the defendant might have an opportunity of applying to the Chancellor, for an injunction, which he afterwards did.

Morris filed his bill in the High Court of Chancery, praying to be relieved againſt this judgment, principally upon the ground of the debt due to him from *Stockdell*, which had not been allowed him as a diſcount in the trial at law.

Picket, in his anſwer to this bill, ſtates himſelf to have been a fair, *bona fide* purchaſer of the bond in queſtion, without notice of any diſputes relative thereto, or of the appellee's right to any diſcounts. That he paid *Stockdell* for the ſaid bond, in money certificates and other public ſecurities, a ſum exceeding the value of this bond, which exceſs, created a debt from *Stockdell* to him, which has been conſiderably encreaſed by other advances.

Whether the County Court refuſed to grant the injunction applied for by *Morris*, or whether the motion was withdrawn in conſequence of the offer made by *Picket*, of ſtaying execution for a month, does not certainly appear from the record.

One witneſs proves, that the appellant applied to him to know what objection the appellee had to the payment of this bond; the witneſs informed him that the appellee had diſcounts againſt it, and alſo mentioned the diſpute about the *Kentucky* land: upon which the appellant replied, "that he would have nothing to do with the bond." The witneſs does not ſtate whether this converſation took place before or after the aſſignment,

ment, but concludes from *Picket's* reply, that it was prior to it. It does not appear when the assignment was made. The High Court of Chancery, upon a hearing of the cause, dissolved the injunction as to £ 36: 13: 3, with interest thereupon from August 1786, after deducting therefrom the costs of that court, and decreed the injunction to stand and be perpetual as to the residue, and that *Morris* should assign to *Picket* the judgment obtained by him against *Stockdell*; the bill as to *Littlepage* was dismissed with costs. From this decree *Picket* appealed.

MARSHALL for the appellant. The first question which I shall consider is, whether the appellant could at law, have set up his judgment against *Stockdell*, as a discount against the appellant. 2dly, Whether he can resort to a court of equity for the relief sought for by this bill.

1st, The assignee of a bond, by the law of this state, is bound to allow all just discounts against *himself*, or against the *obligee* before notice of the assignment. The discount offered by the appellee, is a judgment obtained against a *mesne assignee*, which I contend is not a case provided for by the act of Assembly. *Morris's* bond, coming by assignment into the hands of *Stockdell*, could not be considered as being *ipso facto* discharged, in consequence of the latter being the debtor to the former to an equal amount. The reciprocal possession of each others bonds, did not amount to a *payment* of both, or of either. The one may be *discounted* against the other, unless the conduct of the parties hath prevented it.

This is the difference between *actual payment*, and off-setting mutual demands; in the first, the bond, is discharged by the silent operation of law; in the latter, both debts subsists, until *they are opposed* to each other; for the parties may *waive* the discount if they please.

In this case, *Morris*, evinced his determination not to discount, expressly, as well as impliedly. He refused it *expressly*, when *Stockdell* applied to him for that purpose; and impliedly, by bringing suit against *Stockdell* upon his bond, in which, if the discount had been offered, he must have been nonsuited. And *Stockdell*, by assigning *Morris's* bond to *Picket*, evinced a similar disposition in himself not to discount.

After this, will it be contended, that *Morris* can reclaim his right of discounting, and that too, against a *bona fide* assignee? But suppose *Morris*, was not deprived of this right by his own conduct, let us consider.

2dly, Whether he can be relieved in this court.

Every point in this cauſe, has once been before a court of competent juriſdiction, and without a poſſible objection to the fairneſs of the trial, the jury have decided in favor of the appellant. If the County Court gave an erroneous opinion upon the points ſubmitted to them, or if they erred in refuſing to give any opinion at all, the power of correction belonged excluſively to an *appellate court*. But a court of equity has no juriſdiction in ſuch a caſe. It cannot correct legal errors in an inferior court, or rehear and rejudge the judgment of a court of law. If *Morris* was aggrieved by the judgment of the County Court, he might have excepted and appealed. If the juſtices refuſed to ſanction the bill of exceptions by their ſignature, the law marks out a plain redreſs for the injured party. But inſtead of purſuing thoſe ſteps, the appellee voluntarily abandons them, and now ſeeks relief in a court of equity, *upon the very points*, which had been fully diſcuſſed, and fairly decided upon in a court of law. If he can hope to ſucceed, it muſt not be by aſſerting *the law* to be in his favor, for that has been determined againſt him by the proper tribunal, and therefore, the law is with his antagoniſt, until that deciſion be reverſed. He muſt then rely altogether upon his claim to *ſuperior equity*.

Let the pretenſions of the two parties upon this ground be compared. *Picket*, is a fair purchaſer, for a valuable and full conſideration, without notice of any objection upon the part of *Morris*. On the other hand, *Morris*, had by his own conduct, completely diſcharged the bond in queſtion from the danger of being diſcounted, againſt the debt due from *Stockdell*, to him. He refuſed the diſcount, as one of the depoſitions proves, for the unfair purpoſe of diſcharging his own bond in warrants, at a reduced price, and conſequently for leſs than the real amount. He inſtitutes ſuit againſt *Stockdell*, as an additional evidence of his having diſclaimed the diſcount, after which, his bond is aſſigned. Can he now talk of equity, who by his own conduct has been the cauſe of the very loſs, he is unwilling to bear himſelf, and now ſeeks to throw upon *Picket?* If he had done at that time, what he now inſiſts upon, the bond in queſtion would long ſince have been cancelled, and deprived of its ability to deceive the world.

Perhaps an attempt may be made to excuſe this conduct of *Morris*, on account of the equity againſt his bond, which is faintly relied upon in the bill. If this had been any thing more than a pretence, *Morris*, inſtead of waving the diſcount by bringing ſuit upon *Stockdell's* bond, would have inſtituted a ſuit

in

in equity to be relieved againſt the payment of his bond, by which means, third perſons would have been warned not to purchaſe it. But the decree of the Chancellor, by directing the difference between the two bonds to be paid by *Morris*, neceſſarily diſallows his claim of equity on account of the *Kentucky* lands.

I ſay nothing about the bill of exceptions, becauſe not being ſigned, it contains no facts which this court ought to regard.

WICKHAM for the appellee. I cannot agree, that *Morris*, has by any part of his conduct waved his right of diſcounting *Stockdell's* bond againſt his own, or that he is precluded from aſſerting that right, as well as his prior equity againſt this bond, in a court of chancery.

Morris purchaſed from *Littlepage* his choice of two diſtinct tracts of land, of a thouſand acres each. He is afterwards ſued in the ſtate of *Kentucky*, by *Johnſon*, who claims an undivided moiety of both tracts. Should he ſucceed, no two contracts can be more unlike, than the one made with *Littlepage*, and that which would be thus forced upon him. The bond which he had given in part of the purchaſe money, comes by aſſignment into the hands of *Stockdell*, his debtor, charged with this equity againſt it, and therefore, when *Morris* was applied to by *Stockdell* to diſcount one bond againſt the other, the former, very properly objected. He was not bound to offset a debt juſtly due to him, againſt one, which in equity he did not owe. Under this impreſſion, *Morris* brought ſuit upon *Stockdell's* bond as he certainly had a right to do.

It cannot be denied, that *Morris* had originally an equity againſt *Littlepage*; but it was not neceſſary for him to diſaffirm the contract, unleſs he pleaſed to do ſo; for if the damages to which he was entitled, ſhould be equal to the debt due from him to *Littlepage*, the one would diſcharge the other, and yet the contract remain valid.

The next queſtion then is, whether *Morris*, can in a court of chancery ſet up this equity, as well as the diſcount, againſt *Picket*, the aſſignee. As this point has been fully diſcuſſed in the caſe of *Norton* and *Roſe*, it will not be neceſſary to repeat thoſe arguments.

But it is contended, that croſs bonds do not *diſcharge* each other; that they only give *an election to diſcount*, the one againſt the other. This poſition may be very queſtionable. The words of the law are general enough to make any diſcount, a payment.

But

But if this be not the case, *Morris* may offer *Stockdell's* bond as a discount against *Picket*, because it would have been a good one against *Stockdell*. The time when the discount may be made is not limitted by the law, and therefore, may properly be offered when *payment is demanded*. The conduct of the parties in the mean time cannot defeat this right to discount, unless it amount to an *express waver*. I have endeavored to prove, that the refusal of *Morris*, did not amount to a waver. On the other hand, he retains *Stockdell's* bond in his possession, and as soon as he *was properly called upon* by *Picket's* suit to make his election, whether to discount or not, he then offered *Stockdell's* debt as an offset. The institution of the suit upon *Stockdell's* bond, was not an implied waver; by giving to the debt the security and dignity of a judgment, he did not thereby render it unfit to be made an offset.

But it is contended, that however the general question may be decided, a discount against a *mesne assignee* cannot be set up against the plaintiff in the action. I can see no good reason for this distinction; if it be correct, it is apparent that the most palpable injustice must follow. The obligor, knowing that his bond has come by assignment into the possession of a particular person, goes on to sell him property, or to make payments; will it be contended, that a subsequent assignment of the bond, will discharge it of those discounts which had once fairly attached upon it?

If we must give to the law a construction so strict as to produce this effect, it will follow from the same mode of interpretation, that the negociability of a bond is at an end after one assignment, and of course, that *Picket* could not recover at law. The words of the law are, "that any person or persons may assign," which if taken strictly, will only apply to *obligee* or *obligees*. But if under a liberal construction of the law, assignees may assign, the proviso as to *discounts* must be so far extended in its interpretation, as to be commensurate with the *right to assign*.

The next question is, whether we can be assisted in a court of equity, after what has happened in the trial at law?

It is objected, that the errors which the court committed, were only examinable by a court of appellate jurisdiction. But in the case of *Ambler* and *Wyld*, (*ante* p. 36,) this court determined, that the Chancellor might relieve against a mere error in the court of law. In that case, the court improperly refused to admit certain testimony which was offered; the party aggrieved

grieved by that deciſion might have excepted and appealed, but he did not. Your honors determined, that the inferior court were wrong in refuſing the evidence, and that the party who was injured by the miſtake of his counſel, in not excepting, might ſeek relief in equity. But this is a much ſtronger caſe than that. We do not complain of an erroneous opinion given by the court, but that they refuſed to give any opinion at all when applied to for that purpoſe. Inſtead of inſtructing the jury as to the law, they left a queſtion of nicety and difficulty to be decided upon by them. If the jury undertook to determine upon a queſtion which involved equitable matter, and were wrong in their opinion, ſurely their deciſion does not ouſt the the court of chancery of its juriſdiction over the ſubject. It is obvious, that the counſel for *Morris* were miſled, and the jury confounded by an enquiry into *Morris's equity* againſt the bond, and *Picket's knowledge of it, before the aſſignment*; whereas the ſingle point to which the attention of the jury ought to have been directed, was, the propriety of *diſcounting the bond due from Stockdell*, as to the *notice*, the jury had nothing to do with it; it was a merely equitable queſtion. The defendant was prevented from obtaining a new trial, from a mere accident, which it was not in his power to controul. It is every day's practice, for the Chancellor to relieve againſt an injury, reſulting from a miſtake of counſel; as where he neglects to offer diſcounts, and the like.

Having, I truſt eſtabliſhed the juriſdiction of the court of equity. I will proceed to examine the facts in this cauſe, and apply them to the principles which I have endeavored to maintain.

If *Stockdell* had been the plaintiff at law, no queſtion would exiſt as to our right to relief againſt him. It will alſo be conceded, that whether the equity goes along with the bond into the hands of an aſſignee, or not, he is liable, if he had notice of it before he has paid the conſideration money. Nay, if he received it at a time, when it was in his power to ſave himſelf, he will be conſidered as a purchaſer with notice.

If Mr. *Picket* can be in a better ſituation than *Stockdell* would have been, he muſt not only be a purchaſer without notice, but he muſt proye, that he gave a *full bona fide* conſideration, and that he has paid the *whole* of it.

I ſay, he muſt have paid a full conſideration; for if the aſſignor of a bond be liable to the aſſignee in caſe he cannot receive payment from the obligor, and leſs is paid for the bond, than its real nominal amount, it is uſurious. I

I admit, that the anſwer of *Picket* contains ſtrong general averments, that he paid the whole conſideration before notice of *Morris's* equity. But this general aſſertion is qualified by other parts of the anſwer, and when he is called upon to ſtate the exact conſideration paid for the bond, he refuſes to do ſo, and contents himſelf with a round declaration that it was *adequate*. In oppoſition to this evaſive denial of thoſe material points, there is one witneſs, who thinks he gave notice to *Picket* of the equity of *Morris*, before the aſſignment was made. Independent of this, it appears by the anſwer that long after the aſſignment was made, and when it is not denied that *Picket* had notice, he went on to encreaſe the debt due from *Stockdell*, inſtead of ſaving himſelf and *Morris* with *Stockdell's* property in his hands, which it was in his power to have done.

There is then the teſtimony of one witneſs, oppoſed to the anſwer. Let us ſee if there be not circumſtances in aid of the former, ſufficient to outweigh the latter. In the firſt place, the enquiry which the witneſs ſtates Mr. *Picket* to have made would have been more naturally thought of *before*, than *after he had paid his money*. 2dly, The ſilence which the anſwer obſerves as to the date of the aſſignment. 3dly, The appellant's having property of *Stockdell's* ſo long afterwards in his poſſeſſion. 4thly, The judgment, which *Morris* had obtained againſt *Stockdell* in the very town in which *Picket* reſided, which as to the diſcount, is ſtrong preſumptive notice. The judgment ſpecifically bound the very ſubject in which *Picket* was dealing.

RANDOLPH on the ſame ſide. *Morris* has a two fold equity againſt *Picket*; 1ſt, his right to diſcount againſt *Stockdell*, and 2dly, his equity againſt *Littlepage* on account of the *Kentucky* land. I ſhall not notice the firſt point here, as the ſubject has been fully diſcuſſed in the caſe of *Norton* and *Roſe*. But I will make this obſervation as to the fact of notice; that where an anſwer is to prevail againſt the teſtimony of a ſingle witneſs, it ſhould be plain, candid, and clear of every appearance of concealment. This anſwer denies that the defendant knew of any *diſputes* about the bond, inſtead of being reſponſive to the interrogatory, whether he knew of any *objections* to it by *Morris*?

The queſtion then, which is now to be conſidered is, whether *Picket* is liable to the *diſcount* claimed by *Morris*? It is admitted, that *Morris* knew of his bond having paſſed into the

hands

hands of *Stockdell*; he had therefore a right to keep up *Stockdell's* bond, for the purpose of a discount.

If *Morris* had once a right to oppose *Stockdell's* claim, it should be shewn by what means he has lost it. It is said, that he has waved the right; first, by an express refusal, and secondly, by an implied waver. The reason which induced the refusal to discount was entirely justifiable. He had no objection to the discount in case he was really indebted to *Stockdell*. But the fact was otherwise; the bond which he held was charged with an equity against it, which might have destroyed its force altogether.

As to the implied waver of his right to discount, I would ask whether the debt due from *Stockdell* was less binding, because the dignity of it was encreased? Or will it be contended, that a judgment cannot be set off against a bond, as well as one bond against another? The only proper time at which *Morris* could make an election which could be obligatory upon him, was when *Stockdell*, or his assignee should bring suit, and when that opportunity did occur, it was made in favor of the discount.

But it is contended, that the act of Assembly does not apply to discounts against *mesne assignees*. The word *plaintiff* which is used by the legislature, obviously expresses the same thing as *assignee* would have done; and if this latter word had been used, it would have run through the whole string of assignees, however numerous they might be. The reason of allowing discounts, being to avoid multiplicity of suits, it applies as well to *mesne assignee's*, as to the one, in whom the right to the debt ultimately rests.

The next question respects the jurisdiction of the court of chancery. *Morris*, as I before observed, had a two fold equity; one, which might properly have been decided upon at law; but the other, which respected the *Kentucky* land, was a question, which, belonged exclusively to the court of chancery. If the latter had been the only ground of the application to that court, no one could have denied its jurisdiction. But it is well known, that if that court will entertain the suit at law, it will decide the whole case, though involving points properly determinable at law.

Discounts, are not less a subject of equitable jurisdiction, because they may also be determined at law. Until the statute, the parties were driven into that court to obtain the benefit of discounts, and the jurisdiction is not ousted by its being concurrent

current with the courts of law. Independent of these considerations, there was not only mistake, but accident in this case. The counsel were evidently led off from the true point of discussion, into an enquiry about *notice*, which was entirely unimportant, and from this cause it probably was, that they neglected to file exceptions to the opinion of the court. It was *accident* alone which prevented a new trial from being granted upon the first application, and the offer of *Picket* to wait a month, until *Morris* could have an opportunity of obtaining an injunction, allured the latter from his purpose of renewing the motion.

MARSHALL in reply. Whether the equity attached to a bond follows it into the hands of the assignee or not, is a question I mean not to argue, because, I consider it to be unimportant in this cause. If *Littlepage* himself had been plaintiff, he could not have been opposed by this equitable objection. The only evidence of this equity is, the answer of *Littlepage*, a bill filed in *Kentucky* concerning this land, and a paper signed by *Johnson*, who contests the right of *Morris* to a fulfillment of *Littlepage'e contract*. But none of these papers can be considered as evidence of the fact.

If then *Morris* had in reality no equity against this bond, his refusal to discount, was an absolute waver of his right. It is said that there is no time limited, within which the election to discount, or to wave it, is to be made, and that he might use it at the trial. I do not contend that he was bound to make it sooner, but if he expressly refuse before the trial to make it, and in consequence of his doing so, his bond is assigned away to a fair purchaser, he is bound by it, and cannot afterwards reclaim his right to discount. The reason assigned by *Morris* for his refusal was not real, but a mere subterfuge, used for the purpose of enabling him to purchase up his own bond for less than its value, and therefore it cannot qualify that, which I term an *express waver*.

I do not say, that the bringing suit upon *Stockdell's* bond was of itself a waver, or that the judgment could not be made an offset; but it is *evidence* of his mind upon the subject, that the discount was not to take place; for if it had, *Morris* must have been nonsuited, as the bond due from him to *Stockdell*, amounted to a greater sum than what was due to him.

I have contended, that by the literal words of the act, the defendant cannot set up a discount against an intermediate assignee; to which it is answered, that if the law be thus strictly interpreted,

interpreted, a bond can be aſſigned but once. I cannot clearly comprehend the juſtneſs of this concluſion, for it is plain from the words of the law, that any perſon or perſons having the legal title may aſſign, which muſt mean, more than one aſſignment.

If payments be made, or if property be ſold to an intermediate aſſignee, this would be an *actual diſcharge* of ſo much of the bond, and might be given in evidence without the aid of the proviſo; but this is very different from a *diſcount*, which could not be made were it not for this law.

If *Morris* could not have ſet up the diſcount at law, there is an end of the cauſe. But if he could, he cannot now reſort to a court of equity to get the benefit of it. The whole caſe has once been tried and decided upon before a competent juriſdiction. I contend, that the ſame queſtion cannot be re-examined and rejudged in any but an appellate court. I am now ſpeaking of the *diſcount* alone. The caſe of *Ambler* and *Wyld*, does not ſuſtain the juriſdiction of the court of chancery as now contended for. In that caſe, material teſtimony was not permitted to go to the jury, and of courſe, the *whole caſe* was not before them, nor decided upon by them. This court declared, that if the whole evidence had been laid before the jury, the deciſion would have been otherwiſe. In this caſe, nothing was kept back; the queſtion which we are litigating here, is the very ſame which was conteſted and decided by the jury with the very ſame evidence which is exhibited to this court.

It is ſaid, that the counſel and jury were entangled with a queſtion which was unimportant, and by that means they were ſeduced from the true point in the cauſe. This is mere conjecture, and is not warranted by any part of the record. But if it were, I do not agree, that the miſmanagement of counſel, or the miſconceptions of the jury will give juriſdiction to a court of equity, over a ſubject which has been fully examined and decided upon by a jury.

It is ſaid, that the court of chancery had an original juriſdiction as to diſcounts which is not ouſted by the ſtatute. This is admitted, and it then follows, that the courts of law and equity have concurrent juriſdiction upon that ſubject.

It will I preſume be admitted, that thoſe courts have alſo concurrent juriſdiction in matters of account; but becauſe this is the caſe, will it be contended, that if a ſuit be brought at law upon an account, and a deciſion be there had, the very ſame ſubject may be re-examined in a court of equity? As well

might a court of law rejudge a case decided upon in equity, under the plea of concurrent jurisdiction.

As to all the other pretences for giving jurisdiction to the court of chancery, they are mere conclusions of the counsel, without being warranted by the record; such are the supposed blunders of the counsel in discussing the equity, instead of the law of the case; in their being dazzled by *Picket's* offer of waiting a month, and being thereby put off from their first intention of moving for a new trial.

It is contended, that *Picket* had notice of *Morris's* discount. This is not proved; but if it were, and if he also knew that *Morris* had *rejected the discount*, he certainly would not have been bound to admit it. Neither is there any evidence, that *Picket* had it in his power to save himself; or that there was any thing like usury in the transaction. These, are points not stated in the bill, and therefore could not be noticed by the court, even if they were proved by the evidence.

As to *Morris's* judgment, it could not be even implied notice to *Picket*, who was not privy to, or bound by it. But there is the strongest reason to believe, that the judgment was obtained after the assignment; for if it had been otherwise, it it highly probable, that *Stockdell* would have offered *Moris's* bond as an offset.

The COURT desired this cause to be spoken to again, upon the points of jurisdiction.

DUVAL for the appellee. The conduct of the court in refusing to seal the bill of exceptions, prevented *Morris* from appealing, and produced an injury, against which a court of equity may relieve. I admit, that the statute points out a mode of proceeding where the court refuse to seal a bill of exceptions; but it does not follow from thence, that equity may not exercise a concurrent jurisdiction over the subject, and prevent the injustice which must result from an unfair trial, or one, where the parties have not been *fully heard*, and where the judgment is apparently wrong. 3 *Morg. Es.* 291, proves, that a court of chancery will interfere, if the jury be misdirected. So if the court refuse to direct the jury, and they find an inequitable verdict, the Chancellor may with propriety interfere. After many new trials have been granted at law, this court will for the furtherance of justice grant another. 3 *Morg. Es.* 91.

WICKHAM.

WICKHAM. I think, that the jurisdiction of the court of equity in this case may be maintained, as well upon the general principle and constitution of that court, as upon the decisions of this court on similar cases.

If a want of jurisdiction appear upon the face of the record in proceedings at common law, the judgment may be arrested, or reversed. But in chancery causes, the jurisdiction must be specially objected to by plea. It may be said perhaps, that this bill gives jurisdiction to the court, and that therefore no plea to the jurisdiction could have been properly put in. But since all the material allegations in the bill are proved, the court must retain its jurisdiction, if the bill gave it; if it did not, then it ought to have been objected to by plea.

If the appellant had meant to oppose the relief prayed for, because of the judgment at law, he should have pleaded it in bar, and by answer denied the equity stated in the bill. The County Court when called upon to instruct the jury as to the evidence, and to determine whether the discount which was offered by *Morris*, was legal or not, refused to give any opinion at all, improperly submitting to the decision of the jury, a legal question which it was the duty of the court to have determined.

The case of *Ambler* and *Wyld*, comes fully up to this. The question in that cause was whether the referees had valued the house in specie or in paper money. The original valuation could not be found, and therefore the referees were examined upon that point, who declared, that they had a specie valuation in view. The whole case turned upon their evidence, and *Wyld*, was prepared with testimony to prove, that the valuers had made declarations on the subject, the reverse of what they then deposed. But the County Court before whom the cause was tried, refused to suffer the witnesses to be examined, this court determined that they were wrong in that opinion, and that where the decision of the inferior court was manifestly erroneous, the omission of counsel to file a bill of exceptions, should not bar the jurisdiction of the chancery. The Chancellor said, that if this evidence had been heard, the verdict might have been different. But the ground of the injunction could have been no other, than the error committed by the court, in refusing the examination of the witnesses.

If we refer to British decisions, they will abundantly prove, that equity may grant relief, although the matter has been decided at law.

In

In the case of *Graham vs Stamper* 2 *Vern.* 146, the defendant in equity pleaded the verdict and judgment at law and that the defendant had insisted upon the same matter at law, where it was ruled against him, and demurred. But this was not thought sufficient to bar the relief prayed for, and the plea was overruled. So in the case of *Robinson vs Bell* 2 *Vern.* 146, the ground of the bill was, that the plaintiff's attorney had by mistake, and contrary to instructions, pleaded a general, instead of a *special plene ad niniſtravit*. The court relieved against this mistake although the bill did not state, that the discovery was made before the judgment.

If such be the decisions in *England*, there is a much stronger reason, why a court of equity should be more liberal in granting relief in this country, in cases, which have been decided in the *County Courts*. The want of legal knowledge in those courts, and the loose manner in which business is generally conducted there, will frequently produce improper and unjust decisions of cases, which in many instances could only be remedied in a court of equity. A distinction of this sort is even warranted by English cases. In *Finch* Ch. cas. 472, we find that relief was granted against the judgment of an inferior court, on account of improper conduct, and a distinction is taken between the decisions of *such courts*, and those of the *superior courts*.

Another ground of jurisdiction is the mistake of the jury. The only question was if the debt had been paid: and if the court had determined as they should have done, that the discount offered by the appellee was proper, the verdict must have been different from what it was; yet this opinion of the court was withheld. The jury were led to believe, that the material point in the cause was whether *Picket* was a purchaser, with or without notice, and not being satisfied that he was the former, they found for him. I know, that in *Ambler* and *Wyld* it was said by the court, that if the whole evidence had been left to the jury, the decision would have been otherwise. But it will be noticed, that in this case, the error committed by the jury was in the *law* of the case.

A court of equity will relieve against an award, if there be an evident error on the face of it, or if the arbitrators have mistaken the law of the case. A verdict is not more solemn nor more obligatory upon the parties than an award. This court have gone into the recesses of a jury room, to get evidence of the irregularity and mistake upon which the verdict was given. (*Cochran vs Street*, *ante* vol. 1 p. 79) In (*M'Rae*

vs

vs Woods ante p. 80) the jury conſidered the plaintiff as entitled to half the ticket; but from the evidence, it was clear, that if he were entitled to any part, it could not be to more than a fourth; yet this court ſuſtained the decree of the Chancellor, which awarded a new trial.

It may be contended that *Morris's* attorney might have renewed his motion for a new trial. There is ſome obſcurity upon this ſubject, and it can only be cleared up by ſuppoſing that his counſel was led off from his purpoſe of doing ſo, by *Picket's* offer to ſtay execution until he could apply for an injunction. It appears, that after a fifth magiſtrate came upon the bench, the motion was renewed, and then abandoned. But to make the moſt of this, it was a miſtake of counſel, againſt which this court may relieve.

RANDOLPH. Let us conſider this as an original caſe in the court of chancery; that *Morris* had there filed his bill againſt *Picket*, calling upon him to ſurrender the bond, on the ground of his original equity againſt it, or becauſe of the diſcount; or if the ground of the bill had been, that *Picket* might have ſaved himſelf out of *Stockdell's* property, and had failed to do ſo; in all theſe caſes, the court of equity would have had compleat juriſdiction. So it would, if the bill had called upon *Picket* to diſcover how much he had paid for the bond; For if *Stockdell* could have ſought relief againſt an unconſcionable, or uſurious bargain, (which will not be denied,) it is equally clear that *Morris* poſſeſſed the ſame right.

What then is to bar us from this equitable relief after a deciſion at law? If a verdict be rendered after a *full* and *fair trial* upon the law of the caſe, I admit, that the interference of the court of chancery would be improper. But if the cauſe be mixed with a queſtion of equity, where the juriſdiction is concurrent, as in caſes of fraud diſcounts and the like, and a wrong deciſion has been given, Chancery will interfere and relieve, although the ſame points have been preſſed at law.

A court of equity will entertain a ſuit in the caſe of a loſt bond, although there is alſo a remedy at law, 3 Durnf. and Eaſt 151.

The caſe of *Kent vs Bridgman Prec.* in *Ch.* 233, eſtabliſhes this principle; that where there is concurrent juriſdiction, tho' the party at law attempted to avail himſelf of a point proper for the determination of that court, and failed, yet he might ſeek relief in equity. Now, although the whole caſe in *Kent* and *Bridgman* was not ſubmitted to the jury, and therefore an attempt

tempt may be made to diſtinguiſh that caſe from the preſent, yet it is obvious, that the ground of the deciſion was not the failure to produce the judgment, but the fraud, which was examinable in equity as well as at law: The Chancellor ſuſtained the cauſe upon the ground of a concurrent, and not of an appellate juriſdiction.

MARSHALL. The principle which I have endeavored to maintain is this; that when the *whole queſtion* has been compleely before the jury, accompanied by no circumſtance which could prevent a full and fair deciſion of the caſe, by that body, there is no remedy but in an appellate court. If the party apply for relief to a court of equity, he muſt rely upon other ground than legal errors in the deciſion complained of. Let all the caſes which have been cited be examined, and it will be found in each of them, that the *whole* caſe was not decided upon by the jury. In 2 *Morg. Eſs.* 291, the jury did not decide upon the diſcounts. 3 *Morg. Eſs.* is no ways applicable.

In the caſe of *Kent* and *Bridgeman*, there was an equity which was not determined at law; there was a fraud practiſed and proved, but ſtill the party could not recover at law, without a copy of the judgment; of courſe, the ſubject of the fraud was not tried at all, and the jury were directed to find for the plaintiff, becauſe the judgment was not produced. This is preciſely within the rule I have ſtated.

It is then contended, that if it were intended to object to the juriſdiction, it ſhould have been done by plea, this is founded I ſuppoſe upon the act of 1787, which declares, "that after anſwer filed, and no plea in abatement to the juriſdiction of the court, no exception for want of juriſdiction ſhall ever afterwards be made &c."

The conſtruction of this law muſt neceſſarily be reſtrained to caſes, where *the bill ſhews a right in the plaintiff to recover*. For where the plaintiff has no right at all, and if he be barred by a judgment at law, it is not neceſſary, nor would it be proper to plead to the juriſdiction. Such a plea admits the right of the plaintiff, but denies the power of the court to decide upon it. Thus, if a ſuit in chancery be brought upon a bond; the plaintiff having a right to recover, the defendant muſt appriſe him in an early ſtage of the cauſe, that he means to object to the juriſdiction of the court. But if by the plaintiff's own ſhewing, or otherwiſe, it appears that the bond has been paid off, or that he had brought a ſuit at law upon it, and a verdict

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and judgment had paſſed againſt him; would a court of equity be bound to decree in his favor, becauſe there exiſted an objection to its juriſdiction, which had not been taken advantage of by plea?

It is ſaid, that the defendant ſhould have pleaded the judgment in bar. But this is not neceſſary, where the ſame matter is ſtated in the anſwer, and is alſo relied upon in bar; or if (as in the preſent caſe, the plaintiff himſelf ſtates the judgment in his bill. In *Ambler* and *Wyld*, the whole caſe was confeſſedly not before the jury; for the court would not permit them to hear all the teſtimony which was offered.

In the caſe cited from *Finch. Ch. Cas.* 472, the court had no right to decide at all for want of juriſdiction, ſo that in fact, there was no judgment.

In 2 *Vern.* 146, there was a ſecret equity, of which the defendant could not avail himſelf at law; for the court was not at liberty to enquire into the legal error, whilſt the queſtion was depending in a ſuperior court. In the caſe now before the court, there is no equity unmixt with law, ſince the diſcount might have been made at law. In the caſe laſt cited, the miſtake was not triable at law, and of courſe, it was not enquired into nor decided upon by the jury. The caſe of *Boſanket* and *Daſhwood*, *Talb.* 90, was a ſuit to be relieved againſt an uſurious contract.

If the jury miſtook the law as to the diſcount, it does not from thence follow that a court of equity can interfere; for if ſo, every error of the common law courts may be re-examined and rejudged in this court. In the caſe of *Cockran* and *Street*, this court did not ſet aſide the verdict becauſe it was wrong, but becauſe a part of the jury had been impoſed upon by the others.

As to the power which it is ſaid *Picket* had to ſave himſelf, there is no proof of it.

I am at a loſs to comprehend the diſtinction which is taken between caſes of a merely legal nature, and ſuch as are mixed with equity. I admit that in the latter caſe, the two courts have concurrent juriſdiction, but if the whole ſubject be decided in the court of law, equity can no more re-examine it, than the courts of law in a ſimilar caſe could re-examine a decree of the court of chancery.

I admit, that a ſuit may be brought either at law or in chancery, where a bond is loſt. But if it be decided in either court, the other cannot interfere.

ROANE,

ROANE, J.—Wherever a caſe is fully and fairly tried in a court of law, the deciſion is binding upon the parties, and a re-examination of the cauſe in a court of equity is certainly improper. The parties, by ſubmitting to the deciſion of that tribunal, muſt be governed by it, whether it be right or wrong. But this principle will extend to no caſe, where there has not been a fair trial, as well as a full diſcuſſion of the cauſe.

In this caſe, the appellee at the trial in the County Court, offered the bond of *Stockdell*, as a diſcount againſt the demand, which ought certainly to have been allowed. For I cannot conſider any part of *Morris's* conduct, as amounting to a waver of his legal right to inſiſt upon the offset. His refuſal at one time to admit the diſcount, is ſatisfactorily accounted for. He had ſtrong reaſons for believing, that he might oppoſe the payment of his bond to *Stockdell*, by the equity growing out of the original contract for which that bond was given.

It appears that the counſel for *Morris*, moved the court to inſtruct the jury, that the diſcount was proper; this they refuſed to do, as well as to recommend a ſpecial verdict. In conſequence of this improper conduct in the court the jury found a verdict moſt obviouſly againſt the very right of the caſe. For I hold it moſt clear, that either party has a right to demand the opinion of the court, upon queſtions of law which may ariſe during the trial of a cauſe. Their ſuperintendence in explaining and deciding legal queſtions, is eſſential to the proper adminiſtration of juſtice, and ought to be exerciſed, when either party require their interference.

The ſecond motion which was made for a new trial, was not over-ruled by the court, but for ſome reaſon or other which does not certainly appear, it was abandoned by the defendant. Although there is no teſtimony in the cauſe leading to a ſuſpicion that *Picket's* offer to ſtay execution until an injunction could be applied for, proceeded from an improper motive in him, yet it is highly probable, that it tended to divert *Morris*, from his purpoſe of perſevering in the motion.

I think the decree ought to be affirmed.

CARRINGTON, J.—It would perhaps ſeem ſtrange, that a court of equity ſhould not poſſeſs the power of relieving againſt a judgment at law, obviouſly unjuſt, and againſt the right of the cauſe. In caſes of fraud, ſurpriſe, accident, truſt and the like, where that court has complete juriſdiction, it is within its peculiar province to grant relief, where the parties cannot

obtain

obtain it at law. It is true, that the party asking for its interposition must shew himself entitled to equity superior to that of the person who has unconscientiously obtained the advantage at law.

I admit, that the courts of law and equity should be confined within their proper spheres, and that the line which separates their respective jurisdictions should be carefully guarded. With equal jealousy would I watch over and preserve from violation the trial by *jury*. But it is not less important, that the *court* should exercise those functions which properly belong to them. To the former, belong the uncontrouled power of deciding upon facts and even upon the law if it be submitted to them. The province of the latter, is to determine upon those legal points which come properly before them. It is therefore the duty of the court to instruct the jury upon the law when they are required to do so, or to reserve the point if either party desire it. If the opinion of the court be wrong, there is then a way to get it corrected. If the opinion be right, and yet the jury disregard it, the court may preserve its privilege by setting aside the verdict.

Can it be contended, that this cause was fully and fairly tried, when the only important part of the appellee's case was not decided upon by the jury? When the court refused to state to the jury the law as it respected the discount, they as effectually excluded it from the consideration of the jury, as if they had done it in express terms; for though it was laid before the jury, yet it was a question proper for the decision of the court, and their refusal to give that decision, kept it out of the view of the jury as the verdict evidently proves. The jury were then mistaken in the law, and being involved in unimportant discussions upon points no way relative to the cause, they were allured from the only one which was material.

Independent of this, it is clear that the parties were surprised into the abandonment of their first intention of moving for a new trial, by the offer of *Picket* to stay execution until an injunction could be applied for. It cannot be questioned, but that equity may relieve against the mistakes of a jury, as if they miscalculate, or omit to allow discounts to which the party injured can prove himself entitled.

I think that the case of *Ambler* and *Wyld*, is not distinguishable in principle from this. That cause was determined before a court of competent jurisdiction, but it was determined improperly. The party aggrieved might have appealed, but he did

not; yet this court decided, that equity might relieve him against this *erroneous judgment of a court of law.*

In this case, it is apparent, that there was a struggle for a general verdict, and that the law and right of the case was stifled in the conflict.

I think the decree right and that it should be affirmed.

LYONS, J.—There have been three questions made in this cause; the 1st, has been decided in the case of *Norton* and *Rose*. The 2d is, whether the conduct of *Morris* has not deprived him of the discount, of which he now endeavors to avail himself. 3dly, Whether, if he be entitled to the discount, he can have the benefit of it after the verdict and judgment against him.

Upon the 2d point, it is contended, that *Morris* having once refused to admit the discount, he has thereby waved his right to assert it against a *bona fide* assignee. How far an unqualified refusal might have bound him, it is unnecessary to decide, because I am clear that his conduct did not amount to that. Whether the equity under which he sheltered his refusal to discount was well founded or not, is not material; it was evidently the cause of his refusal, and it cannot from the circumstances which attended it, be considered as a mere pretext to avoid the discount. There was at the time, a suit depending in the state of *Kentucky*, the event of which he could not possibly foretell. This is sufficient to repel the presumption of an intention to wave. Under these circumstances, it was a fraud in *Stockdell* to assign the bond without giving notice of the discount which *Morris* had against it. Whatever may be the equity of *Picket*, that of *Morris* was prior, and equal to it, besides which, he had a *legal right* to set up his discount. But in fact, *Picket* must be considered as standing in the shoes of *Stockdell*, since it was his duty to have enquired of *Morris* respecting the bond, before he took the assignment of it.

There can be no doubt then of *Morris's* right to relief, unless he be barred of it by the verdict and judgment at law, which brings me to the consideration of the third point.

If what I have before stated be correct, it is clear that *Morris* has a sufficient discount against the claim of *Picket*, both at law and in equity. But it is contended, that he cannot now obtain the benefit of the discount, because he has lost the opportunity which he once had of availing himself of it at law. But I would ask, when it was, that this opportunity presented itself? At the trial of the cause at law, he claimed the discount and it was rejected. Considering the question as a legal one,

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he prayed the opinion of the court upon it, or if they doubted, that they would recommend a ſpecial verdict; they refuſed to do either. He then tendered a bill of exceptions, which they would not ſign. He was equally unſucceſsful in obtaining a new trial. What more could he have done? The Superior Court could not relieve him, becauſe nothing was ſpread upon the record which could avail him there. If he had applied for a *mandamus*, or purſued any other method of obtaining relief ſave the one he did, an execution might have iſſued, and he muſt have experienced in the mean time the effect of an unjuſt and inequitable verdict. And is it poſſible that a right thus clearly eſtabliſhed, ſhould be deſtitute of a correſpondent remedy? I thought it was the peculiar province of a court of chancery, to afford relief, in caſes where competent remedy could not be afforded ſome where elſe.

I admit, that in this caſe the party had complete remedy at law and if the cauſe had been fully and fairly decided there, equity would not have interfered. But this was not the caſe. The refuſal of the court to decide upon the points which were properly ſubmitted to them, prevented a juſt determination upon the only important queſtion in the cauſe; and their ſubſequent refuſal to ſeal the bill of exceptions, ſhut out the parties from the proper tribunal to have corrected them. Suppoſe the jury ſhould obſtinately decide againſt the opinion of the court upon a point of law, or ſhould diſregard their recommendation to find a ſpecial verdict; there could be no relief in a court of law againſt two improper verdicts, as a ſecond new trial could not be awarded. Would it not be monſtrous to ſay, that in ſuch caſes, a court of equity could not afford relief?

The Chancellor was not bound to grant a new trial, becauſe being in poſſeſſion of the whole caſe, there was nothing to prevent a final deciſion.

The caſe of *Burrows vs Jemino*, 2 *Str. Rep.* 733, the Chancellor relieved againſt a judgment, upon a point, which he was of opinion the court of law ought to have decided in favor of the plaintiff in equity; but he obſerved, "that other judges might have been of a different opinion."

Ambler and *Wyld* is nearly parallel with this, for in that caſe, as in this, the miſchief complained of aroſe from the error of the court. But there is this difference between them which renders this a ſtronger caſe; in that, the party might have appealed; in this he could not, becauſe the bill of exceptions was not ſealed.

This

This is certainly a hard case upon *Pickett*, but he who trusts most, must submit to bear the consequences of his misplaced confidence.

Decree affirmed.

LEE,

against

TAPSCOTT.

THIS was an appeal from the District Court of *Fredericksburg*. It was an ejectment brought by the lessor of the appellee against the appellant.

At the trial, the plaintiff in support of his title, offered in evidence a writing in the following words to wit: "To all &c. "whereas &c. now know ye, that I the said *Samuel Mathews* "*Esq.* do with consent of the council of state accordingly give "and grant unto *Henry Roach* 1700 acres of land, situated and "being in the county of *Westmoreland*, bounded &c. [and so "describing the bounds] 850 acres part thereof, being formerly granted unto the said *Henry Roach* by patent the 13th of "September 1654, and 850 acres the residue, by and for the "transportation of 17 persons into this colony &c. yielding and "paying &c. dated the 10th of October 1658."

(Signed) SAMUEL MATHEWS,
W. CLAIBORNE.

"Know all men by these presents, that I *Henry Roach*, do "make over, alien, and assign for me my heirs &c. all my "right title and interest in the within patent and whole *portion* "of land therein specified and contained unto *Mr John Hoskins* "of *Bristol*, his heirs &c. In witness whereof I have set my "hand this 13th of February 1660."

(Signed) HENRY ROACH,

and attested by two witnesses. On the 14th of February 1660 this assignment was acknowledged in court and then recorded.

[Note, the record does not state, that this assignment was endorsed upon the writing first mentioned.]

There