A

REPORT OF THE CASE

BETWEEN

FIELD AND HARRISON,

DETERMINED BY THE

HIGH COURT OF CHANCERY,

IN WHICH

THE DECREE WAS REVERSED

BY THE

COURT OF APPEALS.

RICHMOND:

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M,DCC,XCVI.

BETWEEN,

MARGARET FIELD, executrix of James Field, plaintiff.

AND

COLLIER HARRISON, and Chriſtiana his wife, executrix of David Minge, defendents.

WILLIAM CLAIBORNE and David Minge, the former of whom had received fifteen hundred pounds from James Field, by loan, for repayment thereof, ſealed and delivered their obligation, in theſe words: 'know all men, by theſe preſents, that we William Claiborne and David Minge are held and firmly bound unto doctor James Field, of Princegeorge county, in the juſt and full ſum of three thouſand pounds, current money; to be paid unto the ſaid doctor James Field, his certain attorney, his heirs, executors, adminiſtrators, or aſſigns; to which payment, well and truly to be made, we bind ourſelves, our heirs, executors, and adminiſtrators, ſimly by theſe preſents; ſealed with our ſeals, and dated this eleventh day of auguſt, one thouſand ſeven hundred and ſeventy eight. the condition of the above obligation is ſuch, that, if the above bound William Claiborne and David Minge do and ſhall well and truly pay or cauſe to be paid unto the ſaid doctor James Field, his certain attorney, his executors, adminiſtrators, or aſſigns, the juſt ſum

of

of fifteen hundred pounds, current money of Virginia, on demand, with intereſt from this day, then the above obligation to be void, or elſe to remain in full force and virtue.'

David Minge being dead, and William Claiborne being inſolvent, the creditors executrix, who could not maintain an action at common law againſt the repreſentatives of the former, as is generaly ſuppoſed, becauſe the obligation being joint the right of action ſurvived, brought a bill in equity, for recovering the money.

The defendents demurred to the bill, ſhewing, for cauſes, that the repreſentative of David Minge, who died in the lifetime of the other obligor, was diſcharged by that event; that the bill contained no equity; and that the plaintiff might have an action at common law againſt the ſurviving obligor.

The firſt and ſecond cauſes ſeeming falſe, and the third trifling, the high court of chancery overuled the demurrer upon argument, on the 15th day of may, 1794, delivering this opinion: 'that, by the death of one joint obligor, in the lifetime of the other, the duty of the former is not diſcharged, although againſt his repreſentatives the obligee hath no legal remedy for exacting perſormance thereof; for which reaſon the court of equity may properly ſupply ſuch remedy.' and that court afterwards, upon a hearing, decreed the defendents to pay to the plaintiff the principal money, due by the obligation, with intereſt.

This

This decree was, in October, 1795, reverſed by the court of appeals. their opinion, preceding the reverſal, is ſtated thus: 'that the teſtator David Minge, having been neither the borrower nor the uſer of the money lent to and uſed by Claiborne, but a ſecurity only, ought not, in equity, to be further or otherwiſe bound than he was by the contract bound at law; and, no fraud or miſtake appearing to have occurred in the writing of the bond, it is to be conſidered as a joint obligation, and ſubject to the legal conſequence of Minge and his repreſentatives being diſcharged by the death of him, in the lifetime of Claiborne; and that the ſaid decree is erroneous'

The decree of the high court of chancery was thought, by him who pronounced it, and will be thought, as he believeth, by moſt other men, to be conſonant with pureſt principles of juſtice; not to be repugnant to any principle of the common law, that is, of its moral part; and to have been dictated by the ſpirit, which revealed the utility and neceſſity, and deſignated the functions, of the court of equity.

To prove that he, at whoſe requeſt, and in confidence of whoſe cautionary engagement for another, one man lends his money to that other, is bound to reſtore the money, as conſcientiouſly as he would have been bound, if he had applied it to his proper uſe; and that, if this duty be not performed by the cautioner, the repreſentatives who ſuccede to his goods, are bound, no leſs than he was bound, if thoſe goods will enable them,

to perform it, will not be attempted; becauſe theſe propoſitions are thought to be of equal dignity with axioms, and to him who requireth a proof of them no intellectual truth whatever can be proved.

That the common law *(a)* hath declared an obligation, originating by contract, to be diſcharged by any thing, but performance of the act undertaken to be performed, or by conſent of him who had a right to exact performance, will be denied, until it ſhall be proved, otherwiſe than by deduction from want of a legal remedy to coërce performance.

That one capital branch of the court of equitys juriſdiction is to ſupply defects, unavoidable in ſuch a ſyſtem as that which is called the common law,--unavoidable in every ſyſtem of juriſprudence, contrived by human wiſdom, when it is reduced to a text,—every man converſant with thoſe ſubjects, will admit.

Such a man knows the province of the court of equity to be,

Firſt, to invent and apply remedies for recovering, preſerving, and ſecuring rights, and for repreſſing, anticipating, and repairing wrongs, in caſes where the common law had never provided remedies;

Secondly

(*a*) Here is meant what, in contradiſtinction to the ritual, cuſtomary, feodal, &c, aptly may be called the common law, becauſe it is the law common to all men, impreſſed on the human mind in characters ſo legible and ſignificant that every one may underſtand it;—in other words, the law of nature and reaſon, of which the precepts are ſuch that, to their rectitude aſſent is yielded, and to their authority the obligation of obedience is profeſſed, by all, except the diſciples of thoſe who can be eloquent encomiaſts of the moſt barbarous parts of what, by ſome of them, is alleged to have been the antient common law of England.

Secondly, to modify the remedies provided by the common law, amplifying them in caſes where they afford ſcanty, and abridging them in caſes where they afford exceſſive, meaſures of reparation;

Thirdly, to reſtore the remedies, or to ſubſtitute other for the remedies, which had been provided by the common law, but of which the parties are deprived, not by vices in the conſtitution of the rights clamed but, by impracticability of formulae, the obſervance of which in proſecution of the remedies had been required,—the rights theirſelves remaining unchanged, but the modes of aſſerting them being ſuch as, from intermediate events, not through default in the parties, cannot be perſued.

In adminiſtering theſe remedies, the court of equity doth not thwart or counteract, but doth promote and accompliſh the deſign of, the common law itſelf.

Examples of the two former heads of diviſion are not pertinent to this caſe. the ſubjoined examples of the other may be uſefull for illuſtration:

1. F lends money to C, who, for repayment thereof, ſeals and delivers his obligation.

The remedy, provided by the common law, to recover the money, is an action of debt.

F, loſing the writen obligation, which was evidence of the debt, can maintain no action whatever, by common law.

He

He cannot maintain the action upon an implied promiſe, which he might have maintained, if he had not taken the writen obligation, becauſe the promiſe, termed a ſimple contract, was merged in the writen obligation, termed a ſpecialty, the name by which every act of that kind, with a ſeal affixed or appended to it, is called.

He cannot maintain an action of debt upon this; becauſe, if in the declaration, after recital of the ſpecialty, he omit the *profert in curia*, as it is called, that is, if he do not add theſe words, 'which writing obligatory is brought into court,' or the like, except in ſome particular caſes, the defendant may demur to the declaration, and judgment will be given for him. if the declaration contain the *profert in curia*, the defendent cannot be ruled to plead, before the ſpecialty, or, in ſome inſtances an authentic copy of it, ſhall have been ſhewn,—may demand a hearing of it, and the plaintiff, failing to produce it, will be nonſuit.

In ſuch a caſe; to ſay, the right of F to the money is vitiated by the loſs of a paper, which the law requireth to be produced, becauſe it is regularly the legal evidence of the right,—to ſuppoſe the common law to have willed and intended, (if to ſuch an allegorical being we may attribute volition and deſign) when the rule, that a ſpeciality, by which a thing is demanded, ſhould be exhibited, not becauſe the demand was on that account more juſt, but, that the court might judge whether the ſpecialty were a valid act, was eſtabliſhed,—to affirm the common law to have willed

willed and intended, that the creditor, by ſuch an accident as the loſs of this paper, ſhould be deprived of his property, would betray ſtupid ignorance.

The law wills and intends, that juſtice ſhould be done in every caſe; that was the object of it, when its rules were eſtabliſhed, and its formulae preſcribed; but thoſe rules and formulae, in particular caſes, are the very means of injuſtice; as in caſe of the obligation loſt.

Men, who delight in quaintneſs of phraſe, and ſuppoſe themſelves to diſcover in it pith of argument, in ſuch a caſe as this, have ſaid, 'want of remedy and want of right are the ſame,' and hence, by that groſs ſophiſm, where, concerning the *eſſential properties* of a ſubject, is affirmed or denied that, which is true or falſe of ſomething *accidental* only to the ſubject, infer, that, when the EVIDENCE required by law to prove a debt is LOST, ſo that the legal remedy to recover it cannot be perſued, the OBLIGATION to pay the debt is DISCHARGED. they have maintained even a greater abſurdity,—have aſſerted that, where the legal title to property, of a particular kind, could not be recovered, becauſe the remedy to recover it could not be proſecuted *during a certain time only*, upon this principle, as it is ſaid, of the common law, that a perſonal action once ſuſpended is extinct (Hobarts reports p. 150. 1 Salkelds reports p. 306.) in ſuch a caſe, even the court of equity ought not to interpoſe. (*b*)

The

(*b*) In the caſe between Cage and Acton, reported by R. Raymond, 1 vol. p. 515, where a man, who had bound himſelf in the penalty of 2000 pounds, payable

The common law hath indeed expoſed and abandoned that right, which was its own offspring originaly, the legal evidence of which cannot be produced, being not unwilling, but, unable, without diſordering ſome parts of its oeconomy in the praxis, to cheriſh and maintain the right.

This is a defect in the law, if it intended, as ſurely one may venture to affirm it did intend, that juſtice ſhould be done in every caſe.

Here, then, the court of equity ſupplies the defect, by which the right, from debility in the parent of it to ſupport it, would have periſhed, and undertaking the benign office, which the common law reluctantly declined, adopts, and, *in loco parentis*, foſters and educates the foundling.

2. Again: F lends money to C and M who, for repayment thereof, ſealed and delivered their obligation, writen in the form which conſtitutes,

in

payable to the woman whom he married afterwards, with condition that the obligation ſhould be void, if, in the event of her ſurviving him, his executors or adminiſtrators, ſhould pay to her 1000 pounds, died before the wife, chief juſtice Holt, who was of opinion the bond was extinguiſhed by the intermarriage, ſaid, that, in ſuch a caſe the chancery would not give relief; in which, however, the chancellor did not concur, for, in another caſe, found in the 2 vol. of Vernons reports, p. 480, upon that very bond, the chancery did give relief. and upon this principle partly, a debitor hath been adjudged to be diſcharged from his obligation, when he is appointed executor of the teſtament of his creditor, except in particular inſtances. in England this doctrine hath been approved by the court of equity, in caſes innumerable, the authority of which may be thought by ſome ſufficient to condemn the decree of the high court of chancery, in the principal caſe; in vindication whereof, however, is contended, firſt, that a determination, not founded in natural juſtice, in one caſe, ought not, by analogy, to be a precedent for authoriſing a ſimilar determination in other caſes differing from it in material facts and circumſtances, as in the preſent inſtance, and that the determinations in favor of the debitors diſcharge are founded in natural juſtice no man but a bigot to authority, as is conceived, will affirm. and, ſecondly, another reaſon for thoſe determinations is a diſpoſition of the common law and chancery courts in England to preſerve uniformity of deciſion with the eccleſiaſtical courts there, who have attributed to an executor the character of a reſiduary legatee.

in the law nomenclature, a joint bond, in contradiſtinction to a bond joint and ſeveral. (c)

The remedy, provided by the common law, whilſt C and M live, is an action of debt againſt them both jointly.

If M die before C, F cannot maintain one action againſt C and the executor or adminiſtrator of M, becauſe, by the common law, the judgements ought to be againſt one in his proper, againſt the other in his repreſentative, character; moreover the writs of execution, conformably with the judgements, muſt be that ſatisfaction be made, of one, out of the goods and chatels of the defunct, of the other, out of the goods and chatels of the ſurviving, obligor, or by his impriſonment; but an union of ſuch different ſentences, and ſuch different modes of executing them, is irregular.

Neither can F maintain a ſeparate action, as is ſaid, againſt the executor or adminiſtrator of M, becauſe the obligation, being joint, in the law language, the action ſurvived. (d)

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(c) The propriety of this denomination, ſo underſtood originaly perhaps a reverie of ſome dull drowſy dreaming judge, which his ſucceſſors, too lazy to examine it, have ſuffered time to nature into an authority, is doubted; becauſe it ſeems not conſiſtent with the notions of the common law itſelf: for an execution to ſatisfy a judgement againſt C and M jointly the law will compel either of them to diſcharge intirely, which ſeems a proof that each was bound for the whole, and conſequently bound, in effect, ſeveraly, although, in form, jointly. again, when C and M are bound in an obligation, called joint, for payment of money, if C die firſt, the whole may be recovered from M; if M die firſt, the whole may be recovered from C; now, unleſs the death of one man, in the lifetime of another, can create an obligation in that other, which perhaps no man will affirm, C and M muſt have been originaly bound ſeveraly.

(d) An action againſt the ſurvivor of joint obligors is ſuppoſed to have been authoriſed by law, for the benefit of the obligee. of two, bound to perform an act, when one died before performance, the other, required to make amends for the

In this case too, for reasons explaned before, the court of equity, yielding the remedy which the court of common law, constrained by forms prescribed for its governance in ordinary cases, withholds

the whole wrong, might have objected, that the representatives of his associate in the contract ought to partcipate of the burthen proportionaly. but the law prohibits a junction, in the same action, of one party, in his proper, with another party, in his representative, character, for several obvious reasons; nor will the law permit the obligee to maintain two actions for the same thing, because he might thus recover a double satisfaction for a single injury. the law therefore, abhorreat from extinction of a right by failure of a remedy, alloweth an action to be maintained against the surviving obligor, and that he too might not be injured, alloweth him to maintain an action against the representatives of the co-obligor; whereby the matter is finaly adjusted without injury to any party, and, unless one of the obligors shall have become insolvent, without detriment to any party.

The doctrine, stated in this note, the writer of it acknowledgeth to have sprung, as well as he can recollect, from his own invention, and hopes he is not less happy in the discovery than chief justice Holt was, when he racked his more prolific invention, (as we are informed he did, by Peere Williams, in 1 vol. of his reports, p. 21,) to discover the reason why joint estates, and the consequent rights by survivorship, in lands, are favored in law.

If the common law, from its antipathy to injury by failure of remedy, as well as by other causes, allowed the right of action to survive, for the benefit of an obligee, what must have been that logic of the common lawyers, when they affirmed, and common law judges too, when they determined, if judges ever did determine (see Vernons reports, 2 vol. p. 99) that, where the surviving joint obligor was insolvent, the obligation of the defunct was discharged?

That common lawyers, with whom must be classed judges, have not been at all times so well acquainted with, or so attentive to, the rudiments and rituals of their own law, as not to have misunderstood them, or not to have argued fallaciously from them, is probable, if we may credit one who was well informed: 'sir H. Spelman somewhere condemns the common lawyers of his own time, for the small acquaintance they had with the principles and rationale of their profession. 'we are all for profit,' says he, 'and *lucrando pane*,' taking what we find at market, without inquiring whence it came.' Taylors elements of the civil law, p. 309. an error, from a cause not altogether dissimilar, justice Fortescue, in the preface to his reports, hath detected in Coke himself, the english Sulpitius, the *juris antipes* * of the common lawyers.

Let us, for the sake of elucidation, reverse the case, and suppose one, of two joint obligees, to have died, and the other to have removed, carrying with him the bond, to parts unknown. in which case the representative of the defunct obligee could no more maintain an action at common law against the obligor than, in the principal case, the obligee or his executrix could have maintained an action against the representative of the defunct joint obligor; would the common lawyers say, because the law gave no remedy, that the obligation was discharged? and, if judges should so determine, would not the court of equity give the executor of the defunct a remedy against the obligor for so much, at least, of the money, as was due to the testator?

Let us suppose William Claiborne and David Minge to have perished together, by shipwreck, lightning, or some other accident, so that which of them last drew breath could not be proved; would the obligation have been discharged as to David Minge? and, if no action could have been maintained at common law, would not the court of equity have decreed his representatives to pay the money.

* *Spelm. Gl. lib. XI. c. 1.*

olds, would ſubject the eſtate of M, in the hands of his repreſentative, to payment of the money borrowed.

The opinion and decree of the court of appeals are ſuppoſed, inſtead of contravening, to have approved, the doctrine herein before ſtated in theſe examples, unleſs perhaps, in the ſecond example, they would have charged the executor or adminiſtrator of M with ſo much only of the money borrowed as could be proved to have been uſed by himſelf, and thus have made important the inquiry how much of the money borrowed he uſed, and poſſibly which way he uſed it.

But, in the principal caſe, the plaintiff in her bill having confeſſed the money, for repayment of which William Claiborne and David Minge were bound, to have been lent to the former obligor, by which circumſtance the caſe is ſuppoſed to be diſtinguiſhable from the caſe ſtated in that ſecond example, this diſtinction is believed to be partly, if not ſolely, the foundation of the reverſing decree.

For, unleſs the opinion preliminary to that decree be miſunderſtood, which is not impoſſible, whilſt one is ranging among ſuch a groupe of negatives as are there exhibited, if David Minge had appeared to have either borrowed or uſed the money, his repreſentative would have been accountable for it.

The rationale of this diſtinction, and the truth of the propoſitions, and logic of the concluſions,

from

from which it ſeemeth to reſult, will be the ſubjects of examination, in ſome ſtrictures on that opinion, by way of

COMMENTARY.

The teſtator David Minge having been neither the borrower,] when the teſtator James Field conſented to let William Claiborne have money, not on his credit, but on the credit of David Minge only, the term 'borrower,' applied to David Minge, perhaps is, not a catachreſis but, a proper appellation,—not leſs proper than it would be, if David Minge, by his ſeparate obligation, had bound himſelf to repay money advanced, on his credit only, to his friend, his ſon, his ſervant, or to any one elſe. if, granting his ſeparate obligation, David Minge would have been a borrower, how the conjunction, with him, of the friend, ſon, ſervant, or other uſer, could diſrobe him of the character is not diſcerned.

Nor uſer of the money,] for reaſons ſo much like thoſe in the next preceding paragraph, and ſuggeſted ſo obviouſly, that adaptation of them to this would ſeem repetition, the term 'uſer' is applicable to David Minge as properly as the term 'borrower.'

But if theſe appellations belong not to him, whether, in equity, his repreſentative ought to repay the money borrowed and uſed, or not, will de diſcuſſed hereafter.

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Lent to and uſed by Claiborne,] on theſe words no animadverſion is neceſſary, more than that they are a mere pleonaſm; for the repreſentative of David Minge, if he were not the borrower or uſer of the money, was, according to the opinion, not bound, in equity, for repayment of it, what other man ſoever was the borrower or uſer.

But a ſecurity only,] ſecurity, as the term is here uſed, is the ſynonyma of ſurety, which latter, becauſe it is leſs equivocal than the former, ſhall, inſtead of it, be hereafter employed.

A ſurety is one bound that ſomething ſhall be done, not by himſelf in the firſt inſtance but, by ſome other, and, in caſe of default by this prime agent, that the obligor ſhall perform the act, or compenſate for nonperformance.

In the principal caſe, the relation of William Claiborne and David Minge, between themſelves, was the relation of debitor and ſurety, ſo that the latter, if he had been compelled to repay the money borrowed, might, for reparation, have reſorted to the former, upon one or other of the principles explaned in the caſe between Lomax and Pendleton. *(e)* The

(e) This caſe is to be found in a thin folio, called chancery deciſions. About a score, of many copies of it printed, have been ſold. the author of it, who expected it would be thought to deſerve a place in moſt law libraries, accounts for this neglect in a way ſuggeſted to him by the following paſſage in Plutarch: that biographer relates, that Cato, the cenſor, when he was eighty years of age, undertook to learn the language of the greeks, the cultivation of whoſe literature, believed by his countrymen to have enlightened them, he had, upon all occaſions before, diſcouraged, vilified, reprobated. to punish him for this inconſiſtency, the rage, with which, at ſuch an advanced period of his life, he was inflicted, for confabulation in a dialect new to him, was called a judgment upon him. the author of the chancery deciſions was guilty of an offence for wh[illegible] ſimilar. he had [illegible]

for

The legal relation of James Field and David Minge, between themſelves, was, not the relation of creditor and ſurety but, the relation of creditor and principal debitor; for David Minge binds himſelf and his heirs, &c. in a penalty, and the obligation for payment of the penalty he agrees, by the condition, ſhall remain in force, if he and William Claiborne ſhall not pay the principal money and intereſt.

David Minge, therefore, by law was, not a ſurety, or a ſecurity as he is called but, by the terms of the obligation, as much a debitor as the co-obligor William Claiborne.

Ought not, in equity, to be further or otherwiſe bound than he was, by the contract, bound at law,] the contract itſelf ſheweth him to have been bound at law as far as william Claiborne was bound at law.

Why then ought not the repreſentatives of David Minge, in equity, to be bound as far as the repreſentatives of William Claiborne, if he had died firſt, would have been bound? the anſwer, contained in the opinion introductory to the reverſing decree, is, he was, neither, firſt, the borrower, nor, ſecondly, the uſer, of the money, but, thirdly, a ſecurity only. let all theſe, although every one

for many years occaſionaly ſpeaking irreverently of ſome reported weſt-nonaſterian adjudications; to be puniſhed for which, perhaps, he was afterwards ſeized with a rage for reporting——reporting his own adjudications too, which may be as unentertaining and unedifying as the ſenile garrulity of Cato in a language not his vernacular tongue. notwithſtanding that work has been ſlighted, the authors *cacoëthes bluſphemandi* in that way is ſo inveterate that it may be pronounced *inſanabile*. this *opuſculum* may be ſlighted in the ſame manner; yet his *cacoëthes edendi* will break forth, when ſuch occaſions as this preſent ſit ſubjects for his lucubrations.

one of them may plauſibly at leaſt be denied. be, for argumentſake, granted; the ſingle queſtion then will be, whether a creditor ought not, in equity, to have like remedy againſt the ſurety's repreſentatives as he might have proſecuted againſt the principal debitors repreſentatives?

If between the obligations of the debitor and ſurety and their reſpective repreſentatives to pay, and between the rights of the creditor to demand, from one or other, the money due, in the event which happened, the diſtinction exiſt, ſome reaſon for it may be and ought to be adduced.

The only ſpecious argument for the diſtinction, which hath occurred to the commentator, after long, frequent, and diligent inveſtigation, is founded on compaſſion for an innocent ſurety, as he is called,—improperly called, if we regard the etymology of the epithet, and the conſequence to the creditor pretended to be ſanctified by it. an innocent man is he, by whoſe act, or by whoſe omiſſion, another man is not hurt; but the creditor, loſing the money, which he had lent, and the loſs of which he would not have hazarded, if the ſurety had not ſolemnly agreed to be ſponſor for the borrowers ſufficiency, is hurt by an act of the ſurety in procuring the loan, and by his omiſſion to guard againſt the loſs, if his repreſentative be diſcharged from reſponſibility.

However that may be, compaſſion ought not to influence a judge, in whom, acting officially, apathy is leſs a vice than ſympathy.

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The creditor may have mercy upon his neceſſitous debitor, and forgive him the debt, incurred by borrowing money to ſupport a family,—may be content with leſs than he might rigorouſly clame from a ſurety, upon whom the debt of an inſolvent falls. ſuch charity and liberality in the creditor himſelf are commendable. but when he exacts his dues, the judge cannot conſtitute himſelf the creditors almoner, or the diſpenſer of his bounty. the judge, by the eagerneſs, which his yearnings excite, to divert the burthen impending on a ſurety, ought not to be tranſported ſo far as to forget, that his charity and beneficence ought to begin at home; that his own purſe, not the purſe of another man, is the ſource from which the relief he would afford ſhould flow; and that, whilſt he ſpares the ſtore of a wealthy ſurety, he may be taking the bread out of the mouths of a creditors ſtarving family. of the caſes which can be put, ſuch exoneration of the ſurety ſeemeth, in all unjuſt, arbitrary, oppreſſive, and, in ſome, cruel.

The diſtinction, now under conſideration, is oppugned by principles both of law and equity. according to them, the right to demand, and the obligation to make, ſpecific reſtitution, or vicarious ſatisfaction, originating by contract, are complete, either, firſt, by an act of one party *beneficial to the other*, and performed at his requeſt, or, ſecondly, by an act of one party *detrimental to himſelf*, performed at like requeſt of the other party.

The merits of the party performing the acts,

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in both caſes, are equal in legal eſtimation. nor do the principles of equity teach us to exalt the merit in one above that in the other, or to conſtruct tables for graduating the merits in either of them.

Whoever uſed the money, or in whatever manner he uſed it, or whether he threw it away, the merit of the lender was the ſame, becauſe his detriment in parting with his money was the ſame. the borrower indeed, obtaining what he wanted and what he could not have obtained without the ſuretys kind office, in procuring the loan, is indebted to that benefactor doubly,—owes the 'debt immenſe of endleſs gratitude,' and is moreover bound to indemnify him; but the right of the lender to demand from them, and their obligation to repay to him, the money borrowed, do not depend upon, and cannot be magnified or diminiſhed by, the right and obligation exiſting between them, either in law or equity.

When the cauſe was heard before the high court of chancery, the argument, in ſupport of the diſtinction, now irrevocably eſtabliſhed, conſiſted, not of reaſoning on the ſubject but, of quotations from, and references to, authorities, (/) of which kinds

(/) Sentences, exhibited ſometimes in print, and inſhrined, at other times, in MSS, of men in England, who, after inauguration by the coif, with the geometry and grimace attending that ceremony, called by writs, or commiſſions by letters patent, are mounted on the one bench or the other, at Weſtminſter, or who had been appointed maſters of the rolls, or who had received the great ſeal from the hands, after kiſſing them, of his or her ſacred majeſty, with the titles of lord keepers or lord chancellors,—theſe ſentences are called authorities, and are ſo reſpected that when a thing is ſaid to be juſt or unjuſt, the ſpeaker, who is required to prove it, in like manner as ſome men, not long ago, thought nothing neceſſary to prove a phyſical truth more than to ſhew that it had been affirmed by Ariſtotle, ſome where or other in his works, ſuppoſeth the juſtice or injuſtice of the

kinds of argumentation the latter is generaly preferred, becauſe it is not only much eaſier, but, more influential, than the former.

Of the authorities, quoted by the defendents counſel, that upon which he chiefly relied, which was not leſs ſatisfactory than the other, and the ſenſe of which is tranſcribed almoſt literaly into the opinion of the court of appeals, is this caſe of Ratcliffe verſus Graves et alios, in Vernon's reports 1 vol. p. 196.

'Walter Ratcliffe, plaintiffs father, having made his will, and plaintiff and his brother John executors and reſiduary legatees, and they being infants at their fathers death, adminiſtration with the will annexed during their minority was granted to Elizabeth Ratcliffe their mother; and the prerogative court upon granting the ſaid adminiſtration

the thing in queſtion deciſively proved, if he can ſhew it to have been declared to be juſt or unjuſt by ſome lord chief baron, lord chief juſtice, or one of their aſſociates, or by his honor the maſter of the rolls, or by ſome lord keeper or lord chancellor. when one of theſe ſentences, carried before the houſe of lords, is affirmed or reverſed, the matter is then ſuppoſed to have been examined with extreme ſeverity, and like ſubjects tortured in the *examinationcuria*, to be incapable of further enucleation. theſe affirmations and reverſals, by thoſe *judges in appeal*, in that country, at all times after bear the ſtamp of infallibility, to deny or diſpute which is a dangerous hereſy; for, in 1697, the court of kings bench having given a judgment, inconſiſtent with a determination of the houſe of lords, their lordſhips, much offended, ſummoned the chief juſtice to give his reaſons for the judgment, and when he refuſed to do it, threatned him with a commitment to the tower. reports by R. Raymond, 1 vol. p. 18. in numberleſs caſes, and, among them, even when the queſtion is, what was the meaning of a mans words in his teſtament! decrees of heavy, huge, unwieldy, folio volumes, attended by a ſuitable number of quarto and octavos, are introduced, every one pretended to contain the report of a caſe in point the authorities appear ſometimes to jarr, and, when they do ſo, the engliſh judges ſeldom fail, becauſe it is very much their wiſh, to reconcile them. when that is done, every one ſeems to be ſatisfied. but whether the authorities can be reconciled with common ſenſe, often more difficult than reconcilement of them with one another, is rarely thought worth inquiry. the ſuperſtitious veneration for them even in America, is ſo deeply rooted, that the man who can rationaly expect he ſhall live until it is eradicated, ought to have antediluvian ſtamina.

tration took the uſual bond from the adminiſtratrix, in which the two defendents the Heathers were bound, as her ſureties. the plaintiffs brother being dead, and having made his will and plaintiff executor, he now brought his bill for an account of the teſtators perſonal eſtate, and as to the defendents the ſureties, it was ſuggeſted that by fraud and covin, they had got up their ſaid bond, and had procured inſufficient ſecurity to be accepted by the prerogative court in the room thereof. but the lord keeper, upon the firſt opening of the matter, declared he would not charge the ſureties further than they were anſwerable at law; and diſmiſſed the bill as to that part.'

Upon this caſe but few obſervations can be made, becauſe the man who determined it hath not condeſcended to give a reaſon for his determination, not only would give no reaſon, but, interrupted a diſcuſſion, turning a deaf ear, *when the matter was firſt opened*, to every thing which could have been urged againſt, and which might have prevaled upon him to repudiate, the opinion, to which he had been wedded perhaps overfondly. the commentator, when this authority was quoted on another occaſion, ventured to affirm, that ſuch a haſty dogmatical abrupt depulſion of the queſtion, rather than deciſion, which ought always to be preceded by mature deliberation,—*a declaration that he would not charge the ſureties further than they were anſwerable at law*, and this, for any thing appearing to the contrary, only becauſe he *would not charge them*, as if the will of this lordly judge, like the princely *ſic volo, ſic jubeo*, were a law, deſerveth not to be claſſed among the *reſponſa prudentum*;—

dentum;—and moreover ventured to affirm, that it is intitled to leſs reſpect than one of the caſes which are called anomalous, not only deviating from general principles, admited univerſaly to be the foundation of reſort to the court of equity for relief, where the party applying for it is remedileſs at common law but, contradicting thoſe principles where they have been recognized and exemplified in particular caſes, not rationaly diſtinguiſhable from it; in proof of which, beſides the caſes herein before adduced, by way of examples, let a reference be to the caſe of Underwood againſt Staney, reported in chancery caſes, p. 77, which was thus:

'The obligee in a bond of twenty years old exhibits his bill againſt the adminiſtrator of the principal and the ſurety (upon loſs of the bond.) the adminiſtrator ſaith by his anſwer that he hath no aſſets. Upon hearing the cauſe, it was directed to a trial, whether the ſurety had ſealed and delivered the bond; and a verdict had paſſed againſt the ſurety, (viz.) that he had ſealed and entered into the bond. and the cauſe coming back to this court, and the plaintiffs counſil praying a decree for the plaintiffs debt againſt the ſurety, ſerjeant Fountain (not of counſil on either ſide) ſaid it was doubtful whether equity ſhould in this caſe bind the ſurety, who was not obliged in law, but in reſpect of the lien of the bond; and that being loſt and the ſurety having no benefit by (nor conſideration for) being bound, he thought equity after ſo long a time ſhould not charge the

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ſurety. the maſter of the rolls ſaid he would ſee to moderate and mediate this matter between the parties; in order to which, he was ſeveral times attended by the plaintiff; and the defendent making default, he decreed for the plaintiff. and afterwards the cauſe was, upon a caſe made, brought before my lord chancellor, who was of opinion with the maſter of rolls, and decreed it for the plaintiff. it was in the debate of this caſe ſaid, that if a grantee in a voluntary deed, or an obligee in a voluntary bond, loſe the deed or bond, they ſhould have remedy againſt the grantor or obligor in equity. *tamen quaere.* but if ſo, no miſtake in the principal caſe, where the bond was for money lent; and though the ſurety had no advantage, yet the obligee had parted with his money, and loſs is as good a conſideration for a promiſe, as benefit or profit.'

This caſe may be a match at leaſt, if not an overmatch. for that in Vernon. neither of them ſtates any reaſon for the decree. the caſe in Vernon was indeed ditermined a few years after the other; but, to compenſate for this, the determination in the latter was by his honor, the maſter of the rolls, and his lordſhip, the chancellor; in the other, by his lordſhip the keeper only; ſo that here are two judges (one of them not a lord indeed) to one; that in Vernon was *upon the firſt opening*; that in the other was *upon a caſe made brought before my lord chancellor*, and therefore poſſibly, after deliberation. perhaps neither of them ought to be of oracular authority further

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than they are reconcilable with the principles of juſtice. and the one in the chancery caſes is thought reconcilable with thoſe principles.

If its authority be allowed, it is, in forenſic phraſe, a caſe in point, unleſs between a loſs of the ſuretys bond and the ſuretys death in the life time of the principal debitor, by which events the obligees were deprived of their remedies at common law, be ſuch a difference as will, in equity juſtify a decree, for the obligee in one caſe, and a diſmiſſion of his bill in the other caſe.

Judges, whoſe underſtandings elaborate erudition hath poliſhed and recondite ſcience hath illumined, may be able to diſcover ſuch a difference. the commentator acknowledgeth ſuch a difference to have eluded his *acumen ingenii*.

The accident, by which a party, in one caſe, was remedileſs at common law, was the loſs of a paper; the accident, by which a party, in the other caſe, was remedileſs at common law, was the death of one man before another,—a difference, if material at all, favorable to the party in the latter caſe, becauſe the accident there was, not through any default of her or her teſtator but, an act of god, which the law itſelf declareth ſhall not injure any man, whereas the loſs of the paper may have been through negligence of the obligee.

Perhaps this difference may be alleged; that, in one caſe, by the bond, if it were oſtenſible,

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the ſurety might be charged even at common law, ſo that the court of equity, giving relief in that caſe, doth nothing more than ſupply the want of evidence to prove exiſtence of the bond, and enforce performance of an obligation praeexiſtent; but, in the principal caſe, the bond is oſtenſible; and the court of equity giving relief, inſtead of enforcing performance of an obligation praeexiſtent, upon which an action at common law is maintainable, would create a new obligation, the former being diſcharged. but this would bring us back to the queſtion, whether a right were deſtroyed, or an obligation diſcharged, by the want of a legal remedy to recover the right, or to exact performance of the obligation.

Now an obligation may be diſcharged either by an act of the obligor, or by an act of the obligee.

1. By act of the obligor: when William Claiborne and David Minge ſealed and delivered their obligation, acknowledging themſelves bound in 3000 pounds, payable to James Field, upon condition, that, if they paid 1500 pounds to him, the obligation ſhould be void; if they had paid the 1500 pounds accordingly, the obligation would have been diſcharged,—would have been void,—by the letter of the contract.

2. By act of the obligee: if James Field had ſealed and delivered an acquitance, the obligation would have been diſcharged by conſent. neither of theſe having been in the caſe,

If

If the obligation were diſcharged, it muſt have been by an act of the law, or rather by an omiſſion of the law, to provide a remedy for redreſs of a wrong; but let it be called an act of the law. the caſe then is this:

By act of law, a man is deprived of his remedy to recover a juſt debt. on the other hand, one of the maxims of law is, 'an act of the law ſhall never work a wrong.'

In ſuch a caſe, Francis Bacon, in a tract intituled maxims of the law, under the rule, by him numbered 3, *verba fortius accipiuntur contra proferentem*, hath delivered a criterion, fit to be remembered, in theſe words: 'a point worthy to be obſerved generaly in the rules of the law is, that, when they encounter and croſs one another, in any caſe, it be underſtood which the law holdeth worthier, and to be prefered; and it is in this particular very notable to conſider that this being a rule of ſome ſtrictneſs and rigor doth not, as it were, its office, but in abſence of other rules which are of more equity and humanity.'

The man who thinks the rules of law, by an inference from which the bond in the principal caſe was affirmed. as is ſuppoſed, to have been diſcharged, *ſtrict and rigorous*, and the maxim, an act of the law ſhall never work a wrong, *equitable and humane*; and that the foreſaid inference and maxim in this inſtance *encounter and croſs one another*; ſuch a man would incline to believe

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that a Bacon, if he had been the judge, even in a court of law, would not have ſaid that *the bond was diſcharged by the death of Minge in the lifetime of Claiborne*, although no action at common law could be maintained on the bond. what he would probably have ſaid, in another place, will be mentioned hereafter.

That author in the ſame tract hath inſerted this rule, numbered 9, *quod remedio deſtituitur ipſa re valet ſi culpa abſit*, to which are ſubjoined theſe paraphraſtic terms: ‘ the benignity of the law is ſuch, as when to preſerve the principles and grounds of law it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worſe; for if it diſable him to purſue his action, or to make his clame, ſometimes it will give him the thing itſelf by operation of law without any act of his own, ſometimes it will give him a more beneficial remedy.’

If the genius of the common law inſpire its judges with an inclination to invent and apply remedies for averting the perdition of rights, by operation of rigid inflexible rules,—to uphold rights, although, for recovery thereof, thoſe rules have diſabled parties to perſue their actions,—in fine, to put parties, ſo deprived of their actions, in a better condition, rather than in a worſe; may we not reaſonably conjecture that the myſtagogue of ſcience, whoſe language was lately quoted, if, when he adorned the engliſh high court of chancery,

cery, the principal caſe had been brought before him, would not, like the inexorable keeper, in the caſe of Ratcliffe *verſus* Graves, have hurried the plaintiff from his preſence, with a diſmiſſion of her bill. but that, inſpired by the genius of equity, he would have pronounced a ſentence ſomewhat in this form: ' the benignity of equity is ſuch, that it will, when the law, to preſerve its principles and grounds, depriveth a man of his remedy, without his own fault, give him a remedy equaly beneficial? ' and would not ſuch a ſentence have been in perfect concord with principles of equity, which hitherto have been acknowledged univerſaly, and from which examples of deviation occur not, except in two or three ſudden ſelfwilled declarations of a lord keeper, *that he would not charge a ſurety further than he was anſwerable at law*, although neither he, nor any other man, ever pretended to aſſign a reaſon, nor, as is believed, was able to aſſign a reaſon, for the deviation?

So much of the opinion as hath been conſidered, no doubt, ſeemed to thoſe who delivered it ſufficient to evince the error of the reverſed decree; ſo that the following part appeareth to have been added *per ſaturam*; but, as it is crammed therein, it muſt not be paſſed over; and it deſerveth eſpecial notice, becauſe it refereth to certain topics, from which, or from one of which, at leaſt, an argument may be drawn powerfully ſupporting that decree, the everſion of which was intended.

And

And no fraud or miſtake appearing to have occurred in the writing of the bond,] if the three men, who tranſacted this buſineſs, did intend to make a contract to this purpoſe; that the repreſentatives of David Minge, in the event of his death, in the lifetime of William Claiborne, ſhould be diſcharged from their teſtators obligation to aſſure the repayment of the money borrowed by William Claiborne, with intereſt, every man will agree with the court of appeals, that *no fraud or miſtake occurred in the writing of the bond*; and perhaps the court of appeals will agree, with every other man, that the creditor was unwiſe in making ſuch a contract, which was nothing but a wager, by which, in no event, he could gain any thing, and in one event might loſe his ſtake.

But, if the parties did intend, that David Minge or his repreſentatives ſhould aſſure the repayment, in every event, as moſt men will ſuppoſe they did, and if the bond be writen in ſuch a manner, that, unleſs the money were paid in the lifetime of both, the intended ſatiſdation is confined to the ſingle event of David Minges breathing after William Claiborne ſhould ceaſe to breathe, then the parties were deceived,—deception *occurred in the writing of the bond*; and if deception and fraud be convertible terms, as they are, if ordinary vocabularies err not, *fraud occured in the writing of the bond.*

Whether the party who gained by the deception meditated it or not? authorities perhaps,

may

may make an important inquiry; but if they do not decide otherwiſe, the pure principles of equity ſeem to teach, that a man ought not to ſuffer detriment by fraud, occurring in a contract, although the fraud were not premeditated, and the contract not ſtudiouſly and induſtriouſly conceived in terms by which the party was harmed. the turpitude of the fraud, with that ingredient, is indeed the fouler for it; but the reaſon, why the contract ought not to be detrimental to the party, is ſuppoſed to be, that it was a contract which he did not mean to make,—a contract, to which, if he had known the purport of the terms uſed to declare it, he would not have yielded his conſent,—a contract not the image of the parties intention, by which the writen act ought to have been moulded. by the roman civil law, *non videntur, qui errant, conſentire.* Dig. lib. L tit. XVII. Reg. CXVI § 2.

Further, if the parties did intend that David Minge or his repreſentatives ſhould aſſure repayment of the money borrowed, in all events, and the bond be writen in ſuch a form that the ſatisdation would be ineffectual in one event,—an event which neither the creditor nor perhaps either of the other parties had in contemplation;—in other words, if the creditor, if all the parties, did TAKE a bond to be what it is not, ſome men would NAME *what occurred in the writing of the bond* a MISTAKE, and would not be perſuaded eaſily, that they gave it a MISNAME.

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If a court of equity, becauſe poſſibly not ſupported by authorities, would not relieve againſt a *fraud* unpremeditated, that court, as is conceived, would not tranſgreſs its legitime bounds by granting relief againſt ſuch a *miſtake*.

It is to be conſidered as a joint obligation,] it was ſtated to be, and therefore muſt have been *conſidered as, a joint obligation*, both in the bill, and the reverſed decree; and becauſe, being joint, an action at common law could not be maintained upon it, the executrix of the obligee, illadviſed as unlucky, ſupplicated a court of equity to ſuccour a conſcientious demand, which the court of common law, although not an enemy to it, and in truth the parent of it, could not befriend;—a caſe occupying perhaps the firſt grade in the catalogue of caſes, which are intitled to the ſalutiferous interpoſition of the court of equity, and for the ſake of which that tribunal, auxiliary to the common law itſelf, was inſtituted. but vain was her application, for the bond was .

Subject to the LEGAL conſequence of Minge and his repreſentatives being diſcharged by the death of him in the lifetime of Claiborne,] the ſum of the opinion ſeems to be, that, when, for any cauſe whatever, an action at common law cannot be maintained againſt a ſurety, or his repreſentative, on his bond, wherein with him the principal is bound jointly, unleſs he the ſurety was *borrower or uſer of the money, or fraud or miſtake appear to have occurred in the writing of the bond*,

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the obligation is diſcharged in equity. if ſuch be the opinion of the court of appeals, to reconcile it with fundamental general principles is not in the power of the commentator.

If this be not their opinion, what there or elſe where can juſtify the final ſentence

And that the ſaid decree is erroneous?] to which ſentence however, all people, within a certain diſtrict, muſt now ſubmit; but which will not be approved, as is believed, by them any more than it will be approved by others. let us vary the caſe, only, by ſuppoſing James Field to have been reſident in Amſterdam, Paris, or ſome other foreign country, and William Claiborne and David Minge to have gone thither, and, for ſecuring repayment of the money borrowed by William Claiborne, to have ſealed and delivered their obligation there, inſtead of Prince george county in Virginia; would the court of appeals have reverſed the decree, in that caſe, for the executrix of James Field againſt the repreſentative of David Minge? if not, what reaſon can be aſſigned for the difference? if they would have reverſed it, would foreigners think the juſtice of Virginia or the adminiſtrators of it proper ſubjects for panegyric?

FINIS.