

Case No. 5,450.

GILPIN v. OXLEY.

[1 Cranch, C. C. 568.]<sup>1</sup>

Circuit Court, District of Columbia.

July Term, 1809.

PRINCIPAL AND SURETY—ADMINISTRATION BOND—PROOF OF DEBT.

An action will not lie against the sureties in an administration bond, until the plaintiff shall have proved his debt and a devastavit, in an action against the administrator.

Debt [by Gilpin, judge of the orphans' court] on an administration bond against the administrator of Henley and his sureties. The breach alleged is the non-payment of two promissory notes made by Henley.

Mr. Taylor, for Murgatroyd, one of the sureties, prayed the court to instruct the jury that no suit can be supported against the sureties, until the debt has been established by a suit against the administrator, and nulla bona returned upon an execution de bonis testatoris. *Braxton v. Winslow*, 1 Wash. [Va.] 31.

E. J. Lee, contra. The object of the bond is to secure creditors. If the administrator runs away, the plaintiff can get no judgment against him. And if his sureties are not liable, he will have no remedy. The sureties may require counter security. In *Braxton v. Winslow*, the suit was against the sureties only. The executor was not a party to the suit. In *Turner v. Chinn's Ex'rs*, 1 Hen. & M. 53, the court of appeals say the question is not decided; and they leave the question open, whether the return, that the executor had removed to Kentucky; was sufficient to charge the sureties. As to guardians' bonds, there is no such decision. *Call v. Ruffin*, 1 Call, 333.

THE COURT stopped Mr. Taylor in reply, considering the point as settled by the court of appeals in Virginia. Nonsuit.

<sup>1</sup> [Reported by Hon. William Cranch, Chief Judge.]