REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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facias, upon a decree for money in the present case: which execution the law declares shall be executed and returned, and have the same operation and force, to all intents and purposes, as similar process at common law. The law has not limited the operation, nor drawn the line where it is to stop. The Court cannot draw that line, but is of opinion the operation must continue throughout, till the money is paid; and award the damages as part of that operation.

[89]

WM. ALEXANDER &c. Appellants *v.* ROBERT MORRIS, Appellee; WM. ALEXANDER, Appellant *v.* ROBERT MORRIS, Appellee; WM. ALEXANDER & Co. Appellants *v.* JOHN TAYLOE GRIFFIN, Appellee; WM. ALEXANDER, Appellant, on behalf of himself, & Co. *v.* J. T. GRIFFIN & R. MORRIS, Appellees; ALEXANDER J. ALEXANDER, Appellant *v.* J. T. GRIFFIN, R. MORRIS, W. ALEXANDER, GEORGE GRAY & E. M'NAIR, Appellees.

Saturday, November 14*th*, 1801.

The owner of particular certificates, will be entitled to a decree for the certificates themselves, if to be had, and if not, to their value at the time of the decree.

A factor, indebted to his principal at the time, cannot sell the property of the principal, to pay endorsements in the course of his factorage. Nor can a factor buy up the debts of his principal at an under rate, and claim credit for their nominal amount; but, in such a case, he will only be allowed what he actually paid, although the purchase was made after the factorage had ceased, and the principal had brought suit for an account.*

A deposition taken after an appeal from an interlocutory decree in Chancery, may be read upon the hearing of the appeal.†

These five suits, which are appeals from the High Court of Chancery, are so interwoven with each other, as in truth to

*See *Buck & Brander* v. *Copland*, 2 Call, 218.

If an agent employed to sell land, buy it himself from his principal, concealing the fact that a better price could be gotten; it is a fraud, and the contract should be vacated. *Moseley's adm'rs.* v. *Buck & Brander*, 3 Mun. 232.

One who is agent for buyer and seller both, decreed in equity to pay the seller all the agent's share in the profit. *Segar* v. *Edwards and wife*, 11 Leigh, 213.

A confidential agent cannot buy a subject of the agency from his principal, so as to bind the latter. *Buckles* v. *Lafferty*, 2 Rob. 292.

†A deposition may be read, if returned before hearing, and though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree. Code of 1849, p. 666, § 30.

After judgment, decree. or order, as to which there has been or may be allowed an appeal, writ of error, or *supersedeas*, a deposition may be taken as in pending cases; and be read in any subsequent trial, if it could be read had there been no such judgment, decree, or order. Code of 1849, p. 666, § 31.

constitute different points in the same cause. The general history of which, as collected from the various bills and answers, is as follows:

Robert Morris alleges, that, in 1783, overtures were made to him by the Farmers General of France, for a contract for tobacco. That delicacy prevented him from pursuing the subject, he having received information from Jonathan Williams, (the son-in-law of William Alexander,) that they [90] had made a contract with the Farmers for supplying them with tobacco. That this information, though incorrect in its full extent, terminated in Morris's associating himself with Williams and William Alexander, in a contract for 15,000 hogsheads per annum, for three years, to be furnished to the Farmers General. That afterwards, in January, 1785, a contract with the Farmers General was proposed to Robert Morris; which he confirmed in April, 1785, for the shipment of 60,000 hogsheads of tobacco in the years 1785, 1786 and 1787. That William Alexander was to have a share in this contract, but its rate was not absolutely fixed, though he entered upon the purchase of tobacco, with Robert Morris's funds, and continued therein, until the 6th day of July, 1786; when he, Robert Morris, took upon himself the great loss sustained in the shipment of 2,000 hogsheads, which had been shipped upon an experiment, and agreed to give William Alexander a dollar per hogshead, for the 60,000 hogsheads, besides a certain commission, charges and allowance to sub-agents. That Robert Morris furnished necessary funds to a large amount; but William Alexander failed in his part of the contract, whereby Robert Morris's credit was ruined and himself impoverished. That William Alexander speculated with Robert Morris's funds, and made great profits to himself. That among the acquisitions, made with the funds of Robert Morris, were upwards of 56,000 dollars in military certificates, deposited by John Tayloe Griffin on account of a loan made by William Alexander to the said Griffin, by the express direction of Robert Morris himself, on whose proper account the transaction was. That William Alexander has refused to account, and pay the balance due to Robert Morris, and to deliver to him the certificates aforesaid, of which Robert Morris is the owner. Wherefore, Robert Morris prays that William [91] Alexander may be compelled to pay the balance and deliver the certificates.

On the other hand, William Alexander insists, that his credit and influence greatly contributed to the promotion of the contract with the Farmers General; and, if Robert Morris

had not diverted the funds advanced by them, to other purposes than those of the contract, the business might have been perfected with great advantage. That, in the settlement of his accounts, he is entitled to credit for various articles, the most prominent of which are, 1. A dollar per hogshead on 20,000 hogsheads, which Robert Morris was at liberty to ship to the Farmers General, under a permission given subsequently to the contract in April, 1785; but which were never shipped. 2. Counting-house expenses. 3. The cargo of the ship Mary Anne. That he is also entitled to retain the certificates of John Tayloe Griffin, they having been sold to indemnify William Alexander, while he was a creditor of Robert Morris, for his endorsements on certain bills of exchange drawn by Robert Morris, and protested; and that Alexander J. Alexander was a purchaser of some in satisfaction of one of those bills. That William Alexander is also entitled to a discount for 110,000 dollars in the notes of Robert Morris, endorsed by John Nicholson, or of John Nicholson, endorsed by Robert Morris.

The Court of Chancery decreed in favor of Robert Morris; and, thereupon, Alexander appealed to this Court.

HAY, for the appellant.

Alexander was entitled to a commission of a dollar per hogshead on 80,000 hogsheads, because the Farmers General had agreed to take that quantity, and it was the failure of Morris's
[92] funds which prevented his compliance with the agreement. Of course, as the disappointment arose from his own delinquency, his agent is not to be prejudiced thereby; but should have the same compensation as he would have been entitled to, if the agreement had been carried into effect; especially, as the money advanced to Morris, by the Farmers General, would have enabled him to carry the contract into complete effect, if he had managed it judiciously. The household expenses were incurred for the benefit of the factorage; and, therefore, under the agreement, ought to be borne by Morris. The contract with Griffin was made out of Alexander's own funds, and Morris was only to have the tobacco, if paid: The certificates were pledged to Alexander himself, and consequently, he alone was entitled to them; but, if not, still he had a lien on them for the balance of his account. [*Drinkwater* et al. v. *Goodwin*,] Cowp. 251; and, as payment of the bill endorsed by him was demanded, some suits brought, and others threatened, he was justifiable in selling the certifi-

cates to pay the bills. Part of the certificates were bought by John Alexander, who was an innocent purchaser, and, consequently, entitled to hold them. In any event, Alexander is only liable for the value of the certificates, when sold, and Morris is not entitled to a decree for the certificates themselves, or for their present value. *Groves* v. *Graves*, 1 Wash. 1. But, be this as it may, Alexander was clearly entitled to discount the notes of Morris, at their nominal value, against the balance in his hands; for, if he owed Morris on the account, and Morris owed him on the notes, the one ought to be a *set-off* against the other; which argument is the stronger, as there could not be any pretext of a trust, at the time the notes were purchased, for the factorage had long before ceased, and the transactions between the parties had all determined.

CALL and RANDOLPH, contra.

Morris never was authorized to ship the additional 20,000 hogsheads in the year 1788; for, by the terms of the correspondence and agreement, they were to be shipped within the same periods as the first 60,000 were; that is to say, within the years 1785, 1786, 1787: and the evidence clearly proves that Alexander could not ship them within that [93] period, although furnished with ample means for the purpose. It is, therefore, preposterous to demand compensation for a service which he could not perform. Besides, if it were otherwise, the most which could be demanded, would be damages for breach of the agreement, and not a full commission upon the whole; because, in fact, he has not done the service for which it would have been payable. The household expenses were chiefly incurred for business, carried on by Alexander, on his own account, independent of the factorage; and, therefore, he ought to bear them. The advances to Griffin, were out of Morris's funds, and the contract expressly made on his own account, at his own request, and in consequence of his own treaty. Of course, Alexander could have no right to them, upon the ground of the contract: nor had he any just pretence for selling them; but the alleged sale was altogether unauthorized and illegal. For, he did not acquire them in the course of his factorage, but merely as the friend of Morris, upon a transaction entirely out of the line of the factorage. But, if it were even otherwise, still that did not authorize the sale; because it was unnecessary. For, there was no judgment against him; and no case proves, that a factor can sell the property of his principal, before actual damage, upon a mere apprehension of possible danger. Besides, he was ac-

tually a debtor at the time, and had not only refused an indemnity, but declared that he would not retain the funds in his hands. The sale, therefore, was clearly illegal; and Morris is entitled to the certificates themselves, which remain in specie, and to the value of the rest, at the time of the decree. *Reynolds* v. *Waller*, 1 Wash. 164; *Wilson* v. *Rucker*, 1 Call, 500. Which cases prove a difference between a contract for certificates, and a right to a particular set of certificates. The [94] first, from its very nature, being the subject of damages, the damages ought to be according to the period when the breach accrued; but the latter, being the specific property of the owner, he may assert his right to it wherever he finds it, or the value, in case of failure to deliver it, which is the stronger, when it is considered, that if *trover* or *detinue* were brought, the value would be settled, at the time of the verdict.* John Alexander's claim will form no exception; 1. Because the purchase itself is subverted and overthrown by all the testimony in the cause; for, the very bill with which it is alleged to have been bought, is proved to have been retired into Morris's own hands, before the date of the alleged purchase. 2. Because the case of *Wilson* v. *Rucker*, 1 Call, 500, proves that the true owner may pursue the certificates into the hands of any holder, although that holder be an innocent purchaser, without notice. Alexander cannot discount the notes of Morris, at more than he paid for them, either against the certificates which remain in specie, or against the value of the residue. Not against the first: because a discount can only be against things of the same kind, and due in the same right. Ayliff. Pand. Civ. L. 573; 1 Dom. Civ. L. 491, IX; 6 Bac. Abr. 135, 137. Not against the second: 1. Because a trustee, or one standing in a fiduciary character, will not be allowed more for *compositions* than he actually paid for them: which is not grounded merely on the notion that he is *transacting* for the benefit of the trust, but upon the principle of *utility* also, in order to remove the temptation to injustice through the hopes of retaining the fund, until the decline of the principal's affairs should bring down his papers to an under rate. 2 Fonb. Treat. Eq. 191; Ld. Kames' Princ. Eq. 24, 176. Nor does the *ceasing* of the trust, as it is called, alter the rule,

[* See Grose, J. in *King* v. *Leith*, 2 T. R. 145; *Mercer* v. *Jones*, 3 Camp. Cas. 477; *Kennedy* v. *Strong*, 14 John. R. 128; in which, the settled rule was held to be, that the plaintiff, in *trover*, is entitled to damages equal to the value of the article *at the time of the conversion*. Though, under circumstances, damages may be given beyond that value. *Fisher* v. *Prince*, 3 Burr. 1363; *Hunt's adm'x.* v. *Fuller*, 2 Wm. Bl. 902.]

according to the argument on the other side: because, that would tend to encourage misconduct, as the agent would have nothing to do, but to sell the property, and then claim rights which he could not have pretended to before. It is no answer to say, that the principal in such cases sustains [95] no injury. 1. Because, independent of the bad tendency of it, the creditors of the principal have an interest in the subject; for, the trustee is, in conscience, bound to yield it up for their benefit; and, therefore, cannot, for the sake of his own interest, drive them, through despair, to take less than the amount. Francis's Max. 9, 64, 65. Which applies with more force here, where a suit was actually depending, and the fund under the control of the Court. 2. Because the deposition of Cottinger proves the notes to have issued on an illegal consideration; and, therefore, equity will not oblige Morris to allow more than was advanced upon them.

WICKHAM, in reply.

Cottinger's deposition was taken after the appeal; and, therefore, cannot be read at this time. None of the English cases upon the subject of discount, resemble this; and those stated by Lord Kames were fanciful ones, of his own creation. Tobacco may be discounted against money, and money against certificates; then why not notes against certificates? For, money and tobacco, or money and certificates, differ as much, or more, in their nature, than certificates and notes. The pendency of the suit, at the time of the purchase of the notes, does not alter the case; and, as the property of the notes was in Alexander, he was entitled to all which they would command; that is to say, to the sum for which they issued, unless any payments can be proved. Therefore, he ought to have credit for their full amount.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the Court, as follows:

In these voluminous and complex cases, the Court have [96] taken up the points discussed distinctly, and will occasionally state the papers and correspondence, applicable to each question, as they shall occur.

The transactions between the parties took rise from an agreement in November, 1783, between Mr. Alexander and Jonathan Williams, by which they agree to be jointly employed in supplying the Farmers General of France with tobacco,

each to supply 100,000 livres for the purpose: Alexander to come to, and settle in Virginia, in order to buy and ship the tobacco; and Williams to settle in France, to do the business there. Neither was to charge for his *labor*; but to be allowed all necessary expenses of house-keeping, travelling, clerks, &c. of which their respective books were to be evidence. Alexander was empowered to take in a partner in America; and, in March, 1784, assumed Mr. Morris as a partner, one-third concerned in the agreement; and all extension or alteration, which might take place, was to be by common consent; Morris to have a third of gain, and bear a third of loss, but to have no allowance for *services*, except actual expenses incurred.

Morris, thus introduced, made a new contract with Le Normand, Receiver General of the finances of France, for the delivery of 60,000 hogsheads of tobacco, in the years 1785, 1786, 1787; for which he was to receive 36 livres per hundred, to be paid to the bankers Le Couteulx & Co. retaining two livres per centum to reimburse a million of livres, which was to be immediately advanced to Morris. Under these contracts, Mr. Alexander continued to purchase and ship tobacco until July, 1786. In the mean time, a loss having been sustained in the shipment of 2,000 hogsheads, from the high price in Virginia, Le Normand permits Morris to ship 20,000 hogsheads more than the 60,000, within the limited time of three
[97] years; Morris to be at liberty to ship them, if convenient: Le Normand bound to take them. July the 6th, 1786, Morris and Alexander enter into a new agreement, which reciting the contract with Le Normand in January, 1785, and that Alexander had been employed to superintend the purchase and shipment of tobacco on terms to be afterwards settled, proceeds to settle the terms, as follows: All tobacco purchased by, or under the orders of Alexander since October, 1784, till the completion of the contract with Le Normand, were to be on the account and risk of Morris; and Alexander was to account for those, as well as for all gain on the sales of tobacco purchased, and commissions on purchases made for others. In consideration of which, and as a recompense for his great abilities exerted, and to be exerted, Morris agrees to allow him, over and above all commissions to subagents and charges, a dollar per hogshead for every hogshead which had been, or might be shipped to France, in consequence of the contracts aforesaid; and to allow him two and a half per cent. on all tobacco purchased and not sent to France. Alexander to retain all profit made by him, by speculations in military certificates, or otherwise.

Under this agreement, Mr. Alexander has credit for his dollar, on 60,000 hogsheads, although so many were not shipped before the end of the year 1787. But, his first claim discussed is for $20,000 for the tobacco which Mr. Morris was permitted to ship, if he chose, and did so within that year; the agreement between Morris and Alexander, is in terms confined to the contract for the 60,000 hogsheads, by reference to that contract for its date: and though both knew at the time that Morris had permission to add the 20,000 hogsheads, there is no reason to presume they meant to treat of it at all. Their silence, with that knowledge, is opposed to such presumption. It was optional with Morris; and it was precarious, whether it could be procured in time, in addition to the 60,000: Besides, [98] it being substituted to recompense a loss in the 2,000 hogsheads borne by Morris, and producing a loss in itself, instead of a recompense, upon Mr. Alexander's own principles, his claim is unfounded, as he would receive the reward for getting rid of a losing bargain, instead of yielding a beneficial interest. Although the agreement did not extend to the 2,000 hogsheads, yet the correspondence shews that Morris meant to allow the six shillings upon them, if they could be shipped in time to entitle him to the profit; and to such intention, the stimulus to exertion, "increase *my profit* and *your commission*," refers. It could not be purchased; Morris lost the profits; and Alexander's demand of reward, for what he could not do is unreasonable. Hints are given, as if both knew that the tobacco would be received in 1788; a fact not proved by any document, and contradicted by the event. Morris made an essay, in that year, to discover if it would be received: The discovery was unfortunate. Much labor was employed, in argument, to shew, on one side, that Morris did not supply funds sufficient, and, on the other, that Alexander misapplied the funds furnished to his private speculations. Neither is satisfactorily proved; for, although Alexander frequently recommends it to Morris to keep him supplied, he never states that he lost a single opportunity of purchasing, for want of them: The accounts shew, that there were always considerable balances in the hands of him, and of his sub-agents; and though they consisted mostly in facilities, and not specie, those appear generally to have answered the purpose. In the few instances where specie was required and sent for, it was furnished. The detention of the messengers, a few days, only proves the difficulty of procuring, and Morris's anxiety to furnish, the specie. On the other hand, the Court discover no proof of Alexander's having used the funds for his private speculations.

The true cause of disappointment appears, from Alexander's letters, to have been at first, the high price of tobacco; and, [99] afterwards, the scarcity of that commodity; of which, his strong expressions, *that it could not be procured by the aid of the best funds of Heaven and Earth*, are the most conclusive evidence. Upon the whole, the Court is of opinion that this claim was properly rejected by the Court of Chancery.

The second claim is for about £1,700, for household or counting-house expenses. This is founded on the agreement between Alexander and Williams, wherein it is stipulated, that such expenses of house-keeping, travelling, clerks, &c., should be allowed, but which does not apply to the present contract. By the agreement between Alexander and Williams, as first entered into, both were to devote themselves to that business only; and to settle, one in Virginia, the other in France, for carrying it on. Neither was to charge any thing for his labor, but their whole expenses of living was to be a common charge. When Morris was taken in, however, a different language is used; no mention of house-keeping, clerks, &c., is made; but, he was to be allowed for actual expenses incurred. So, in the agreement between Morris and Alexander, charges are to be allowed over and above a large salary, and commissions to sub-agents. Two auditors, who adjusted the accounts, well understood the common acceptation of *charges*, in a mercantile contract of this sort, to comprehend only real expenses paid in the purchase and shipment of tobacco; so much they had allowed in the costs of tobacco; and, therefore, they properly rejected the whole claim of £1,700, including those and other improper articles. On this point, therefore, the Court also approve the decree.

The third claim is for the loss of tobacco shipped in the Mary Anne, and the expenses on that occasion. The deposition of Eddins proves, that the loss was occasioned either from the insufficiency of the *ship*, or the bad conduct of the captain and *seamen;* and Mr. Alexander must bear it, as owner of the former and answerable for the latter. On this point, the decree is also approved.

[100] We come then to the fourth, respecting Griffin's certificates, from which Mr. Alexander insists to be discharged, on accounting for the price at which he sold them, amounting to £2,571 7s. 3d., which sale he justifies under his contract with Griffin in July, 1787, by which he was empowered to sell them for what they would fetch, to be applied to the purchase of the tobacco, as a security for which they were deposited.

The whole correspondence, from March, 1786, to May, 1788, shews, that it was Morris's money which was advanced to Griffin; the securities his; and the delays in selling the certificates were by his consent: and why Alexander should complain of Morris's having finally settled with Griffin, without consulting him, is not conceived, unless he meant to have added a heavy penalty upon Griffin, to his other gains of that sort.

On the 3d of May, 1788, Morris wrote Alexander that he had settled Griffin's debt, and desired him to deliver Griffin all securities and deposits taken of him. John Richards and Alexander K. Marshall, prove Griffin's demand and Alexander's refusal; and the latter adds, that Alexander said he retained them as his property, and that Griffin said he should hold Alexander responsible for the certificates. Alexander's letters to Morris of May 1st and 6th, state, that he retained the certificates as an indemnity against Morris's protests; and for the same reason, he refused to transfer vouchers for the outstanding debts, but said he was ready to do both, on having these protests produced, cancelled, or himself discharged. At that time the certificates were all in his hands, the sale of which he did not commence until the 16th of May; and we come to consider whether those sales were justifiable. That the certificates were the specific property of Morris, in the hands of Alexander, as his agent, is unquestionable; and that an agent or factor may *retain* such property as security for a *debt* due, or as an indemnity against engagements for the principal, is also clear. But, whether he can sell [101] such property, depends on the circumstances of each particular case, inducing a necessity for a sale to answer those purposes; and the circumstances ought to be strong, whereas, in the present case, the sale was forbid by the proprietor.

The general principle laid down by Lord Mansfield, in *Drinkwater et al.* v. *Goodwin*, Cowp. 251, is, that a factor who receives cloths and is *authorized to sell them*, makes the buyer debtor to himself, and though he is not answerable for the debt, he has a right to receive the money, his receipt discharges the buyer, he may compel payment by suit, in which case the buyer could not defend himself by shewing that the principal was indebted to him; for, the principal can never say *that*, but where nothing is due to the factor. The circumstances there were very strong; the factor, when he became security, stipulated that the money borrowed should pass through his hands to the principal, a clothier, who was to send his cloth to sell, *as usual*, for his security. But, in the present case, the sale of these certificates was not within the ordinary agency of

Alexander. They were deposited as a pledge for Morris's money advanced, and subject to his control. He did not *authorize*, but *forbid* the sale; and it can only be justified, if at all, by shewing that money was then due to the agent, or that a sale was necessary to exonerate him from his engagements for Morris. That Alexander was not a creditor at the time, but a debtor to upwards of £6,000, appears from the account settled; and he must shew that his engagements required it, in order to justify the sale. The bills *really paid* are charged to Morris in the accounts settled, amongst which are Mr. Alexander John Alexander's; which, in his account current March 28, 1788, he charges to Morris, with the interest and charges, amounting to £2,191 3s. 7d. currency; at the foot of that account, he states a list of bills returned and unsettled, amounting to £3,600 sterling, a sum not equal to the [102] balance he owed, and would not justify a sale of the certificates, even if he had been pressed for payment, which is not shewn. Whether these bills have been since paid by either party, or were endorsed by Alexander, does not appear, except that Morris says in his answer that Alexander has paid part of them, which is credited to him in the account settled. If they are yet outstanding, and were endorsed by Alexander, he ought to be indemnified by Morris against them. No other protests appear, except those on which judgments have been recovered by Stott & Donaldson; which judgments, Mr. Morris swears, in his answer to the last bill, he paid to those creditors in 1793, and took an assignment of the judgments, on which he ought to give a release to Alexander, which will amount to an indemnity of the bail. There not appearing, then, any pressing necessity for a sale of the certificates on account of those protests, Alexander had no power to sell; but ought to be considered as having retained them, and to be made so accountable. For, though deposited with Gray & M'Nair, there seems to be no question but they are to be specifically delivered, on those defendants being indemnified as bail for Alexander, at the suit of Stott & Donaldson. As to the balance, Alexander is, by the decree, to procure and transfer stock of equal value, or compensate for their present value, to be settled by a jury. This is objected to, and it is urged that the price they sold for, or the real value, at that time, ought to be the rule. After reasoning by analogy to the case of trover on one side, and detinue on the other, which did not support the objection, since Morris had the option which of those suits he would commence, the counsel recurred to cases in this Court. *Groves* v. *Graves*, [1 Wash. 1,] was a contract

to deliver, on a fixed day, certificates of a certain description, but no *specific* paper; and the principal reason for fixing the value at that day, was, that Groves was not afterwards obliged to take the paper if depreciated; and, therefore, ought not to have the gain by their rise: But, this is not the case of pro-
[103] perty in specific paper, which remains at the risk of the proprietor, for gain or loss; and so it was determined in the case of *Reynolds* v. *Waller*, [1 Wash. 164,] and *Wilson* v. *Rucker*, [1 Call, 500.] In both which, the value at the time of the recovery was the rule.* Of this responsibility Alexander was warned before the sale; and any hardship in the case, he has brought on him by his own misconduct. On this point, therefore, the decree is also right; as is the dismission of the bill of Alexander John Alexander, as his protests were given up and charged to Morris before the sale, when Morris ceased to be his debtor, and he became a creditor of William Alexander & Co. only.

We now come to the last point, whether Alexander shall be allowed to discount the notes of Morris & Nicholson at their nominal value, or at the price which he paid for them? The latter is the decree, and that price to be settled by a jury. The question is important in value, but the only difficulty is, to decide between two men, both of whom appear to have done wrong, on which of them the injury shall fall. On the one hand, it is impossible to justify Morris, whether his conduct proceeded from his distress, or an insatiable thirst for riches, in coining these millions of notes, to circulate under a promise to redeem them at full specie value, which he must have known he would not be able to do; and that the world would be thereby deceived. According to his account, however, mankind was not wholly deceived; they got into circulation by his depositing them in heaps for money borrowed, and their value to him was what they would sell for. And those sales gave a tone to their depreciation from time to time, as a rate at which they were generally passed between individuals. Of these deposits and sales, we have no account, till 1796, when some were deposited at two shillings in the pound, and which sold afterwards, in February, 1797, at twelve cents, some-
[104] thing less than nine pence; at which rate Williams purchased at least 64,000 dollars of the notes now offered in discount; for, that they are the same notes, appears from a comparison of three lists, one by each of the brokers Amridge, and Biddle, and the other by Alexander, all agreeing, so far

[*See *Shepherd* v. *Johnson*, 2 East, 211; *Gray* v. *The Portland Bank*, 3 Mass. R. 364; *Merryman* v. *Criddle*, 4 Munf. 543; *Shepherd et al.* v. *Hampton*, 3 Wheat; 200.]

as date, number and sums. The value Williams paid for them, appears in Biddle's deposition. He received them in exchange for old notes, which were sold for less than the new ones, and he paid Biddle one cent per pound for the difference.

Here, it may be necessary to observe, that the Court allow the depositions to be read, though taken after the decree and appeal, since they relate to the subject of discount; as to which the suits are to be considered as yet depending in the Court of Chancery, of which Morris ought not to be deprived by the appeal having been granted before the final decree. The commissions were properly awarded, and the depositions taken in presence of the attorney of Alexander.

Having stated the situation of Morris, what is that of Alexander? After suits depending near ten years, and the accounts between the parties are adjusted, he is found to be a fair debtor to Morris in a large sum; upon which he buys up those notes at about nine pence in the pound, and claims a discount for them at twenty shillings. Was he deceived by the import of the notes? William Marshall's deposition shews his opinion of the value of those notes in summer of 1797; when he declared that he did not possess, nor would he be concerned with one of them, and advised Mr. Marshall not to be concerned with any more: or, is he injured by being allowed the specie he really paid, as if he had paid that to Morris? It is believed that the widows and orphans spoken of, and all others holding Morris's notes, would be glad to be so paid for them.

[105] In 6 Bac. Abr. 137, Gwil. ed. it is said as in the case of bankruptcy the debt claimed to be set off, must have existed at the time of the bankruptcy, so, in *other cases*, it must be in existence at the time of commencing the suit; for which he refers to the 3 T. R. 186, [*Evans* v. *Prosser*,] 2 Burr. 1229, [*Baskerville* v. *Brown*.] Which is surely very reasonable, it being improper for a debtor, after suit, to trump up claims against his creditors, in order to discount them, especially when purchased at an under rate.* The counsel aware of this, and that is the case at law, claims the discount as an equity, and justifies the advantage gained in the purchase, as a balance for the loss in the certificates. Mr. Alexander's opinion of that loss may justify his morality in the attempt; but the Court having decided that the claim of Morris to the certificates is just, and that the loss, if any, was occasioned by Alexander's own fault, that loss can give him no equity to extend the value of his discounts.

[*See *Dangerfield* v. *Rootes*, 1 Munf. 529; and act Ass. Feb. 26, 1819, R. C. c. 128, §87, ed. 1819.]

Upon the whole, the Court is of opinion that the decrees are all right as far as they go; but that Morris's recovery ought to be suspended, until he shall release the judgments of Stott & Donaldson, and indemnify Alexander against the outstanding bills, if any, endorsed by him, or allow him credit for their amount: And, with this direction, the decrees are affirmed, with costs.

TOMLINSON AND OTHERS *v.* DILLARD.

Friday, November 13th, 1801.

By the act of distributions of 1792, the personal estate is distributable among the persons entitled to the real; and, therefore, the mother of a deceased infant was not entitled under that act, to any part of his personal estate derived from the father.*

Tomlinson and others brought a bill against Dillard in the High Court of Chancery, stating, that the plaintiffs are, some of them, the brothers and sisters, and the rest descendants of the brothers and sisters of Benjamin Tomlinson, deceased. That the said Benjamin Tomlinson died February 1, 1791, leaving a will, whereby he gave his wife, Nancy Edloe Tomlinson, one moiety of a tract of land in Greensville county, in fee simple; together with the use of the plantation, in Greensville county aforesaid, whereon he lived, during her natural life: and then devised as follows: "Item, whereas my said wife appears to be pregnant at this time, I give all the rest and residue of my estate, real and personal, to such child or children as may be born from my intermarriage with her; if she should bring forth more than one, to be equally divided share and share alike: If but one, I give the whole of the said residue of my estate to that one, whether male or female, and to his or her (as the case may be) heirs forever." That after the testator's death, the said Nancy Edloe Tomlinson, the wife, was delivered of a son called Benjamin Edloe Tomlinson; and in the year 1798, she intermarried with the defendant George Dillard. That the property devised to the wife, included *all that, and much more than the testator received by her.* That the testator's said son, died on the 3d September, 1798, at [106]

* The law was altered in 1801. See Revised Code of 1819, p. 382, § 29, 31; Code of 1849, p. 524, § 10.