REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

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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.

cution iſſued upon it, and the opinion of the court upon ſuch motion might, if erroneous, have been corrected by a Superior Court upon a ſuperſedeas; but in this caſe, there was no judgment to ſuperſede.

THE COURT affirmed the judgment of the Diſtrict Court.

SARAH WALKER & THOMAS WALKER, executrix & executor of THOMAS R. WALKER, deceaſed,

againſt

THOMAS WALKE.

THE appellee filed his bill in the County Court of *Princeſs Anne*, ſtating, that the ſaid *Thomas R. Walker* was appointed his guardian, and in the year 1776 was indebted to the plaintiff, £1312: 12: 0: ½; as appeared by his guardianſhip accounts, ſettled and filed in the County Court. That in the year the ſaid *Thomas R. Walker*, paid to *John Thoroughgood*, the ſubſequent guardian of the plaintiff, £854: 3: 3 in bonds, leaving a balance of £468: 8: 8½ ſtill due. The prayer of the bill is for payment of this balance with intereſt.

The anſwer ſtates, that after the appointment of *Thoroughgood* as guardian to the plaintiff, he and the teſtator, *Thomas R. Walker*, ſettled the accounts of the latter, and ſtated a balance then due to the plaintiff, of £244: 12: 2. That they have underſtood, that in the year 1787, after the plaintiff came of age, he accepted a bond from the ſaid teſtator for the above balance. They ſtate a ſmall payment ſince, and are ready to diſcharge the balance ſtill due.

Amongſt the exhibits filed in this cauſe, is a letter from *Thoroughgood*, to the teſtator, *Thomas R. Walker*, dated in June 1786, encloſing a blank bond, with a requeſt, that the teſtator would ſettle the balance due to the ward, (the preſent plaintiff,) fill up the bond with the ſum due, and return it executed. The writer alſo acknowledges in this letter, the receipt of £300, in January 1780, " which" he ſays " will, according to the ſcale

of

of depreciation amount to £ 7: 10 ſpecie, and being deducted from the balance now on the books of the ſaid teſtator, will be the amount in which he is indebted." He alſo adds, "that the teſtator ſhould not complain of hardſhip in the ſettlement, as a great part of the money paid by the teſtator, was received by him in paper money according to its nominal amount." In anſwer to this letter, (alſo dated in June 1786,) the teſtator promiſes to prepare for the ſettlement, and adds, "that he ſhall ſay no more about hardſhips, being fully ſatisfied that all debts ſhould be ſettled."

The bond was accordingly filled up with the ſum of £244, and returned: it was afterwards accepted by the plaintiff without objection, except, that by letter, he required a bond from the teſtator for the amount of the intereſt on the £244, from a date anterior to the principal bond; this bond for intereſt was not given,

The cauſe coming on to be heard, on the bill, anſwer, replication and exhibits, an account was directed. The commiſſioners report a balance of £ 784: 4 due the plaintiff, with intereſt. In this account they reduce the £ 300 by the ſcale of January 1780; they alſo make a ſpecial report, ſtating the bond above mentioned, amongſt other exhibits, but give it as their opinion, that the plaintiff was not bound by the ſettlement, nor by his letter to the teſtator, ſince the terms of it were not accepted.

The report not being excepted to, a decree was made confirming it, from which the defendants appealed.

The High Court of Chancery directed an account to be ſettled, before one of the maſters of that court.

To the report made by the maſter, exceptions were filed, and amongſt others, the following; viz; that the ſettlement with *Thoroughgood* ought to be eſtabliſhed; and if not, the payments in paper money ought to be credited at their nominal amount, and not according to the ſcale.

The exceptions being over-ruled, the decree of the County Court was affirmed, and an appeal was prayed to this court.

MARSHALL for the appellant. The ſettlement between the firſt and ſecond guardian was binding upon the ward, unleſs unfairneſs or collution between them in making it, had been charged, and proved. But if I am incorrect in this, I contend, that the payments made to the ſecond guardian in paper money, ought not to have been ſcaled. The act of 1781, Ch. 22, is too clear upon this ſubject to be miſunderſtood; it declares, that all

payments,

payments, either to the full amount, or in part discharge of any debt, are to be credited at their nominal amount. Nothing I conceive, but the agreement of parties could vary this rule.

It is true, that in this case, the payments were scaled by the settlement, but this was part of the settlement, and if the settlement be annulled, the agreement to scale has equally lost its obligation upon the parties; for surely, the court will not set aside the former, and bind the parties by the latter, when both constitute one entire act.

CAMPBELL for the appellee. This is the common case of a ward calling upon his guardian for an account. The guardian attempts to avoid it, by insisting upon a settlement made with the former guardian; a fact not responsive to the bill, and therefore not to be noticed, further, than as he could prove it to be correct and fair. That it was either, in this case, cannot be contended.

As to the payments made by the guardian, they ought to be scaled. That clause of the act of 1781 Ch. 22, which declares, that payments made of any sum, either to the full amount, or in part payment of any debt, should be credited at the nominal amount, was never considered as being applicable to cases of running accounts.

WICKHAM on the same side. I consider it as an important question, whether the exception to the master's report, can avail the appellant, as it was not *originally taken to the report made in the County Court.*

I doubt very much the power of the High Court of Chancery, acting as an *appellate court*, to direct an account. The decree such as it appeared upon the record, should have been affirmed, or reversed and remanded; and if so, the former must have taken place, since the report on which the decree sought to be reversed, was founded, was not excepted to. As well might this court direct an account, and upon the report, make a decree corresponding with it, but this was never yet attempted. The reference in this case was only for the purpose of calculation, and was not intended to open the decree.

As to the merits, I lay it down, that nothing can discharge the guardian from accounting, but a settlement with *the ward*, after his attaining full age. *Payments* to the second guardian, would I admit, be valid, but a *settlement* would not. Great inconvenience might result from a contrary doctrine; the second guardian might with the best intentions be imposed upon; and yet he might repel the claim of the ward, by saying, he was a trustee, and act-

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ed with good faith, and therefore ſhould not be charged; and the firſt guardian would defend himſelf by the ſettlement.

But in this caſe, no ſettlement appears. One guardian demands it of the other, and calls for a bond for the balance: a bond is given, but no ſettlement is made.

The conſent of the appellant to be accountable by the ſcale, forms no part of the ſettlement, but is antecedent to it.

The act of 1781 with reſpect to partial payments, is never applied to items in unliquidated, running accounts, and ſo it has been often ſettled in this court. But certainly it can never apply in the caſe of a truſtee.

MARSHALL in reply. There is no doubt, but that the Chancellor may, upon an appeal, open the decree, and if neceſſary, direct a new ſettlement of the accounts; he is in the conſtant practice of doing ſo, and I have never before known it queſtioned.

In *Humphrey* and *Smith*, this court reverſed the Chancellor's decree, becauſe a calculation had not been made by the maſter, which any perſon might have made in one minute.

But be this as it may; if the error appear in the decree of the County Court, or is *apparent upon the face of the account*, it will be ſufficient to reverſe the decree of the High Court of Chancery, although no exception was ſpecially taken; for an exception is not neceſſary, where the error appears, either upon the face of the account, or in a ſpecial report. The uſe of an exception is, to bring into view ſuch objections to the report, as do not appear upon the face of it.

In this caſe, the commiſſioners have ſtated ſpecially, the ground upon which the account is ſettled, and the court are at liberty to ſay, if they decided right or not.

But it is contended, that no ſettlement was made; we ſee a letter reſpecting a ſettlement, with an admiſſion of the ſum then due, an account, and a bond for the balance, in the poſſeſſion, firſt of the guardian, and then of the ward. Suppoſe that the ward was not originally bound by the ſettlement; he is certainly concluded by his ſubſequent conſent to, and ratification of it.

This conſent is proved by his having poſſeſſion of the bond after his arrival at age, and his letter to the teſtator, demanding a bond for the intereſt due on the £ 244.

It is then ſaid, that in caſes of this ſort, we are not entitled to a credit for payments at their nominal amount, and that the point has been ſo decided in this court. If ſuch have been the deciſions, I am a ſtranger to them.

The

The teſtator ceaſed to be guardian before depreciation began; *Thoroughgood* ſucceeded him in that office, which completely cloſed the accounts of the former; the balance then due, whether liquidated or not, was a debt to be paid; no further items could be introduced into it but payments, and theſe, when made, were like all other payments.

It is objected, that *Walker* was a truſtee; ſo he was until he ceaſed to be a guardian; but whether he was or was not, it has been determined in this court, in the caſe of *Sallee* and *Yates*, and *Granberry* and *Granberry*, that payments made by an executor to the eſtate he repreſented, and entered on his books, ſhould be credited at their nominal amount.

We are then brought to conſider, whether this right to a credit at the nominal amount has been abandoned. It is not true as was contended, that the conſent of the teſtator to ſcale, preceded the ſettlement; but if it were, the principle of the ſettlement is thereby eſtabliſhed, and if the ſettlement be ſet aſide, it would be monſtrous to bind the teſtator by his conceſſions in that letter, which were made in order to produce the ſettlement.

ROANE, J.—Upon the appointment of *Thoroughgood*, in 1776, as guardian of the appellee, the character of the appellant's teſtator as guardian ceaſed, and with it, his liability to pay and receive monies generally, on account of his ward. Conſequently, any payment by him thereafter, to the ſucceeding guardian, ſhould be conſidered as a payment on account of a debt admitted to be due. And the receipt for £300, given by *Thoroughgood*, in January 1780, which uſes the terms "£300 in part of your account with *T. Walke*" ſtrongly imports, that that money was received in part of a *debt*, due from the teſtator to the appellee as his former guardian; of courſe, that payment, muſt, according to the ſecond ſection of the act of Aſſembly, directing the mode of adjuſting and ſettling certain debts and contracts, and agreeably to prior deciſions by this court, be credited at its nominal amount.

If the letter of the appellant's teſtator of June 1786, can be conſtrued into an admiſſion, that the payment of the £300 ſhould be ſubjected to the ſcale of depreciation, it was made in conſequence of an offer of *Thoroughgood*, in his letter of the ſame date, to accept a ſettlement *made by the ſaid teſtator* from his books, according to the tenor of that letter; and the appellee, by bringing this ſuit, having departed from the ſettlement ſo made, or *expected*

pected to be made by the teſtator, the admiſſion, if it can be conſidered in that light, (for the expreſſions are extremely vague and indefinite as to that,) is no longer binding upon the repreſentatives of the teſtator.

I am therefore of opinion, that the decree is erroneous in not allowing the credit for the £300, at its nominal amount.

THE COURT gave the following opinion and decree viz: "By the appointment of *John Thoroughgood* to the guardianſhip "of the appellee, the guardianſhip of the appellant's teſtator, as "alſo his habit of receiving and diſburſing monies generally, "on account of the appellee, having ceaſed, the receipt thereaf-"ter of any money by the ſaid *John Thoroughgood*, from the ſaid "preceding guardian, ſhould be conſidered as a payment on ac-"count of a debt, admitted to be due from him as guardian a-"foreſaid; that by authority of the act of the General Aſſembly "paſſed in 1781, entitled "an act directing the mode of adjuſt-"ing and ſettling the payment of certain debts and contracts, "and for other purpoſes" and in conformity to former deciſions "by this court, the payment of £300, made the 3d of January "1780, by the appellant's teſtator to the ſubſequent guardian, "was not ſubject to the operation of the ſcale of depreciation? "That there is error in the decree of the High Court of Chan-"cery, permitting that payment to ſtand reduced, and that "there is no error in the reſidue of the ſaid decree, there-"fore &c."

DAVENPORT,

against.

MASON.

THE appellee, obtained an injunction in the County Court, to a judgment rendered againſt him in the ſame court. After anſwer put in, a motion was made to diſſolve, and on a hearing the court over-ruled the motion, but continued the cauſe and awarded commiſſions to take depoſitions. At a ſubſequent court, on hearing the bill, anſwer, depoſitions and exhibits, the court diſſolved the injunction, and decreed the plaintiff in that court to pay coſts.

From