REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

RICHMOND:
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M,DCC,XCVIII.

"Charles Harrison one of the mortgagees is not a party. But "this court is of opinion, that as the said Augustine suffered the "said Herbert to retain the possession of the slaves, and other "estate, on which the appellees execution was levied, after the "sales in October and November, for which bills of sale were "made, (as referred to in the answer of the appellant, and filed "among the exhibits in this cause,) releasing the equity of "redemption, and conveying the absolute property in the estate, "thereby conveyed and confirmed, to the said Augustine, which "bills of sale were not recorded until the 14th of April 1785; "that they were fraudulent and void as to the appellee, and "neither the said sales, nor the prior mortgage which had ceased "to operate, did protect the estate, (then sufficient to satisfy his "demand) from his execution, and that there is no error in "the decree for the payment of the appellee's debt and costs.

Decree affirmed.

TARPLEY'S Administrator
against
DOBYNS.

THIS was a suit in Equity, instituted in the County Court of Richmond, by the present appellant. The bill charges, that there were various specie dealings, between the intestate of the plaintiff, and the defendant; and that upon a settlement made in 1779, there being a balance found due from the defendant, he executed a bond for £54 current money, the amount thereof. That this was understood by the parties, to be a specie debt, and as a proof, that such was the meaning of the parties, the defendant, afterwards paid £6: 10; in specie, and still acknowledged himself further indebted to the plaintiff's intestate; which could not have been the case, if the debt had been subject to the legal scale of depreciation, which in 1779, was 10 for 1. That the plaintiff, instituted a suit at law, against the defendant, and not suspecting that the defendant would attempt to contend, that the debt should be scaled, he was unprepared to prove the defendant's declarations, tending to shew, that he considered it as a specie debt.—In consequence whereof, the jury reduced the debt, to a smaller sum, than the defendant had actually paid,

and found a verdict againſt the plaintiff. The bill prays, that the defendant may be decreed to pay the £54, in ſpecie with intereſt, after deducting the above payments.

To this bill, the defendant demurred for want of equity. The demurrer being ſuſtained in the County Court, as alſo in the High Court of Chancery where it was carried by appeal, the plaintiff below appealed to this court.

The cauſe, being argued here by Mr. Campbell for the appellant;

The PRESIDENT delivered the opinion of the court.

We feel no difficulty in declaring, that both decrees are right. Although the appellant might have reſorted to a Court of Equity in the firſt inſtance, if his caſe would bear it, it is now too late, after having made his election, to take a trial at law. As to the ſurpriſe, which is made the pretext for this application to a Court of Equity, it ought not to benefit the appellant in the preſent caſe; ſince, when he diſcovered a diſpoſition in the appellee, to avail himſelf of his legal advantage at the trial, he might have ſuffered a nonſuit.

Decree affirmed.

ANDERSON *againſt* BERNARD.

THIS was an action of treſpaſs, brought in the Diſtrict Court of Prince Edward, by the appellant, againſt the appellee, for taking a ſaddle from his poſſeſſion. Plea, not guilty. The defendant at the trial offered in evidence to the jury, a record of his qualification as a deputy ſheriff, and alſo a witneſs to prove, that the defendant, as deputy ſheriff, had ſeized the ſaddle in the declaration mentioned; to ſatisfy certain fees due in 1781, to the clerk of the General Court. The account of the fees due, and ſtated in the record to have been produced in evidence, is headed thus, "Dr. Thomas Anderſon, to Adam Craig, *deputy* clerk, General Court." To this evidence the plaintiff filed a bill of exceptions. Verdict and judgment for the defendant, from which the plaintiff appealed.

RONOLD for the appellant, contended, that the *deputy* clerk, was not entitled by law to demand fees from ſuitors, and therefore, the account offered in evidence, could not juſtify the ſheriff in levying the diſtreſs. That theſe ſummary modes of enforcing