REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, 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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WOODSON *v.* PAYNE.

Tuesday, November 6, 1799.

Trustee of a certificate for a particular purpose, cannot apply it in discharge of other demands due to himself from the beneficiary.

This was an appeal from a decree of the High Court of Chancery. The bill states, that Thomas Payne, in November, 1784, requested the appellant to take charge of a final settlement or commutation certificate, amounting to £628, *and to keep the same for him, as a friend;* and furnish him with certificates or money for his purposes. That such certificates were then of little value. That, in the same month and year, the appellant paid £290 in certificates, of the like kind, for Payne; and, on the 19th of January, the further sum of £224 in certificates; leaving a balance of £114 in certificates, in favor of Payne: On which the appellant drew indents. That, in March, May and July, 1786, the appellant paid for the appellee, at his request, £22, 3s. 9½d. specie, which was equal to £139, 19s. in certificates; leaving a balance of £29, 19s. certificates in favor of the appellant. That the appellee admitted these debits, but sued the appellant for a supposed balance; and the jury, through mistake, found a verdict for £215 specie. That the mistake arose from the appellant being unable to prove upon the trial that the £22, 3s. 9½ specie was equal to £139, 19s. certificates. That the appellant moved for a new trial; which the County Court refused, and gave judgment for the verdict. The bill, therefore, prayed an *injunction*, which was awarded.

The answer admits the deposit for safe-keeping of the certificate for £628; having an interest due thereon, from the 22d of March, 1783. That it was delivered, in order to be appropriated as the appellee should direct. That the appellee afterwards appropriated £150 for the purchase of a horse from the appellant, for one Ligon. That he also [571] drew for £50 in favor of Pollock, and £80 in favor of Duke; making in all £280. That on the 19th of January, 1785, the appellant paid Wade Woodson £170; and John Shelton £54; all together making £504; and leaving a balance in favor of the appellee of £134, exclusive of interest. That the charges in the bill relative to the specie account, were chiefly for goods and merchandize; for which the appellant was to take pay out of the interest of the certificate. That the appellee, on the

trial at law, admitted all the appellant's *offsets;* but contested their application; and the jury, after a fair trial, found for the appellee; that the sum allowed by the jury was not quite as much as the appellee was entitled to.

Ligon proves the payment to himself. Pickett proves that the price of final settlement certificates in 1784 and 1785 was 2s. 6d., and in 1786, from 2s. 9d. to 3s. 6d.; with the interest due thereon given up. Crouch proves that the appellant had credit with him in 1786, for £10 or £12 of indents at par.

The High Court of Chancery dismissed the bill with costs; and Woodson appealed to this Court.

DUVAL and RANDOLPH, for the appellants.

The intention was, that the certificate should indemnify all advances and accruing claims against Payne; who ought not to be received to say, that the certificate was to lie, for the advantage of a rise in value, whilst his creditor was kept out of his money; and left to rely only upon the general credit of the debtor. [*Henriques* v. *Franchise,*] 2 Eq. Ca. Abr. 740; [Prec. Ch. 205, S. C.] The long acquiescence of Payne argues a consciousness upon his part, that he thought this the fund out of which the advances and claims were to be paid; and that he has only come forward now, in consequence of the rise in value. The price at which they are credited by Woodson, is just, and conformable to the opinion of the Court in the case of *Groves* v. *Graves,* 1 Wash. 1. At any rate, the Court will allow them to be restored in specie, or settled at the true current price of the time, according to that case.

[572] M'CRAW, for the appellee.

The certificate was deposited for safe-keeping; and only the interest was to be applied by Woodson. Of course, he could not appropriate the certificate itself, for advances or future claims. If the certificate had sunk in value, it would have been Payne's, and not Woodson's loss. It is fairly to be inferred, that Woodson now holds the certificate, and has never actually parted with it at any price. Of course, he was liable to restore it to us upon equitable terms. The case in 2 Eq. Ca. Abr. turned upon the imposition; but here was none in Payne: who, though ready to do justice, has been kept out of his property by Woodson; and, therefore, the latter is justly liable for the rise in value.

ROANE, Judge. If the agreement stated in the answer of the appellee was rightly interpreted by the jury who found

the verdict in question, and there was no fraud used, or any improper conduct in the jury, which is not pretended, their verdict and the judgment upon it ought not to be disturbed.

The substance of the agreement, as disclosed in the answer of the appellee, and not disproved by any testimony, was, "that the appellant should, in November, 1784, take into his custody and safe-keeping a final settlement certificate for £628, having interest due thereon from the 22d of March, 1783, to be thereafter appropriated agreeable to the directions of the appellee." Every appropriation, therefore, made by order of the appellee, (which includes all the advances in certificates stated by the appellant, and admitted in the report of the commissioner,) was in pursuance of the agreement, and made the appellant a proprietor of the like sum in the certificate then in custody. But, with respect to his ulterior account, stated in specie, he was not only not warranted by the agreement to set off the balance of the certificate at the then current price as a payment thereof, but it is expressly stated in the answer, and not disproved, that the chief of the charges were for goods, wares and merchandizes; and, that before he took one of those articles, the appellant gave him to understand, that he would receive payment therefor out [573] *of the interest* on the certificate. The appropriation, then, of this balance of the appellee's certificate, without his consent and in violation of the agreement thus stated, was rightly estimated by the jury; and the principles upon which their verdict was founded, are not improper.

With respect to the £10 difference in the price of the horse, as resulting from the answer of the appellee in opposition to Ligon's testimony, the answer in this respect ought not to avail him. For, admitting that answer in this instance to be positive, the deposition of Ligon is equally so; and is supported by the following circumstances: 1st. That this charge was not objected to before the commissioner; although the appellee was personally present. 2d. That he says in another part of his answer, "that he admitted, at the trial at law, all the offsets which the appellant contended for, and now contends for;" among which is comprehended the £10 now in question.

As, then, it does not appear, from the present case, that the jury interpreted this agreement otherwise than is right; as it is not shewn that their calculations under this principle were erroneous, there is no ground to impeach the verdict. There is no ground to say, from the case before us, that they did not take into consideration, in assessing the damages, the circumstances that a part of this certificate, if funded, would have constituted what is called deferred stock.

If, indeed, it now appeared to us that this was not the case; if this could be deduced with any certainty from any testimony in the record, going to show the value of these certificates about *the time of the demand*, or from other circumstances, it might be material to give relief in this respect. So, if the appellant [574] had shewn that the price of certificates, by which the jury went, in assessing the damages, was not the price at the time of the demand, (which, for want of other testimony, we must fix to be that of bringing the suit, which time likewise is not mentioned in the proceedings,) but a higher price at some anterior period, this circumstance also might be a substantial ground of relief. But, we cannot make the appellant's case better than he himself has made it, and we must not, upon surmise and conjecture, overturn the verdict of a jury.

Therefore, I think the decree must be affirmed.

CARRINGTON, Judge. The judgment at law was probably unjust; but I cannot interfere without testimony; and the appellant has furnished none. I am, therefore, constrained to concur in affirming the decree, upon the principles mentioned by Judge ROANE, although I fear injustice is done by it.

PENDLETON, President. The certificate for £628 was delivered by Payne to Woodson, as bank stock, to be drawn for as Payne wanted it; and Woodson paid for Payne at different times £514. In consequence of which, he became entitled to so much in the stock and interest; and Payne to the balance of £114. Woodson drew £66, 12s. in specie, for the whole certificate; and was accountable to Payne for his proportion as £514 is to £114; amounting to £12, 1s. 9d. Woodson, before and soon after, paid for Payne, in specie, £22, 3s. 9d.; leaving a balance due to Woodson, in specie, to be changed into certificates, at 3s. 6d. of £10, 2s. equal to £57, 10s. Which left due to Payne, in certificates, the sum of £56, 9s. 11d.; worth then, something less than £10. And the verdict is for £202, 16s. 7d. specie, on account of the aforesaid balance of £114 certificates.

It is, therefore, very probable, that the verdict is unjust, but the appellant has not made out a case for the interference of a Court of Equity; and, therefore, the decree must be affirmed. The appellant ought to have shewn the period when the certificate ought to be turned into money, in consequence of the conversion.

The decree was affirmed without prejudice.