REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

NEW-YORK:
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1812.

DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh year of the Independence of the United States of America, LEWIS MOREL, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. I. By WILLIAM MUNFORD."

IN CONFORMITY to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of "maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, "supplementary to an act, entitled an act for the encouragement of learning, "by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending "the benefits thereof to the arts of designing, engraving and etching historical and other prints."

CHARLES CLINTON,
Clerk of the District of New-York.

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Judge ROANE. I am clearly of the same opinion. The *notes* taken by the bed-side of the dying man were a good nuncupative will; but, as it does not appear clearly whether the Court below meant to establish the *notes*, or the *draught* of a will, I think it would be proper to express it to be the intention of this Court to establish the *notes;* especially as there is a slight difference between *them* and the *draught.*

Judge FLEMING. This is a plain case, that the *notes* are a good nuncupative will, better authenticated than any I have seen. But the *notes* ought to be established, instead of the *draught;* there being a slight difference between the two papers, merely as to the disposal of the money arising from the sale of certain oxen.

Judgment unanimously affirmed; and the Clerk (to prevent misconceptions) directed to enter the notes *verbatim* in the order-book.

Monday, November 18.

Day, Executor of Yates, who was Executor of Payne, *against* Murdoch, surviving partner of Cuningham & Co.

THIS was a suit originally brought in the late High Court of Chancery, by *Charles Yates*, executor of *Daniel Payne*, against

1. A payment in paper money, by a *British* debtor to an *American* creditor, operated a full discharge to its nominal amount, of a current money debt, contracted in specie; notwithstanding the *creditor* made objections to receiving the paper money, and observed, at the time, that he would keep it safe for the debtor, but did not consider it as a *payment, though intended as such by the debtor;* and notwithstanding the receipt contained a reservation that, since the creditor had demanded the debt when the rate of exchange was at 15 *per cent.* he therefore claimed so much as might be allowed him *on that account* by arbitrators afterwards to have been (but who never were) appointed.

2. A factor and agent for a company of *British* merchants having, in the year 1771, purchased, on their behalf, a tract of land in *Virginia*, for a sum of money payable on demand, and then received possession thereof for their use; and a credit for the money having been entered in their books; the *equitable* title to, and possession of, such land was thereby completely vested in the company; and, under the act of *May* session, 1779, "concerning escheats and forfeitures from *British* subjects," the same *escheated* to the Commonwealth, which, on inquest found, became entitled, *in the same manner the company were entitled;* but subject to the payment of so much only of the purchase money, remaining due, as did not exceed the *net* amount for which the land was sold by the escheator, reduced to present current money, according to the 2d section of that act; the said *British* company being still liable for the residue of the said purchase-money.

3. Upon an appeal from a decree in Chancery, an error to the injury of the *appellee* ought to be corrected, although he did not appeal.*

* Note. The Court have since, to wit, on the 2d of *October*, 1811, established the following GENERAL RULE. "It is the opinion of this Court, founded as well on a

William Cuningham & Co. British merchants, and *Walter Colquhoun*, their agent in this country, to attach in his hands so much of the effects of the said company, (the partners being residents in *Great Britain*,) as would be sufficient to satisfy two claims for debts due from them to the said *Daniel Payne* in his life-time; the first being a balance of account, on the 1st of *September*, 1774, of 373*l.* 11*s.* 7*d. current* money, and the other 491*l.* 19*s.* 10*d. sterling*; of which last-mentioned sum, 400*l.* was the price of certain houses and lots in the town of *Dumfries*, sold by the said *Payne* to *John Neilson*, an agent of the said company, for their use, some time in the year 1771, and the residue was a balance of account.

The material circumstances relative to each claim (as collected from the bill, answer, depositions and exhibits) were the following.

The *currency* debt was admitted to have been originally due as stated; but the point in dispute related to a subsequent payment of 423*l.* 19*s.* in paper money, by a certain *James Robinson*, (a factor and partner of the company,) to the said *Daniel Payne*, on the 4th of *April*, 1777. The question was whether this payment, which, at its *nominal* amount was equal to the principal and interest of the currency debt, was to be considered as a full satisfaction thereof, or to be credited at its *value*, according to the scale of depreciation. It appeared that *Payne* was very unwilling to receive the paper money, but was induced to do so by *Robinson's* threatening to lodge an information against him with the committee of safety; that, when he received it, he put it in his desk, observing that he would keep it safe for the company, but *did not consider it as a payment.* He gave a receipt in the following words: "Received, *April* 4th, 1777, of Mr. *James Robinson*, 423*l.* 19*s.* current money of *Virginia*, being the amount of the principal and interest due to me in currency by Messrs.

full consideration of the law, as on various decisions which have heretofore been had, that, in future, where a judgment or decree is reversed neither in the whole, nor in part, on the ground of error against the appellant, or plaintiff, in any appeal, writ of error, or supersedeas; yet, if error is perceived against the appellee, or defendant, the Court will consider the whole record as before them, and will reverse the proceedings, either in whole, or in part, in the same manner as they would do, were the appellee or defendant also to bring the same before them, either by appeal, writ of error, or supersedeas; unless such error be waived by the appellee, or defendant; which waiver shall be considered a release of all errors as to him."

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William Cuningham & Co. of *Glasgow*, at their *Dumfries* store, and exclusive of the sterling sum owing for the lots that I sold them; nevertheless, I demanded the currency debt when the rate of exchange was at 15 *per cent.*; if, on arbitration hereafter to be had, it should be determined that I am entitled to an allowance on that account, the said company are hereby subjected to such allowance. *Dan. Payne.*"

It was contended by him that, in consequence of the demand mentioned in that receipt, the debt in question should be considered as turned into *sterling* at the rate of 15 *per cent.* difference of exchange; and he alleged that this had been consented to, on the part of *William Cuningham & Co.* as a consideration for further forbearance of the debt; but of this there was no proof. It was stated in the *deposition* of *Walter Colquhoun*, (who, it seems, did not *answer* the bill as a *defendant*, but was examined as a *witness*,) that *Payne* never made him any offer of leaving the conditional clause in the receipt to the decision of arbitrators; that, subsequent to his death, his executor *Yates* wrote a letter to the deponent as agent for the company, touching an arbitration; to which he answered that, if it was meant to open the whole transaction, he did not feel himself at liberty to consent; but, if the matter in controversy be considered as restricted to the claim, in Mr. *Payne's* receipt, respecting the exchange, he might, unless counselled to the contrary, consent to the leaving of that point, as the only disputable one, to the decision of arbitrators; that no written reply was given, but the deponent understood the limitation proposed would not be agreed to.

As to the debt in *sterling* money; it appeared that a verbal contract was made by *John Neilson*, factor for the company, in the year 1771, for the purchase of the houses and lots aforesaid of *Daniel Payne*, at the price of 400*l.* sterling, payable on demand; that possession was then given to the said factor for the use of the Company, and a credit for the money entered in their books; that no deeds were executed; *Payne* having refused to make any, since the money was not paid, and choosing to retain the legal title in himself as security for such payment; that the said lots and houses were afterwards confiscated as the property of *British* subjects, and that he (although requested by *Adam Newall*, an agent of the Company) did not interfere to prevent it, by setting up his legal title against the claim of the

Commonwealth. The Company therefore contended, that they ought not to be compelled to pay the said purchase-money. It appeared, moreover, that four bonds belonging to the said Company, and amounting to 1,971*l.* 4*s.* 6*d.* 1-2. were put into the said *Payne's* hands on the 4th day of *February*, 1786, as security for his claims; of which bonds one for 233*l.* 10*s.* 10*d.* was returned to *Walter Colquhoun*, their agent, on the 31st of *July*, 1789, but the other three (with two bills of sale as additional security to two of them) were said to have been retained by the said *Payne* and his executor.

The Chancellor made a general order of account, *March* 15, 1800; and, afterwards, on the 18th of *May*, 1801, "having considered allegations of parties, their proofs, and the arguments of counsel, directed the Commissioner, in stating the accounts between the parties, to debit the plaintiff's testator with the *value* of the money (which he acknowledged himself to have received) according to the statutory scale of *depreciation*, and not to debit the defendants with the consideration money which they had agreed to pay for the houses and land in *Dumfries*." The Commissioner made a report accordingly, finding a balance against the defendants (after charging them with rent for the said houses and lots during the time they were occupied by their agents) to the amount of 465*l.* 11*s.* 2*d.* to bear interest from the 4th of *April*, 1777; (the date of the receipt for the money paid as aforesaid on account of the currency debt;) about which time *James Robinson*, the factor and partner of the Company, with all their clerks, storekeepers and assistant storekeepers were obliged to leave the State under the resolution of the Assembly, dated the 18th day of *December*, 1776, for enforcing the statute staple of the 27th *Edw.* III. c. 17.

This report was confirmed by the Chancellor, and (omitting eight years' interest for the time of the war) he decreed to the plaintiff the balance reported, with interest from the 4th of *April*, 1785: from which decree the *plaintiff* appealed.

Warden and *Botts*, for the appellant.

Williams and *Wickham*, for the appellee.

On the part of the appellant, it was contended that the decree

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was erroneous in not allowing the purchase-money for the lots and houses in *Dumfries*. This bargain was made before the statute of frauds was adopted in this country. A parol agreement, at that time, would have been enforced in equity, even without part performance. But here there was part performance, *Cuningham & Co.* were put into actual possession, and made considerable improvements. The *land* was their property, and the *money* the property of *Payne*. He had a right to go against them personally as debtors, though, it is true, he retained *a lien* on the land. He might waive his *lien* if he chose, but this could not deprive him of his personal remedy.

The bargain being obligatory on him, he could not have prevented the sale by the escheator: for, if he had filed a *monstrans de droit*, the previous sale to *Cuningham & Co.* would have barred his right; and he was not bound to have committed a fraud on the government by representing the land as his own. If, then, he has done no wrong, how has he forfeited his right?

According to the contract, *Cuningham & Co.* ought to have paid the money *immediately;* whereupon, a deed would have been made, conveying to them the legal title; if which had been done, it is admitted on all hands, nothing could have saved the land from the claim of the Commonwealth. Shall they be benefited by their own wrong, and put in a better situation than if they had paid the money. The doctrine laid down in 3 *Dall.* 225. shews that, as *British* subjects, they were personally liable for the acts of their government.

On the other side, it was said that the jurisdiction of the Court of Equity in this case could be supported only by taking this as a bill for *specific performance*. Considering it as such, the Court has a discretionary power to grant or withhold relief. No man shall demand equity without doing equity; so, also, without *having done* equity. It was *Payne's* duty to protect our rights, and, not having done it, he is not entitled to a decree. He must be presumed to have had it in his power to assert all his *legal* rights, the act of Assembly (*a*) having provided for the protection of such rights. The Commonwealth could only take, *subject to the rights of Payne;* nothing but the rights of *Cuningham & Co.* being confiscated.

(*a*) *Ch. Rev.* 65.

As a *creditor*, also, *Payne* was protected.(*b*) There can be

(*b*) *Ch. Rev.* 99. 106. 118.

no doubt that he might have secured himself in the mode pointed out by one or other of the laws on this subject. An ample fund, therefore, existing, in the lots and houses themselves, out of which he might have been paid, it was his duty to resort to that fund, and not to *Cuningham & Co.*; according to the maxim that "no right ought to be exercised in a manner prejudicial to the rights of others."(*a*)

(*a*) 2 *Fonb.* p. 297. b 3. c. 2. s. 6. *note* (*i*). 1 *H. Bl.* 136. *Wright* v. *Nutt.* 3 *Bro. Ch.* 326. S C. 3 *Bro. Ch.* 54. *Peters* v. *Irvine.*

In reply it was observed that this was not a bill for *specific performance.* The plaintiff came into equity on the ground that the defendants were out of the Commonwealth, and he could not sue them at law. This was the only circumstance which ousted the Court of Law of its jurisdiction. *Cuningham & Co.* were not entitled to a deed, but upon payment of the money; and, now, *upon payment of the money*, a deed may be made them, conveying all the right remaining in *Payne's* representatives.

On the part of the appellees, also, the decree was said to be erroneous, in directing the paper money payment to be *scaled.* The scale applies only to subsisting *debts* unpaid, but *not to payments;* for the law is positive that all actual payments in paper money shall be good at their *nominal amount.* This, being an error to the injury of the *appellee*, ought to be corrected, *though he has not appealed.* If there be one error in favour of the *appellant*, and another in favour of the *appellee*, the Court will direct *both* to be corrected. Where a balance of account is to be struck, and the sum of errors on both sides to be calculated, the Court must look into the whole business, and correct *all* the errors. For this reason, after a decree for an *account*, the plaintiff cannot dismiss his bill; but a balance of account may be decreed to the defendant; as was done the other day in *Todd* v. *Bowyer.*(*a*)

(*a*) *Ante*, p. 447.

To this it was objected, that *Payne* was not obliged to take paper money between 1770 and 1774; when he demanded payment, and *Cuningham & Co.* failed to pay. The particular wording of the receipt of the 4th *April*, 1777, proves this, and shews that, *in equity*, the payment should be *scaled.*

The counsel for the appellee contended, *contra*, that the word-

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ing of the receipt proved nothing, but that *Payne* wished to get over giving a receipt. It was, nevertheless, a plain receipt in full.

Friday, November 30. The following was entered as the opinion of the Court, consisting of Judges ROANE and TUCKER.

" The Court, having maturely considered, &c. is of opinion that the said decree is erroneous: therefore, it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellant the costs as well by him as by his testator expended in prosecuting his appeal aforesaid here. And this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, is of opinion, that the payment of 423*l.* 19*s.*, current money by *James Robinson*, for and on account of the appellees, to *Daniel Payne*, on the 4th day of *April*, 1777, which is acknowledged by said *Payne* to have been the full amount of the principal and interest then due to him, in current money, was a full payment and extinguishment of that debt, notwithstanding the demand made by the said *Payne*, that the same should be turned into sterling at the rate of 15 *per cent.* difference of exchange, and the reservation by him, of a right to claim the same in future; the commutation aforesaid of that debt, being neither agreed to by the debtors, or their agent, (and, if consented to as a consideration for further forbearance of the debt, as alleged by the said *Payne*, was probably a device to elude the provision of the statute of usury, and therefore void,) nor being established by the award of arbitrators, according to the tenor of the receipt granted by the said *Payne* at the time of the payment aforesaid; nor, if this bill was intended to procure the decision of the Court of Equity in lieu of that of the arbitrators upon that question, does it appear that the appellant has any just right to claim the addition or commutation aforesaid; and that therefore the bill should, as to the appellant, be dismissed, so far as it relates to that article, with costs; but that, on the other hand, the appellees, although they have not appealed from the decree in question, ought to be allowed the benefit of the nominal amount of the payment aforesaid, which ought not to be subjected to the operation of the scale of depreciation established by law; that sum forming only one item of the account between the

parties, and its allowance in full to the appellees not changing the result of the decree, which will, under the opinion of this Court, as now declared, be still rendered more favourable to the appellant.

"And this Court is further of opinion that, by the contract and agreement between *John Neilson*, factor and agent for the said *William Cuningham & Co.*, and made in their behalf with *Daniel Payne* in the year 1771, and not disapproved of, but acquiesced in by them, for the purchase of the said *Payne's* lots and houses in the town of *Dumfries*, for the sum of 400*l.* sterling, payable on demand, possession whereof was then given, and a credit for the money entered in the books of the Company, as appears by their answer, the equitable title and possession was thereby completely vested in the said *William Cuningham & Co.*, who might at any time have coerced a legal title from the said *Daniel Payne*, by paying or tendering to him the purchase-money, until the said *Daniel Payne* was absolved from that obligation by the Acts of the Legislature of the Commonwealth of *Virginia*, and the proceedings had under the same, confiscating the rights of the said *William Cuningham* and Company in and to the same.

"And this Court is further of opinion, that the retention by the said *Daniel Payne* of the said legal title as a security for the payment of the purchase-money for the said lots and houses did not impose it upon him as a duty, by any sinister act or device, to endeavour to protect the property therein of the said *William Cuningham & Co.* from confiscation; more especially, as it appears, from their own shewing, that they had one or more agents or factors in this country during the whole period of the revolutionary war, who were equally competent to have defended the same; and that the said *Daniel Payne* is not responsible for the confiscation and sale thereof, which he could not probably have prevented, as the Commonwealth, by the act "concerning escheats and forfeitures," became entitled in the same manner as the said *William Cuningham & Co.* were entitled, subject, nevertheless, to the payment of the consideration agreed to be paid by the said *William Cuningham & Co.* for the same.

And this Court is further of opinion, that the appellees are still liable to the representatives of the said *Daniel Payne*, for any part of the said consideration money which may remain due

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beyond the net amount of the consideration for which the lots and houses aforesaid were sold by the escheator of the Commonwealth, after deducting all just and reasonable expenses of the sales of the same, reduced to current money of this present period, according to the directions of the act of *May*, 1779, c. 4. s. 2. "concerning escheats and forfeitures from *British* subjects," according to the rate of exchange between current and sterling money at the time when the final decree shall be made in this cause, with interest thereupon from the time of the institution of this suit; and if the bonds, mentioned in the exhibit No. 6. have been retained by the said *Daniel Payne*, or his representatives, as is suggested in the answer, that the same, upon the performance of this decree on the part of the appellees, shall be delivered up to them, the appellant accounting with them for any moneys, which may have been received thereupon by himself, or his testator *Charles Yates*, or the said *Daniel Payne*, or any other person to his or their use.

"And the cause was remanded to the said Superior Court of Chancery, with liberty to the appellant to make the Commonwealth, or those claiming under it, parties thereto, if he shall be so advised."

Benjamin Watkins Leigh's Case.

Friday, November 16.

1. The practice of LAW is not an *office* or *place* under the *Commonwealth.*

2 An attorney at law is not bound, as a requisite to his admission to the bar of any Court, to take the oath prescribed by the 3d section of the act to suppress duelling.

MR. LEIGH having on a former day of this term asked permission to qualify as counsel at this bar, it was then resolved by the whole Court, that in addition to the oaths of qualification heretofore usual in such cases, he must take the oath prescribed in the 3d section of the late act to suppress duelling: which he said he would consider of, and for the time declined. And now, *by leave of the Court*, he again moved to be admitted to the bar, on his taking the usual oaths, *without the additional one last mentioned.* He flattered himself he should be able to convince the Court that its first impression on this subject, formed and expressed as it was without argument, and on the sudden, was incorrect; in which, if he should have the good fortune to succeed, he should have no doubt or apprehension which would preponderate with that tribunal, the love of justice or the pride of consistency.