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

BY
BUSHROD WASHINGTON.

VOL. I.

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ney lent, tho' it conſiſted of paper bills, was the repreſentative of ſo much ſpecie, as it was received by him in diſcharge of a ſpecie debt.

M'Rae is to be conſidered in this court, as ſtanding in the ſhoes of the perſon, to whom Keeling paid the ſum he had borrowed, in the ſame manner, as if that debt had actually been aſſigned to him. That the parties conſidered this as a ſpecie contract, is evident, from the value of the property mortgaged.

But the decree is ſurely erroneous, ſo far as it ſtops the intereſt from the tender of the money, to the time of the ſubſequent demand, ſince the preſent caſe cannot be likened to that, of a tender made in ſpecie. In the latter caſe, the money always continuing of the ſame value, no injury can ariſe, if it be not tendered on the day of payment. But in the caſe of paper money, its value was continually leſſening, and therefore it ought to have been tendered on the *very day*, as the lender, (relying on the punctual payment of the money,) might have made contracts, providing for the immediate application of it, and might loſe the benefit of ſuch contracts by diſappointment.

MARSHALL for the appellee, was ſtopped by the court.

LYONS J. delivered the opinion of the court. The caſe is too clear to be argued. This is a downright attempt to evade the law, directing the mode of ſettling debts contracted in paper money, without a ſingle circumſtance to countenance it.

In the caſe of Wily and Panky, in the General Court, it was determined, that the creditor who concealed himſelf in his houſe, to evade a tender, ſhould ſuſtain the loſs by the depreciation of the money.

Decree affirmed.

WILLIAM PAYNE, Executor of John Payne,

againſt

WILLIAM DUDLEY, Executor of Fleet.

THIS was an appeal from a decree of the High Court of Chancery. The appellant filed his bill in that Court, [illegible], that his teſtator was indebted to the teſtator of the appellee by bond, upon which a judgment had been obtained in the year 1766, during the lives of the parties. That the bond,

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being afterwards found by the defendant amongst the papers of his testator, the defendant had instituted an action upon the same bond, against the plaintiff, in a different court from that in which the original judgment had been obtained: that the plaintiff, not knowing of this judgment, was prevented from pleading it in bar, in consequence of which, a second judgment was rendered in the year 1789, against the plaintiff. The ground of equity is, that the testator of the plaintiff had, in the year 1766, conveyed the greatest part of his property to John Semple, in trust for the payment of the debt in question, (amongst many others,) provided, the enumerated creditors would within a reasonable time accede to, and accept of that security. That Fleet was one of the acceding creditors, and had been fully satisfied for the above mentioned debt out of the trust estate. An injunction was prayed for and granted.

The defendant in his answer, denied any knowledge of the judgment in 1766, or that the debt had been satisfied either by Payne himself, or by Semple out of the trust estate; and insists, that the debt (for which the judgment sought to be injoined was rendered) being yet due and unpaid, it ought now to be satisfied by the plaintiff, whether Fleet was, or was not an acceding creditor.

The judgment in 1766 was entered upon confession; no declaration or bond was filed, and consequently, it was entered generally, without ascertaining any precise sum.

The Chancellor upon a hearing of the cause, dismissed the bill, being of opinion, that the equity stated, was neither admitted by the answer, nor supported by the evidence.

Campbell for the appellant. I am aware of an objection, which may be urged against the relief sought for by this bill; which is, that the defendant at law, having lost the opportunity of availing himself of a legal advantage, cannot expect the favor of a Court of Equity, unless he shew, that the judgment is an unconscientious one. But it should be observed, that this legal advantage being gained, (and that too by the ignorance of the appellant) he has lost the opportunity of availing himself of the presumption, that the first judgment (obtained so long ago as the year 1766) had been paid; a defence which he might safely have used if instead of improperly instituting a second suit upon the same bond, a *sci. fa.* had been prosecuted to revive that judgment. The presumption arising from length of time, is much stronger against a judgment, than against a bond; for in the first case, a *sci. fa.* cannot be sued

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out after 7 years, but by permiſſion of the court. There are ſtrong circumſtances in this cauſe to ſtrengthen the preſumption. On the day when the firſt judgment was to be confeſſed, Payne executed a deed of truſt, conveying his property to Semple, to ſecure ſuch of his creditors as ſhould accede thereto. That Fleet was one of the acceding creditors, appears from the circumſtance of one of his ſons being found in poſſeſſion of a part of the truſt eſtate; after which it does not appear, that any demand of payment was made.

MARSHALL for the appellee. The principle ſtated and admitted by Mr. Campbell, furniſhes a compleat anſwer to all the objections relied upon; for it is clear, that where a man has neglected to avail himſelf of an advantage merely legal, equity will not aſſiſt him, ſo as to defeat the juſtice of the caſe. Fleet by receiving part of the truſt eſtate, is not thereby barred from recovering the balance of his debt, if other property can be found. It is like the caſe of a mortgagee, who if not fully ſatisfied by the ſale of the property mortgaged, may proceed to recover the balance from the mortgagor.

LYONS J. in caſe of a *foreclosure*, how would it be, if there were no covenant for payment of the debt.

MARSHALL. In that caſe, the mortgagee muſt be ſatisfied with the ſecurity he has taken; but he may elect to have the property ſold, in which caſe, he may proceed againſt the mortgagor for the balance left unſatisfied by the mortgaged property.

As to the preſumption of payment, it was a fit ſubject to have been relied upon at law. But ſurely it cannot be ſeriouſly contended, that the acceding creditors are precluded from claiming ſuch part of their debts, as remained unſatisfied under the truſt.

The PRESIDENT. The preſumption of payment ariſing from length of time, beſides being defeated by the acknowledgments of the debtor in 1775 and 1779, is ſufficiently repelled, by conſidering the delay neceſſarily incurred, whilſt the creditor was waiting to ſee what the truſt eſtate would produce. The creditors are not barred, by the terms on which they acceded to the deed of truſt, from demanding any balance not ſatisfied under the truſt—nor does it even appear, that the debtor had a letter of licence, which on ſuch occaſions is generally given.

It never was ſuppoſed, that the property of an inſolvent debtor, acquired after his diſcharge, was exempted from the claims of his creditors, until the debts before contracted were fully ſatisfied. It is his perſon only, which is protected.

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We come now to consider, the nature and extent of the relief sought for. Courts of Equity never interfere, to deprive the plaintiff at law, of any legal advantage which he may have gained, unless the party, seeking relief, will do compleat justice by paying what is really due. Indeed, they have (upon the same principle,) gone so far as to refuse their assistance, in relieving against a judgment, obtained by fraud.

The trust deed furnishes no equitable bar to the creditor, since he has waited, to know the result of that fund, as long as could have been expected. If Payne's executor had supposed, that a balance of the trust property were still remaining unapplied, he might have made the representatives of the trustees parties, and called for an account.

Decree affirmed.

WILLIAM M'WILLIAMS

against

LEWIS WILLIS.

THIS was an action upon the case, brought by the appellee against the appellant in the District Court of Fredericksburg. The declaration contains two counts. The first states; that a certain discourse was had between the plaintiff and the defendant, concerning the renting of a piece of ground of the defendant's, for the use of the *Jockey Club*, whereupon, the plaintiff, (*called in the said agreement Colonel Willis*) agreed to rent the said ground to the defendant, for the use of the Jockey Club, for the term of seven years, and the defendant agreed to pay for the same, the sum of £ 30, a year, the field to be enclosed by the plaintiff, with a good fence, and the defendant, in behalf of the Jockey Club, agreed to have the field restored to the plaintiff at the end of the term, with the fence in as good order, as when it was received, and the defendant, in consideration of the plaintiff's promise to do every thing &c. on his part agreed to be done promised to do every thing on his part to be performed: avers performance on the part of the plaintiff, and lays the breach, in the non-payment of 2 years rent, and in not restoring the field enclosed as he received it. The 2d count, is an *indebitatus assumpsit* for the use and occupation of a race field