

REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

*SUPREME COURT OF APPEALS*

OF

VIRGINIA.

—  
VOLUME II.  
—

BY WILLIAM MUNFORD.

---

*NEWYORK:*

PUBLISHED BY I. RILEY, No. 4. CITY-HOTEL.

C. Wiley, Printer.

1814.

**DISTRICT OF NEW-YORK, ss.**

**BE IT REMEMBERED**, that on the twenty-first day of January, in the thirty-eighth 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. II. 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.”

**THERON RUDD,**  
Clerk of the District of New-York.

MARCH,  
1811.

The Auditor of Public Accounts (in behalf of the Commonwealth) against Nicholas, Clerk of Dinwiddie. The Auditor v. Nicholas.

UPON an appeal from a decree of the superior court of chancery for the *Richmond* district, pronounced the 12th of *March*, 1805, by which an injunction, to stay proceedings on two judgments of the general court against the appellee, was made perpetual.

The case is sufficiently stated in the following opinions of the judges.

*The Attorney-Genéral*, for the appellant.

*Peyton Randolph*, for the appellee.

*Tuesday, March 19th.* The judges pronounced their opinions.

Judge BROOKE. The object of the appellee in the court of chancery was to be relieved against two judgments rendered against him in the general court, as clerk of *Dinwiddie* county, for failing to account for, and pay, the taxes on law process, according to the act of the assembly, entitled "An act to impose certain taxes on law process, and for other purposes." The circumstances relied on, in his bill, are precisely such as he might have submitted to the general court. To the notice of the first motion in that court against him, he appeared; to the second notice he failed to appear, but does not assign any cause for it. The doctrine is well established in this court, that decisions at law cannot be revised in a court of chancery upon the mere ground of error in the law court, nor upon circumstances of which that court had cognisance, unless the complainant can make a com-

1. On a motion against a clerk for the penalty incurred by failing to pay the taxes on law process, he may defend himself by showing that he used due diligence to get a commissioner of the revenue to compare his account with the books in his office, and certify thereupon as the law requires, and was prevented by the default of such commissioner from obtaining a *quætu*s.  
2. And if he fail to make such defence, without a competent excuse, he cannot obtain relief in *equity* on the same ground.

MARCH,  
1811.  
—  
The Auditor  
v.  
Nicholas.

petent excuse for having failed to defend himself at law.(1) The decree, therefore, must be reversed, the injunction dissolved, and the bill dismissed.

Judge TUCKER. The appellee brought a bill in the *Richmond* chancery court, to be relieved against two judgments against him in the general court, for a fine of 600 dollars each, for failing to account for and pay into the treasury the taxes collected by him as clerk of *Dinwiddie* county, upon law process, pursuant to the act of 1798, c. 2.(a)

(a) *Rev. Code*, vol. 1. p. 385.

The second section of the act requires the clerk to account upon oath to the auditor of public accounts for all taxes received by him, and pay the amount thereof into the treasury on or before the first of *October* annually. And, "that a commissioner of the tax shall compare the account of each clerk with the books in his office, and certify that it thence appears that all taxes by him received are accounted for."

The bill charges that he applied several times to Mr. *Goodwin*, a commissioner of the tax in his county, to come to his office for that purpose ; and this is supported by the deposition of Mr. *Goodwin* himself, who says the applications were made to him at the court-house, on court days, and he forgot to look into the law to see whether it was his duty to do so. The auditor, in his answer, says there were two commissioners in the county ; but, as he does not name them, nor produce any proof of this substantive allegation, I pass it over.

The law makes no provision, by summons or otherwise, by which a commissioner can be compelled to perform this duty, or be punished for neglect of it. There are two judgments in the record, the first for less than forty dollars, the second for less than one hundred dollars. The fines are 1,200 dollars ; and the act inflicts a further penalty, of being liable to lose his office.

(1) See *Kincaid v. Cuninghame*, ante, 1.

From the records of the general court, it appears that the appellee appeared, and was heard in his defence on the motion for the first judgment; but that he failed to do so on the second. No reason is assigned for this failure in the latter instance; nor are we informed what was the nature of the defence made on the first motion.

MARCH,  
1811.  
—  
The Auditor  
v.  
Nicholas.

It is with infinite regret I find myself compelled to say that, grievous as this penalty is, and favourable as the deposition of Mr. *Goodwin* is to the appellee, I think we cannot, without departing from principles long established, and recently confirmed, grant the appellee that relief which the decree of the chancellor was calculated to afford him; but that that decree must be reversed entirely.

Judge ROANE was of the same opinion. It was a hard case; but the decree must be reversed.

Judge FLEMING. This is, no doubt, a very hard case on the part of the appellee; but, as it is a question purely of a legal nature, and has been discussed and decided in a court of law, it seems that, by a number of precedents of this court, he is precluded from redress in a court of equity. Had he appealed from the judgment of the general court, and rested his defence on the law of the case, I should probably have been of opinion that it was in his favour, and that the judgment ought to have been reversed; but am of opinion that a court of equity had no jurisdiction of the case; and, therefore, concur in the opinion that the decree be reversed, and the bill dismissed, with costs.(1)

(1) The general assembly, by an act passed the 4th of *February*, 1812, directed the *penalties* in question, which *John Nicholas*, the appellee in this case, was compelled to pay into the treasury, to be refunded to him; it appearing that he had also paid the sums due for taxes on law process.