REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) 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.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

CHAS. H. WYNNE, PRINTER, RICHMOND.

BREWER *v.* HASTIE & CO.

Tuesday, April 21st, 1801.

If the answer admits dealings, and the Commissioner reports a balance due, without exception before him, or in the Court of Chancery, the defendant cannot object in the Court of Appeals, that there was no evidence of the debt.*

Interest during the war deducted from a debt due a British subject resident abroad.†

Interest, not to be carried down beyond the date of the decree.‡

Hastie & Co. merchants, and partners, and British subjects, filed a bill in the High Court of Chancery against Brewer, praying an account and relief for money due for dealings with Lindsy, their factor in Virginia, before the Revolution. The answer admitted dealings to a considerable amount, but [23] alleged that Brewer had paid considerable sums of money and tobacco towards the discharge thereof, and had frequently solicited the plaintiff's factors and agents for a final settlement, which they did not comply with until the year 1774 or 1775, when one Burt presented an account, which upon examination, the defendant found to be incorrect, and sets forth some credits which he claims. That, upon receipt of the account rendered by Burt he went to Petersburg prepared to settle and discharge the balance, but, upon enquiry, found that the plaintiffs' agents had all left the country.

There are no documents or evidence filed in the cause, except a copy of the plaintiffs' account.

The Court of Chancery referred the accounts to a Commissioner, who reported a balance of £226 13s. 8d. due the plaintiffs, with interest from the 1st of September, 1775.

No exception to this report was taken, either in the Commissioner's office or in the Court of Chancery; and that the Court confirming the report, decreed payment of the balance reported due, with interest as aforesaid. From which decree, the defendant appealed to this Court.

* But an error apparent on the face of an account in a commissioner's report, is ground for reversing a decree confirming it, though no exception was taken below. *Walker's* ex'rs. v. *Walke,* 2 Wash. 195. Accordant, in substance, *Harris* v. *Magee,* post. 502.

But without an exception in the Court below, the report cannot be impeached on grounds, or as to subjects, depending on extraneous evidence. *White's* ex'rs. v. *Johnson,* &c., 2 Mun. 285.

† Acc. *McCall* v. *Turner,* 1 Call, 133.

‡ Acc. *Deanes* v. *Scriba,* 2 Call, 415.

But see Code of 1849, p. 673, § 14, 18, giving to Court or jury nearly unlimited discretion as to interest.

DUVAL, for the appellant.

There was no evidence of the debt; for, the answer does not admit the amount, but merely that there had been dealings between the parties; and, therefore, the appellees were not entitled to a decree for any sum. However, be that as it may, the decree was clearly wrong in allowing interest during the war; as the plaintiffs were British subjects, who, by their own bill, shew that they were out of the Commonwealth; and the answer states, that the defendant was desirous of a settlement, but could not obtain it.

CALL, contra.

The answer admits, that there were dealings and transactions, and only claims credit for some tobaccoes and [24] grain; which virtually amounts to an admission that the items stated in the plaintiffs' account were really furnished; especially, as the account is referred to, and made part of the bill. Besides, upon the taking of the account before the Commissioner, the defendant appeared, his allegations were heard, a report made, and no exception taken, either before the Commissioner or in the Court of Chancery. After which, it is too much to deny the existence of the debt. As to the question of interest, that is submitted to the judgment of the Court upon the law.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the Court, that there was no error in the decree as to the debt; but, that it was erroneous in allowing interest during the war, according to the case of *M'Call* v. *Turner*, 1 Call, 133, in this Court; and that the decree was likewise erroneous, in continuing the interest after the date of the decree. That, consequently, the eight years during the war were to be deducted, and the interest to be carried down to the time of the decree only, as was done in *Deanes* v. *Scriba*, 2 Call, 415, and *Deanes* v. *Kunkall*, at the last term.

The decree was as follows:

"The Court is of opinion, that there is error in the said decree, in allowing to the appellees interest on the sum recovered, for the eight years during which the war continued between the United States and Great Britain, and during which the appellees, who are British subjects, were non-residents [25] within this Commonwealth, and no payment or tender

could have been made to them; and, also, in continuing the interest to the time of payment instead of to the time of the decree, and making the recovery to be of the aggregate of principal and interest."*

[* See notes to *M'Call* v. *Turner*, and *Deanes* v. *Scriba*.]

Chisholm *v.* Starke and others.

Tuesday, April 28th, 1801.

A. devises slaves to his wife for life, remainder to his children. The wife marries B. who empowers C. to sell the slaves. C. does sell them to D. who was ignorant of the right of those in remainder; and D. sells them to E. If the remaindermen bring a bill of *quia timet* against B., D. and E., the Court will decree B. to give security for the forthcoming of the slaves, [and their increase,] at the death of his wife; but, as D. was a purchaser without notice, he will not be compelled to give such security.*

This was an appeal from the High Court of Chancery. The bill states, that James Underwood, the father of the plaintiffs Ann Starke and Martha Underwood, who live in the city of Richmond, died in 1773, having first made his will, and thereby devised, as follows: "I lend to my loving wife Ann, the use, labor, and profits of one-third of my slaves, during her natural life; my will and desire is that the dower slaves of my loving wife Ann (meaning the third lent to her as aforesaid) may be equally divided at her decease amongst all my children." That the said Ann took possession of a third part of the slaves, which have greatly increased; but, through the severity of her, and her second husband, William Richardson, (of Hanover county,) they are reduced to three: That the said

* Injunction granted to restrain tenant for life of slaves from selling them out of the State. *Didlake* v. *Hooper*, Gilm. 194.

But the Chancery Court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear danger of its being wasted, or made way with. *Mortimer* v. *Moffatt and wife*, 4 H. & M. 503. *Coleman* v. *Holladay*, 2 Mun. 162.

Acc. 2 Kent's Comm. 287.

So, a fraud in A. does not affect B., purchasing from A. *bona fide*, and without notice. *Coleman* v. *Cocke*, 6 Rand. 618.

And a d rivative purchaser *with* notice is protected by the want of notice in him he claims under. *Curtis* v. *Lunn*, ex'r. &c., 6 Mun. 42.

So, if grantor make a deed with intent to defraud creditors, &c.; yet if grantee do not partake or know of the fraud, and pay valuable consideration,—he is clear of charge. *Astor* v. *Wells, &c.* 4 Wheat. 466; 4 Cond. Rep. 513.