REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
Printed by THOMAS NICOLSON
M,DCC,XCIX.

To The PUBLIC.

THE caſe of *Maze* and *Hamilton*, with one other, I had intended to publiſh in an appendix to this volume. But the manuſcript having been unfortunately depoſited in a houſe which was lately conſumed by fire. I have great reaſon to apprehend that it was either burnt, or by ſome other means deſtroyed.

ERRATA.

PAGE.	LINE.	
11	41	*For* hinder *read* hinders.
54	26	*Inſert* by *before the words* the owner.
66	4	*Strike out the comma after* mother *and put a period.*
—	12	*Strike out the ſemicolon after* it *and put a comma.*
68	5	*For* empowed *read* empowered.
69	36	*For* 1 *read* 3.
70	17	*For* appellant *read* appellee.
71	2 & 3	*For* appellant *read* appellee.
87	8	*After* teſtimony *inſert* of.
98	17	*After* regarded *inſert* it.
99	31	*After* rule, *ſtrike out the mark of interrogation and put a period.*
106	12	*For* lands *read* land.
122	44	*For* forfeiled *read* forfeited.
139	7 & 14	*For* ſecurity *read* ſurety.
140	4	*For* principal *read* plinciple.
163	32	*Before* ſuperior *read* the.
182	21	*For* laws *read* law.
206	4	*After* it *inſert* to.
—	21	*For* principal *read* principle.
209	14	*For* determination *read* termination.
212	11	*After* but *inſert* where.
224	37	*After* idea *put a ſemicolon.*
225	40	*After* that *inſert* of.
227	3	*Strike out* not.
—	34	*After* endorſer, *ſtrike out a period and put a comma, after* 443 *ſtrike out the comma and put a period.*
242	14	*Strike out the ſemicolon after* fault.
243	24	*After* not *inſert* an.
244	41	*Strike out the ſemicolon after* declarations.
249	2	*For* is *read* as.
255	10	*For* prices *read* price.
—	12	*After* Johnſon, *ſtrike out the ſemicolon and put a comma.*
261	19	*Strike out the comma after the word* Stockdell, *and put a period.*
263	37	*For* law *read* all.
266	25	*For* points *read* point.
270	27	*Strike out the comma & put a period after the word* plea.
278	9	*For* 2 *read* 1.
288	40	*For* ſurvices *read* ſervices.
289	1	*For* ſtronger *read* ſtrong.
—	14	*For* centinental *read* continental.

39 *For*

ERRATA.

PAGE	LINE	
289	39	*For* collufion *read* collifion.
292	22	*For* deciffion *read* decifion.
——	30	*Strike out* of *after the word General.*
——	31	*For* Hooker *read* Hocker.
293	19	*After the word* intended *infert*)
——	21	*For* legal *read* regal.
295	23	*After* Carolina, *put a comma inftead of a femicolon, and ftrike out the femicolon after the word* loci.
——	38	*For* defribed *read* defcribed.
296	8	*Strike out the comma after* bills.
——	35	*For* there *read* thefe.
300	11	*For* legal *read* regal.
301	26	*After* damages, *put a period.*
302	8	*For* is due *read* iffue.
——	22	*After* verdict *infert* ought.

WICKHAM. This is always done by a general order at the end of the term, and applies to all the sterling judgments of that term without forming a part of every distinct judgment.

THE PRESIDENT. Upon an appeal, the order should be annexed to each judgment, and should appear in the record.

WICKHAM then prayed a *certiorari*, which was awarded.

Note. The general order being certified, the judgment was affirmed in April 1796.

BROWN & others,

against

The administratrix of THOMAS BROWN dec.

THIS was an appeal from the High Court of Chancery, in which the only question was, whether the master ought to have allowed an *item* in an account upon the evidence offered to prove it. The appellants who were the plaintiffs below are the children of *Samuel Brown*, to whom *Wentworth* was administrator. He settled his accounts of that estate under an order of the County Court, admitting himself to be a debtor to the amount of £ 386 : 10 : 1. After his death, his wife was appointed his administratrix, and at the same time, *Thomas Brown* was appointed guardian to the appellants. After the death of *Mrs. Wentworth*, *John Day* qualified as administrator *de bonis non* &c. of *Wentworth*, whose estate was by a decree of the County Court in an amicable suit commenced for that purpose, divided amongst his children, one of whom was the wife of *Thomas Brown*. On *Wentworth's* books is an entry made by *Day* in the life-time of *Mrs. Wentworth* the administratrix, charging *Thomas Brown* with £ 386: 9: 1, paid him as guardian of the plaintiffs on account of *Wentworth's* estate. *Day* is dead, and his hand writing proved. *Thomas Brown* on his day book *debits* himself with £ 155: 9: 1, received by him on account of his wards. But tho' all other entries from this day book are posted on his ledger, the sum of £ 155: 9: 1, is not carried to account there. It appears that an order was made by the County Court, directing a summons to issue to the said *Thomas Brown*, to settle his guardianship accounts, but nothing farther was ever

done

done in the business. The defendant's exceptions to the master's report which allowed this sum of £386: 10: 1, to the debit of *Thomas Brown's* estate, with interest thereon from 1768, when the credit was entered by *Day* being sustained by the High Court of Chancery, an appeal was prayed from the decree founded thereon to this court.

RONOLD for the appellant. *Day*, if living would have been a good witness at the time he made the entry, and his evidence is not destroyed by his afterwards becoming the administrator. But if I am wrong in this, the law is well settled, that if a witness were once competent, and afterwards becomes interested, his hand writing may be proved. In this case, the hand writing of *Day* being established, his entry ought to have been considered as evidence. Besides, if *Brown*, when summoned to settle his accounts had done so, there would have been no necessity of resorting to this evidence, and consequently slighter proof should be received to charge him.

MARSHALL. The rule is, that the best evidence which the nature *of the case will admit* shall be required, and not as Mr. *Ronold* supposes, the best evidence which it is *in the power of the party to produce*. This case from its nature admits of conclusive testimony: *Wentworth*, it is admitted, once had this money in his hands;—it is contended that he is discharged of it, and that *Brown* is chargeable because he was appointed the guardian, and in *Wentworth's* books an entry was made by *Day*, of the money being paid over to *Brown*. Now this is a case where *Wentworth* might, and as a prudent man ought to have taken a receipt, and therefore the entry is not the best evidence which the nature of the case would have admitted. *Wentworth* himself could not have been examined as a witness to discharge himself and to charge another: Can his entry then be admitted, or is the case stronger, because the entry is made by *Day*? The evidence of his hand writing proves only that he made the entry, but it does not establish the fact to which the entry relates. As to *Brown's* misconduct in not settling up his guardianship accounts, he might have been punished for not doing so, but it does not authorise the establishment of a principle as to him, which is repugnant to the rules of evidence when applied to general cases.

RONOLD in reply. I do not contend that the entry of the party himself would be evidence; but it is sufficient if made by a third person, and his hand writing proved. It is like the case of a book keeper, whose hand writing may be proved after his

death,

death, to establish entries, with which perhaps he was himself totally unacquainted.

THE COURT delivered the following opinion and decree viz. "The court is of opinion, that the exhibits stated in the record are not only corroborative of the entry made in *Wentworth's* books by *John Day*, the clerk, or agent of *Mary Wentworth* the administratrix; but are abundantly sufficient independent of that entry, to charge *Thomas Brown* with the whole £386 : 10 : 1. The demand against *Wentworth's* estate was ascertained by his administration account duly settled and recorded, so as not to admit of doubt or litigation: *Thomas Brown* the same day, on which administration of that estate was obtained, is appointed guardian to *Samuel Brown's* children with a view, it would seem, to the receiving of this money before that estate was divided. There appears to have been so little doubt of the personal estate (of which there is no account) being sufficient to pay this, and all other demands, that *Brown* himself who married a daughter of *Wentworth*, with the husbands of the others, immediately commenced an amicable suit in Chancery to have a division of the lands and slaves: an order for such division is accordingly made and carried into execution, comprehending 17 slaves, which at their stated value, amounted to much more than this demand of *Samuel Brown's* orphans, and were liable thereto if the personal estate were not sufficient. Hence it appears that this money either was received by *Thomas Brown* the guardian, or he was guilty of gross neglect of duty, either of which would be a proper ground for charging him therewith. That he did receive it, is highly presumable from the circumstances before stated, and from that of his having entered in his memorandum book, the receipt of so considerable a part as £155 : 9 : 6, without having returned an account thereof to court as his duty required, or even carrying it to account in his own books, either to the credit of a general account with *Samuel Brown's* estate, or to the credit of each individual child, although such accounts appear to be open on his books, and although it is stated that he had posted from the memorandum book all other entries made at the same time. That therefore his estate ought to be charged with the whole £386 : 10 : 1, as received in May 1768, accountable to each child for one third thereof, with interest. But since the accounts of disbursements for their maintainance, appear to be inadequate to that purpose, and probably de-

"fective, and the intereſt of the money a very moderate allow-
"ance, the court is of opinion that the intereſt with each child
"ſhall commence from the time when he or ſhe attained the age
"of 21 years or married, till which period the intereſt ſhall be
"ſet againſt the maintainance, and all the accounts of his diſ-
"burſements for the latter diſcarded, unleſs the plaintiffs can
"make it appear before the commiſſioner, that they derived
"part of their maintainance from ſome other ſource than from
"their ſaid guardian, in which caſe the charge of intereſt is to
"be made againſt him, and he to be allowed his accounts for
"maintainance. The decree is reverſed with coſts, and the
"cauſe to be remanded to have the accounts reformed, and
"a final decree made according to the principles of this de-
"cree."

BENNET,

against

THE COMMONWEALTH.

THIS was an appeal from a judgment of the Diſtrict Court of *Dumfries*, quaſhing an inquiſition taken between the *Commonwealth* and the appellant, which found "that the appellant was a *Britiſh ſubject*; that he had ſince the peace of 1783 ſold the land in queſtion to citizens of this country, and that the *Commonwealth* hath no right to the ſame by way of eſcheat or otherwiſe." This inquiſition was ſigned by 17 *jurors*.

The only queſtion in the cauſe was, whether the jury might be compoſed of a greater number than *twelve*?

LEE for the appellant, cited 3 *Blac. Com.* 258—*Finche's* law 323, 4, 5, to ſhew that in inqueſts of this ſort, no determinate number was required. That it might conſiſt of twelve, or more, or leſs.

ROANE, J.—The quotations from the 3 *Blac. Com.* 258 are completely deciſive, that no determinate number of jurors is requiſite in queſtions of this kind by the Engliſh law, and no act of our Aſſembly prior to the year 1794, has altered the common law in this particular.

The act of 1794, to amend the act concerning eſcheators, after premiſing that a contrariety of opinions had prevailed as to the conſtruction of the act of 1792, goes on to limit the number

of