REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR THE RICHMOND DISTRICT.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. The second edition, revised and corrected by the "authors. Volume I. By William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "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, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie-"tors 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."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

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*Court be likewise reversed and annulled down to the "replication, and awarding of commissions to take depositions, as to the defendants who have answered; and "down to the writs, as to the defendants who have not "answered; and that the appellees pay to the appellant his "costs by him expended in prosecuting his appeal in the "said Superior Court of Chancery: and further it is ordered that the cause be put again on the rule docket of "the County Court, or the Superior Court of Chancery "for the *Richmond* District, as the Judge of the latter "Court may direct, in order to be further proceeded in: "for which purpose the said cause is remitted to the said "Superior Court of Chancery."

M'Rae's Executors *against* Woods' Executor.

Thursday, November 12.

After two concurring verdicts for the same party, on an issue directed by the chancellor to be tried at common law, he is not bound to direct a new trial, notwithstanding both verdicts were in opposition to the opinions of the Judges before whom the issues were tried, and a verdict had originally been rendered in favour of the other party.

THIS cause was heretofore in the Court of Appeals, and is reported in 2 *Washington's Reports*, p. 80. The statement of Mr. *Washington* will, for the most part, be pursued as far as it goes, and the circumstances which have since attended the case, will be added. This case first came into the Court of appeals as an appeal from the High Court of Chancery, in a suit instituted there by *Richard Woods*, the testator of the present appellee, against *Philip M'Rae*, the testator of the present appellants. The bill filed by *Woods* states that the complainant, in the year 1769, had a lottery, the highest prize in which was some improved lots in *Charlottesville*, and a tract of land, which property, in the scheme of the lottery was estimated at 440*l.* That *Roderick M'Rae* purchased two tickets, *Henry Mullins* one, to which the plaintiff added another, the whole forming a joint property in which *Roderick M'Rae* owned one-half. That one of the partnership tickets, No. 69. drew the highest prize, and was therefore entitled to the property above mentioned. But the ticket, so soon as its good fortune was known, was forcibly taken from the said *Roderick M'Rae*, by the defendant *Philip M'Rae*, who claimed the entire benefit of the prize. That the plaintiff and *Mullins* having sold their interest in the prize to *Roderick M'Rae*, the plaintiff conveyed the whole property to the assignee of *Roderick*. That about fifteen years after this, the defendant, *Philip M'Rae*, commenced a suit *against the plaintiff at law, and, in the absence of the plaintiff's witnesses, who could have proved the tortious manner in which the plaintiff acquired the possession of the

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ticket, a verdict was rendered against him for 451*l.* 18*s.* 4*d.* damages, for the whole value of the ticket. The bill prays an injunction to the judgment at law.

The answer states that half the ticket in question was purchased by *Roderick M'Rae*, for the defendant, the day before the drawing, and that, after it was known to have been fortunate, it was delivered to the defendant by the said *Roderick*. That the defendant never claimed more than one-half of the prize drawn by this ticket.

The evidence as to the right of *Philip M'Rae*, and the manner of his obtaining possession of the ticket, is extremely contradictory.

The subject of dispute was submitted to arbitration by the two *M'Raes*, as appears by the testimony of some of the arbitrators, and a decision was given in favour of *Philip M'Rae's* title to one half of *Roderick's* interest in the prize. One of the jurymen who tried the cause, deposes that his intention was to give damages for the *whole value* of the ticket. Another juryman deposes that the Jury gave to the defendant, *Philip M'Rae*, damages for the *interest which Roderick M'Rae held in the ticket.* The declaration in the action at law, claimed the whole ticket, and the verdict was general, "That the defendant did assume upon himself as the plaintiff hath declared against "him and assessed the damages to 451*l.* 18*s.* 4*d.*"

The Chancellor upon the hearing of this cause, directed the issue between the parties in the action at common law to be tried again; from which decree the defendant *M'Rae* appealed. In the Court of Appeals, the decree of the Chancellor was affirmed. This decree being affirmed, the issue directed by it was tried in the *Charlottesville* District Court, and was found in favour of *Woods*. But the Judge having certified his dissatisfaction with the verdict, the Chancellor directed the issue to be tried again in the District Court at *Richmond*. On this trial the Jury found a verdict for *Woods*, and the Court certified that in their opinion the verdict was against evidence.

Upon the first trial of the *issue*, the deposition of *Milly Oglesby*, which was stated to operate strongly in favour of *M'Rae*, and was not before the Court of Appeals, was read. Additional evidence was adduced on both sides. The second issue was tried upon the evidence contained in the papers filed in the High Court of Chancery. The
* 550 *injunction obtained by *Woods* was decreed to be perpetual: from which decree the present appeal was taken.

Randolph, for the appellants. If this had been the case of a single trial, according to the precedents of a Court of Chancery, the cause ought to have been sent back, on the Judge's expressing his dissatisfaction with the verdict.(*a*) What difference then does the second trial at common law make when the Judge, who presided, certifies that the verdict was contrary to evidence, and that there was no testimony in addition to that contained in the papers which came from the High Court of Chancery? A Court of Chancery may send out issues till the conscience of the Judge shall be satisfied; and the question is, whether it ought to be *satisfied* when the Judges of common law say they are *dissatisfied*. But the Chancellor, on the testimony of *Milly Oglesby*, ought to have decided in favour of *M'Rae* without directing a third issue. If that testimony had been before the Court of Appeals, the original verdict would not have been disturbed.

(*a*) 1 *Wash.* 336. *Southall* v. *M'Keand*, &c.

Wickham, for the appellee. The original verdict in favour of *M'Rae* was for the *whole* of a lottery ticket, when he was not entitled to more than *one-fourth*, if to any thing. Those Judges of the Court of Appeals, when the case was brought up before, who gave any opinion as to the merits, did not think that *M'Rae* was entitled to more than *one-fourth;* and if the verdict had been for one-fourth of the ticket, it is probable that they would not have been disposed to disturb it; but all the Judges were of opinion that a new trial ought to be granted. There was a great variety of contradictory evidence in the cause; and the additional testimony of *Milly Oglesby* was probably weighed by the Jury. When there is such contradictory evidence, the Court ought with extreme caution to interfere. It would be no disparagement to the learning of the Judges to say, that cases of this kind emphatically belong to the decision of the Jury, who, knowing the characters of the witnesses, are better enabled to determine on the degree of credibility to which they are entitled, than the Judges possibly can be from merely *hearing them* give their evidence in Court.

A Court of Chancery will not grant a new trial on the mere certificate of the Judge.(*b*)

(*b*) 3 *Call*, 568. *Ross* v. *Pines*.

After the trial at *Charlottesville M'Rae* did not choose to trust to a Jury of the vicinage, but brought his case to trial at *Richmond*, where a Jury of strangers concurred *with the Jury of the vicinage. As to the *power* of a Court of Chancery to grant even five new trials, such a thing may exist, but it ought not to have been exerted in the present case. Under all the circumstances of this case, it would

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have been a mere mockery of the trial by Jury to have directed another issue.

Hay, in reply. There appear to have been three verdicts in this case; in one instance there was a verdict for *M'Rae*, and in two others, for *Woods*, both of which were in opposition to the opinions of the Judges. The scales were therefore equipoised. The Judges, if not better Judges of *men*, are certainly better Judges of *facts*, better able to take a comprehensive view of a complicated subject. Juries, perplexed with the cause, and more perplexed with the arguments of counsel, and not seeing their way clear, often find for the defendant without investigating with accuracy the merits of the cause. He could see no reason for departing from the principle laid down in *Southall* v. *M'Keand*,(a) where the Court say, "that the verdict in "the District Court ought not to stand, upon the certificate "of the Judges, that the weight of evidence was against "it: since it is unusual for the Chancellor to be satisfied "with such a verdict." This decision applies as emphatically to a case after the second verdict as the first.

(a) 1 *Wash.* 336.

Curia advisare vult.

Thursday, *November* 19. The Judges delivered their opinions.

Judge TUCKER. The history of the occasion and progress of this suit is given in 2 *Wash. Rep.* 80. Since that period, there have been two new trials—One at *Charlottesville*, where the cause of action, if any, arose: the other at *Richmond*, eighty miles distant from the scene. In both, the Jury found verdicts for the defendant at law: but, before either of their verdicts were rendered, a Jury had been impanelled three days, without being able to agree, and were finally discharged. The Judges before whom the trials were had, certified, in the first instance, that, upon the whole, in the opinion of the Court, the evidence on the part of the plaintiff outweighed that of the defendant; in the second instance, the Judges' certificate declares that, no evidence was introduced in addition to that contained in the record now before us, and that, in their opinion, the
* 552 *verdict was contrary to evidence. This has imposed upon this Court the necessity of inspecting that evidence. There is a prodigious mass on both sides, which it is impossible for me to reconcile; such is the opposition between the evidence for the parties respectively. Ignorant of the

characters of all the witnesses, (which were perhaps known to the jurors,) I know not whom I ought most to credit or discredit. I must therefore confide in the opinion of the Jury, who are the constitutional judges in such cases. More than twenty years have elapsed since this suit was instituted; and fifteen years passed over before the plaintiff was confident enough in the justice of his claim to assert it in a Court of Law, although all that time in possession of the fatal ticket, which has been the apple of discord for eight and thirty years. I think it high time to say—*Interest Reipublicæ ut sit finis litium;* and therefore am for affirming the decree whereby the plaintiff's judgment hath been perpetually enjoined.

Judge ROANE. Upon the principles which seem to have governed the Court in the case of *Ross* v. *Pines*,(a) I am of the same opinion. The concurring verdicts of the two Juries ought to conclude this matter. The first Jury was probably acquainted with the characters and credibility of the witnesses; and the last Jury were probably strangers to them all; yet both have reprobated the plaintiff's pretensions.

(a) 3 *Call*, 568.

Juries are certainly the best judges of credibility; and, as was said by this Court in the case of *Ross* v. *Pines*, it would be vain to resort to the verdict of a Jury, if their verdicts were perpetually to be set aside, until they corresponded with the opinions of the Courts before which they are taken:—then it would be the opinion of the Court, and not of the Jury, which would govern the decision of the Chancellor. In further corroboration of my opinion in this instance, I will mention that, in the former decision of this case by this Court, one Judge seems to have expressed no opinion as to the extent of the appellant's right; another said, that, at most, it was only to one-fourth; and the President said his impressions were that the appellant had *no title*. On the ground therefore of these opinions, in addition to the two concurring verdicts, I think that the decree of the Chancellor should be affirmed.

*Judge FLEMING. This is precisely the case that was before this Court at the *October* Term, 1795, reported in 2 *Wash.* p. 80; with this only difference, that the deposition of *Milly Oglesby*, which I think not material, was read on the first trial of the issue, but was not in the record exhibited to this Court. There has been a second trial of the issue ordered by the Court of Chancery, and the verdict again in favour of the appellee, with both of which I

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am perfectly satisfied, whatever may have been the impressions of the Courts before which those issues were tried.

I think it high time the parties were at rest, as it is now thirty-eight years since the origin of the controversy; during fifteen of which, the appellant's testator, though living in the County, quietly acquiesced in the possession of *Roderick M'Rae*, and of those who claimed under him, before he asserted his claim to the premises in a Court of Justice. I therefore concur in the opinion that the decree making the injunction of *Woods* perpetual is correct, and ought to be affirmed.

Decree of the Court of Chancery AFFIRMED, by the unanimous opinion of the Judges.

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Bowyer, &c. *against* Lewis.

Monday, November 16.

An appeal ought not to be allowed *by this Court* from an order of a Superior Court of Chancery rejecting a motion to allow a bill of review, where the right of property had been decided, and a writ of *habere facias possessionem* awarded, but an account remained to be taken, and the commissioner's report had not come in; such decree being interlocutory only.

IN this case, the Court requested that counsel would argue the preliminary question whether an appeal could be allowed *by this Court* from an order of a Superior Court of Chancery, rejecting a motion to allow a bill of review, where the *right* of property had been decided, and a writ *of habere facias possessionem* awarded, but an account remained to be taken, and the report of the commissioners had not come in: in short, whether an appeal would be allowed, till the decree was, *in all respects*, made final.

After the affirmance of the decree, in this cause, it was certified to the Superior Court of Chancery for the *Staunton* District; and, upon the certificate's being presented to the Judge of that Court, the defendants petitioned for a bill of review, for *new matter* alleged to have been discovered since the rendition of the original decree in the High Court of Chancery; which motion was overruled without *costs. The Court then proceeding to carry the decree of the High Court of Chancery into effect, as affirmed by this Court, awarded a writ of *habere facias possessionem* to the appellee, and appointed commissioners to make an inquiry and settlement of some accounts between the parties, and subjected the property to be sold for ready money, to pay any balance which might be found due to the appellant from the appellee.

Note the diversity between a bill of review, and a supplemental bill, in the nature of a bill of review.