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.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, 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. Volume II. By William W. Hening and Wil- "liam 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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Tuesday, May 3.

Morris, Overton, and others, *against* Ross.

After a party has been fully heard in a Court of Law (in a case in which the rule is the same *in equity* as *at law*,) he shall not be permitted to go into a Court of Equity *on the same controverted points.*

An award ought not to be set aside, either in a Court of Law or Equity, on the ground of a mistake in the judgment of the arbitrators, unless that mistake be *very palpable;* a mere difference of opinion between the Court and the arbitrators, in a *doubtful* case, not being sufficient to authorise such interference.

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced on the 19th of *May*, 1803, whereby an injunction obtained by the appellee to stay the execution of a judgment of the appellants was made perpetual.

After the decision of this case, *at common law*, by the Court of Appeals, in *October*, 1802, affirming a judgment of the District Court of *Richmond*, as reported in 3 *Call*, 309. (under the name of *Ross* v. *Overton*,) *Ross*, on the 1st of *January*, 1803, exhibited his bill to the late Judge of the Superior Court of Chancery for the *Richmond* District, in which he stated, at full length, his contract with *Morris* as the agent of the *Overtons*, in 1783, for a lease of a slip of land and mill in the vicinity of *Richmond;* the total destruction of the mill, with the loss of lives, and property to a considerable amount, by an unusual "torrent" of broken ice, before the expiration of the lease; a reference, by mutual bonds, of the subject in controversy to the arbitrament of *Joseph Jones*, *James Madison*, and *Henry Tazewell*, and their award thereupon, which declared that *Ross* was bound to pay the rent, and perform all the other stipulations in his agreement for seven years, notwithstanding it appeared, that, "in *January*, 1784, by an extraordinary "and unexpected movement of the ice, the mill-house was "entirely demolished, and the said *Ross* had it not in his "power to prevent it;" that *Ross* refused to perform the award, of which he gave notice to the adverse parties, and considered himself as out of possession of the property, the wrecks of which were gathered up by a certain *Martin Hawkins*, (whom he charges to have been the agent, or to have acted with the license of the *Overtons*,) and appropriated to his own use; that a suit was thereupon brought against *Ross* in the District Court of *Richmond*, in 1793, upon the arbitration bond, the record containing the pro-

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ceedings in which suit was particularly referred to, by which it appeared that to an action of debt on the said bond, setting forth the award, *Ross* pleaded "*conditions performed*," and "*no award*," and there having been a verdict for the plaintiffs on both issues with 3,530*l.* damages, errors were filed in arrest of judgment, principally on the ground of a variance between the bond declared on, and that recited in the award; and the District Court having entered judgment on the verdict, *Ross* appealed to the Supreme Court of Appeals, where the judgment was affirmed. The bill further stated, that the award was not submitted to *Ross*, but made in his absence, without the aid of those explanations which might reasonably have been expected, and without his having communicated with the arbitrators, either verbally or in writing, before it was delivered; of which award he heard nothing till several weeks afterwards, when it was mentioned by *Morris*.

Ross, insisting on the matters of equity which he considered as growing out of this statement, prayed for an injunction to the judgment as affirmed by the Court of Appeals, which was granted.

The award, stating the facts of the case, having been set forth in the declaration, the merits of the question were fully discussed in the Court of Appeals, on the ground that the arbitrators had mistaken the law; that *Ross* having been deprived of the use of the property by the act of God, was not bound to pay the rent, or perform the other stipulations in the covenant.

The Chancellor, after animadverting on the decision of the Court of Appeals with great freedom, made the injunction perpetual; from which *Morris* and the *Overtons* appealed to this Court.

The *Attorney-General*, for the appellants, (after reciting the case, as reported in 3 *Call*, 309.) observed, that the points relied on by *Ross* in the former cause were, 1st. Some informality in the proceedings; and, 2dly. That in

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point of law he was not liable, because the mill had been carried away by the ice. After this decision, *Ross* goes into a Court of Equity, and states the very grounds for its interposition which had been previously decided by this Court.

The objection in the bill, that the arbitrators did not submit their award to the parties has no weight, because they were not bound to do it; and because *Ross* suffered the cause to progress through all the other Courts, and for the first time made his objection in the Court of Chancery.

Throwing out of the case the allegations of *Ross*, that he had not an opportunity of being heard before the arbitrators; and that *Martin Hawkins*, as the *agent* of the appellants, interfered with the wreck of the mill, it is precisely the same case with that before decided by this Court. But the authority of *Hawkins* is expressly denied by all the answers.

Several depositions have been taken, which prove the destruction of the mill to have been as complete as if it had been done by a volcano or an earthquake. But this is no new fact. It was admitted on all sides before.

The sole question then is, whether this Court, sitting as a Court of Chancery, can review the decision of a Court of Law, where the party complaining had a full opportunity of being heard.

[Here Judge TUCKER interrupted the *Attorney-General* by inquiring, whether the doctrine had not been fully settled in the case of *Meredith* v. *Benning*,(*a*) and in *Turpin*, *Administrator of James*, v. *Thomas*,(*b*) that when a party had had a full opportunity of being heard in a Court of Law, he should not be permitted to go into a Court of Equity.]

(*a*) 1 *Hen. & Munf.* 585.
(*b*) *Ante*, 139.

Wickham, for the appellee, said he was not prepared to controvert the doctrine laid down in those cases, but presumed that this was a different one. From the nature of

the jurisdiction of a Court of Equity, relief ought to be granted in many cases where it could not be afforded at law. This was one of those cases, as expressly decided by Lord *Northington* in *Brown* v. *Quilter*.(a)

(a) *Ambler*, 619.

Warden, on the same side, contended, that, in the former case, only the questions of law arising on the *errors in arrest of judgment* were before the Court.

The *Attorney-General* insisted, that it was the same case, as would appear from the arguments of counsel and the opinion of the Court in the report of the case; and that it would be impossible to take any ground in argument which was not urged in that case.

There are cases, it is true, in which Courts of Equity will interfere when Courts of Law are not *competent* to afford relief. But was not a Court of Law as *competent* to decide upon the effect of the loss of the mills by ice, as a Court of Equity? And did not a Court of Law decide upon this very case?

Wickham. My argument in the former case is perfectly consistent with what I should now urge. I was then addressing a Court of Law; and observed, that although a Court of *Law* might not relieve, yet a Court of *Equity* would, as was proved by the case of *Brown* v. *Quilter*. These were my arguments *then*, and they are the same *now*.

Attorney-General. The question comes to the same thing; and is completely within the reason of the cases cited by one of the Judges. The question still is, whether after a party has been fully heard at Law, he shall go again before a Court of Equity upon the same matter; whether he shall take two chances, instead of one, for a decision of his case. He referred to 1 *Fonblanque*, 376, &c. (note,) where the authority of *Brown* v. *Quilter* has been *questioned*.

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Hay, for the appellee. Under the pleas of "*conditions performed*," and "*no award*," in the Court of Law, it was impossible that the merits of the question could have been discussed. *Ross*, in his bill, refers to the proceedings in the Court of Law to shew that he could not be relieved there.

Tuesday, May 10. The Judges delivered their opinions.

Judge TUCKER. *Ross* obtained an injunction to the judgment obtained against him in this Court at the suit of *Overton*, reported in 3 *Call*, 309. The case is precisely the same, without the smallest variance that I can discover, upon an attentive perusal of that report, and of the present record. The Chancellor, after canvassing the judgment of *this* Court with a *freedom* which few Judges of an *appellate* Court would have indulged towards a *subordinate* one, perpetuated the injunction.

After the decisions of this Court in the case of *Terrel* v. *Dick*, 1 *Call*, 546. wherein it was settled, that, after a cause has been once fully decided by a Court of Common Law, a Court of Equity will not grant relief; and in the more recent cases of *Meredith* v. *Benning*, in *November* last,(a) and *Turpin, Administrator of James*, v. *Thomas*, (the last term,) to the same effect; I think this Court ought not to suffer a case, decided upon such full and solemn argument and consideration, to be again discussed upon the same controverted points; since it would only encourage that endless spirit of litigation, which has kept this controversy on foot for four and twenty years, and, if indulged, would perpetuate it.

(a) 1 *Hen. & Munf.* 585.

I am, therefore, of opinion, that the decree be reversed, and the plaintiff's bill dismissed with costs.

Judge ROANE. This case does not differ in any material circumstance from that formerly decided by this Court, between the same parties. The grounds of the decision in

that case were, 1st. That if the arbitrators were even mistaken in their judgment, in point of law, in a doubtful case, this Court ought not to consider itself as an appellate Court, and on that ground (merely) to reverse the judgment; and 2dly. That in fact the arbitrators, in that case, decided upon the law correctly.

The first ground of decision equally applies to the case before us. There is no doubt but that the parties put themselves upon the judgment of the arbitrators, as to the whole law and equity of the case; and this Court ought not to interfere, on the ground of a mistake in their judgment; at least, unless the mistake be very palpable. In that case, if the Court should be authorised to interfere, it would be because something like improper conduct would be inferable on the part of the arbitrators. Nothing of that sort, nor even any irregularity, is shewn to have taken place in the present instance; and, if there were irregularities, it was as competent for the appellee to have taken advantage of them *at law* as *in equity*.

In this view, I should be loath to interfere in this case, if it were even *probable* that the arbitrators were mistaken with respect to the *equity* of the case. A view of all the decisions on this subject induces me, however, *at least to doubt* whether the rule of equity is different from that of law on this question; and as Courts of Equity ought not to interfere when no new circumstance is adduced to vary the case from that existing, and regularly decided upon at law, I am of opinion, that the decree of the Chancellor should be reversed.

Judge FLEMING. This appears to me to be a hard case on the part of *Ross*, owing principally, perhaps, to his want of caution in the contract with the *Overtons*. He, however, at the commencement of the controversy, submitted his cause to judges of his own choosing, men of distinguished talents, and undoubted integrity, who decided against him in favour of his opponents; and, although, had

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I been one of the arbitrators, I might, perhaps, have been of a different opinion, yet it seems a doubtful case, and I think he was bound, and concluded by the decision of the arbitrators. On his refusing to abide by, and perform the award, an action was brought in the District Court of *Richmond*, against him on the arbitration bond, to which he pleaded *conditions performed*, and *no award;* on which issues being joined, the Jury found for the plaintiff on both pleas. He then moved the Court in arrest of judgment, and stated his reasons; which the Court overruled, and gave judgment for the plaintiff; from which he appealed to this Court; and, after a very solemn and elaborate argument, the judgment was affirmed by the unanimous opinion of the Court.

Ross then obtained an injunction in the Chancery District Court of *Richmond*, to stay all further proceedings on the judgment at law; and by his bill, in which the transactions were set forth at great length, prayed that the said judgment might be perpetually enjoined: and, in *May*, 1803, the Chancellor made a decree accordingly, from which the defendants appealed to this Court.

This case, from a careful inspection of the record, (to which the record of the proceedings at law is subjoined,) appears to be precisely the same with that which has been already so solemnly decided, only brought up in a *different form;* and, on the principles settled in the case of *Turpin, Administrator of James*, v. *Thomas*, and some others, in this Court, I have no difficulty in saying that the decree of the Chancery Court is erroneous, and ought to be reversed.

By the whole Court, (absent Judge LYONS,) decree of the Chancellor REVERSED.