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.

FLATBUSH, (*N. Y.*)
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1809.

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.

ence had been settled by arbitrators, chosen by the parties for that purpose, according to the agreement; or that the defendant had, on application, refused to appoint, or consent to such arbitration.

With respect to the exception taken to the instruction given to the Jury, it appears to me that (from the state of the case, as it appeared by the record) the instruction was, in substance, correct enough, and that the Jury was governed by it. It seems however that the Court erred in permitting the plaintiff to give in evidence that the sum of 1,000*l.* specie, in the year 1782, 1783, 1784, 1785, 1786, and 1787, or any of them, or when the suit was instituted, would only be sufficient to purchase half as much land, or half as many slaves, as that sum would have been sufficient to purchase in the year 1774; that being a matter not in issue between the parties. But as the defendant took no exception to that evidence; and it seems to me that the Jury paid no regard to it, and found a verdict for what remained unpaid of the 1,000*l.* with interest only, I am of opinion that the judgment ought to be affirmed.

By the whole Court, (absent Judge LYONS,) the judgment of the District Court AFFIRMED.

The President and Professors and Masters of William and Mary College, *against* Hodgson et al. Executors of Lee.

Fairfax *against* Muse's Executors.

THE first mentioned cause came up from the Superior Court of Chancery for the *Richmond* District, on an appeal

The *Judges* of the several Superior Courts of Chancery cannot grant appeals from *interlocutory* decrees in *vacation*; but in *Court* only.

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allowed by the Chancellor *in vacation* from an *interlocutory decree* pronounced by himself at the preceding term.

It had been argued at the last term,(*a*) *on the merits*, and at this term(*b*) it was decided by the unanimous opinion of the Court.

Mr. *Wickham* moved for a rehearing of the cause upon various grounds; principally, however, on account of the novelty and difficulty of the subject, it involving the doctrine of annuities, and devises in perpetuity to a corporation, which were so little practised in this country. He mentioned four cases in which the Court had granted a similar indulgence. These were *Cutchin* v. *Wilkinson*, (23d *Nov.* 1796;) *Hunt* v. *Wilkinson*, (15th *May*, 1799;) *Barnet* v. *Darnielle*, (15th *Nov.* 1800;) and *Murray and Co.* v. *Carzet, Kosters and Co.* (25th *April*, 1803.) Among other reasons for setting aside the decree, he observed that, upon looking into the record, after the decision, he had discovered that this Court had no jurisdiction of the cause, the appeal having been granted by the JUDGE in *vacation* from an *interlocutory* decree—a power which could only be exercised by the COURT in *term time*.(1)

(*a*) *Tuesday, March* 29.
(*b*) *Friday, April* 29.

On Saturday, the 21st of May, all the Judges consented to a re-hearing of the cause, but required that the preliminary question, whether the appeal had been improvidently allowed, should be first argued.

As several other causes(2) depended upon the same question, the point was argued, on *Saturday*, the 28th of

(1) In the case of *Dawney* v. *Wright, ante*, p. 12, *Fall Vacation*, 1807. the Chancellor decided, from a view of all the acts of Assembly, that he could not grant an appeal from an *interlocutory* decree in *vacation*, but only in *Court*.

A decree, to foreclose a mortgage, and directing the sale of the mortgaged premises, is an *interlocutory* decree.

(2) The case of *Fairfax* v. *Muse's Executors* was argued at the same time with that of *The President and Professors and Masters of William and Mary College* v. *Lee's Executors*. It was an appeal allowed by the JUDGE of the Superior Court of Chancery for the *Staunton* District, in *vacation*, from a decree pronounced by him, for closing the equity of redemption in mortgaged lands; but before any sale had been made, or the report of the commissioners had been returned and confirmed.

May, by *Page* and *Wickham*, in support of the motion for dismissing the appeal; and by the *Attorney-General*, *Warden* and *Wirt*, in opposition to it.

In favour of dismissing the appeal, the following acts were relied on: *Rev. Code*, vol. 1. c. 63. p. 62. sect. 14. which gives jurisdiction to the Court of Appeals in cases of *final* decrees or judgments of the High Court of Chancery, General Court, or District Courts. Ibid. c. 167. sect. 2. p. 318. which allows an appeal from any decree or *final order* of the High Court of Chancery to the Court of Appeals, in the same manner, and under the like regulations, as appeals were thereby allowed from decrees or final orders of the County and Corporation Courts to the High Court of Chancery. Ibid. c. 64. p. 68. sect. 59. by which power is granted to a Judge of the Court of Appeals, or the Judge of the High Court of Chancery, in vacation, next after the term when a decree shall have been pronounced, to allow, upon petition, an appeal from such decree, where it shall appear to such Judge that the failure to take an appeal at the time of pronouncing the decree, did not arise from any culpable neglect in the petitioner.

The two first mentioned acts applied to final decrees, in express terms; and the last, though silent on that subject, it was contended, must necessarily have relation to final decrees, because, at that day, there was no *law* authorising

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Warden submitted to the Court, whether this was not a *final* decree, inasmuch as the *principle* had been finally settled, the land would be sold by commissioners under it, and the mortgagor (the appellant) would be turned out of possession.

But it was answered by *Page*, that, in the case of *M'Call* v. *Peachey*, 1 *Call*, 55. there was equally a final decree, the principle having been settled, but it was nevertheless decided to have been *interlocutory only*. In short, that all decrees were interlocutory until the parties were *completely* out of Court.

By the whole Court, (absent Judge LYONS,) this appeal was dismissed, as having been improvidently allowed from an *interlocutory* decree.

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appeals from interlocutory decrees. It had indeed been the *practice* of the High Court of Chancery to allow appeals from such decrees, but in the cases of *Grymes* v. *Pendleton*,(*a*) and *M'Call* v. *Peachey*,(*b*) in 1797, it was decided, that the law gave no such power; and, in the latter case, it was settled, that even consent would not give this Court jurisdiction. But at the next session of the Legislature, in the same year, an act passed giving power to the High *Court* of Chancery, in its discretion, to grant an appeal from an interlocutory decree, under certain circumstances.(*c*)

(*a*) 1 *Call*, 54.

(*b*) Ib. 55.

(*c*) See *Rev. Code*, vol. 1. c. 223. p. 375.

It may be assumed as a general principle, that a *Court* can perform no judicial act except *in session*, and that a *Judge* can exercise no power *in vacation*, unless it be specifically given. Whenever the Legislature have intended that they should exercise such power, it has always been clearly expressed. There are several instances in which a Judge may perform certain acts in vacation; as, 1. In relation to writs of *habeas corpus*.(*d*) 2. Writs of *ne exeat* and *certiorari*.(*e*) 3. Appeals from decrees of County and Corporation Courts, and writs of *supersedeas* to stop the execution thereof.(*f*) 4. Injunctions.(*g*) 5. Bills of review, and appeals from the High Court of Chancery to the Court of Appeals.(*h*) 6. Executions on interlocutory decrees, and discharging writs of *ne exeat*.(*i*) 7. Directing accounts.(*k*)

(*d*) Ib. c. 118. p. 233. s. 8.

(*e*) Ib. c. 64. p. 64. s. 9. and p. 67. s. 50.

(*f*) Ib. s. 16. and p. 65. s. 18.

(*g*) Ib. p. 67. s. 50.

(*h*) Ib. p. 68. s. 59, 60.

(*i*) Ib. c. 223. p. 375. s. 3, 4.

(*k*) Ib. vol. 2. c. 103. s. 1. p. 128.

By the second section(*l*) of the last mentioned act, no appeal can be granted in any cause in Chancery till a final decree, unless where the *Court* in which such cause may be depending, shall think it necessary to prevent a change of property under an interlocutory decree. It is sufficient to say, that no *law* can be found authorising this appeal *in vacation*. But there is a good *reason* for the distinction in allowing appeals from interlocutory and final decrees. An application for an appeal from an interlocutory decree is to the *discretion* of the Court; from a final decree, it is a matter of *right*. If it be made *during the Court*, the counsel on both sides are attending, and the motion may be contro-

(*l*) Ib. p. 129.

verted. But when the application is *to the Judge*, at his chambers, the other party is deprived of this benefit.

In opposition to the motion for dismissing the appeal, it was said, that all the acts upon this subject should be considered as constituting but one law; and it being a remedial statute, ought to have a liberal construction, not according to the *words*, but the *intention* of the Legislature.(*a*)

The act of the 23d of *January*, 1798,(*b*) allows appeals from interlocutory decrees. It was passed after the Court of Chancery had been in operation for a series of years, and had exercised the right of granting appeals. This was not intended to give the right of appeal in the first instance, but to enlarge the sphere of the Court's authority. It is intituled, "An act enlarging the right of appeals;" and did not prescribe a *new mode*, but extended the right to a *new class of cases*. The mode *then existing*, under the act of 1792,(*c*) was to apply to the Judge either in *Court* or in *vacation*, and the same practice has existed ever since. Is there not strong reason to believe, that, when the Legislature merely extended the right of appeals to a new class of cases, they meant that it should be exercised as before? And is it not presumable that the Chancellors, who have acted upon the law of 1798, and have been in the constant habit of allowing appeals in *vacation* from *interlocutory decrees*, are the best judges of the law relating to the practice of their own Courts?

(*a*) See 6 *Bac. Abr.* by *Gwil.* 389. tit. "STATUTE," let. (I.) div. 8. 5 *Com. Dig.* by *Rose*, 249. 251. tit. "PARLIAMENT." (R. 10.) (R. 13.)

(*b*) See *Rev. Code*, vol. 1. c. 223. p. 375.

(*c*) Ib. c. 64. p. 68. s. 59.

No reason can be assigned why the Judge is not as competent to grant an appeal *at his chambers*, as *in Court*. He has to act upon the papers in both cases; and it is as important to allow him the exercise of the power in the one case as the other. Unless it can be supposed that the Judge is more wise during term time than in vacation, there is no ground for the distinction contended for.

With respect to the word COURT, used in the law, it must be observed, that a Court of Chancery differs from all others. A Court of Common Law is *never* a COURT but

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in *term time;* but a Court of Chancery, as to most purposes, is always open. When, therefore, the Legislature were speaking of a tribunal which was equally a Court in term time and in vacation for a variety of purposes, among others for granting appeals by a pre-existing law, they used appropriate language in the term *Court*, which embraces the Judge in both situations.

(a) *Rev. Code*, vol. 1. c. 297. p. 427. s. 7.

The act of the 23d of *January*, 1802,(a) for dividing the High Court of Chancery into districts, is sufficiently extensive in its phraseology to allow appeals either from interlocutory or final decrees, in term time or vacation. Besides giving the Judges all the powers exercised by the Judge of the High Court of Chancery, it authorises them to allow appeals *general* and *special*, either in Court or vacation. A general appeal is where the whole matter is decided; a *special* appeal is where it is taken from an interlocutory decree.

In reply it was said, that the intention of the Legislature is only to be gathered from the words of the statute, where they are *plain;* but if they be *doubtful*, the rules of interpretation mentioned on the other side are to be applied. In this case there is no ambiguity. The simple question is whether the term *Court* meant the *Judge*.

There are now three orders of appeals: 1st. One of *right*, to be taken in Court from a final decree; 2dly. When a party has not taken an appeal from a final decree at the time of pronouncing it, but may apply for it, by petition, to a Judge of the Court of Appeals, or the Chancellor within a certain time after the decree shall have been pronounced; and 3dly. An appeal from an interlocutory decree to be allowed or not at the *discretion* of the *Court of Chancery*. This involves the question, whether the *Judge* be the *Court*. If the *Judge* should go to his estate in the country, would the Court of Chancery be there? If he should only take a ride into the country, would it be contended that he carried the Court with him? Are his pro-

ceedings entered of *record* in all those cases, as they must be, when he sits in Court? This circumstance alone is sufficient to decide the question whether the *Judge* can be considered the *Court.*

Wednesday, June 1. The Judges delivered their opinions.

Judge TUCKER. My opinion is, that by the act concerning the Court of Appeals, *L. V.* 1794, c. 63. s. 14. the jurisdiction of this Court is limited to appeals from, or writs of error and *supersedeas* to, FINAL decrees, and judgments; that all the cotemporaneous acts, and all subsequent acts must be expounded with reference to that act. The act for enlarging the right of appeals, in certain cases, declares it shall be lawful for the HIGH COURT OF CHANCERY upon any *interlocutory* decree, *in* ITS discretion to grant an appeal to this Court. The same act, sect. 3. authorises the JUDGE of that Court, *in vacation*, to discharge writs of *ne exeat;* thereby clearly distinguishing between the power of the COURT, *in term time*, when all parties are supposed to be present, and the power of the JUDGE in vacation, when the application may be altogether *ex parte.* A variety of other cases may be pointed out, where the same distinction is observed by the Legislature. They were pointed out in the argument, and are unnecessary to be repeated. I therefore think the appeal must be dismissed, as improvidently granted.

Judge ROANE was of opinion that the ground taken by the counsel for the appellees was too strong to be resisted. He concurred in the opinion that the appeal must be dismissed.

Judge FLEMING. By our laws, any party thinking him, or herself aggrieved by a final judgment, or decree, of any inferior Court, may, as a matter of *right*, appeal to a Court of superior jurisdiction, on complying with certain

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requisites pointed out by law; except in cases of forthcoming bonds, prohibited by a late act of Assembly.

In examining the several acts, and parts of acts, on the subject of appeals, and affording remedies to parties who have not prayed an appeal at the time of rendering the judgment or decree we find, in some cases, the *right* preserved to the party to appeal at a subsequent day, within a given time; and, in other cases, *powers* given to the *Judges* of the superior Courts to grant appeals in time of *vacation*. But in all those cases, where powers are given to the Judges to act *out of term time*, it is so particularly expressed by law; and applied exclusively, to final decrees. And there have been several appeals, from interlocutory decrees, dismissed in this Court, for want of jurisdiction. It being found, however, by experience, that delays, and other inconveniences had arisen from a rigid adherence to that rule, the Legislature in *January*, 1798, passed an act, declaring that it shall be lawful for the *High Court of Chancery* upon any interlocutory decrees, where the *right* claimed shall have been affirmed, or disaffirmed, to grant, in its *discretion*, an appeal to the Court of Appeals, if the *High Court of Chancery* shall be of opinion that the granting of such appeal will contribute to expedition, the saving of expense, the furtherance of justice, or the convenience of parties; any law, custom, usage, or construction, to the contrary, notwithstanding. The only power then, of granting appeals from interlocutory decrees, is given by this act, and is not a matter of *right* in the party praying the same, but is expressly confined to the discretion of the *High Court of Chancery*, to be exercised as circumstances may seem to require; but no such *discretion* is given to the Judges of that Court, to be exercised in vacation, as in the cases before mentioned; and the reason to me appears obvious. In those former cases the decrees were final, and the causes, with all the parties, were out of Court: and in many cases, where persons, against whom decrees may have been rendered, either from their remote residence from the Court, or from some adventitious circumstances, have

been prevented from appealing from such decrees, at the terms in which they were pronounced, the law, to remedy the mischief, very properly gave power to the judges to grant appeals in such cases, in times of vacation: but, in cases of interlocutory decrees, the same reason does not exist, because the causes, with all the parties, still remain in Court; and an adverse party has an opportunity of being heard against granting an appeal from an interlocutory decree, in any particular stage of the cause; and the Judge, sitting in Court, (after hearing the arguments on both sides,) has a fairer opportunity of exercising his discretion with propriety. And had the Legislature intended that such appeals should have been granted out of term time, a special power no doubt, (as in other cases,) would have been given the Judges, for that purpose.

The act of 1802, for branching the High Court of Chancery into three District Courts, gives to each of these Courts, and to the Judges thereof, in term time, as well as in vacation, the same jurisdiction and powers within their respective districts, in all and every matter and thing, as the High Court of Chancery, or the Judge thereof possessed prior to the passing the said act; but gave no new jurisdiction or power whatever to the said District Courts, or to the Judges thereof. And as the High Court of Chancery had no power to grant appeals from interlocutory decrees in vacation, so neither can the Judges of the District Courts exercise such a power, out of term time: For these reasons, I concur in opinion that the appeal of the *President* and *Professors* and *Masters of Wm. & Mary College*, must be dismissed as having been improvidently granted.(1)

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(1) This cause having been sent back to the Superior Court of Chancery, for the *Richmond* District, the complainants, at *June* term, 1808, prayed the Chancellor (*in Court*) for an appeal from the interlocutory decree; which he refused, on the ground that an appeal was not necessary, in this case, to prevent a change of property before a final decree; for which purpose *only* an appeal can now (by virtue of the act of 1806, *Rev. Code.* v. 2. c. 103. s. 2. p. 129.) be granted from an interlocutory decree.

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The same order was made in the case of *Fairfax* v. *Muse's* executors; the decree in that case having been considered as *interlocutory* only.

Wednesday, May 25.

Page, Governor, &c. (at the relation of Goolrick,) *against* Peyton, an Inspector of Tobacco and his Sureties.

An action may be maintained on an inspector's bond in the name of the Governor, for the benefit of a person injured by the non-delivery of tobacco, although the law directs the original bond to be transmitted to the treasurer, and is silent as to the prosecuting of suits thereon; the person injured in such case having his option either to bring such suit, or an action in his own name against the inspectors, for the penalty (imposed by law) of double the value of the tobacco.

THIS was an appeal from a judgment of the District Court of *Fredericksburg*, reversing a judgment of the County Court of *Stafford*.

An action of debt was instituted in the County Court of *Stafford*, in the name of *John Page*, Governor of *Virginia*, against *Henry Peyton*, and his sureties, (*Samuel H. Peyton* and *John P. Harrison*,) on a bond executed by them *to the Governor of the Commonwealth of Virginia and his successors*, on the 12th of *September*, 1803, in the penalty of 4,000 dollars, the condition of which recited the appointment of the said *Henry Peyton*, to continue in the office of inspector at *Aquia* warehouse, and the obligation to be void on his faithfully executing the duties of his office, as inspector at the said warehouse. The declaration is on the penalty, in the usual form: and the breaches assigned are, that the said *Henry* did not, as inspector of *Aquia* warehouse, faithfully execute the duties of his office, in this, that, while acting in his said office as inspector, he refused to deliver to *John Goolrick* a quantity of Tobacco, for which the said *Goolrick* held notes, and which notes he presented to the said *Peyton* at *Aquia* warehouse, and tendered him in the current coin of this Commonwealth, all duties and charges on the said tobacco according to law. And further, because said *Peyton*, acting in his office aforesaid, did re-mark and change, and cause to be re-marked and changed, the numbers and marks of certain hogsheads