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.

securities are liable to the 15 per cent. damages; for it is the act of the Sheriff which produces them, and the law says he shall pay them. That all the obligors were not sued, makes no difference; for it should have been plead in abatement. Co. Litt. 485; Allen, 21, 41; [*Ascue* v. *Hollingworth*,] Cro. Eliz. 494, 544; [Whelpdale's case,] 5 Co. 119.

The Court gave no opinion on the merits, but reversed the judgment on account of the faults in the proceedings.

Ross *v.* Colville & Co.

[382]

Wednesday, May 11, 1803.

A sequestration is proper, if the defendant (imprisoned for not performing a decree) obstinately lies in jail to save his estate, or exhausts it in paying other creditors, to the plaintiff's injury.*

Quære. If an appeal lies to this Court, from an order of the Court of Chancery awarding a sequestration.

Colville & Co. obtained writs of *sequestration* from the High Court of Chancery against Ross, in order to enforce performance of a decree. Ross offered to appeal to this Court; which the Court of Chancery allowed. Whereupon the motion to appeal, and the allowance therefor, were entered on the record, which states that the defendant is in the prison rules, for his contempt in not performing the decree, and is charged in execution in other suits; that he has paid sundry debts since he was so in jail; that he produced a deed conveying property for further securing the plaintiffs; a copy of which is made part of the record. And that the plaintiffs opposed the appeal, but the Court allowed it.

* There is no statutory mention of *Sequestration* in Virginia. In 1 R. C. of 1819, p. 213, '4, § 81, and in the Code of 1849, p. 652, § 46 and 47, "process of contempt" is authorized against a contumacious defendant in Chancery. A note of Mr. Leigh to 1 R. C. of 1819, p. 214, says—"The several acts concerning the practice of our Chancery Courts in such cases, all refer to the practice of the General Court, sitting in Chancery, before the Revolution. What was that practice? The practice of the High Court of Chancery of England."

See the subject of sequestration discussed, *Hook* v. *Ross*, 1 H. & M. 310; especially Judge Tucker's opinion, p. 319, &c.

A writ of sequestration cannot regularly be issued upon a sheriff's return of *not found*, upon an attachment for contempt. *Hook* v. *Ross*, 1 H. & M. 310.

WICKHAM, for the appellee.

It was not a decree that the appeal was taken from; but a mere award of process on a decree already made. The security taken was collateral to the decree, and not a payment. A deed of trust is not of so high a nature as a decree; and there is an express stipulation that it should not affect the decree. Besides, the appellee might pursue all his remedies at once; for a man may proceed at law upon his bond, and in equity upon his mortgage.

DUVAL, contra.

The party may appeal from an award of execution. *Harrison* v. *Tomkins*, 1 Call, 295. A sequestration ought never to issue, where the application for it is unconscionable; and here it was unreasonable in the plaintiff to ask it, when he had such abundant security for his money.

WARDEN, on the same side. The act of Assembly allows an appeal from any final order of an inferior Court. R. C. 67. And this exposition is expressly confirmed by the case of *Harrison* v. *Tomkins*.

WICKHAM, in reply.

If the defendant, having property enough to pay his debts, lies in prison for a long time, rather than satisfy the [383] decree, he lies there obstinately; and, therefore, it is right to sequester his estate until he will comply. Besides, the order states that it was awarded for good cause shewn.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the Court, as follows:

This is an appeal from an order of the High Court of Chancery, awarding writs of sequestration upon a former decree in favor of the appellees against the appellant; which is stated to have been done for good cause shewn; and we presume the reasons assigned were satisfactory, since the appellant did not, by exception, place them upon the record, to enable the Court to judge of their force.

What the appellant states by way of objection, is very unsatisfactory; first, he is in custody for contempt of a decree of that Court, not stated to be the decree of the appellees; or, if it had been, it was no objection to the sequestration; which,

perhaps, might be awarded, although his body is in confinement, if it shall appear that he obstinately resolved to lie in prison to save his estate. His second objection, that he has been paying debts since he was in prison, seems rather a good reason for awarding the writs, as he is thereby exhausting his funds in preferring other creditors, to the injury of the appellees. His third objection is on account of the deed of trust by which certain property was conveyed to trustees, to be sold by them, or any one, to satisfy the instalments as they should become due; which the Court at first thought a reasonable objection; since it did not appear to be on the footing of a common mortgage, as a collateral security, but answering the effect of a sequestration by an immediate sale for satisfaction; and the rather as the counsel for the appellees was one of the trustees, and had alone a power to sell at any time. But, on further reflection, considering that there might be prior incumbrances on the property, or that the appellant might withhold the possession of it, in order to prevent a sale, which might have been part of the good cause shewn, the Court is now of opinion that the order ought to be affirmed, with costs, leaving the question whether the appeal ought to have been allowed to be decided in some future case, wherein it shall be necessary. [384]

THORNTON *v.* CORBIN.

Thursday, May 5th, 1803.

It seems that a deposition taken under a commission awarded before the bill was filed, and executed by two persons, of whom one was not a magistrate, may be read in a subsequent suit.*

A *parol* marriage contract, made before the act of 1785, supported against a subsequent voluntary conveyance.†

Thornton, as trustee for the estate of Joseph Robinson, brought a bill in Chancery against Corbin, stating; that Benjamin Robinson, the elder, on the 10th of February, 1757, conveyed 450 acres of land, including a mill, in trust as to the

* See all the present statutory provisions concerning depositions, Va. Code of 1849, p. 665, '6, § 26—34.

† The act of 1785 (1 R. C. of 1819, p. 462, § 2,) provided that no agreement in consideration of marriage should be good against a purchaser for valuable consideration, without notice, unless recorded.

See this modified, Code of 1849, p. 508, § 4.