REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

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.

RICHMOND: CHAS. H. WYNNE, PRINTER.

master and servant, where both are liable. As to the article furnished not being within the nature of the trade, how is the planter to know the objects of the trade? He takes goods, and to pay for them, sells the merchant whatever he is willing to receive; tobacco, wheat, a horse, a slave, or any thing else, for which he is usually credited in the store-books, without enquiry for whom purchased, or how applied. Here the slave was sold to Fraser, still the acting partner, and no bond was required, as in the case of a creditor. He was not a creditor in his private character, but as a partner of the company; and, in the store-book, the estate was entitled to a credit for the amount, which leaves the estate a creditor of Donald, Fraser & Co. for £43 15s., to whom, or to Simon Fraser's estate, the executor of Banister may resort for satisfaction; but, he has no claim as to that, upon the defendant, James Fraser, although he is bound, so far as the debt assigned him was paid. [415]

The last decrees are to be reversed, with costs, and the first affirmed.

DEANES *v.* SCRIBA AND OTHERS.

Wednesday, October 22d, 1800.

A party, who takes no steps to procure the testimony of a sea-faring witness, is not entitled to a continuance of the cause.

A consignee, who neglected to render an account of the outstanding debts for five years, charged with the amount.*

The Court of Chancery, on debts not bearing interest, *in terms*, cannot carry interest down below the decree.†

This was an appeal from a decree of the High Court of Chancery, where Scriba, Scroppal and Starman, brought a bill against the Deanes for an account of the sales of goods consigned by the plaintiffs to the defendants, and for payment of the balance due, with interest.

The answer admits the consignment, without instructions whether to sell for cash or on credit: States, that the defendants sold some for cash and others on credit, and [416]

* See ante, p. 358, point 2d.

† But now, see 1 R. C. of 1819, p. 208, § 58; Code of 1849, p. 673, § 14, 18 and *ante*, p. 358, note. (†)

have made several remittances. That there are £326 5s. 7d. of outstanding debts. That the plaintiffs left with the defendants a cask described to contain snuff-boxes, and directed some to be forwarded to Baltimore, to M'Grea and Deanes, to be left with the vendue-master on account of the plaintiffs, which the defendants complied with.

The Court of Chancery referred the accounts to a commissioner; who reported, that he had appointed, at the instance of the plaintiffs' agent, the 27th of September, 1793, for carrying the decretal order into effect; notice of which not being served on the defendants on the 6th of November, 1795, he appointed the 27th of that month for the purpose, but, the defendants, failing to attend, he appointed the 20th of September, 1796; on the 14th of which month, the plaintiffs' agent and James Deane attended, and Deane having filed his affidavit that Rose, a material witness, was absent on a trading voyage, further time was allowed. That the commissioner afterwards appointed the 21st of April, 1797; that a notice to this effect, addressed to James and Thomas Deane, was served on Francis B. Deane, who appeared on the 26th of May, and said the notice was not legal as to James and Thomas Deane, because he, Francis B. Deane, was not a partner of the house of James and Thomas Deane, when the transaction happened, although he was at the then time of making the objection, a partner in the business. That the said Francis Deane then agreed, that if the report was postponed to enable James and Thomas Deane to take the deposition of Rose, the report might be made to the September term, and that a decree should be entered up at that term, and that the said James and Thomas would write to that effect, but, as they had failed, he proceeded to report, making a balance of £495 15s. 3d. due from the defendants to the plaintiffs.

[417] The defendants excepted to the report: 1. Because the notice was not legal. 2. That the defendants were debited with the outstanding debts. 3. That no commission was allowed to the plaintiff. 4. That the defendants were debited with £94 3s. 9d. Pennsylvania currency, for a box of hardware.

A witness examined for the plaintiff states, that in 1785 or 1786, he received from the defendants a large case said to contain hardware; but no invoice or instructions to sell the same were given. That it was afterwards taken away and sent, (as he understood,) to Philadelphia.

The Court of Chancery re-committed the report. And the commissioner in his second report, stated, that he appointed

the 3d of March, 1798: That he received a letter from James Deane, requesting a postponement until the 7th, when he attended with an affidavit to prove that Rose had sailed for New York, and prayed a continuance until he could procure his testimony. But, as it was not proved that any steps to take his deposition had been taken, he refused the continuance. That Francis Deane, on the 26th May, attended; and on behalf of the other defendants agreed, that if the report was delayed till September, a decree might then be entered up.

There is an affidavit on the 13th February, 1798, stating that Rose had sailed from New York to London, and was to remain there until April next, and that the deponent has reason believe he will return to Philadelphia.

There is an invoice of the box of hardware, signed by the plaintiffs, which is headed as follows: "Contents of 1 box of sundries marked A. No. 20, consigned to Messrs. M'Grea & Deanes, Baltimore, with the prices affixed to in order to direct them at the sale of public vendue."

Upon the coming in of the second report, which made no alteration in the first, the Court of Chancery decreed the defendants to pay the whole £495 15s. 3d. with [418] interest on £439 11s. 1d. from the 15th of April, 1790, until paid. From which decree, the defendants appealed to this Court.

CALL, for the appellants.

The notice was insufficient; for, the law requiring actual notice to the party, or a written notice to be left with some free person at the dwelling-house, one of those requisites must be complied with; which has not been done in the present case. Further time ought to have been allowed the appellants, to procure the testimony of their witness, as they state him to have been material. The box of hardware was sent to Baltimore according to the directions which had been given; and there is no proof that it ever came to the hands of the appellants afterwards. Of course, they ought not to be charged with it. The appellants were justifiable in selling on credit, and, therefore, the plaintiffs should bear the loss of insolvencies, if any, and the decree should have been, that the balance in their hands should be dischargeable in the bonds and debts due for the sale of the goods consigned.

DUVAL, contra,

Contended that the notice was sufficient upon the circumstances of the case. That time enough had been allowed the

appellants to take the testimony of their witness. That the evidence shewed that the box of hardware was taken away by the order of the appellants. And that no regard should be had to the objection concerning insolvencies; because none had been shewn to exist, from 1786, (the date of the sales of the goods, as appears by the commissioner's report, and the defendant's own account,) to this time; which is fourteen years.

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

[419] On the principal question, whether the Court of Chancery erred in not giving a further indulgence to the appellants, on account of his witness Hickman Rose, the Court have no difficulty. The commissioner had indulged them from 1792 to 1797; and, during that time, the witness, who was a sea-faring man, was going abroad and returning to America from time to time; and yet it does not appear that the appellants had taken any steps to provide for taking his deposition, whilst he should be in America.

But the principal dispute was, whether he should be accountable for the outstanding debts? On which subject it does not appear that Rose was material. And, above all, it is remarkable that they never, in the five years of litigation, rendered an account of those debts, stating which had been collected, or remained due; and whether any of the debtors, and who of them, were insolvent; which was in their own power, and which they ought to have rendered: Therefore, the Court is of opinion, that they ought to stand chargeable for the amount;* and that, so far, there is no error in the decree.

But, as to the sum of £75 7s. Virginia money, allowed by the commissioner for a chest of hardware, that article is not sufficiently supported by the testimony; and ought not, at present, to be allowed; but, as there seems some color for the demand, that it ought to be left open for further enquiry. Therefore, that the decree, as to so much, ought to be reversed, with liberty to the appellees to make further proof, if they can, for establishing that part of their demand.

The Court then considered the question, whether the decree as to the remaining claim was right, in continuing the interest to the time of payment, instead of the time of entering the decree?

[*See *Clark* v. *Moody et al.* 17 Mass. R. 145; *Leverick* v. *Neigs et al.* 1 Cowen's R. 645.]

The case of *Skipwith* v. *Clinch*, ante 253, has been reviewed; and the question examined upon principle and authority: And upon the fullest investigation we are [420] unanimously of opinion, that in all cases of simple contract, not bearing interest in their original, but on which, at law, interest is given by juries in the way of damages, the interest in equity can only be continued to the time of entering the final decree; and in the present case, the Court fix the interest to the period of entering the decree, on that part of the demand, which is affirmed. We are satisfied that many decrees for this contingent interest have been affirmed; but, they passed *sub silentio*, and never were considered until the cause of *Skipwith* v. *Clinch*, which is now approved of, and considered as giving the rule in future.*

The decree was as follows:

"The Court is of opinion that there is error, in so much of the said decree as allows the appellees seventy-five pounds seven shillings, for a chest of hardware and the interest charged by the commissioner and accruing thereon, that article not being sufficiently established by the testimony in the cause; that there is also error in so much of the said decree as to the residue of the demand, which omits to allow the commissions for collecting the outstanding debts charged to the appellants and which continues the interest thereon to the time of payment, instead of computing it to the time of the decree and making the recovery to be of the aggregate of principal and interest. Therefore, so much of the said decree, as is herein stated to be erroneous, is to be reversed with costs, and the residue be affirmed, with this direction, that the commissions for collecting as aforesaid be allowed, and interest be computed on the balance to the time of entering the final decree, (as to that part,) in the said High Court of Chancery, in pursuance hereof, the appellants having unjustly delayed the final decree, by their appeal to this Court: But, the appel- [421] lees are to be at liberty to make further proof of the article aforesaid, in the said High Court of Chancery, within a reasonable time to be limited by the said Court."

[*See *Brewer* v. *Hastie & Co.* 3 Call, 22, and *Bell* v. *Free*, 1 Swanst. R. 90; but see act of Jan. 20, 1804, c. 66, §58, R. C. ed. 1819.]