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.

SKIPWITH *v.* CLINCH.

Saturday, November 14th, 1801.

If the defendant appeals from a decree of the High Court of Chancery, pronounced on a *forthcoming bond*, the Court of Appeals may allow ten per cent. damages for his retarding the execution of the decree.*

The question in this case was, whether this Court, upon affirming a decree of the High Court of Chancery, pronounced on a motion upon a forthcoming bond taken on an execution issued upon a decree of that Court, can give ten per cent. damages against the appellant for retarding the execution of the decree?

WICKHAM and WARDEN, for the appellee.

Although there is no act of Assembly which gives damages in express words, yet they may be allowed in consequence of the act which gives the same executions upon decrees in Chancery, as upon judgments in Courts of Common law. [October, 1787, c. 9, 12 Stat. Larg. 465, ch. 134, § 55, R. C. ed. 1819.] Because that act declares, that the same proceedings may be
[87] had upon such executions, as upon those issued from the Courts of Common Law; and, therefore, as damages is one of the consequences of an appeal from a judgment of a Court of Common Law rendered on a forthcoming bond, it follows, that they may also be allowed upon an appeal from a decree in Chancery upon such a bond.

RANDOLPH, contra.

That act only relates to the proceedings upon the execution whilst they are going on under the control of the Court of Chancery; and does not extend to the proceedings in the appellate Court; which is a separate jurisdiction, and whose proceedings are entirely extraneous and distinct from those of the inferior Court upon the execution itself. Of course, the declaration, in that act, that the same proceedings shall be had upon the execution, as upon those issued from the Courts of

* Damages on affirmance of a judgment or decree, 6 *per cent. per annum* on the whole amount recovered, including interest and costs. Or, when the judgment, &c. is not for payment of money (except costs) the damages shall be for such specific sum as the Appellate Court deems reasonable; not exceeding 100, nor in the Court of Appeals less than 30 dollars. Code of 1849, p. 687, § 24. And see Supp. to R. C. of 1819, p. 149, § 32.

Common Law, is to be understood of the proceedings had in the inferior Court itself; and not to those which are transacted in the Court of Error. This argument receives additional weight from the consideration, that the damages are a penalty; and, therefore, express words are necessary, in order to create them. Consequently, as there are none such in the act, they cannot be allowed by the Court.

Cur. adv. vult.

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

This is an appeal from the High Court of Chancery for the amount of a forthcoming bond, taken by the Sheriff on a writ of *fieri facias*, issued from that Court upon a decree for the payment of money. The appellant made no objection to the decree on the forthcoming bond in the Court of Chancery, although he appealed from it; nor has he attempted here, to shew any error in the record; and none is discovered by the Court. Therefore, the decree is affirmed. But a question occurs, whether the legal damages ought not to be awarded, in consequence of the affirmance, as is done on common law judgments upon such bonds taken upon common law executions? It [88] cannot be doubted, but there is the same reason for giving damages on this appeal and in all appeals from decrees for payment of money, as on one from a judgment at law of the same sort; but in general, the act permitting appeals in Chancery does not authorize the awarding damages, as it does in common law cases, probably, because Chancery causes generally depend upon complex and difficult questions, the principles of which ought to be settled by the Supreme Court; and therefore, appeals in those seldom practised, merely for delay, are not discouraged:* this, or some such reason, occasioned the distinction, and not because Chancery Courts do not decree penalties; for, I do not consider these damages as a penalty, but as a retribution for the extraordinary expense and trouble of the party in defending the appeal, not allowed in the bill of costs. Although the law does not allow damages in Chancery cases in general, yet there are no negative words in the act to restrain them, but it leaves them open for allowance in particular cases authorized by the Legislature: and such a case I take the present to be. By the execution law of 1793, § 53; [§ 55, c. 134, R. C. ed. 1819,] parties are allowed to sue out common law executions upon decrees in Chancery, and of course a *fieri*

[* See remarks of ROANE, J., in *Scott's ex'rs.* v. *Trents* et al. 4 H. & M. 363.]

facias, upon a decree for money in the present case: which execution the law declares shall be executed and returned, and have the same operation and force, to all intents and purposes, as similar process at common law. The law has not limited the operation, nor drawn the line where it is to stop. The Court cannot draw that line, but is of opinion the operation must continue throughout, till the money is paid; and award the damages as part of that operation.

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WM. ALEXANDER &c. Appellants *v.* ROBERT MORRIS, Appellee; WM. ALEXANDER, Appellant *v.* ROBERT MORRIS, Appellee; WM. ALEXANDER & Co. Appellants *v.* JOHN TAYLOE GRIFFIN, Appellee; WM. ALEXANDER, Appellant, on behalf of himself, & Co. *v.* J. T. GRIFFIN & R. MORRIS, Appellees; ALEXANDER J. ALEXANDER, Appellant *v.* J. T. GRIFFIN, R. MORRIS, W. ALEXANDER, GEORGE GRAY & E. M'NAIR, Appellees.

Saturday, November 14*th*, 1801.

The owner of particular certificates, will be entitled to a decree for the certificates themselves, if to be had, and if not, to their value at the time of the decree.

A factor, indebted to his principal at the time, cannot sell the property of the principal, to pay endorsements in the course of his factorage. Nor can a factor buy up the debts of his principal at an under rate, and claim credit for their nominal amount; but, in such a case, he will only be allowed what he actually paid, although the purchase was made after the factorage had ceased, and the principal had brought suit for an account.*

A deposition taken after an appeal from an interlocutory decree in Chancery, may be read upon the hearing of the appeal.†

These five suits, which are appeals from the High Court of Chancery, are so interwoven with each other, as in truth to

*See *Buck & Brander* v. *Copland*, 2 Call, 218.

If an agent employed to sell land, buy it himself from his principal, concealing the fact that a better price could be gotten; it is a fraud, and the contract should be vacated. *Moseley's adm'rs.* v. *Buck & Brander*, 3 Mun. 232.

One who is agent for buyer and seller both, decreed in equity to pay the seller all the agent's share in the profit. *Segar* v. *Edwards and wife*, 11 Leigh, 213.

A confidential agent cannot buy a subject of the agency from his principal, so as to bind the latter. *Buckles* v. *Lafferty*, 2 Rob. 292.

†A deposition may be read, if returned before hearing, and though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree. Code of 1849, p. 666, § 30.

After judgment, decree. or order, as to which there has been or may be allowed an appeal, writ of error, or *supersedeas*, a deposition may be taken as in pending cases; and be read in any subsequent trial, if it could be read had there been no such judgment, decree, or order. Code of 1849, p. 666, § 31.