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 IV.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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ERRATA.

Page 152, line 5th, for "*Elizabeth*" read "*Anne.*"

Page 155, at the end of the case of *Braxton* v. *Gaines & others*, add,

"*Wednesday, October* 11th. BY THE COURT, consisting of Judges "FLEMING and TUCKER, the decree was reversed, and the bill dismissed, "as to the appellant *Anne Corbin Braxton*, who was ordered to be quieted "in the possession of *Thamar* and her increase."

Page 172, at the end of the case of *Eppes's Ex'rs* v. *Cole & Wife*, add,

"Judge FLEMING said it was the unanimous opinion of the Court that "the judgment be affirmed."

Page 282, *in the note*, the reporters were mistaken in supposing that Judge ROANE was *related* to the plaintiff. Other motives prevented his sitting in the cause.

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Currie's Administrators v. Mutual Assurance Society.

sulted nor assenting to the regulation. It would be misspending time to refute this argument, as in all institutions of this kind, the acts of a majority are binding on the whole: by the civil law that majority must consist of two-thirds of the members. And the appellants' principal had the less reason to complain, as he was, by the 13th section of the same act, at full liberty to withdraw from the society, on giving six weeks previous notice, and paying all arrearages due at the time of withdrawing.

As to the right of the assembly to alter the charter, I will just observe that it was, in effect, done by the society itself; who in order to give it more validity, did it under the sanction of a legislative act, the same authority by which the institution was established; and I shall only subjoin a very correct note in *Tucker's Blackstone*, on the subject. That "no corporation has been created in *Virginia*, since "the revolution, but by an act of the Legislature; their pow- "ers and privileges must therefore, depend wholly on the "act of Assembly by which they are first established, or "such as have been afterwards made, for the special pur- "pose of *limiting* or *enlarging* their *privileges* respectively."

I, upon the whole, concur in the opinion, that the judgment be affirmed.

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Scott's Executors *against* Trents, Crump, and Bates.

In a suit in Chancery to set aside an award on the ground of a *mistake* of the arbitrators, the defendant by his answer *consenting* that the award may be *opened*, and an *account taken* (*if the complainants choose*) from the *beginning*, but, at any rate, as to certain particulars specified by himself; he is bound to abide by a statement thereupon made by a Commissioner of the Court, refusing to open the account (on *his* motion) from the *beginning*, and professing only to correct the *mistake* alleged by the *complainants*; (notwithstanding such mistake be not proved independently of the report of the Commissioners;) no evidence having been offered by the said *defendant* as to the *particulars* specified by *him*, and no objection to such report appearing, except that the account was not opened from the *beginning*.

THIS was an appeal from a decree of the Superior Court of Chancery, held in *Richmond*, pronounced the 1st of *May*, 1803.

The appellees brought a suit in the *Charlottesville* District Court, upon an open account against *John Scott*, on the 19th of *April*, 1792. The cause, by consent of parties, was referred to *Richard Adams*, and three others, or to any three of them, whose award was to be made the judgment of the court. Previous to the meeting of the arbitrators, (as appears by a certified copy of the instrument hereafter mentioned, brought up since this cause was argued,) *Richard Crump*, for *Trents*, *Crump* and *Bates*, the plaintiffs in that suit, executed an instrument in writing under his hand and seal, (dated *Oct.* 25th, 1792,) whereby they covenant and "oblige themselves "that, if on a reference of the accounts of *Carter and* "*Trent*, *Alexander and P. Trent*, *Prosser and Trent*, "*Carter and Trents*, and *Peterfield Trent*, with *John* "*Scott*, gentleman, there is a balance or balances due "him on such reference, they agree that the said ba- "lance or balances shall be discounted and allowed out of "the debt due from the said *John Scott* to *Trents*, "*Crump and Bates*."

In *September*, 1793, the arbitrators returned their award, dated *December* 10th, 1792, reciting, "that, hav- "ing examined the accounts existing between the par- "ties, and the *other* accounts laid before them by the "parties, they find a balance of 472*l.* 9*s.* 3 1-2*d.* due "from *Scott* to *Trents*, *Crump and Bates*, including in- "terest; which sum of 472*l.* 9*s.* 3 1-2*d.* *is by consent* "*and desire of the parties*, *balanced* by a *like sum* brought "from an account then under arbitration, between the "said *John Scott* and *Peterfield Trent*, and in part of "the balance due on the said account from the said *P.* "*Trent*;" and they award the same accordingly.

No exception was taken to the award; the court entered judgment in these words: "Therefore it is con- "sidered by the court, that this cause be dismissed; the "parties having consented thereto."

In *March*, 1794, *Trent*, *Crump and Bates*, filed a bill

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in the late High Court of Chancery, the object of which was to set aside this award, as founded in a mistake of the arbitrators, as to the intention of the parties, in the submission to them; suggesting that *Scott* was not to have any credit with *Trent, Crump and Bates*, on their account, for any balance which might be due him from the other parties named in the instrument executed by *Richard Crump*, in their behalf, unless upon an adjustment of ALL the accounts between him and those parties respectively, there should appear to be a balance due upon the aggregate amount of *all* those accounts, instead of a balance upon any *one* of them only; whereas, they had applied part of a balance due from *P. Trent* alone, to the discharge of their account; although there were balances due from *Scott* to three of the other firms, which remain unsatisfied.

Scott, by his answer, insists, that the terms on which the accounts with the complainants were referred were essentially different from the representation in the bill; and, for proof, refers to the instrument executed by *Richard Crump*; and further, that the award shews that all the discounts made therein were with the *consent* of the *complainant*. That, however, as the complainants are desirous and seeking to *open* the said *award*, he accedes thereto, and *prays that an account may be taken* (*if the complainants choose*) from the *beginning*; but, at any rate, in certain particulars afterwards mentioned. An account was accordingly directed; a balance of 620*l.* 1*s.* 9*d.* stated to be due from *Scott*; for which sum there was a decree entered, and an appeal taken to this court; which having abated by the death of *Scott*, was revived by his executors.

Randolph, for the appellants.
Wickham, for the appellees.

Judge TUCKER, (after stating the case as above.) I was at first inclined to think that the suggestions of the

bill were supported by the depositions of the arbitrators, as well as by the instrument executed by *Richard Crump*, above referred to. And on those grounds I thought the case was brought within the principle stated by Lord *Hardwicke*, (3 *Atk.* 644.) and by the master of the rolls, (*Ambler*, 245) as also within that of *Pleasants*, *Shore & Co.* v. *Ross*, (1 *Wash.* 158.) independent of the defendant's consent to open the awards given in his answer. But I entertain some doubts now upon that point; for the arbitrators do not acknowledge any mistake in terms sufficient, as I conceive, to remove the weight of evidence arising out of their award, viz. that the arrangement was made by *consent and desire of the parties.* This is strongly supported by the affidavit of *Mayo Carrington*, one of the arbitrators, who swears that, during the examination of the business, a number of accounts and other papers were exhibited by all the parties present, and that *Alexander Trent*, *Peterfield Trent*, and *John Scott*, were present during the whole time of collating the evidences that were brought forward in the discussion of the business, *P. Trent* representing *Carter and Trent*, and *Carter and Trents*; and on those documents the award was founded and returned.

What strengthens this evidence very much, is, that on the 27th *July*, 1793, more than six months after the former award, two of the same arbitrators made a second award, (in a suit depending in *Henrico* Court, between *Carter and Trents*, plaintiffs, and *John Scott*, defendant; and, in another between *Peterfield Trent* and the said *John Scott*,) in which latter award they proceed upon the same principles as in the first, declaring the application of a part of the balance due from *P. Trent* to *Scott*, to the credit of the latter with *Trent*, *Crump and Bates*, to have been made by the consent and desire of *John Scott*, and *Trent*, *Crump and Bates.* I think therefore the award ought not to be set aside on the ground of mistake in the arbitrators.

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But the defendant having in his answer consented to open the award, and it appearing that one of his executors, who is now a defendant, had notice of the reference to a Commissioner, and actually attended him, and admitted that the claim of *Trents*, *Crump and Bates* against his testator was properly stated; and having also produced in evidence the statements upon which the referees appointed by *Henrico* Court had made up their award in the suits before noticed, without producing evidence of any errors therein, according to the suggestions made in the answer of *John Scott*, both the report and decree appear to me to be right.

Judge Roane. Were it not for the consent of *Scott*, stated in his answer, to waive the advantage gained by the award and judgment at law, on condition of re-examining the accounts in relation to the several items stated in that answer, I should *probably* be of opinion that the award should not be disturbed. The evidence of the arbitrators would, perhaps, be too loose to vary the construction of an agreement from that admitted by the *consent of parties*, at the time of rendering *both* awards, as also at that of the rendition of the judgment in the District Court. Besides, the agreement itself of *October* 25th, 1792, is not explicit and unequivocal in support of the construction now contended for on the part of the appellees' counsel. The expression "balance or *balances*," twice repeated in that instrument, would rather seem to *rebut* that construction, and apply to the *separate* balances found in favour of *Scott*, with the several firms, and thus correspond with the construction made at the time of rendering the several awards. But, however this point may be, (as to which I give no conclusive opinion,) the appellants must abide by the admission their testator has made; and on a perusal of the Commissioners' report and the accounts, I see no cause to depart from his report in any of those particulars, and concur that the decree of the Chancery Court be affirmed.

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By both the Judges, (Judge FLEMING not sitting in the cause,) the decree of the Superior Court of Chancery AFFIRMED.

After the Court had delivered their opinions in favour of affirming the decree in the above case, Mr. *Wickham* submitted to the Court the propriety of allowing the appellees interest upon the debt from the time of the decree made in the Court of Chancery, until it should be finally affirmed there; and referred the Court to the case of *Deans* v. *Scriba*, (2 *Call*, 420.) the decree in which seems to justify that idea.

Interest on the amount of a decree of the Superior court of Chancery, pending an appeal from that decree, such appeal having been taken before the act of 1803, was not allowed, notwithstanding the case of *Deans* v. *Scriba*.

Judge TUCKER. With all the respect which I feel for the precedents of this Court, I must be permitted to doubt its power to give such a decree as is now asked for. The powers of this Court are altogether *statutory*. Until the act of 1803, c. 116.(*a*) which passed after this appeal was allowed, I know of no law that gave to this Court the power of giving *damages* upon the affirmance of a decree in Chancery. And if *interest* and *damages* are convertible terms, as perhaps they may be, I cannot think this Court warranted in giving the latter, under the name of the former, in any case which was depending in this court prior to the commencement of that act. The case of *Deans* v. *Scriba* was decided nine years ago, and although there must have been at least a hundred decrees in Chancery affirmed generally since that decision, this is the first application, except in the case of *Taylor* and *Nicholson*, for this court to give interest *pendente* the appeal, that I have heard of: in that case it was refused. Nor do I think we have power to give it in this.

(*a*) 2 *Rev. Code*, p. 29.

Judge ROANE. In the case of *Deans* v. *Scriba*,(*b*) the decree was for a given sum of money, with interest

(*b*) 2 *Call*, 415.

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thereafter, *until paid.* On an appeal by the defendant, this Court declared its opinion to be, "that in all cases "of simple contracts, not bearing interest in their origin- "al, 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." The decree was therefore *reversed*, (*inter alia*,) as to this interest; and by the decree of this Court interest was directed "to be computed, on the balance, to the "time of entering the *final* decree in the High Court of "Chancery, *in pursuance hereof*, the appellants having "unjustly delayed the final decree, by their appeal to "this Court." As the Court of Chancery had no power to allow interest, according to this opinion of the Court, *beyond* the time of entering its decree; and as this Court, reversing a decree, is to render such judgment as the Court below ought to have rendered (*a*) and none other, I do not clearly discern that this decision, though upon a *reversal*, was either warranted by the act just mentioned, so far as it relates to this *ulterior* interest, or by the general spirit of our acts, (of that day,) which did not allow compensation by way of damages, in the event of affirming *decrees* in Chancery. As this decree, however, is said to have been rendered upon great consideration, I have certainly no wish whatever to disturb or depart from it. It is however the case of a *reversal*, which *may* make a difference; whereas, the case before us is that of an *affirmance*. It is true that the ground assigned by the Court for giving this *ulterior* interest in the case of *Deans* v. *Scriba*, also applies to this case, viz. that the appellants "have by their appeal, unjustly delayed the "final decree;" but, on the other hand, as the law had (at that period) allowed no damages on the *affirmance* of decrees in Chancery, probably, as was said by this court in the case of *Skipwith* v. *Clinch*,(*b*) "be- "cause Chancery cases generally depend upon complex "and difficult questions which ought to be settled by the "Supreme Court, and therefore appeals in those, seldom

(*a*) *Rev. Code*, vol. 1. p. 63.

(*b*) 3 *Call*, 88.

"practised merely for delay, are not discouraged," it would seem to be in unison with the same policy, in the case of an affirmance, to omit giving the *ulterior* interest also, if it were even regular in the case of an affirmance, to add to the decree affirmed. This evil, if it be one, is now remedied, except as to prior cases, by the act of *January*, 1804, c. 29.(a) which not only gives power to the Courts of Equity to award interest up *to the time of payment*, but also authorizes the appellate Courts to award 10 *per cent.* damages in "satisfaction of all interest or damages," from the time the decree was rendered.

On these grounds I am of opinion that no addition, in respect of this ulterior interest, should be made to this decree of affirmance.

(a) *Rev. Code*, 2 vol, p, 29,

Brickhouse *against* Hunter, Banks & Co.

Argued at *April* term, 1809. Decided at *October* term, 1809.

THIS was an appeal from a decree of the Superior Court of Chancery, held at *Williamsburgh*, pronounced on the 9th of *April*, 1803.

Brickhouse brought an action of *account render*, against *Isaac Smith*, one of the partners of *Hunter, Banks & Co.* and obtained a judgment for an account. In pursuance of which, auditors were appointed by the Court; and, at a subsequent day, at the instance and on the motion of the parties, three other auditors were added to the former number, and any three of the whole, were directed to examine, state and settle all accounts be-

1. Although consent of parties cannot give jurisdiction to a Court of Equity; yet, (after an injunction granted improperly,) if the parties refer all matters in difference between them in that suit, to certain arbitrators mutually chosen; consenting that their award may be made the decree of the Court, such consent is binding; the whole case, including the question of *law*, being thereby transferred from the Court to the arbitrators.

2. An award is not the less *certain* and *final*, because the arbitrators refer to a report previously made by a Commissioner in Chancery, and declare (*in general terms*) their concurrence with it, instead of *specifying* the particulars or substance thereof, in the award itself; nor because they submit to the Court the propriety of their award in point of law, and as a guide for the Court in deciding upon it, state the grounds and reasons thereof.

3. In a settlement of accounts between copartners, the books of the copartnery are admissible evidence, and vouchers for every *item* need not be produced.