REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

THIRD EDITION.

TO WHICH, 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.

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PER CURIAM. Remand the cause to the Court of Chancery to be further proceeded in.

M'CALL *v.* PEACHY.

Monday, May 21, 1798.

Consent of parties cannot give jurisdiction.
No appeal lies from an interlocutory decree of the High Court of Chancery.*
Nor can consent of parties authorise the appellate court to take cognizance of such an appeal.

The question was, whether this Court had jurisdiction of a cause from the High Court of Chancery upon an appeal from an interlocutory decree pronounced there, and appealed from by consent of parties?

WARDEN. I think that in general, consent does not give jurisdiction, although, perhaps it may be otherwise in this case. Because, here all the principles of decision are established by the interlocutory order; and what remains to be done is merely formal, as the Court which allows the appeal must necessarily see. So, that the Court below will not allow an appeal for the sake of delay, until there is a final decree; but, in a case of difficulty, where the question of law and equity is definitively decided, it may reasonably be granted, especially as it will be in the discretion of the Court to allow it or not. The practice under these restrictions will rather tend to expedite, than delay justice.

WASHINGTON. That consent takes away error is generally admitted; but it is said that it will not give jurisdiction. The reason of the difference is not easy to be discerned; for it would seem proper, that consent should be as obligatory in one case as in the other. Perhaps this may be the distinction; [56] where the Court has not original jurisdiction of the subject matter of the cause, there consent cannot give it; but where the Court has eventual jurisdiction of the subject, there consent may speed the submission of the cause to their determination. These ideas seem warranted by the usual course of proceedings; for, wherever the defendant omits to plead to the jurisdiction of a Court not having cognizance of the cause, it is not competent to him to except afterwards. In a case of eventual jurisdiction, it is not a matter *coram non*

[* See Note to last case.]

judice, but it is a subject, the cognizance of which emphatically belongs to the appellate Court. The act prohibiting appeals before a final decree, was made to prevent delay and costs, and was intended for the plaintiff's benefit: He may waive it if he will though, and if he does, there is no injury done.

RANDOLPH. I admit that the practice is convenient, and wish it could be supported; but I fear that the interposition of the Legislature is requisite. That consent takes away error, is one rule; but that it cannot give jurisdiction, is another. Both rules are equally settled; and one of as much force as the other. Consent only applies to personal rights, which the litigant parties may waive if they please. Mr. WASHINGTON stated the case of a Court which had no jurisdiction. But that is the very case with this Court; because it has no jurisdiction until a final decree in the Court below. It is said, that the matter of one jurisdiction may be decided by another, if not pleaded; but that is, because the jurisdiction is presumed, where the contrary does not appear. It was said, that the reason of the law was to prevent delay. That indeed is one reason: but another is, that the Court of Chancery may change the interlocutory decree, and make a total alteration in the principles established by it. The practice would multiply appeals to infinity, and it will not be in the power of either Court to prevent it.

There may be some inconveniences from this opinion, as in the case of a decree to foreclose a mortgage; but that is in some measure obviated by this reflection; that there is no power which can force the mortgagor out of pos- [57] session, but the Court of Chancery: whose authority to compel performance of the decree, will be suspended by the appeal.

WICKHAM. I felt an inclination to persuade myself that the Court had jurisdiction in these cases; but am constrained to acknowledge that, in general, my opinion is otherwise. It is the act of Assembly only which gives this Court jurisdiction; and the words are so express that I do not see how they are to be gotten over. Mr. WASHINGTON'S idea is ingenious, but I believe not tenable. For, if consent can give jurisdiction, why may not the party appeal directly from a County Court to this Court, without going through any of the intermediate Courts; since this Court, under that idea, would as well have jurisdiction of the subject matter of such a suit, as if it had been through the intermediate Courts? But, it is evident that such a construction would, in the long run, bring every thing here;

and destroy the intermediate Courts altogether. I therefore think, that generally speaking, the decree must be final before any appeal can be allowed.

But, I think also, that this doctrine admits of some qualification; as, where the matter of the suit is finally decreed so as to change the right, and the judgment only remains to be carried into execution. As, for instance, where there is a decree for slaves and an account of the profits directed; here the decree is final as to the title, and changes the right, and the taking of the account of the profits is only an execution of the decree. True it is, that there may be a double appeal sometimes in such cases, but that inconvenience is small, when compared to that, which would follow from the contrary practice. Which would oftentimes render the appeal but a mockery, as the plaintiff can proceed to enforce that part of the [58] decree which changes the property, by attachment from the Court of Chancery, and may thus get possession of the property, and waste or remove it, before the appeal can be determined. It appears by the English books, that in that country the appeal is taken up when any thing final is decreed. Under these restrictions, therefore, I think that there may be an appeal before the cause is entirely out of the Court of Chancery.

ROANE, Judge. By the Court of Appeals law, of [October,] 1792, R. C. [ed. 1794,] p. 67, [c. 11, 13 Stat. Larg. 406,] this Court is to have jurisdiction not only in cases provided for by the Constitution and in suits originating there, or adjourned thither by virtue of any statute, &c. but also in such as are now pending therein or which may be brought before them by appeal, writs of *error*, *supersedeas* to reverse decrees of the High Court of Chancery, or judgments of the General Court, or District Court, after those decisions shall be final there, if the matter in controversy be of the value of one hundred dollars, &c.

It is to be observed also, that that expression *after those, &c.* is to be found in, and was taken from the original act of [May,] 1779, [c. 22, 10 Stat. Larg. 89,] constituting the Court of Appeals.

It is likewise observable, that in the act constituting the Court of Admiralty of 1779, [c. 26, 10 Stat. Larg. 101,] there is a provision that a party thinking himself aggrieved, may appeal from a final sentence of that Court, in some cases to a Court to be constituted by Congress, and in others to the Court of Appeals.

I mention this, to shew that the Legislature have not only restricted appeals to final decrees in Chancery, and to final judgments of common law jurisdiction, but have also, in the case of sentences of the Admiralty, adopted the same principle.

The § 14 of the act of 1792, constituting the Court of Appeals, further provides, that appeals, writs of *error* and *supersedeas* may be granted, heard and determined by the Court of Appeals, to and from any final decree or judgment of the High Court of Chancery, General Court and District Courts, in the same manner, and on the same principles as they are granted, heard and determined in the High Court of Chancery and District Courts, to and from any final decree, or judgment of the County Court. [59]

And I may here once for all remark, that on an attentive inspection of the various acts on this subject, they all seem to restrict appeals, to cases, where final decrees, sentences and judgments have been given.

The arguments of inconvenience arising from restricting appeals to cases of final judgment, are improperly addressed to a Court, when the words of a whole series of acts are express and unequivocal; and, by being kept up in that series through a long course of time, they appear in the mind of the Legislature not to have been available. It is consequently rendered unnecessary for me, from the positive terms of the law, to form or express any opinion, whether greater inconvenience would ensue from allowing appeals from interlocutory decrees, than those which are apprehended from a contrary construction. For example, in a writ of partition, the first judgment is, that the Sheriff take a jury and make partition between the parties. Now, though in executing this power, he absolutely changes the possession of the land, no writ of error at common law, nor appeal by our act of Assembly, will lie, until a final judgment is rendered upon the return of the Sheriff, of his having executed the writ.

There is no distinction in law more clearly understood, than that between interlocutory and final judgments, and this distinction runs through decrees in equity as well as others. If, therefore, we depart from the plain signification of the act of Assembly in cases of decrees, we may, with as much propriety in case of judgments, (which was never yet pretended,) as the same words in the act are equally applicable to both; and perhaps some instances might be noted, shewing the same reasons of convenience to apply in the one case as in the other. [60]

So far upon the subject of general jurisdiction.

But, then it is said, that consent of parties can give this Court jurisdiction, although otherwise we have none. It was properly observed at the bar, that from the law alone, this Court has derived its power; and that in cases not proper for the cognizance of the Court under the law, they can have no authority whatsoever: and it would be a strange construction indeed, that when the Legislature has constituted this Court to revise the solemn and final decisions of Courts of high authority in this country, it should be in the power of parties to anticipate their admission here, by appealing from orders or opinions of the inferior Courts, which are still within the control of those Courts, until final judgment; and which, consequently, if not hastily appealed from, they might themselves correct.

But, it is said, that this restriction to final decrees was intended for the benefit of the parties, and here they have waived it. I answer, that this restriction is not for the benefit of the parties merely, but that it is a principle running through the whole judiciary system, and cannot be departed from without introducing an infinity of appeals and litigation. Consequently, that a departure from them, would *quoad this*, change the nature of the jurisdiction of an appellate Court, which properly should be confined to the correction of the final and deliberative judgments of the Courts below, into a jurisdiction merely for correcting and consummating their inchoate and interlocutory judgments.

The parties, therefore, under a pretence of waiving a benefit introduced for themselves, must not be permitted to destroy the very principle on which our judiciary system is founded; and thereby to produce a general evil to the community.

[61] The case in Vesey, sen. 446, [*Penn* v. *Ld. Baltimore*,] is conclusive, that a Court of Equity, even after argument, cannot proceed, if it appears that there is a defect of jurisdiction; and this principle applies to the case now before us. I, therefore, think that the cause ought to be sent back to the High Court of Chancery to receive a final decision there.

FLEMING, Judge. No consent can give jurisdiction against the plain words of the act of Assembly; which are too clear to admit of a doubt. The practice would be dangerous; and I think there is less inconvenience in that established by law, than there would be in the other. At any rate, if there be an inconvenience, the Legislature must correct it, and not the Court.

CARRINGTON, Judge. The question is, if consent can give this Court jurisdiction, before a final decree in the Court of

Chancery? By examining all the laws upon the subject, it will be found, that this Court, which is bound by the law creating it, is confined to the case of final decrees; and consent cannot alter the law. The power of this Court is extensive, and from its judgments no appeal lies: It should, therefore, be extremely cautious not to assume to itself a jurisdiction which the law has not conferred. If consent would give jurisdiction, then cases below the cognizance of this Court might be brought here; causes may be hurried hither, before they have been properly investigated in the Courts below; and numberless other inconveniences may follow, which it is better to prevent. Besides, the Chancellor, in his final decree, may correct the error in the interlocutory decree, if there be any; and so the grievance complained of may be redressed in that Court without the delay and expense of an appeal to this. However, be that as it may, the law is express, that this Court has no jurisdiction until a final decree is pronounced below: and, therefore, I think we cannot exercise it, even by the consent of the parties. Consequently, the cause must go back to the Court of Chancery, in order to receive a final decree there.

LYONS, Judge. That this Court has no original jurisdiction until the final decree, has already been determined: and the question now is, whether consent can give it? If consent can give jurisdiction, then consent may take it away; which will scarcely be contended for. The general rule is clear, that consent cannot give jurisdiction to a Court which has it not. How, then, can this Court exercise it here, when we are, by the express language of the law, confined to appeals from final decrees? As to the cases put from local jurisdictions, they prove nothing; because, there it depends on fiction, and the party's neglect to plead; so that the defect of jurisdiction does not appear upon the record. But here the very question arises from, and is contained in, the record itself: So that the Court cannot avoid seeing the defect. I think consent cannot give jurisdiction, or else the parties may erect Courts for themselves, which the law will not allow. I am, therefore, of opinion that we have no jurisdiction; and that the appeal was premature: consequently, the cause must be sent back to the Court of Chancery, to be there proceeded in to a final decree, before any appeal can be allowed to this Court.* [62]

*An interlocutory decree, what? See *Alexander's heirs* v. *Coleman* et ux., 6 Munf. 328; *Royall's admrs.* v. *Johnson* et al., 1 Rand. 421, 427.