# REPORTS

OF

# C A S E S

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 II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

*FLATBUSH,* (*N. Y.*)
PRINTED AND PUBLISHED BY I. RILEY.
1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"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 II. By William W. Hening and Wil- "liam Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie- "tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

# CASES

## ARGUED AND DETERMINED

IN

## THE SUPREME COURT OF APPEALS

OF

## *VIRGINIA.*

At the Term commencing in October, 1808.

IN THE THIRTY-THIRD YEAR OF THE COMMONWEALTH.

JUDGES, PETER LYONS,(1) ESQUIRE, *President.*
WILLIAM FLEMING, ESQUIRE.
SPENCER ROANE, ESQUIRE.
ST. GEORGE TUCKER, ESQUIRE.

ATTORNEY-GENERAL,

PHILIP NORBORNE NICHOLAS, ESQUIRE,

## Ellzey *against* Lane's Executrix.

*Wednesday, October 5.*

THE point, in this cause, upon which it went off, was, that a bill of review would not lie to a decree foreclosing the equity of redemption in mortgaged lands, before any sale was made, and the report of the commissioners returned and confirmed by the Court of Chancery, and the

A bill of review cannot be brought until the decree, sought to be reviewed and reversed, is final, and the parties out of Court.

(1) Judge LYONS was absent the whole of this term, having been prevented from attending by indisposition.

The party *substantially prevailing* in the Court of Appeals is entitled to costs, although, *in form*, the decision be against him.

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parties completely out of Court.(1) The *merits* were not considered by the Court.

The case (so far as it respects the points decided) was this: *Lane* brought a suit in the late High Court of Chancery, against *Ellzey*, to foreclose the equity of redemption in mortgaged lands; the bill was taken for confessed for want of an appearance; and a decree entered, in the usual form, for a sale of the lands by commissioners, who were directed to report to the Court, &c. Before any sale was effected, *Ellzey*, by leave of the Court, filed a bill of review, charging that the conveyance of the land was obtained by *Lane* upon an usurious consideration, calling upon him to make a discovery, and praying to be released from the interest under the act of Assembly,(2) and that a reasonable time, to make sale of the land, might be allowed. *Lane* answered, and denied that the contract was usurious. The Chancellor, however, upon the *circumstances*, (no depositions having been taken in the cause to support the charge of usury,) was of opinion that the contract was usurious, and, *pursuing the prayer of Ellzey's bill*, decreed that he should be released from the interest, and gave time for the sale of the land, by commissioners appointed by the Court. From this decree *Ellzey* appealed.

This cause was argued by the *Attorney-General* for the appellant, and by *Edmund J. Lee* and *Wirt* for the appellee. Various points were made by the counsel on both sides. On the *merits*, the principal question was, whether, as *Ellzey* had gone into a Court of Chancery for a discovery of the usurious contract from the *oath* of *Lane*, he could ob-

(1) See the case of *Fairfax* v. *Muse's Executors*, *ante*, p. 558. where a similar decree was considered as *interlocutory* only.

(2) See *Rev. Code*, vol. 1. c. 31. p. 37. s. 3. and ib. c. 219. p. 367. s. 3. same law.

tain any other relief than a discharge from the *interest* of the debt, pursuant to the prayer of his bill, or whether, as the usury was proved (as was contended) independently of, and in opposition to, the answer, the defendant (*Lane*) should not be subjected to all the penalties of the act.

As to the propriety of allowing a bill of review in the stage of the proceedings at which this was filed, it was said, that the case of *Fairfax* v. *Muse's Executors*,(a) having settled the point, that a decree to foreclose the equity of redemption in mortgaged property was but *interlocutory*, until a sale had taken place by commissioners, and their report had been returned and confirmed by the Chancellor, the only inquiry was, whether a bill of review would lie in any case till a *final* decree. To prove that it would not, the following authorities were cited: 1 *Har. Chancery Practice*, 652.(b) Ibid. 169.(c) *Mitford's Pleadings*, 78. 81.(1)

(a) *Ante*, p. 558.

(b) 8th *Dublin* edit. or, 439. *Farrand's* edit. under the head "*Of signing and enrolling decrees.*"

(c) 8th *Dublin* edit or, 137. *Farrand's* edit. under head "*Of Bills of Review.*"

(1) See "Pleadings and Observations on Bills of Review," 1 *Equity Pleader*, 347 *Dubl.* edit. 1796. See also the case of *Gould* v. *Tancred*, 2 *Atk.* [533.] 548. in which Ld. *Hardwicke* states the grounds upon which bills of review may be brought, and the constant method pursued by both parties; which is such, "that in effect you cannot bring a bill of "review without having the leave of the Court in some shape;" for if it be for matter apparent in the body of the decree, then upon the defendant's pleading the former decree, and demurring against opening the enrolment, (which is the constant course in *England*,) the Court judges whether there be any grounds for opening such enrolment; if, for new matter, then, upon application for leave to bring a bill of review, the Court will judge whether there be any foundation for such leave. But, in *Virginia*, the practice is, to apply for leave to file a bill of review in the first instance, whether it be for error apparent in the body of the decree, (*Mitford's Pleadings*, 78. 1 *Har. Ch. Prac.* 452. *Farrand's* edit. 1 *Eq. Pleader*, 348.) or, upon a mistake in conscience, upon the proof before the Chancellor; and that is the usual course (1 *Roll Abr.* 382. 1 *Har. Ch. Pract.* 352, 353. *Farrand's* edit. 1 *Eq. Pleader*, 348. 4 *Vin.* 403. pl. 4.) Or, upon discovery of new matter since the decree was pronounced. (*Mitford's Pleadings*, 78. 1 *Har. Ch. Prac.* 352. *Farrand's* edit. 1 *Eq. Pleader*, 348. 4 *Vin.* 407. let. (Z).) The Chancellor, either in term time or in vacation, may award a *supersedeas* to stay proceedings on the

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*Friday, October 7.* The Judges delivered their opinions.

Judge TUCKER. This was a bill of review to an interlocutory decree of the High Court of Chancery for the sale of certain mortgaged premises; in which suit the mortgagor, though duly served with notice of the decree *nisi*, put in no answer; whereupon the bill was taken for confessed, and a decree of foreclosure made in the usual form, *May* 26, 1801. The bill of review was received by the Court, *March* 2, 1802. The sale had not been made, nor any final decree pronounced. It is unnecessary to state the grounds upon which the bill of review was admitted, as a previous question arises, whether such a bill was admissible, at that stage of the proceedings.

In the case of *Fairfax* v. *Muse's Executors*, last term,(*a*) this Court decided, that a decree of foreclosure and sale of mortgaged estate, *unless* the debt were paid by a certain day, was not a *final* decree; and for that reason dismissed an appeal which had been allowed by the Chancellor during vacation. In the case of *Bowyer* v. *Lewis*,(*b*) the question occurred whether a bill of review will lie before a *final* decree made in the cause. On that occasion I delivered my opinion that it would not, for the reasons there mentioned, to which I beg leave to refer; and I believe there was no difference of opinion in the Court. Considering the bill, in the present case, as a bill of review, properly so called, I am of opinion it was prematurely granted; a supplemental bill, in nature of a bill of review, is to be allowed only where *new matter* has been discovered since the decree: that is not the case here. The decree not being *final*, might have been altered upon a re-hearing,

(*a*) *Ante*, p. 558.

(*b*) 1 *Hen. & Munf.* 553.

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original decree, pending the bill of review. *Rev. Code*, vol. 1. c. 64. s. 60. p. 68, 69. And the practice of the County Courts, in Chancery cases, shall conform to that of the High Court of Chancery in like cases. *Rev. Code*, vol. 1. c. 67. s. 69. p. 92.

without the assistance of a *bill of review*, if there were sufficient matter to reverse it appearing upon the former proceedings.(*b*) And there must be a petition for such re-hearing.(*c*)

In order to come at the merits of this case, which, as far as they have been spoken to, has been very ably argued on both sides, I was willing to see whether this bill could be considered in the nature of a cross-bill, to the bill for foreclosing; and if the defendant in that suit had put in his answer to the bill to foreclose, I probably should have struggled hard, (though possibly without success,) for such an interpretation. But this he has never done, and consequently he is not entitled to any favour in that way. I am therefore constrained, without giving any opinion on the merits, to say, that the bill of review was improperly admitted by the Chancellor, and therefore, that the decree be reversed, and the bill dismissed with costs.

(*a*) 2 *Atk.* 40. *Lewellin* v. *Mackworth.* *Mitford's Pleadings*, 82. 3 *Atk.* [811.] *in arguendo*, *per* YORKE.

(*b*) 2 *Ves.* 597, 598. *Moore* v. *Moore.*

Judge ROANE concurred in the opinion, that the bill had been improperly received as a bill of review, the decree sought to be reviewed and reversed, not having been final; and that the bill ought to be dismissed.

Judge FLEMING. It seems now a well settled principle, that a bill of review may not be brought, (and if brought cannot be sustained,) until the decree sought to be *reviewed* and *reversed* be final, and the parties out of Court; and then can be sustained on two grounds only: 1st. Where error of law is apparent upon the record; and 2dly. Upon discovery of some new matter; and in the latter case, the plaintiff in the bill of review must obtain the previous leave of the Court for filing such bill; and the leave of the Court is never obtained, but upon allegation, upon oath, that the new matter could not be produced or used by the party preferring this bill, at the time the decree was pronounced: and the Court, upon the new matter being discovered, will decide upon its relevancy or irrelevancy; and

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permission to file such bill of review will accordingly depend upon such decision.

Forgetfulness or negligence of parties, under no incapacity, is no foundation for a bill of review.

It is unnecessary to consider the doctrine of supplemental bills, in the nature of bills of review, as it does not apply in the case before us; and the bill, now the subject of discussion, having been prematurely brought, before a final decree, must, agreeable to the first principle above laid down, be dismissed.

By the whole Court, (absent Judge LYONS,) the decree of the Superior Court of Chancery REVERSED, and the bill of review filed by *Ellzey*, DISMISSED, *at his costs.*

*Ellzey* being the *appellant*, in this Court, and the decree of the Superior Court of Chancery having been *reversed*,

*Wirt* said, he understood that, according to the *usual* course, the clerk would tax the costs against the appellee, (*Lane's* Executrix,) although she *substantially* prevailed. This would not be equitable, inasmuch as the error was produced by *Ellzey* himself, in filing a bill of review improperly; and for another reason, that he took an appeal from a decree which gave him every thing he asked for in his bill.

*By all the Judges.* The appellee having *substantially* prevailed, let the decree be reversed *at the costs of the appellant.*(1)

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(1) In *Mantz* v. *Hendley, ante*, p. 308. the same principle was adopted. There the judgment of the District Court, from which *Mantz* took an appeal, was reversed and reformed; but, as he substantially prevailed, he recovered his costs.