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THE REPORTS OF CHARLES LEE AND OF JOHN BROWN

*Edited by W. Hamilton Bryson**

The reports of Virginia cases from 1784 to 1794 compiled by Charles Lee and those of John Brown, which cover the period 1791 to 1799 in the Virginia Court of Appeals, are published for the first time here. Many of the cases in Lee's Reports and some in Brown's Reports have not been reported elsewhere, and the others supplement the rather brief case reports made by Bushrod Washington and Daniel Call. During the period of these reports, the judges of the court of appeals usually gave their opinions immediately after the attorneys had concluded their arguments; in the other cases their opinions were delivered orally in open court within several days. The lawyers while in court took notes of the cases for their own personal future reference. These hastily written notes were later redrafted and expanded. Different reporters would report different details and even different points of law. This was especially true of Brown's Reports, which add procedural details to the reports made by Washington.

John Brown, being a clerk of court, was particularly concerned with the taxing of court costs. Since the law of costs is the same now as it was in the late eighteenth century, these cases are valuable statements of the law today. By statute then as now costs in an action at law are to be awarded to the prevailing party.¹ The current

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1. 11 HENING'S STAT. AT LARGE 293 (1823) [hereinafter cited as HENING'S STAT.]; 13 HENING'S STAT. 444, 445; VA. CODE ANN. § 14.1-178 (Repl. Vol. 1973).

statutes are careful to preserve the traditional discretion of equity judges to award costs.² The precedents reported by Brown are useful to guide the exercise of this discretion.

Normally costs in equity are granted to the party substantially prevailing, but in the case of *Banister's exors. v. Shore's admr.*³ the appellee was not required to pay costs because the claim was believed by him to be due to the plaintiff's intestate. If the assets of an estate are insufficient to pay costs, then the administrator or executor must pay them out of his own pocket;⁴ however, costs are not payable by him if the suit was begun in the lifetime of the decedent and was revived.⁵ In the common law appeal of *Pendleton v. Vandever*,⁶ the court found error but error in favor of the appellant, and the appellant was directed to pay the costs. In the area of costs, as in many areas of the law in general, the older cases are frequently useful to show the antiquity of the establishment and acceptance of a particular rule.

Lee's Reports have been transcribed from two sources. The earlier cases, from the beginning through *Anonymous*, were found in a largely unused notebook which is now in the possession of Colonial Williamsburg, Inc.⁷ The later cases, *Alexander v. Murray* to the end, were found at the end of a notebook entitled "Suits pending 1st Jany. 1794."⁸ This latter manuscript is not as neat in hand or in grammar as the former; this suggests that we have here rough notes taken in court. Judging from the presence of a title page in the Williamsburg manuscript, it was apparently intended to be the fin-

2. VA. CODE ANN. § 14.1-177 (Repl. Vol. 1973). See also, e.g., *Cushman Corp. v. Barnes*, 204 Va. 245, 254-55, 129 S.E.2d 633, 641 (1963); 4 J.B. MINOR, *INSTITUTES OF COMMON AND STATUTE LAW* 971 (3d ed. 1893).

3. Brown's Reports, *infra* note 101 and accompanying text.

4. *Hawkins v. Beverley*, Brown's Reports, *infra* note 109 and accompanying text; *Walden v. Payne*, Brown's Reports, *infra* note 129 and accompanying text.

5. *Keel v. Herbert*, Brown's Reports, *infra* note 71 and accompanying text; *Payne v. Ellzy*, Brown's Reports, *infra* note 139 and accompanying text.

6. Brown's Reports, *infra* note 127 and accompanying text.

7. We would like to thank The Colonial Williamsburg Foundation for giving permission to publish these reports. Another copy is in the Virginia State Library, MS. 21779b; this copy was kindly brought to our notice by Dr. Charles T. Cullen and Mr. J. W. Dudley.

8. We would like to thank the Manuscript Department of the University of Virginia Library for giving permission to publish its *Register of Law Cases by Charles Lee (1794)* (Accession No. 850).

ished product. However, it is unlikely that Lee ever intended to publish it.

Charles Lee, the son of Henry Lee and Lucy Grymes, brother of "Light-Horse Harry", was born in 1758 at Leesylvania, Prince William County. He entered Princeton in 1770 and received his B.A. in 1775 and an M.A. in 1778. In the next year he was reading law in Philadelphia, and in 1781 he was licensed to practice in Virginia.⁹ From 1781 to 1795 Charles Lee practiced law in Alexandria. He was quite successful, having cases in all the courts of northern Virginia. It was during this period that he compiled these reports of Virginia cases. He was also politically active, holding the Virginia appointment of Naval Officer of the South Potomac from 1784 until 1789 when the position was suppressed upon the adoption of the Federal Constitution. He was the customs collector for the port of Alexandria from August, 1789, to 1793, and from then until 1795 he represented Fairfax County in the Virginia House of Delegates.¹⁰

Charles Lee was an old personal friend of George Washington and shared his ardent Federalist views. Lee was appointed United States Attorney General in November, 1795, and was continued in office by John Adams. He remained the Attorney General until the Federalists lost political power in 1801. He was a close friend of John Marshall, who had the same political and judicial outlook. He was appointed to be one of the new circuit judges in March, 1801, but the next year Congress repealed the Judiciary Act, and he along with the other Federalist "midnight judges" was removed from the bench. Lee then retired from the active political scene and devoted the rest of his life to his private law practice. He was counsel in *Marbury v. Madison* and aided in the defense of Burr and Chase.¹¹

The original manuscript of John Brown's reports of Virginia cases from 1791 to 1799 is in the Virginia State Library.¹² This heretofore unidentified manuscript of reports of cases in the court of appeals

9. 11 *DICTIONARY OF AMERICAN BIOGRAPHY* 101, 102 (1933); Virginia Historical Society Mss. 1, L 5113, a6, Mss. 2, M 3817, al.

10. E. G. SWEM and J. W. WILLIAMS, *REGISTER OF THE GENERAL ASSEMBLY OF VIRGINIA* 39, 41, 44 (1918); 12 *THE SOUTH IN THE BUILDING OF THE NATION* 70, 71 (1909).

11. R. SOBEL, *BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH* 209 (1971).

12. MS. 21779c; we would like to thank the Virginia State Librarian for permission to publish this manuscript.

is remarkable in that the reporter was so concerned with clerical details and points of appellate procedure to the almost complete neglect of the substantive law. The comparison of the handwriting of this manuscript and that of the clerk of the court of appeals at the time of these reports shows that these reports were made by John Brown.¹³

John Brown, who was born on October 4, 1750, was appointed clerk of the court of Mecklenburg County and was sworn into office on July 10, 1775. According to Frederick Johnston "from the records left in his office, he was a good clerk, and everything [was] kept in good order." In 1781 Brown was appointed clerk of the General Court of Virginia which required him to move to Richmond. Therefore, he appointed William Baskervill on June 4, 1781, to act as his deputy. He held the clerkship of Mecklenburg County until February 9, 1795, when he resigned to be succeeded by Baskervill.¹⁴ He held the clerkship of the General Court until 1794. In addition he was clerk of the court of appeals, the highest court of Virginia, from 1785 until his death in 1810. Apparently the Virginia appellate courts were not very busy before 1795, for Brown was also the clerk of the District Court of Richmond during the period 1789 to 1793 and clerk of the court of chancery in 1787. It is easy to see why he was interested in the law of court costs, which was the main focus of his reports.¹⁵

Brown acted as clerk of the court of appeals until his death in Richmond on October 31, 1810. He was characterized in the *Virginia Patriot* shortly after his death as "long well known for his superior talents in the line of his profession, and highly esteemed for his urbanity of manners and general good deportment."

13. This identification is corroborated by the opinions of Dr. Charles T. Cullen, Mr. William Ray, and Mr. Lee Shepard, who very kindly came to my assistance.

14. Bruton and Middleton Parish Register 1662-1797, Photostat in Virginia State Library, f. 10; Virginia Gazette, 26 March 1772; L. G. Tyler, "Abstracts of Marriage License Bonds" 1 WM. & MARY Q., 1st ser., 49 (1892); Mecklenburg County Order Books, No. 4 (1773-1779), p. 314, No. 5 (1779-1784), p. 97, No. 8 (1792-1795), p. 391, we would like to thank Mr. N. G. Hutcheson for these references; F. JOHNSTON, MEMORIALS OF OLD VIRGINIA CLERKS 245 (1888); P. H. BASKERVILL, GENEALOGY OF THE BASKERVILLE FAMILY 63 (1912). We would like to thank Mr. Davenport Carrington for this reference.

15. 4 W. T. HUTCHINSON. W.M.E. RACHAL, PAPERS OF JAMES MADISON, 209, n. 5 (1965); CALENDAR OF VIRGINIA STATE PAPERS, vols. 3-9 *passim* (1883-1890); Treasurer's Office Receipt Books, *passim*, which were kindly made available by Miss Emily Jones of the Virginia State Library.

Brown's reports cover the period 1791 to 1799. These reports were continued in a second booklet which is now lost; on the front cover of this manuscript is written "No. 1" and "See page 18th, 2 Book, for entries of some notes of decisions prior to 1791—omitted to be entered first, the rough notes being mislaid."

In transcribing these reports angle brackets have been used to enclose comments which seem to have been added by another hand or at a later time. References to the reports of Washington and Call were added to these manuscripts by William Green, the legal scholar who died in 1880, but these are omitted because this information has been included in the footnotes. In both sets of reports the spelling has been modernized, but the original punctuation has been retained.

Cases adjudged in the General Court from the year 1783 to the year [____].¹⁷ Compiled by Charles Lee. L. A.

April 1784

Desmarais assignee v. Jones

Motion for trial out of course under act of Assembly of 1779¹⁸ in favor of foreigners.

Curia. The assignee stands in the shoes of the original obligee and in this case he being a citizen the motion must be dismissed.

Turner v. Turner¹⁹

Appeal; Slaves.

Question whether the slave law of 1758²⁰ be confined by the preamble or to have general operation.

Chief justice and judge Lyons of opinion that it was not to be confined by the preamble. Judge Mercer Contra. Adjourned for further argument.

17. Date left blank in the manuscript.

18. 10 HENING'S STAT. 203.

19. Further proceedings in this case are reported in 1 Va. (1 Wash.) 139 (1792) and 8 Va. (4 Call) 234 (1792).

20. 7 HENING'S STAT. 237-239.

Finnie v. Gilbert

Appeal from the court of Hustings at Williamsburg.

H. Tazewell for appellant.

The exception that I rely on is to the declaration not averring that the cause of action did arise within the jurisdiction of the court, the court of Hustings being an inferior court: 2 Raym. 795 Stanian v. Davis. Id. 1310 Sir Thomas Cooke Winford v. Powell. 1 Saund. 73 Peacock v. Bell. As to local actions 3 Keb. 677 Harvey v. Holland.²¹

Nothing is to be intended within the jurisdiction of an inferior court unless averred. 1 Sid. 95. 3 Lev. 243. 1 Vent. 28. Cro. Car. 571. Thos. Raym. 63.²²

Ed. Randolph Contra. arguendo.

A court which hath jurisdiction over transitory actions is not limited and no averment in such case requisite. The court of Hustings a court of record and not within the description of an inferior court.

Judge Mercer. The Court of Hustings having general jurisdiction, the matter to be intended within it and need not to be averred. Being a court of record it cannot be deemed an inferior court according to the British ideas as no writ of false judgment lieth therefrom.

Judge Lyons. Transitory actions need only to be so laid within the jurisdiction that they may be intended.

Chief justice of the same opinion.

The appeal Dismissed.

October 1784

Gault & Ux. v. Hornsby & al.

Supersedeas; Debt.

A principal obligor and the executor of another obligor cannot be sued in the same writ if bound jointly and severally.

21. Stanian v. Davis, 2 Ld. Raym. 795, 92 Eng. Rep. 31 (K.B. 1702); Winford v. Powell, 2 Ld. Raym. 1310, 92 Eng. Rep. 357 (K.B. 1712); Peacock v. Bell, 1 Wm. Saund. 73, 85 Eng. Rep. 84 (K.B. 1667); Harvey v. Holland, 3 Keble 677, 84 Eng. Rep. 948 (K.B. 1676).

22. Littlebury v. Wright, 1 Sid. 95, 82 Eng. Rep. 992 (K.B. 1662); Adney v. Vernon, 3 Lev. 243, 83 Eng. Rep. 671 (1685); Barkley v. Paine, 1 Vent. 28, 86 Eng. Rep. 20 (K.B. 1669); Bulley v. Hubbins, Cro. Car. 571, 79 Eng. Rep. 1090 (K.B. 1639); Littleboy v. Wright, T. Raym. 63, 83 Eng. Rep. 35 (K.B. 1663).

Stringer v. Stringer

Supersedeas in Ejectment.

The error assigned was that habere facias possessionem was adjudged to issue after the term had expired. Curia. This is fatal and judgment must be reversed. Then another question arose whether court would order restitution and Jenk. 58²³ was cited in favor of it. Mr. Mason opposed the restitution a year having elapsed since execution was made but this objection was considered insufficient and restitution ordered.

Copland's exrs. v. Dunn

Detinue; Limitation.

Curia. The act of limitations may be given in evidence on the plea of non detinet or non debet.

Clarke v. LaFarge

Evidence.

A deposition not objected to at the time of taking it by him on whose behalf it was taken shall be evidence at the trial.

Hedges v. Cogbill

Evidence.

The assignors of a bond, not admitted to prove anything relative to the payment of it, being interested as ultimately though not immediately liable.

Shore & Co. v. Ferguson

Book debts.

The law of 1779²⁴ concerning book debts for goods &c. began to operate in May 1780 and continued in force till 1st Jan. 1781, was suspended by an act of the June session 1781, from the said 1st Jan. 1781 till the end of the session that should open the courts which happened to be till Jan. 1782. since which it continued in force till May 1783 when it was again suspended till October 1783 since which it has been in full force.

23. Case 7, Jenk. 57, 58, 145 Eng. Rep. 41 (C.P.).

24. 10 HENING'S STAT. 133.

Brown v. Bailey

Ejectment; Evidence.

Some of the jury admitted to prove the malfeasance of the officers, jury and themselves as part of the jury in making an inquisition for docking the entail of certain lands.

Southerland v. England

Appeal; Evidence.

Hearsay being admitted as evidence but not appearing to be in support of direct testimony, the judgment for this cause was reversed.

Burrow v. Burrow

Detinue; Fraud.

The defendant was present at an arbitration between the plaintiff and his father, and having a deed for certain slaves from the father, did not communicate it to the plaintiff or arbitrators and these very slaves were awarded to the plaintiff, for which slaves the present action was brought. Verdict and Judgment for the Plaintiff.

Hedges v. Pegram

Motion; Practice.

A distringas appearing to be irregularly returned was quashed. The court have exercised the right of quashing all executions for irregularity. 2 Wilson 394.²⁵ But notice must be given to the parties interested in the usual form of the motions for such purposes.

Newsom v. Davis

Debt; Officers.

The defendant was assistant quartermaster general and took up goods for which he gave his bond to the plaintiff the goods being for the public service held liable to pay out of his private funds; verdict for plaintiff and the tobacco estimated at the average price through the commonwealth. A full court.

25. Hole v. Finch, 2 Wils. K.B. 393, 95 Eng. Rep. 880 (C.P. 1769).

Tarte v. Shute

Case; Book debts.

Question whether on a store account the articles in which are older than six months, an assumpsit after the account became older than six months but within six months before the bringing of the suit, might be given in evidence. Court was of opinion it might not, being contrary to the act of 1779²⁶ but Judge Dandridge differed from the court and the bar was dissatisfied; However so it was adjudged.

Downing v. Nutt

Ejectment; Maxim.

Possession of part is possession of the whole applies only to such cases where there is a social possession and not an actual occupation of one to the exclusion of another.

Dade v. Dade

Ejectment; Special Verdict.

The plaintiff's title was derived from a conveyance of lease and release, the lease dated the 30th May and the release dated the 21st May in the same year, and the only objection to the title was the date of the lease being subsequent to the release.

It was argued by H. Tazewell for the plaintiff that the lease and release should operate as a covenant to stand seised to uses. Cited 1 Ven. 27²⁷ Ut res magis valeat quam pereat. 2 Wilson 75,²⁸ 333, deeds of lease and release of a remainder to operate as a covenant to stand seised to uses.

It was argued on the other side by T. Mason for the defendant first that the lease being void the release could not operate upon it 1 Mod. 162 Lit. sect. Secondly a privity between lessor and lessee at the time of release necessary Co. Lit. 273b. This being wanting the conveyance of no effect.

J. Baker in reply for the plaintiff. If a grant cannot pass literally it shall pass otherwise if possible Co. Lit. 103b, 2 Bac. 666. Observed that Hobart and Coke had said that the dates are immaterial and deeds to take effect

26. 10 HENING'S STAT. 133.

27. Perhaps this is Gregory v. Eads, 1 Vent. 27, 86 Eng. Rep. 20 (K.B. 1669).

28. Roe ex dem. Wilkinson v. Tranmer, 2 Wils. K.B. 75, 95 Eng. Rep. 694 (C.P. 1757). The other references to English authorities are not identifiable except for COKE UPON LITTLETON and M. BACON, ABRIDGMENT.

from livery, cited 1 Vent. 35, 107. Also the defects remedied as to the dates by the act of assembly 1748²⁹ and by the acknowledgement in court.

The court were inclined for the plaintiff but adjournatur for another argument. Afterwards the parties came to an agreement.

Cocke's Exrs. v. Linton

Appeal; Paper Money; Vide the various acts touching paper money.

The appellants sued the appellee in the year 1779 in the county court of Prince William upon a bond conditioned with the payment of a certain sum in sterling money. Pending the suit on the 2d day of October 1781 the defendants paid into court the amount of the debt in the condition computed at the legal exchange the greater part in the paper emissions of July 1780 and the court ordered the suit to be dismissed; from which the plaintiffs appealed.

This cause was very fully argued and often, upon general points, but was adjudged on a circumstance peculiar to itself which was this. The emissions of July 1780 were nominally at the rate of 40 for 1. They were paid into court on the 2d October, and were expressly made a tender afterwards on the 16th October. The court delivered their opinions to the following effect.

Judge Mercer.

The question seems to be confined to the emissions of 14 July 1780. They in my opinion were issued for special purposes, were not payable generally in taxes but only in such as were imposed by that act.³⁰ A very great proportion of the money paid being of this emission, the court erred in ordering it to be received and in dismissing the suit.

Anything made by the legislature money shall be a tender without any words particularly making it a tender. The clause of tender was introduced in some acts to save the debtor the hazard of keeping it, paying it into court at the time of plea and to stop interest, and not to make the emissions circulate as money.

The emissions of July 1780 came into circulation at the value of 40 for 1 and could be paid only at that ratio. N.B. Mr. Mercer seemed to think that all emissions prior to the May session of assembly 1780 were after that to be tendered after the same rate of forty for one.

29. 5 HENING'S STAT. 409.

30. 10 HENING'S STAT. 248, 279, note also 321.

Judge Fleming.

I conceive the emissions of 14 July 1780 to have been distinct from all other emissions prior to them. They were current at the rate of forty for one and being receivable in discharge of particular taxes, they were not to be tendered as money. Therefore error in the county court to receive it in the present case.

Judge Lyons.

Upon this appeal two questions arise. 1st. Whether any money emitted subsequent to the act of 1777³¹ is to be considered as a legal tender. 2dly whether the emissions of 14 July 1780 differ from other emissions of paper money in this respect.

As to the first question, an act of assembly is to be construed in a popular sense and not strictly according to grammar and therefore the monies emitted subsequent to 1777 are to be considered as a legal tender in some manner or other.

As to the second question the emissions of 14 July 1780 were not applied to particular purposes but were made use of in every respect as other bills. There was a penalty for counterfeiting them.

Being of the value of forty for one, they were a tender at that rate, so that if enough had been paid into court I should be for affirming what was done by the county court, but enough not being paid their proceedings should be reversed for this error.

Chief Justice Carrington.

The emissions of 14 July 1780 were not a legal tender on the 2d day of October 1780 when they were paid into court. Let the judgment be reversed.

Quere how far does the act of 1781³² effect this case in as much as thereby all payments are to be good for the nominal sum.

Vaughan v. Moss

Appeal; Replevin Bond.

Judgment in the county court; fieri facias executed and the effects replevied. Before the three months run out, the judgment was reversed for error, but notwithstanding that when the three months run out, motion was

31. 9 HENING'S STAT. 287, 288, note also 297, 298.

32. 10 HENING'S STAT. 398, note also 412, 456.

made for judgment on the replevin bond and judgment thereupon was given from which an appeal was prayed to the General Court. Notwithstanding this appeal, the goods were executed a second time and the debt satisfied. 2 Strange 867.³³ 6 Mod. 23.

Adjourned for another argument.

Stringer v. Stringer

Supersedeas.

The defendant was one of four justices who composed the court when issue was joined in the suit. Reversed for error.

April 1786

Commonwealth v. Sorrel³⁴

Indictment for murder.

A man sent for trial by a county court for manslaughter may be indicted for murder before the general court. Three judges against two.

November 1787

Reid and Ford v. Biddle &c.

Case of foreign attachment in chancery.

1st. The assignment to the defendants does not comprehend the attached effects, and this being the ground on which the claim of the plaintiffs is opposed, there appears no obstacle to their demands. The assignment was fair and also the prior of transfer of the goods which the defendants held as factors.

2d. Formerly citizens had a preference in attachments to foreigners and still will be preferred in all cases where they do not stand in an equal condition with foreigners in every point of advantage relative to the payment of their debts.

3d. This is the case of foreigners only, for the act done by Ford to acquire citizenship is considered by the court not as a reality but an appearance only.

33. Sweetapple v. Goodfellow, 2 Strange 867, 93 Eng. Rep. 903 (K.B. 1763).

34. Also reported in 3 Va. (1 Va. Cas.) 253 (1786); Lee was counsel for the defendant.

4th. Risberg who is plaintiff in another suit against the same effects commenced, before they are ordered by this court to be applied to any particular debts, is in time and shall share in proportion with Reed and Ford.

5th. These debts being fully paid, the surplus may be distributed amongst the assignees and Tellier in proportion to the original stock of the parties.

6th. It remains to have it ascertained whether Richardson & Co. be connected with C. Biddle & Co. and Tellier.

Court of Appeals. November 1787

Taylor v. Wallace³⁵

Verbal gift accompanied with possession which remains four years is fraudulent and the title defective.

General Court June 1789

Ordered that the clerks of the said district courts do not docket any appeal received after the last day of the term to which the appeal is returnable without the leave of the court, and that all appeals not docketed during the next succeeding term shall stand dismissed and the clerks may grant certificates accordingly.

Taylor's exrs. v. Taylor's exrs.

Adjudged by the Chancellor Nov. 1789.

Act of limitation against a fraud unless the same is charged to have been discovered within the time of limitation, is a good plea. 3 Wms. 143.

Equity regards length of time. 1 Ch. rep. 139. 2 Ch. rep. 48.

A suit is not pending till the bill be filed.

An appeal may be from an interlocutory decree though in this case the order is final. 3 Black. Com.

A man may demur ore tenus at the bar. 3 Wms. 371.³⁶

35. Also reported in 8 Va. (4 Call) 92 (1786).

36. South Sea Co. v. Wymondsell, 3 P. Wms. 143, 24 Eng. Rep. 1004 (Ch. 1732); Goddard v. Goddard, 1 Chan. Rep. 139, 21 Eng. Rep. 531 (Ch. 1639); Castlehaven v. Underhill, 2 Chan. Rep. 46, 21 Eng. Rep. 612 (Ch. 1670); 3 W. BLACKSTONE, COMMENTARIES, 454; Tourton v. Flower, 3 P. Wms. 369, 24 Eng. Rep. 1105 (Ch. 1735).

March term 1791. High Court of Chancery

Hinde v. Pendleton³⁷

[Auctions]

Decreed upon the authority of a case reported in Cowper that at a sale by public auction the person proposing to sell shall not buy by himself or another, and therefore the bid of a by bidder for his use shall stand for nothing and the next bona fide bidder to him shall be considered as the purchaser and especially if his bid be equal to the reasonable value of the thing sold.

Morgan v. Dorsey

An appeal.

Judgment was rendered on a motion against the sheriff charging him with a voluntary escape of a debtor but the record states no return of the sheriff that the prisoner was in custody in consequence of the warrant. Virginia Laws 304, 446.³⁸ Reversed.

Cadwallader's exrs. v. Mason³⁹

A question was made whether a devisee of mortgaged land be accountable to a mortgagee for the mesne profits.

To show he is not were cited 3 Atkins 245, 2 Atkins 120 a mortgagee is accountable for the mesne profits. Bunch v. Wright reported in Dearnford and East.⁴⁰

June 1791

Champ's exrs. v. Starke⁴¹

Motion for a supersedeas before the Appeals.

The action was brought since the act of frauds and perjuries,⁴² upon a verbal promise made prior thereto and a nonsuit was directed by the dis-

37. Also reported in Wythe 354 (1791).

38. *Acts of Assembly Now in Force*, pp. 304, 446 (1769); reprinted in HENING'S STAT., vol. 6, pp. 344, 345, vol. 8, pp. 118, 119.

39. Also reported in Wythe 188 (1793).

40. Mead v. Lord Orrery, 3 Atk. 235, 26 Eng. Rep. 937 (Ch. 1745); French v. Baron, 2 Atk. 120, 26 Eng. Rep. 475 (Ch. 1740); Birch v. Wright, 1 Term Rep. 378, 99 Eng. Rep. 1148 (K.B. 1786).

41. Note the very similar case of Thornton, Exr. of Champ v. Jett, 1 Va. (1 Wash.) 138 (1792).

42. Act of Oct. 1785, c. 64, 12 HENING'S STAT. 160-162.

strict court of [_____] because the promise proved was only a verbal one and the action was commenced subsequent to the act of frauds. Motion granted, the court saying that the point ought to be settled.

Also in this case it was determined that the executors need not give security for prosecuting the supersedeas because they were executors.

Pollard v. Rogers⁴³

Appeal from the Court of Chancery.

Rogers the appellee sold to the appellant a tract of land having then a good title only to a moiety and subsequent to this sale bought in a part of the outstanding titles to the other moiety. The bill was to set aside the contract which was dismissed and from the dismissal this appeal was made.

The decree was reversed as to that part of the tract of land to which the appellee had at the time of pronouncing the decree a good title and affirmed as to the rest of the cause.

The particular reasons that led to this decision are to me unknown.

Downman v. Downman's exrs.⁴⁴

An appeal.

The common bail entered himself as special bail and offered a plea of tender which did not state the sort of money nor the quantity of debt. The court refused the plea first because the plea was after office judgment secondly that the bills tendered as money were not current as money at the time of the tender.

Campbell for appellant contended that after office judgment a tender cannot be pleaded and cited 1 Burrow and Eq. Ca. Abr. Secondly that the court cannot notice the thing tendered because that was a subject fit for a jury, 5 Rep. 114,⁴⁵ a defendant is not bound to receive money tendered.

Curia. The act of assembly⁴⁶ allows only pleas to issue immediately. But this act should be liberally construed and any plea should be received which being put in issue will decide the cause according to its merit or

43. Also reported in 8 Va. (4 Call) 239 (1791).

44. Also reported in 1 Va. (1 Wash.) 26 (1791) and in Brown's Reports, *infra* note 67 and accompanying text.

45. Wade's Case, 5 Co. Rep. 114, 77 Eng. Rep. 232 (C.P. 1601).

46. Perhaps Act of Oct. 1785, c. 39, s. 20, 12 HENING'S STAT. 544.

justice. Where a bond has a collateral condition the plea of condition performed is usually allowed though it makes other pleadings necessary. A tender may be pleaded after imparlance Str. 136, T. Raym. 254.⁴⁷

But the judgment ought to be affirmed because the plea tendered was in itself bad.

1st it was blank.

2dly it states the principal sum and not the interest leaving that to future computation.

3d the sort of money should be stated in the plea that it might be in the power of the plaintiff to demur to it if he pleased, Davis' Reports.⁴⁸ Money is a legal question determinable by a court what it is and not by a jury.

Whether the thing tendered as money should be current as such at the time of the plea is questionable but that in this case need not be decided.

Judgment affirmed.

Smith v. Harmanson⁴⁹

Appeal from a district court.

An action of debt was brought in a county court upon a bond in the penalty of £2000 conditioned to pay £1000. The verdict was for £1147.8.4 and judgment was rendered for £2000 to be discharged by the payment of £1147.8.4 in the county court from which there was an appeal to the district court who reversed this judgment and entered another for £2000 to be discharged by the payment of £1000 and interest. The bond was not regularly made a part of the record.

This judgment being variant from the verdict was held to be erroneous, and for another reason viz. because the bond was not a part of the record to which judgment related. The first judgment was held to be erroneous also, but it being more in favor of the appellant the court would not reverse it but affirmed it.

The court said the practice was right upon the act of assembly in not entering principal and interest as an aggregate sum and giving judgment for the same. An adjudication similar to this was cited by Ronald.⁵⁰

47. *Rochtschilt v. Leibman*, 2 Strange 836, 93 Eng. Rep. 883 (K.B. 1729); *Giles v. Hartis*, 1 Ld. Raym. 254, 91 Eng. Rep. 1066 (K.B. 1697).

48. *Case of Mixed Money*, Davis 18 at 28, 80 Eng. Rep. 507 at 516 (P.C. 1604).

49. Also reported in 1 Va. (1 Wash.) 6 (1791) and in *Brown's Reports*, *infra* note 68 and accompanying text.

50. *Andrew Ronald*; see *Commonwealth v. Ronald*, 8 Va. (4 Call) 97 (1786) (where the lawyer was the defendant).

High Court of Chancery

Morris v. Pickett⁵¹

The assignee of a bond for valuable consideration and bona fide is not liable to any equity existing against the assignor of which he had not notice at the time of the assignment; but the court would enquire into the consideration paid and if it were not to the full value of the bond, as to the difference the equity would be allowed as to that.

Graham v. Graham

A trust deed prior to marriage and in consideration thereof is to be construed by the same rules of law as if the estate was a legal one. Wherefore decided that the estate in this instance was an estate in special tail.

Fredericksburg District Court

[In re Gray]

French Gray as was supposed committed suicide about two months ago. The coroner omitted to take an inquest upon the body as he might have done. The deceased made his will in which he devised a part of his personal property to a person not related to him nor entitled as a distributee of his estate in case he had died intestate.

At the instance of one of the distributees an inquisition was presented to the grand jury stating French Gray to have been *felo de se*. Though no precedent from the English books was produced, the court suffered the grand jury to take the inquisition and to examine witnesses touching the same, who returned it to be a true bill, and the same was received by the court.

Winslow v. Stockdell

An action of trespass for mesne profits. Plaintiff was heir in tail, whose father devised the land to and died, who entered and sold the same to the defendant, who possessed the same for 22 years ago, and by a decree in chancery the plaintiff recovered the land. The time of the trespasses was prior to any actual possession as found in the special verdict. The defendant rests the cause upon this question whether the plaintiff could recover for a trespass prior to his first actual possession and cited *Co. Rep. Liffard's*

51. Affirmed, 2 Va. (2 Wash.) 255 (1796).

Case, 2 Barnes 367 Stanyhout v.,⁵² Co. Lit. 142. The ad quod damnum was executed under the former act of assembly prior to 1748.⁵³ Judgment for the defendant.

Pendleton v. Carter

In debt.

This suit was founded on a promissory note for the payment of a sum of money with interest from the date. The verdict was for the debt in the declaration mentioned to be discharged by the payment of the sum due with interest from the 1st November 1769 till paid. It was moved in arrest of judgment that in debt without a penalty a verdict and judgment cannot be rendered so as to carry interest subsequent to the judgment, but this objection was overruled.

Boyer v. M'Clenachan

A wife is entitled to dower in a trust estate in this country; the reason for the contrary doctrine in England not prevailing here.

Heathcote & Fenwick v. Martin

If British creditors and the assignees of a bankrupt, according to the British laws, were pursuing the effects of the debtor here, the assignees should be preferred and the bill of the former dismissed. But if the competition was between an American citizen creditor and the assignees of a British subject bankrupt, concerning his effects and credits, the American creditor should be preferred, unless the assignees would bring into a dividend all the assets in that as well as this country, in which latter case all the bankrupt's creditors would be placed upon an equal footing without respect to their country, nor would this court compel the American creditor to seek redress in Great Britain.

Anonymous

Improper for this court to direct any testimony to be admitted upon a trial at law, because it is possible that at the trial a witness who may have been examined in this court may be proved to have been incompetent and if so the deposition ought not to be read. Depositions regularly taken here may be read at the trial at law, unless incompetency by proved at the time it was sworn to.

52. Liford's Case, 11 Co. Rep. 46, 77 Eng. Rep. 1206 (K.B. 1614); Stanynought v. Cosins, Barnes 457, 94 Eng. Rep. 1002 (C.P. 1746).

53. Cf. Act of Oct. 1748, c. 1, s. 16, 5 HENING'S STAT. 414.

Alexander v. Murray

It is a rule of equity that a vendee upon giving up his deposit as well as all rights to the thing bought may be discharged. 1 Wms. 745 Saville vs. Saville.⁵⁴

Roush v. Carver

An appeal from a decree in a county court.

Carver brought his bill for a conveyance of a title under a patent which Roush had obtained bearing date prior to a patent for the same land to Carver and obtained a decree.

One Cheifly had made an entry, and obtained a warrant from the office of Lord Fairfax in the year [____]⁵⁵ which by sundry sales became vested in Roush for a tract of land containing 400 acres adjoining a tract of Lord Fairfax. He and Roush obtained a patent for it. Many years previous to this entry Lord Fairfax had made a survey for a tract containing near 700 acres in which it appears the 400 acres was a part, and these 700 acres he leased for a term of years, Carver made an entry with Lord Fairfax in his office for the 700 acres but his patent was obtained subsequent to that of Roush and Lord Fairfax conveyed his right in the lease. One principal question was made.

First. Whether the 400 acres were not to be considered as waste and ungranted, notwithstanding Lord Fairfax survey, it not being made an entry and warrant recorded in the public book of his office but only recorded in his book of private estate. Determined this was not necessary, and the reason urged, that this was necessary in order to give notice to Cheifly was deemed insufficient especially as notice appears to have been had from the terms of Cheifly's entry. Second. Lord Fairfax a private man as to his estate and might reserve for his own use, a part of his lands notwithstanding his public invitation to settlers and the method he took sufficient in the present case inasmuch as Cheifly appears by his entry [____]It had notice of the reservation. Decree affirmed.

Proudfit v. Blane⁵⁶

Decree against defendant as an absentee about two years ago. At this term a motion was made to redocket it and for leave to file the answer and

54. Savile v. Savile, 1 P. Wms. 745, 24 Eng. Rep. 596 (Ch. 1721).

55. Date left blank in the manuscript.

56. Same case on appeal: 7 Va. (3 Call) 207 (1802).

to try it on the merits after argument of the 39th section,⁵⁷ the motion was granted &c.

Federal court

Harwood v. Lewis⁵⁸

Debt on bond conditioned for the payment of certificates. Jury estimated the damages by the value of certificates when their verdict was rendered. A motion for a new trial on the ground of excessive damages, the rule that the jury ought to have adopted being the value when the contract was broken, authorities cited *Dutch v. Warren in Strange*, *Powell on Contracts* 137, *Graves v. Groves* in the court of appeals.⁵⁹ New trial denied, the court saying that notwithstanding the precedents, the rule adopted by the jury was the just one.

Curry v. Burns⁶⁰

An appeal from a decree of Berkeley County.

Burns made a survey in the year 1757 but failed to apply for a grant within the time limited by the rules of Lord Fairfax's office, another person thereafter applied for a part of the same land in the year 1768 and complying in all respects with the rules of the office obtained a grant, which has been conveyed regularly to Curry. This grant recites the forfeited right of Burns. Curry recovered the land in ejectment which Burns enjoined in the county court of Berkeley, and the injunction was there made perpetual. This suit was commenced in 1785. From this decree Curry appealed and the court affirmed the decree whereby the injunction was ordered to be perpetual and Curry ordered to convey his title to Burns.

The court said without the act of 1786⁶¹ which was made to procure and substantiate such rights as that of Burns he had an equitable right to the land in question. This act might and did corroborate the rights. In this case Burns having obtained a patent in the year 1788 according to law, though junior to the patent under which Curry claims, yet by relation, it shall go back to the equitable right and prevail at law over the older patent. This

57. Perhaps Act of Oct. 1792, c. 12, s. 39, 13 HENING'S STAT. 418.

58. Reversed 2 U.S. (6 Cranch) 325 (1810).

59. *Dutch v. Warren*, 1 *Strange* 406, 93 Eng. Rep. 598 (1720); *Graves v. Groves*, 1 Va. (1 Wash.) 1 (1790).

60. Also reported in 2 Va. (2 Wash.) 121 (1795); Lee was counsel for the appellant; note also the further litigation in 7 Va. (3 Call) 183 (1802).

61. 12 HENING'S STAT. 237-240.

was laid down in another case which was carried to the court of appeals and what was there done this court does not recollect. So that a conveyance from Curry is unnecessary, but doth not vitiate the decree. Mr. Williams said that the Appeals had confirmed the doctrine in the case of Maese against Hambleton.⁶²

A divided court.

Wilson v. Rucker⁶³

A military certificate lost may be recovered from the bona fide purchaser for valuable consideration. The case of lost money or notes not alike determined by the court of Chancery.

Turner v. Stip⁶⁴

An appeal to the Court of Appeals.

By the act of 1748,⁶⁵ a deed is good between the parties though never recorded, and the execution of the deed may be proved before a jury as any other fact by one witness. Refusing this testimony was error in the county court, and their judgment was for this properly reversed by the district court, whose judgment is affirmed here.

John Brown's Reports

Ellis v. McCall

June 7th 1791. The Court overruled the motion for a writ of [____] on the merits. And, after some conversation on the necessity of making an entry of the motion and decision, directed it to be made, although the parties wished it not to be done.

Thweat v. Finch⁶⁶

[Revivor by appellee]

June 7th 1791. The appellant being dead, his executor wished the appeal to abate; but the Court determined that the appellee without the consent

62. *Maze v. Hamilton*, 8 Va. (4 Call) 33 (1783); note also the connected cases in *Wythe* 51 (1789) and 8 Va. (4 Call) 196 (1791).

63. Also reported in *Wythe* 296 (1794) and reversed on other grounds in 5 Va. (1 Call) 500 (1799).

64. Also reported in 1 Va. (1 Wash.) 319 (1794); Lee was counsel for the appellant.

65. 5 HENING'S STAT. 410.

66. Further proceedings in this case are reported in 1 Va. (1 Wash.) 217 (1793); note also the connected case of *Thweatt v. Jones*, 22 Va. (1 Rand.) 328 (1823).

of the executor might receive [sic] it by scire facias which was accordingly awarded. They also said that it was at the appellees option either to permit an appeal to be dismissed, if not prosecuted, or to open the record for the decision of the Court upon the regularity of the proceedings.

Downman v. Downman's Exors.⁶⁷

June 10th 1791. Appeal from an office judgment in District Court which the appellant offered to set aside on the 3rd day of the District Court by filing a plea of tender, which plea was refused. The Court here said that any plea after office judgment by which when an issue at law or in fact is made up, an end will be wholly put to the dispute, ought to be received, but this plea <of tender> the Court below were right to refuse, for the second reason assigned by them <to wit because the money brought into Court is what was once paper money but is not now in April 1790 money under any des[____] see reason (as entered in order book) in next page> Judgment affirmed.

see Wash. rep. Vol. 1. p. 26.

Smith v. Harmanson⁶⁸

Appeal to Accomack District Court from a Judgment in Northampton County Court for £2000 and costs to be discharged [by] £1147.18.1 and costs, which is the sum found by the Jury [to be] owing and is supposed to contain the aggregate sum of principal and interest to the day of Judgment. This Judgment was reversed by the district court for that reason & they gave Judgment for £2000 to be discharged by £1000 with interest from 21st April 1783 till payment. From this Judgment, the debtor having become insolvent, Smith the creditor appeals. The Court here said that upon reversing the Judgment the District Court ought either to have directed a new trial to ascertain the debt, or, as the error was in favor of the debtor and not complained of by the creditor, the Judgment of the County Court ought to have been affirmed. Judgment of District Court reversed, and Judgment of County Court affirmed with damages from the day of the Judgment in the County Court to the time of reversal in the District Court. A copy of the bond of which oyer was not prayed was added by the Clerk to the record, but the Court's observation on it I could not hear.

67. Also reported in 1 Va. (1 Wash.) 26 (1791) and Lee's Reports, *supra* note 44 and accompanying text; note also the further comment which follows the next case.

68. Also reported in 1 Va. (1 Wash.) 6 (1791) and Lee's Reports, *supra* note 49 and accompanying text.

Downman v. Downman's Exors.

When about to enter the Judgment, the judge presiding in Court, upon being asked, said that when the Court wished a reason for their Judgment to be entered on record they would direct it to be done. <but in this case, though an affirmance, the Court at the reading of the orders had this reason, "The Court having properly refused the plea upon the second reason" interlined after the words "no error in the said judgment.">

Dade & al. v. Alexander⁶⁹

[Interest and Costs]

June 17th 1791. This Court having considered all the Ca[s]es respecting damages on affirming Chancery decrees wa[s of the] opinion that no damages, however justly entitled [thereto] the appellees might in such cases be, were given [—] and directed the decree to be affirmed with costs only.

Pleasants v. Bibbs⁷⁰

Three appeals. In these cases the direction of the General Court in *Cosby v. Stodghill* was confirmed. <i.e. that bonds for paper money ought to be sealed according to the time mentioned in the condition for carrying interest, if that time should be antecedent to the date of the bond.>

Armistead v. Jordan

Judgment in County Court on replevin bond entered into not for the penalty, but the sum due with interest affirmed in District Court and upon appeal to this Court the Judgment of the District Court was affirmed, no other error being alleged.

Keel &c. v. Herbert⁷¹

The Court in this case, the record (except the one filed with the petition which the Court did not consider as the record) not being returned, directed the Clerk to award a writ of certiorari to the Judges of the district court to certify the record fully and also to issue the like writ whenever a writ of supersedeas was first awarded either out of term or in term, and to consider these directions as general.

69. Also reported in 1 Va. (1 Wash.) 30 (1791).

70. Also reported in 1 Va. (1 Wash.) 8 (1791).

71. Further proceedings in this case are reported in 1 Va. (1 Wash.) 138, 203 (1792, 1793) and *infra* notes 92, 95, & 111 and accompanying text.

Henderson &c. v. Southall & DuVal⁷²

One of the appellees being dead the Court being informed thereof directed an abatement to be entered as to him & Judgment to be entered for surviving appellees.

Singleton v. Madison

Common law appeal from Kentucky. On a doubt of the clerk the Court directed judgment to be entered for damages on the affirmance.

Hambleton & al. v. Wells⁷³

[Mistake of clerk is not error as to defendants]

An appeal from a judgment in ejectment versus the appellants for the lands claimed by the appellee, the defendants were made at three different times, an issue for the whole lands was made up as to two of them, but the other was made a defendant only and put in no plea, which was alleged to be error, but the Court considered the want of a plea as to this defendant as a misprision of the clerk and of no consequence as to the defendants as to whom issue was joined, defended for the whole land, but judgment was reversed for another reason which is entered on record.

Hudson v. Johnson⁷⁴

[Costs]

An action for debt brought by the appellant in the County Court which appears, by a demurrer to the evidence, to have been paid after the bringing of the suit. The County Court overruled the demurrer and gave judgment for the appellee for full costs. On an appeal to the District Court, so much of the judgment as gave the costs preceeding the payment was reversed; but notwithstanding that, damages on the affirmance as to the residue were awarded the appellee. From which the appellant appealed to this Court. The Court here said that a payment made after the bringing of the suit was equal to bringing the money into Court and that the suit ought to have been dismissed at the defendant's costs but that the judgment of the district court as to the damages awarded was erroneous and therefore it was reversed as to those damages and affirmed as to the residue.

72. Earlier proceedings in this case are reported in 8 Va. (4 Call) 371 (1790).

73. Also reported in 8 Va. (4 Call) 213 (1791) and in 11 Va. (1 Hen. & M.) 307 n. (1791).

74. Also reported in 1 Va. (1 Wash.) 10 (1791).

Browne v. Belscher⁷⁵

[Arbitration waived by consent]

After the suit in the court below had been referred to arbitration, the parties went on to trial of the issue by a jury without setting aside the order of reference. And this court being of opinion that the proceeding to trial in such case by consent was not erroneous proceeding, affirmed the judgment of the district court, which affirmed the judgment given below for the plaintiff in the original action.

Croughton v. Peachy & al.

Nov. 22nd 1791. Judgment was obtained in the district court against three defendants but only Croughton prayed an appeal. The court being applied to said that the judgment was to be affirmed as to all three but the damages and costs paid by the one appealing only, and that he alone was to be entered as appellant, but in the recital it must be shown that the judgment in the district court was against the other two also. But it being said that Mr. Brooke was concerned for the appellant who did not appear judgment was directed for that reason only not to be entered.

Woodson &c. exors. of Benjamin Woodson exor. of John Woodson exor. of Booth Woodson v. William Fitzpatrick

[liability of executor]

Motion for a supersedeas to a judgment of the district court of Charlotteville affirming a judgment of Fluvanna court entered "To be levied of the effects of Benjamin Woodson (who by his assumpsit for his testator had made himself liable) if sufficient but if not the costs to be levied of the executor's goods" the reason alleged for the supersedeas was that the judgment which made the executor's own estate liable as above ought to have been entered "To be levied of the effects of Booth Woodson if sufficient, but if not then of the effects of Benjamin" but the court overruled the motion and said that where a suit was brought against an executor who had made the testator's debt his own by his assumpsit the judgment ought to be absolute against the executor although he may be styled executor in the proceedings which in such case there is no necessity for doing, but where an executor is sued for a debt of his testator and he must of necessity be sued as executor, if he by his false pleading makes himself liable then the judgment must be entered for debt &c. "To be levied of the testator's effects if sufficient but if not of the executors own effects" quaere?

75. Also reported in 1 Va. (1 Wash.) 9 (1791).

Jones &c. v. Logwood⁷⁶

[Scroll as seal]

The court among other things in this cause determined that a scroll used as a seal and acknowledged as such prior to the passage of the act in 1788⁷⁷ on that subject was a good seal.

April Term 1792

When an appeal or other cause is dismissed for want of appearance the default is to be entered of the party or parties failing to appear see Standfin against Hunt page 147.

Appeals coming to the clerk on or before the end of the second term, to be docketed by him without inquiring by whom they were brought.

Charles Hudson exor. of Christopher Hudson v. Ross &c.⁷⁸

[executor not personally liable for interest and costs]

Judgment entered against Christopher Hudson in Amelia court from which he appealed, and pending the appeal he died. And on the motion of present appellant a scire facias was awarded him as executor of the said Christopher to revive and hear errors, which writ the appellant did not prosecute, afterwards a scire facias was awarded the appellees which was returned executed on the executor now appellant by which the court here said he was become a party, the judgment of the county court was affirmed by the district court with damages as if all the parties to the county court's judgment had been living and from this judgment the executor appealed to this court, upon deliberation the court here determined that the district court's judgment was erroneous in not awarding the damages and costs, upon the affirmance, against the testator's estate in the hands of his executor who had been brought into court by the scire facias and made a party and that the case of Gordon and Bates⁷⁹ in this court which subjects the executor's own estate in case of a deficiency of assets to the payment of the damages and costs was in that respect a wrong decision which was not particularly attended to because of the smallness of the sum on which the damages on the affirmance were to run. Judgment of district court reversed with costs. Judgment of county court affirmed with damages and costs to

76. Also reported in 1 Va. (1 Wash.) 42 (1791).

77. 12 HENING'S STAT. 749.

78. Also reported in 1 Va. (1 Wash.) 74 (1792).

79. Bates v. Gordon, 7 Va. (3 Call) 555 (1790).

be levied of the testator's estate only in his executor's hands. The court also said that it was probable the judgment of the district court would have been right in not taking notice of the executor if he had not been before the court by the scire facias.

Bibb &c. v. Commonwealth⁸⁰

[Suit on sheriff's bond]

This suit was prosecuted in the district court in the name of "the Commonwealth for the benefit of Catharine Cawthorne" upon a sheriff's bond dated in 1787 for performance of his office made payable to the Commonwealth in the penalty of £1000, and judgment was entered "that the Commonwealth recover against the defendants for the benefit of C.C. £1000" and costs But to be "Discharged by the payment of the damages aforesaid and such other damages as may be hereafter assessed upon suing out a scire facias and assigning new breaches. Objection by appellants that the bond ought to have been taken to the justices pursuant to the ordinance of convention in 1776⁸¹ and not to the Commonwealth.

Per the court. This ordinance is temporary in its nature and does not repeal the act in 1748⁸² which was amended by an act in 1753⁸³ directing the penalty of £1000 payable to the King and giving the same remedy to the party injured as is given by the ordinance and the legislature considered the law of 1748 as in force in 1782 referring to it at that time and changing the mode,⁸⁴ and this bond of Bibb's pursuing the form of those laws substituting the Commonwealth for the King is right upon the merits, but the judgment "attaching the recovery to C. Cawthorne as to future injuries excluding all others" is erroneous. Reverse and judgment entered for Commonwealth for £1000 debt and costs to be discharged "by the payment of £162 the damages assessed for the benefit of the said C.C. and the costs and such other damages as may be hereafter assessed upon a scire facias being sued out thereon and new breaches assigned by the said C. or any other person or persons injured" N. B. The words with the double line under them were added and those with the single line were entered by the direction of the court the rule formerly entered being adjudged to confine the remedy for future injuries to the said C. C. only.

80. Also reported in 1 Va. (1 Wash.) 91 (1792).

81. 9 HENING'S STAT. 128.

82. 5 HENING'S STAT. 516.

83. 6 HENING'S STAT. 344.

84. 11 HENING'S STAT. 168.

Taylor v. Dundass⁸⁵

[Execution is valid until quashed]

A judgment was obtained in Fairfax court by Dundass against Hendricks and Taylor upon which an execution against the goods issued and was served on those of Hendricks only who gave a twelve months bond with security. Afterwards another fieri facias issued and was served on Taylor's property who moved the court of Fairfax to quash the last execution which was done accordingly. To this judgment quashing the second execution a supersedeas issued out of Dumfries district court where the said judgment was reversed and from the judgment of the district court Taylor appealed to this court. The court here was of opinion that the judgment of the district court was erroneous "the evidence offered by the appellee tending to prove that the first execution was issued and executed improperly although if true a good ground for quashing the first execution if the appellee had made a motion for that purpose did not apply in opposition to the quashing of the second execution which issued after the first was returned executed and remained in that state this court being of opinion that under the Act of Assembly⁸⁶ a bond to replevy, whilst the execution remains unquashed is as much a complete execution of the judgment as if the estate had been sold to the full amount of the debt and the party is left to pursue his new remedy on that bond" Judgment of district court reversed, and judgment of county court affirmed.

The president in giving opinion said "that after a fieri facias had been once served" and returned executed "a new execution could not issue whatever has become of the estate until the execution so served is quashed."

It appears by the bill of exceptions "that the appellee offered to prove by less than a record that the first execution issued without the order or direction of himself or his attorney; he also offered proof to show that Taylor undertook the management of the 1st execution and that the same under the care and management of the said Taylor's agent was unduly served and unfairly executed, but the county court refused to admit the proof.

85. Also reported in 1 Va. (1 Wash.) 92 (1792); later proceedings are reported *sub. nom.* Hendricks v. Dundass, *infra* note 133 and accompanying text and in 2 Va. (2 Wash.) 50 (1795).

86. 12 HENING'S STAT. 458, 459.

[general rule]

The court directed an entry to be made of the argument of a cause or of a continuance of the argument from day to day, whether any other entry was made in any other case or not.

Verell v. Coleman⁸⁷

[Default judgment]

Coleman sued Verell in the county court of Dinwiddie and after the suit was at issue Verell was delivered up by his special bail and obtained a writ of habeas corpus from the superior court upon which the sheriff returned the cause of detention. Coleman filed a new declaration in the district court and took a common order which was confirmed and judgment became final for want of the appearance of Verell, after the confirmation of the common order a copy of the proceedings of the county court was filed with the district clerk, to this judgment a supersedeas was awarded. The court here was of opinion that the habeas corpus suspended the proceedings in the court below; that the proceedings in the court above may be de novo or a certiorari may be awarded to bring up the record; that as the said Verell the defendant below moved the suit it was his business to have attended to it and not having done so he must submit to the consequences and therefore the proceedings de novo in the district court being right and no error in the judgment by default the same was affirmed.

Hubbard v. Blow &c.⁸⁸

[Recovery limited by pleadings]

Original suit brought on a note of hand for £319.8.7 with interest the declaration stated the sum right but omitted that part of the note relating to interest. The defendant without oyer pleaded payment and afterwards withdrew his plea and suffered judgment by non sum informatus which was entered for principal with interest as expressed in the note and then appealed to the district court of Prince Edward in which court the county court's judgment was affirmed; upon the appeal to the Court of Appeals both judgments were reversed and judgment entered according to the demand in the declaration without interest.

87. Also reported in 8 Va. (4 Call) 230 (1793).

88. Also reported in 1 Va. (1 Wash.) 70 (1792) and in 8 Va. (4 Call) 224 (1792).

William Thompson v. Davenports⁸⁹

One David Davenport was a defendant below with the appellant Thompson but did not join in the prayer for appeal the clerk on recording the order made on the hearing applied to the court to know whether said D. Davenport's name should be inserted as party appellant or not and the court directed his name to be omitted as he did not appeal nor bring his case before them Oct. 16th 1792.

Ross &c. v. Poythress⁹⁰

An appeal from a judgment of Petersburg district court given for the appellee in a suit brought by the appellants against the appellee upon a prison bounds bond on the following verdict "We find for the plaintiffs and do assess their damages to £736.16.8 but if in the opinion of the opinion [sic] of the court a subpoena of injunction issued from the High Court of Chancery and delivered to the sheriff having the defendant Lacey in custody and served on the plaintiffs attorney whereby the judgment on which the defendant was confined was enjoined was a sufficient authority to the sheriff to discharge him from custody under that execution then we find for the defendant." The court being unanimously of opinion that an injunction after a *capias ad satisfaciendum* executed does discharge the body out of custody affirmed the judgment of the district court. The court seemed to think in this case that the security for the bounds could not be responsible as it appears by the jury's finding that the defendant was discharged by the sheriff who if he had not been justified by the injunction would have been liable for a voluntary escape.

Redford v. Wiseman

A new appeal to this term. The appellee this day made application to the court to affirm the judgment alleging as the only cause for trying the appeal at the first term, that the appeal was merely for sake of delay and that he had given notice which was produced with an affidavit thereto that he would this day move this court for an affirmance but the court refused to take the cause up at this term because it was not one of those causes which from the nature or circumstances of them required a speedy decision as for instance concerning a will or mill or similar to *Groves & Graves*⁹¹ where the appellee was in confinement under a judgment the propriety of which was disputed on the appeal.

89. Also reported in 1 Va. (1 Wash.) 125 (1792).

90. Also reported in 1 Va. (1 Wash.) 120 (1792).

91. 1 Va. (1 Wash.) 1 (1790).

Keel &c. v. Herbert's exor.⁹²

In the lifetime of Herbert the plaintiffs sued out their writ of supersedeas which after it went from the office had the word "Executor" interlined after the word Herbert to whom notice was to be given but by whom or whether before or after the service of was not known. At the last term the circumstances above being made known on the motion of the plaintiffs a new writ of supersedeas was awarded against the executor of the defendant in the first writ as a continuing process but the court having now considered the propriety of issuing a new writ quashed it as being improper and awarded a scire facias to hear error as a proper writ.

Bird v. Wallace, Johnson and Muier

Appeal from a judgment affirming a judgment rendered on an assumpsit for sterling money damages. The appellants attorney acknowledged there was no error but after the judgment of affirmance here was entered he supposed that the damages ought to have been in current money and applied to the court for their opinion on that point. They said that as the account arose on a sterling money contract the judgment was right and that the damages in actions on the case ought to be laid in sterling money if the contract was payable in it.

Thompson & al. exors. v. Jett⁹³

Upon the quashing of this supersedeas because the plaintiffs had abandoned their suit by submitting to the nonsuit in the district court the court awarded costs against them on a motion for that purpose as they were suing in the original suit on an assumpsit made to themselves they directed in this case that no certificate should be made of record to the district court.

<See Carr exor of Carr v. Anderson, April 1808.⁹⁴ The question whether an absolute judgment for costs, or one against testator's goods if sufficient if not was settled by the court after consideration.>

92. Earlier proceedings in this case are reported *supra* note 71 and accompanying text; this stage is also reported in 1 Va. (1 Wash.) 138 (1792); later proceedings are reported in 1 Va. (1 Wash.) 203 (1793) and *infra* notes 95 & 111 and accompanying text.

93. Also reported *sub nom.* Champ v. Jett, 1 Va. (1 Wash.) 138 (1792); further proceedings are reported *infra* note 103 and accompanying text, *sub nom.* Thornton v. Jett (1793).

94. 12 Va. (2 Hen. & M.) 361 at 369, 370 (1808) which quotes from the record of Thornton v. Jett, *infra* note 103.

April term 1793

Keel &c. v. Herbert⁹⁵

April Court 1793. The damages assessed being larger than those laid in the declaration the defendant acknowledged error and judgment reversed, and the court then directed the verdict to be set aside and the cause sent back and referred to, to reverse the proceedings in toto.

<The true name of the case is Blodget v. Brown et al. 12 April 1793.⁹⁶>

McGuire v. Parker's exors.

An appeal granted at the chancery term in September 1792 on bond being given by the first day of the then next chancery term which sat on the 1st day of March last. The court directed this cause to be put on the docket as a new one to this term considering the last October term which intervened between the granting the appeal and giving bond not as the term to which the appeal was granted.

Daniel v. Robinsons exor. of Robinson⁹⁷

[Revival of appeal by appellee]

The appellee being deceased her executors came into court and moving the court that the appeal might be revived in their names against the appellants who made default and the cause now heard it was suggested that a writ of scire facias ought to issue to warn the appellants but the court said that the appeal might be revived without and heard immediately it being the business of the appellants to follow their cause. Judgment affirmed.

Garland v. Atkinson

[Record on appeal]

April 12th 1793. On opening the record in this cause the appellee's counsel discovered that the forthcoming bond was not in the record and applied to the court to know whether it was necessary or not and two of the judges being of different opinions the president thought it would be the better way to take out a certiorari to certify the diminution but the court afterwards said that the appellee might without a certiorari get a fuller record from

95. Also reported in 1 Va. (1 Wash.) 203 (1793); earlier proceedings are reported *supra* notes 71 & 92 and accompanying text and in 1 Va. (1 Wash.) 138 (1792); later proceedings are reported *infra* note 111 and accompanying text.

96. This last comment was written by William Green.

97. Also reported in 1 Va. (1 Wash.) 154 (1793).

the clerk and file in lieu of the present one which advice was pursued and the cause left open for such record to be produced. N.B. the appellants made default.

White v. Johnson⁹⁸

[Failure to require bail; deputy sheriffs]

Johnson brought a suit in the general court against one Watson and put the writ without directing it to the sheriff into the hands of the plaintiff White who served it on Watson without taking bail and returned it executed adding to the end of his name the letters "DS" omitting the name of his principal. The defendant Watson failing to appear a cognovit was entered and afterwards affirmed against him and the plaintiff White as deputy sheriff of [____]⁹⁹ County; upon the execution of the writ of inquiry judgment was entered against Watson and said White as deputy sheriff of Louisa County; to this judgment White obtained a supersedeas and objected among other things that there was no law authorizing a judgment in such case against a deputy sheriff the court said that by an act¹⁰⁰ passed in 1763 (until which time the deputy sheriffs here were in the same situation with those in England) a remedy was first given by motion against a deputy sheriff for money received by execution only in the first instance in favor of the creditor, or if he proceeded against the high sheriff then in the second instance, to such high sheriff and by the same law the deputy sheriff was directed to put his own name as well as that of his principal to all mesne process executed by him but if he failed to do so that there was no law authorizing a judgment on such mesne process against him they said the practice in the General Court before [the] war and since was to proceed in such cases against the deputy sheriff but that such practice was not warranted by any law and therefore the judgment and all the proceedings subsequent to the declaration were set aside and the cause sent back to the General Court to be proceeded in anew on the sheriff's return. After the rising of the court this day Mr. Pendleton being asked told me that the proceedings were to be carried on hereafter against the defendant and high sheriff whose name the party was to let me know and not against the deputy as the sheriff and that the court thought that the writ notwithstanding it was not directed was properly and regularly served.

98. Also reported in 1 Va. (1 Wash.) 159 (1793).

99. Left blank in the manuscript.

100. 7 HENING'S STAT. 648, 649.

Banister's exors. v. Shore's admr.¹⁰¹

[Costs in equity]

This suit was brought by the appellee as administrator of his wife the daughter of the appellant's testator for the recovery of the alleged marriage portion of the daughter for which a decree was obtained in the court of chancery; but upon an appeal to this court the decree was reversed and the bill dismissed but without costs either on the reversal or dismissal by the particular direction of the court who said that no costs ought to be paid by the appellee as the suit was brought for the recovery of a claim supposed to be due to the intestate.

Reynolds v. Walter's admr.¹⁰²

Directed by the president that no costs on the reversal be awarded against the appellee for reason mentioned in the above note and this direction was before signing the orders on being mentioned to the court approved by them.

Thornton's exors. v. Jett¹⁰³

The award of costs in this suit at the last court being against the testator's estate if sufficient &c. the clerk refused to tax a lawyer's fee and application being now made to the court to direct the fee to be taxed it was refused by the court whose opinions were as follow. Mr. Mercer was for taxing it, Mr. Lyons would have been for taxing it also but thought the entry which implied that the suit was on a contract with the testator made the taxing it improper, Mr. Pendleton was against the motion because he thought that the executors suing on an assumpsit made to them as executors ought not to pay costs more than executors suing on an assumpsit made to the testator but on this point both Mr. Mercer and Mr. Lyons differed from him.

Williams & Roy exors. of Corrie v. Roane executor of Campbell¹⁰⁴

[Objection to process; bail]

A writ issued out of the General Court by the appellants versus Campbell in case without any endorsement of the cause of action made thereon

101. Also reported in 1 Va. (1 Wash.) 173 (1793).

102. Also reported *sub nom.* Reynolds v. Waller, 1 Va. (1 Wash.) 164 (1793).

103. Earlier proceedings are reported *supra* note 93 and accompanying text, *sub nom.* Thompson v. Jett and in 1 Va. (1 Wash.) 138 (1792).

104. Also reported in 1 Va. (1 Wash.) 153 (1793).

which the sheriff executed and took appearance bail. A common order was entered against the defendant and sheriff for want of a copy of the bail bond and the order confirmed and a writ of enquiry awarded and in this situation the said suit which the declaration showed was in [_____] ¹⁰⁵ was sent to the district court where the defendant appeared by attorney at April court 1790 and then consented that the suit should not abate and a commission was awarded the defendant; afterwards at April 1791 the writ of enquiry not set aside on the defendant's motion the suit was dismissed with costs "for want of endorsement of the cause of action on the writ" and the appeal being reversed in the name of Campbell exor. "The court was of opinion that the court below could on a motion made bih [?] proper time inspect the writ and dismiss the suit without plea in abatement or jury, but that as to the defendant himself the motion was too late; he might have made it during the General Court term next after the judgment confessed in the office, but not after and that if he was not precluded by that omission he would have been so by his appearance afterwards in the district court and not making his objection then. As to the sheriff he was not obliged to take bail and there was no pretence to enter judgment against him either for want of bail bond or for insufficiency of bail of this judgment it does not appear that he had notice but might conclude the contrary by hearing that the defendant had appeared and that the suit was going on between the parties this being disclosed before executing the writ of enquiry the court ought to have set aside the judgment as to the sheriff. They might also have set it aside as to the defendant if moved for without bail on his pleading to issue reversed with costs with direction to the court to set aside judgment as to the sheriff and proceed to execute the writ of enquiry as to the defendant unless they shall move to set aside the office judgment as to the testator which they are to do without special bail plead to issue and proceed to trial immediately without delay to the plaintiffs on that account.

The court said that by the law of 1753¹⁰⁶ the sheriff in cases where bail was not requirable by law on serving a writ was to take the endorsement of an attorney but by this the sheriff was in a difficulty[?] and might do an injury to plaintiff or defendant by a mistake in his judgment; therefore, in the act of 1787¹⁰⁷ the actions in which bail shall be required shall be described in which trover or any action on the case is not included unless a judge shall certify it to be so also those in which bail shall not be required

105. Left blank in the manuscript.

106. 6 HENING'S STAT. 330, 331.

107. Either the Act of 1777, 9 HENING'S STAT. 404, or the Act of 1788, 12 HENING'S STAT. 740.

and as a direction to the sheriff whether bail is to be demanded every plaintiff on pain of having his suit dismissed shall endorse on the writ the true species of action.

Mr. Pendleton informed me that in actions of debt if the causes of action were not endorsed on the writs proceedings were not to be had against the sheriffs.

Wilson v. Keeling¹⁰⁸

[Minutes]

October 1793. Was the only cause heard on the 17th; after the cause was opened Mr. Mercer declined to sit in it and directed himself to be entered absent. At the reading of the orders next day it did not appear that he had been present at all in court that day and on that circumstance being mentioned it was proposed that his name should be entered previous to the adjourning order; he said he was satisfied for the present with the orders and entries but thought that the record ought to show things as they really were and that he ought first to have been entered present and then immediately absent previous to the affirmance in the cause and to this the court acquiesced; see proceedings of the 18th for entries agreeably to the above note. Query if he should not also had he been entered absent before affirmance have been entered present after it and before adjournment? Yes. See proceedings of 18th.

Hawkins's exor. v. Beverley¹⁰⁹

[Executor to pay interest and costs]

In this cause an objection being made to that part of the judgment of the district court which directs the damages on affirmance and the costs to be levied in case of a deficiency of assets of the appellant's own goods the court enquired into the practice of the general court before the war and since and of this court in similar cases and finding them all to agree with the judgment now appealed from affirmed the said judgment with damages to be levied according to the directions of the [_____].¹¹⁰

[general rule]

On every dismissal of an appeal whether with or without costs the court directed that an order be made to certify such dismissal to the court from

108. This case is reported in 1 Va. (1 Wash.) 194 (1793).

109. Also reported *sub nom.* Hawkin's ex'rs. v. Berkley, 1 Va. (1 Wash.) 204 (1793).

110. Left blank in the manuscript.

whence the appeal came. See proceedings of 19th October 1793 for cases applying to the direction of which the court on reading the orders approved.

Keel &c. v. Herbert's extrx.¹¹¹

[Executor not to pay costs]

The judgment of the borough court of Norfolk and of Suffolk district court were reversed and a new trial awarded. The costs in this case were directed to be levied of the goods of the testator only who was plaintiff in the original suit and who died after the supersedeas issued to the judgment of the district court and not in case of a deficiency of the assets of the executor's goods who was forced into this court by scire facias came in not voluntarily but through necessity.

October 31st 1793. The court directed the reasons to be entered why there was no court on the 3 preceeding days on which a sufficient number of judges did not attend and no adjournment was entered on record; see entry.

Ronald v. Harmanson &c.¹¹²

[Supersedeas; scire facias]

At October term 1792 the first writ of supersedeas which appeared to have been served after the return day was past was quashed and another writ of supersedeas awarded after consideration. At this term the administrator of the plaintiff who lately died moved the court for a writ of scire facias to hear errors which was directed to issue.

Field &c. v. Spotswood¹¹³

[Appeals]

The judgment appealed from was entered in the district court the 6th day of October 1792 and the record was returned the 18th June 1793. The clerk supposing that two terms had elapsed refused to docket the suit but the court on motion in my absence directed it to be docketed and considered this second term as the Court of Appeals met in October 1792 before the Fredericksburg district court adjourned. By information of Mr. Rob.

111. Earlier proceedings are reported *supra* notes 71, 92 & 95 and accompanying text and in 1 Va. (1 Wash.) 138, 203 (1792, 1793).

112. Later proceedings are reported *infra* note 117 and accompanying text and *sub nom.* Bently ex'r. of Ronald v. Harmanson's ex'rs., 1 Va. (1 Wash.) 273 (1794).

113. Later proceedings are reported in 1 Va. (1 Wash.) 280 (1794).

Jordan v. Neilson¹¹⁴

The court awarded a new writ of supersedeas after being informed by Mr. Marshall that one term (to wit April last to which the first writ was returnable) has passed by without any process being awarded, but no argument was had or opinion given on the propriety of the awarding it.

Byrd v. Cocke¹¹⁵

The president was applied to respecting the manner of entering the judgment as to the costs as well as the final part respecting district court's judgment and on being informed of the direction in Keel against Herbert¹¹⁶ approved of the entry in this case.

April Court 1794

Ronald's admr. v. Harmansons¹¹⁷

[Scire facias against administrator]

April 11th 1794. The first writ of supersedeas issued by Ronald was formerly adjudged improperly served and a new one awarded which was not returned at all afterwards Ronald the plaintiff died a writ of scire facias was awarded his administrator at the last term and returned to this term executed but the defendants did not now nor had they ever before appeared. The court adhered to the rule established in the case of Keel &c. against Herbert's exx.¹¹⁸ at April Court 1793 considering the present as a new cause which was not to be tried at this term but by consent; there was this difference between the two cases: in Keel's the scire facias was against the executor at the plaintiff's motion, in the other in favor of the plaintiff's administrator on his motion. Query if the defendants Harmansons had ever appeared before the issuing of the scire facias whether such appearance would not have so altered the rule as that the cause might have been tried at the court to which the scire facias was returnable without consent? <No, see Oct. 1808.>

114. Later proceedings are reported in 2 Va. (2 Wash.) 164 (1795).

115. Earlier proceedings are reported in 1 Va. (1 Wash.) 232 (1793).

116. *Supra* note 111 and accompanying text, 1 Va. (1 Wash.) 138, 203 (1792, 1793).

117. Earlier proceedings are reported *supra* note 112 and accompanying text; later proceedings are *sub nom.* Ronald v. Harmanson, 1 Va. (1 Wash.) 273 (1794).

118. *Supra* note 111 and accompanying text.

Foushee v. Lea¹¹⁹

[Scire facias against unknown executor]

April 11th 1794. The appellee being dead and his executor not known the court on the appellant's motion awarded a scire facias against the executors. Mr. Lyons observed that upon the clerk's being furnished with their names he might insert them in the writ.

Wallace v. Smith & Moreton¹²⁰

[Relief in equity against surprise]

Case. A writ was issued in the General Court by Smith and Moreton against B. and W. Piper one of whom was arrested by Wallace's deputy but no appearance bail being taken by him a common order was confirmed against the defendant arrested and Wallace; at the subsequent court the plea was entered as put in by Wallace the sheriff and judgment was afterwards obtained in Fredericksburg district court against him and the defendant arrested; to this judgment Wallace issued a supersedeas from the Court of Appeals a judgment of affirmance was given the court seeing nothing erroneous in the record. Wallace then obtained an injunction to stay the execution as to him on the said judgment and the evidence showed that a bail piece in the suit at law had been offered to the clerk at the rules which being thought by him deficient was not received and a common order confirmed against the defendant arrested and the said Wallace the sheriff and that at the subsequent term the said bail piece was admitted and received by the plaintiff's attorney and a plea directed to be put in for the defendant himself, but that the clerk not understanding the direction entered it as through mistake as put in by the sheriff. The injunction was made perpetual in chancery and on an appeal from the decree the court here said that Wallace instead of proceeding by supersedeas as above ought to have moved the district court to have rectified the proceedings as being a surprise upon him not having notice of the plea or other proceedings & that it was the province of the said district court upon having the surprise proved to them to have relieved him by setting the matter right but not having done so it properly belonged to the chancery court to relieve against the surprise. Decree affirmed.

119. Later proceedings are reported in 8 Va. (4 Call) 279 (1795).

120. Also reported *sub nom.* Smith & Moreton v. Wallace, 1 Va. (1 Wash.) 254 (1794).

October Court 1794

William Shermer heir, exor., and residuary legatee of Richard Shermer decd. v. Dudley Richardson & al.¹²¹

[Costs]

Before reading the decree of affirmance in which a blank was left as to the costs, Mr. Marshall for the appellees said that they ought to be given against the appellant who was plaintiff in the original suit as he claimed as heir and in his own right as well as executor; but the court directed that costs should not be awarded; Mr. Lyons said that the appellant ought not to pay costs as the claim was for personal estate which would be subject to the payment of the testator's debts.

Burnley v. Lambert¹²²

[Distribution by executor; waste]

Proof of possession of a slave at the time stated in the declaration though prior to the date of writ sufficient to maintain action unless defendant be legally evicted which he ought to show. Legacies delivered by executors before debts paid cannot afterwards be claimed by executors or any other. Executors in such case liable on a devastavit to creditor.

Armistead v. Marks & c.¹²³

[Supersedeas by sheriff]

The court adjudged that the sheriff against whom with another judgment was entered but who was not interested in the merits might obtain and prosecute a writ of supersedeas alone and without the other party to the judgment whom he arrested.

Turner v. Strip¹²⁴

[Validity of deed improperly recorded]

A deed admitted to record without proper proof was not considered as recorded and adjudged to be void as to creditors and subsequent purchasers; but to be a good deed as between the parties and their heirs in this case, no creditors or subsequent purchasers being interested.

121. Also reported *sub nom.* Shermer v. Shermer, 1 Va. (1 Wash.) 266 (1794); earlier proceedings are reported in Wythe 159 (1792).

122. Also reported in 1 Va. (1 Wash.) 308 (1794).

123. Also reported in 1 Va. (1 Wash.) 325 (1794).

124. Also reported *sub nom.* Turner v. Stip, Lee's Reports, *supra* note 64 and accompanying text and 1 Va. (1 Wash.) 319 (1794).

Pleasants & Co. v. Lewis & al.¹²⁵

[Forthcoming bond]

A partial delivery to the sheriff of the property mentioned in a forthcoming bond not a sufficient compliance with the condition and the bond was adjudged forfeited. The sheriff's proceeding to sell the part of property delivered not deemed improper, and it was ordered that the obligation, on the court below rendering a final judgment on the bond, should have a credit for what the sheriff should have raised by such sale.

Bruer v. Tarpley¹²⁶

[Mistake of clerk does not invalidate judgment]

The order setting aside the writ of inquiry was concluded with these "And the order for a writ of inquiry of damages be set aside and thereupon he pleads non assumpsit." The only error alleged was that for want of a formal conclusion of the plea with the addition of "And the plaintiff likewise" there was no issue joined; but the court considered this want of form in making up the issue to be a misprision of the clerk. Judgment affirmed.

Pendleton & al. v. Vandever¹²⁷

[Costs taxed to appellant where error in his favor]

The judgment in this case being for a smaller quantity of land than the appellee was entitled to and the error therefore in favor of the appellant, the court directed the appellant to pay costs here. See *Hite v. Matthews* former court, same case, to be considered as a rule established.

Cosby, Ludoun's Admor. v. Hite¹²⁸

[Amendment of pleadings]

The court determined that upon any amendment of a declaration the defendant has a right and ought to be allowed to put in a new plea, or to demur, without being subject to any creditors previous to being allowed to do so.

125. Also reported in 1 Va. (1 Wash.) 273 (1794).

126. Also reported in 1 Va. (1 Wash.) 363 (1794).

127. Also reported in 1 Va. (1 Wash.) 381 (1794).

128. Also reported in 1 Va. (1 Wash.) 365 (1794).

Walden exor. of Walden v. Payne¹²⁹

[Costs payable out of estate]

Walden the executor died pending the appeal which was revived by consent in the name of John Taylor his executor upon affirmance of the judgment the court directed the damages to be made of the first testator's estate if sufficient, but if not then of the second testator's estate.

Roy v. Garnett¹³⁰

The court directed the costs to be awarded against guardian of the lessors of the appellants as the court below had done.

Brock exor. of Lewis & Beverley Stubblefield v. Philips¹³¹

April 16th 1795. Upon my application Mr. Lyons referred to a former direction of the court which he said directed the decree to be absolute as to the costs. The case he referred to I take to be that of Wilson &c. against Keeling in 93,¹³² the minute of the decree in which shews that such direction was given.

Hendricks &c. v. Dundass¹³³

[Interest; costs]

April 18th 1795. The motion of Dundass to quash an execution against Hendricks &c. was granted by Fairfax Court without costs which upon an appeal of Hendricks &c. was affirmed by Dumfries District Court with damages and costs and this last judgment on their further appeal affirmed here. A question occurred whether so much of the District Court judgment as awarded damages ought not to be reversed but the court adjudged it to be surplussage as there was nothing for damages to run on. Another question occurred whether damages on the District Court costs ought to be awarded by this court. Mr. Pendleton thought they ought; Mr. Roane seemed to think damages ought not to be given unless a "principal sum" as well as costs had been recovered the words of the law giving damages being "principal sum and costs recovered", but the appellee consenting to waive any rights he might have to damages and take his costs only, the court left that question to be determined in some future case.

129. Also reported in 2 Va. (2 Wash.) 1 (1794).

130. Also reported in 2 Va. (2 Wash.) 9 (1794).

131. Also reported in 2 Va. (2 Wash.) 68 (1795).

132. *Supra* note 108 and accompanying text and 1 Va. (1 Wash.) 194 (1793).

133. Also reported in 2 Va. (2 Wash.) 50 (1795); earlier proceedings are reported *supra* note 85 and accompanying text and 1 Va. (1 Wash.) 92 (1792) *sub nom.* Taylor v. Dundass.

Fairfax v. The Commonwealth

The court ruled this cause for trial as coming within a clause of the law concerning escheators, which directs a speedy trial, but said that it had been before determined by the court that appeals granted during the sitting of this court should be considered as new appeals to the next term.

Bernard v. Brewer¹³⁴

< See further >

[Costs]

October 1795. Upon an appeal from a judgment of the District Court of Northumberland affirming an order and judgment of a county court giving leave to build a mill and awarding costs in favor of the petitioner. On a total reversal in this court, the court said that neither party was entitled to costs in the county court and therefore those costs were not awarded to the appellants, on application of the clerk for instruction on that point.

Collins v. Lowry &c.¹³⁵

[Costs]

The appellants failed to appear and the judgment being reserved, the court (on application of the clerk for instruction) directed the judgment to be entered for his costs not to include a lawyer's fee.

Bernard v. Brewer

< see before >

[Drafting of orders]

From what fell from the court at the time they gave judgment in the case of Bernard and Brewer above mentioned, it seems to be the safer way to insert in orders and judgments made on summary proceedings in which notice is required by law that such notice was given and this whether the person to whom notice was given appeared or not.

Wood v. Webb

[Scire facias]

The appellants not appearing and the appellee being dead his adminis-

134. Also reported in 2 Va. (2 Wash.) 76 (1795).

135. Also reported in 2 Va. (2 Wash.) 75 (1795).

tratrix appeared and moved the court to revive the appeal and proceed immediately to hear the cause according to the former practice (see note in case of Daniel against Robinson administratrix¹³⁶ in April 1793) but the court refused to do so saying the case aforesaid which was read to them passed without due consideration and therefore awarded a writ of scire facias. (The case of Daniel against Robinson's administratrix had as much consideration though not by so full a court as this case of Wood against Webb.)

Gordon v. Frazer &c.¹³⁷

[writ of error coram vobis; amendment upon motion]

The appellees obtained a judgment by confession <nil dicit see Washington> in Northumberland District Court which the clerk entered for the principal sum omitting to credit the payments endorsed on the bond <bill penal> and the several warehouses at which the tobacco was payable. To correct these errors the appellees sued out of the said District Court a writ of error coram vobis and the court thereupon reversed the said judgment and gave a new judgment for what was then supposed to be the right balance and inserted the three warehouses mentioned in the bill penal both in the judgment although the declaration was for tobacco generally and in the rule for payment of the principal but omitted a warehouse at which the appellees by their endorsement on the bill witnessed had agreed to add to the others and also omitted the name of the security for appearance against whom the first judgment was entered. This second judgment was adjudged by the court here to be erroneous in leaving out the warehouse mentioned in the endorsement which being witnessed the court considered as part of the bill penal, in giving an over credit to the appellant and awarding costs against him on the writ of error to which he ought not to be subjected as he was no wise in fault the mistakes being the clerks the president directed the judgment to be entered for tobacco generally as demanded by the declaration but in the rule concerning the principal to insert the several warehouses according to the bill penal. The court was of opinion that the error alledged in the first judgment was the misprision of the clerk which might have been amended on motion previous notice thereof being given, with more convenience and less costs than by writ of error which was also proper to correct mistakes of officers as well as errors in fact, that errors of the clerk in business usually left to him which cannot appear officially to the court on reading the orders, the court will correct

136. *Supra* note 97 and accompanying text and 1 Va. (1 Wash.) 154 (1793).

137. Also reported in 2 Va. (2 Wash.) 130 (1795).

if discovered to them if the record furnishes anything to amend by as in this case, the declaration bond and confession of judgment, and that the court can officially correct on reading the orders such things only as have been discussed before them.

Wroe v. Harris¹³⁸

[Deputy sheriffs]

The order of the county court giving leave to build a mill being reversed by the district court because the inquisition was taken by the under sheriff and not the high sheriff the appellant appealed to this court by which the judgment of the district court was reversed and that of the county court affirmed the court being of opinion that the under sheriff may act and administer oaths for the principal in all cases those only excepted which are by law expressly confined to the high sheriff alone.

B. Payne exor. of S. Payne v. T. Ellzy¹³⁹

[Executor not to pay costs]

A judgment was obtained in Fairfax Court by the testator against the appellee from which he appealed to Dumfries District Court and pending the appeal there the said S. Payne died and the appeal was revived in his executor's name afterwards the county court's judgment being reversed the executor appealed to this court but failing to prosecute the appeal was dismissed with costs on application to the court they directed the costs to be levied on the testator's estate only and not in case of deficiency of the executor's estate who was only endeavoring to complete a suit began by his testator and stood in the same situation as if he had been made a party in this court; see *Keel v. Herbert's exor.*¹⁴⁰ If the executor had begun the suit originally in the county court he would not have paid any costs. *Quere?*

Harrison & uxor exor. of Minge v. Field exor. of Field¹⁴¹

[Costs]

The costs on the reversal against the appellee who was originally plaintiff out of the testator's estate only were given by the express direction of

138. Also reported in 2 Va. (2 Wash.) 126 (1795).

139. Also reported in 2 Va. (2 Wash.) 143 (1795).

140. *Supra* note 111.

141. Also reported in 2 Va. (2 Wash.) 136 (1795); earlier proceedings are reported in *Field v. Harrison, Wythe* 273 (1794).

the court by the like direction omitted on dismissing the bill the reason for deviating from the rule respecting executors was not assigned.

Harvie v. Borden¹⁴²

A commission to take the examination of a feme covert with the return is among the exhibits an exception was taken to this commission and return because it did not appear by them that the person to whom the commission was directed and who executed it were justices of the peace but the objection was overruled by the court with an observation that as the law was directory to the clerk and he was bound to direct the commission to justices of the peace they would presume the persons named therein to be so, unless the contrary was proved.

[Drew v. Anderson]

[Judgment presumed to be based on evidence]

Cary Drew petitioned for a writ of supersedeas to a judgment of the Prince Edward District Court affirming a judgment obtained against him as deputy sheriff by Thomas Anderson, the high sheriff, in Buckingham County Court on a motion for his proportion of the taxes for 1793 collected in the said county and among other errors alledged that the evidence by which the sum was ascertained before the county court did not appear in the record as in cases of that nature where the court was to judge without the intervention of a jury it ought but the court said that as in a jury cause where the evidence does not appear in the record unless introduced by bill of exceptions every thing is supposed to be proved to establish the judgment so in this case the court would have presumed the evidence to have been sufficient as the petitioner whose business it was to introduce it into the record if he had intended to avail himself of it had failed to do so, and denied the petition.

April Court 1797.

Meade v. Jones

[Appeal bonds]

A petition for an appeal from a decree of the High Court of Chancery dismissing the petitioner's bill of injunction with costs. The petition was granted and the court directed the bond to be taken in a penalty double the amount of the judgment enjoined, but being informed that the chancel-

142. Also reported in 2 Va. (2 Wash.) 156 (1795).

lor in granting appeals in similar cases only took the bond to cover the costs the court directed the bond in this case to be taken in the penalty of £20 only. Upon an inquiry by the clerk the court also directed that whenever the party praying an appeal did not enter into bond himself and a responsible person gave it, that the responsible person as well as a party was to give security.

Hudnall's Admx. v. Gordon

[Jury discharged before verdict]

Gordon having instituted a suit against the appellants in the Court of Northumberland County and the suit being at issue a jury was sworn and sent out of court to consult of their verdict but before they returned one and before any other entry was made in the cause the court adjourned till the court in course. At the next court a jury was sworn and a verdict brought in for the defendants from which the plaintiff appealed to the district court. The district court reversed the judgment of the county court and sent the same back and from this judgment the appellants appealed to this court, upon the trial in this court the counsel for Gordon alledged as error in the county court its having sworn a second jury before the first was withdrawn or discharged but the court here reversed the judgment of the district court and affirmed the judgment of the county court.

Mills v. Black¹⁴³

[Time for appeal]

May 1st 1798. The appellant being called and not appearing the appeal was on the appellee's motion ordered to be docketted. Afterwards on the 16th May the court was of "opinion that in this case, in which the transcript of the record was not sent to this court within two terms after the appeal was granted the court under the act of assembly¹⁴⁴ could proceed no further on the motion of the appellee than to a dismissal of the appeal with costs" and therefore the order of the 1st May was set aside and the appeal dismissed.

[general rule]

October 12th 1798. The President informed the gentlemen of the bar, that the court would hear no cause out of term even by consent except such causes as are brought here for delay which may be taken up (but in course)

143. Also reported in 5 Va. (1 Call) 241 (1798).

144. REVISED CODE OF 1792, ch. 63, § 17 (1792).

when the court is at leisure from other business; but that this rule is not to operate against the trial of a cause out of course for special reasons.

Craig v. Craig¹⁴⁵

April 11th 1799. Adjudged that a bond with a condition for performance of covenants was not assignable before the law lately passed authorizing it.

[Hausmitt v. Bullitt's exors.]¹⁴⁶

[Supersedeas]

Hausmitt's petition for a supersedeas to a judgment recovered in Dumfries District Court against him by Bullitt's executors denied; the errors being in form and in favor of petitioners; one of the errors was that the plaintiffs declared for a debt without interest when the declaration showed in a subsequent part that the speciality carried interest. The judgment was for the debt declared for with damages which appears to have been given in lieu of interest.

Field v. Culbreath¹⁴⁷

The clerk added to the judgment in the record that the "defendant prayed an appeal to the Court of Appeals" not stating that the appeal was allowed or that bond was given to prosecute. On a doubt of the clerk as to the propriety of docketing it the court consisting of all but Mr. Pendleton directed it to be done.

Jones & al. v. Williams¹⁴⁸

[Appeals]

Mr. Wickham for appellee wished to object to the decree but doubted whether he could do so as he had not appealed. Before he began his argument he mentioned his wish and doubt to the court and Mr. Pendleton answered that the court has always in such cases considered the whole case before them on the record and would correct what was wrong as to either party, to which the other judges objected not.

145. Also reported in 5 Va. (1 Call) 483 (1799).

146. Also reported *sub nom.* Hammitt v. Bullett, 5 Va. (1 Call) 567 (1799).

147. Later proceedings reported in 6 Va. (2 Call) 547 (1801).

148. Also reported in 6 Va. (2 Call) 102 (1799).

Fox's v. Grigory &c.¹⁴⁹

[Pleadings; infants]

A suit was brought by the appellees in Williamsburg District Court against John Fox heir of John Fox, Anne Fox, Henry Fox, and two other children devisees of John Fox, against all but Henry who was not arrested, a judgment was entered at the rules which was set aside by a plea of payment by the ancestor <& testator [?]> put in by attorney as well for Henry as for the others. Afterwards on the plaintiff's motion a guardian was appointed to the defendant Henry who then for the first time was known to be an infant and the plea as to him withdrawn and leave was also given the other defendants to plead a further plea denying assets, and for further proceedings against all the defendants the suit was sent to rules. A rule was given to plead, but after no further plea being filed a judgment by nil dicit was entered against the whole. To this judgment John the heir being dead the other parties obtained a supersedeas on which the Court of Appeals reversed the judgment and remanded the cause for further proceedings to be had, being of opinion "that there was error as to the defendants John, Anne, William, and T. B. Fox in this that their plea of payment not having been waived although they had leave to plead at the rules further matter prescribed by the court the permission was optional in them, and they could not be in default for not availing themselves of it but on failing to file a further plea the cause should have been tried in court upon the former issue joined and that there is also error in the said judgment as to the other defendant Henry Fox who being an infant is not stated in the record to have appeared by his guardian to defend the suit nor does it appear that the guardian appointed by the court on the motion of the appellees ever acted under or even had notice of such appointment and therefore instead of the judgment by default entered at the rules against the infant a motion should have been made to the court for proceedings against that guardian or the appointment of another for defence." Mr. Pendleton said that the judgment must be reversed as to John, although no party to the supersedeas, the whole record being before the court and the judgment being erroneous as to him as well as the other defendants. The directions for further proceedings was made general, that the court below might do what was right with respect to all the defendants.

[Noel v. Upshaw]¹⁵⁰

October 16th. In answer to Mr. Warden's further observation to induce

149. Also reported in 6 Va. (2 Call) 1 (1799) *sub nom.* Fox v. Cosby.

150. See also *infra* note 152 and accompanying text.

the court to revise an opinion of yesterday denying Noel's petition for a supersedeas against Upshaw Mr. Pendleton said that the court do consider the stay of execution for 11 months by consent as a release of errors.

See form of entry.

Williams & al. v. Barbour

[Mistake of date on bond]

Appeal from a judgment on forthcoming bond dated 13th March 1798 taken by virtue of an execution dated the "29th December 1798 in the 22nd year of the Commonwealth" the bond recited the execution as dated the 29th December 1797. Exceptions were filed. The Court of Appeals affirmed the judgment being of opinion that the execution was dated in 1797 and the mistake in the year was set right by the addition of the year of the Commonwealth, all the proceedings appearing to have been subsequent to December 29th 1797 and in the 22nd year of the Commonwealth. See copy record filed with opinions.

Porter v. Anderson

[Dockets]

Ordered to be docketed in its proper place to ascertain which I searched for an appeal from the same district court to the same term of this court and placed it after the latter. Mr. Pendleton said it was rightly done.

Selden v. King¹⁵¹

After a special verdict in ejectment the defendant died and a scire facias issued by order of the district court to revive against proper parties against whom subsequent proceedings were had and the suit terminated in their favor. On appeal no objections were made to proceedings and therefore supposed to be right; but cause heard on merits. Judgment for defendants affirmed. Copy scire facias.

Noel v. Upshaw¹⁵²

[Amended declaration does not require a new plea]

The record in the case of Noel's petition against Upshaw for a supersedeas states a declaration and plea with issue and that afterwards by con-

151. Also reported in 6 Va. (2 Call) 72 (1799).

152. See also *supra* note 150 and accompanying text.

sent another declaration was filed to stand as the original declaration but no new plea. It was objected that no issue was made up because a new plea was not filed but the President answered that the consent of the parties that the new declaration should stand as the original made the plea to first declaration stand to second and therefore there was an issue and a new plea not necessary. (On Noel's petition for supersedeas and in answer to Mr. Warden's observations when the court denied the petition, examine and correct statement.)

Cook v. Simms¹⁵³

Declaration in case in county court entered in four counts, pleas to three first replevied to the second plea [____] first count to which the defendant demurred on which judgment was given for plaintiff and a writ of inquiry [ex]ecuted damages assessed and judgment given there[on] no notice being taken of the other three counts [____] the last of which the pleadings did not even [_____].

153. Also reported in 6 Va. (2 Call) 39, 374 (1799, 1800).

