REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME IV.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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1811.

ERRATA.

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

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

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

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

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

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

Wednesday, October 18, 1809.

Quarrier *against* Carter's Representatives.

1. What are the proper grounds for a bill of review. * * See 2 *Hen. & Munf.* p. 591. *note* to the case of *Ellzey* v. *Lane's Executrix.*

2. It is not necessary to state, in a decree in Chancery, that all the preliminary steps towards maturing the cause for hearing were taken; it being intended, where the cause is *set for hearing*, that it was regularly done, unless the party attempting to impugn the decree shew the contrary.

THIS was an appeal from an order of the late Chancellor of the *Richmond* District, (Mr. *Wythe*,) rejecting the application of the appellant for a bill of review. The ground on which the applicant rested his claim to a bill of review, in the Court of Chancery, was, that the cause had been taken up and decided in the absence of his counsel, and that he had been consequently surprised in the hearing. Another point was added by the counsel, *in this Court*, viz. "that the decree which the bill of review sought to "reverse was erroneous, because the original cause was "not set for hearing according to the act of Assembly."

The *Attorney General* and *Call*, for the appellant, contended, that, although the last point was not stated in the bill of review, as presented to the Chancellor, yet it was not too late for this Court to notice it. Where it appears from the whole of the proceedings, that there are sufficient grounds for a bill of review, it ought to be allowed, though *some* of the grounds may not be explicitly stated: and they likened it to the case of a *supersedeas*, where the Court will inspect the *whole record*, and reverse the judgment, if there be error, although the particular error on which the opinion of the Court is founded, may not have been stated in the petition for the *supersedeas*.

Williams, *contra*, said, that it was essential to a bill of review, that it state the former bill, and the proceedings thereon; the decree and the *particular point* in which the party exhibiting the bill conceives himself aggrieved by that decree; and the ground of law, or new matter discovered upon which he seeks to impeach it. He cited *Mitf. Plead.* 80. and 4 *Vin.* 414. pl. 5.

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Judge ROANE. A preliminary question arises in this cause, from the additional point stated by the appellant's counsel, namely, "that the decree sought to be reversed "by the bill of review was erroneous, because the case "was not set for a hearing, according to the act of As-"sembly."

This question again subdivides itself into two points of view; viz. 1. Whether this alleged irregularity is, under any circumstances, a ground for a bill of review; and, 2. If so, whether in this case it can be set up as such ground, under the particular frame of the bill which has been rejected, in the case before us.

As to the first point of view, it is clear, that a bill of review lies only for new matter discovered since the decree, or for errors apparent on the face of the decree.

When a bill of review is brought for error apparent on the face of the decree, the constant method is, (in *England*,) for the defendant to put in a plea *of the decree*, and a demurrer against opening the enrolment.(*a*) On this plea, of the decree, (and it only,) and demurrer, the Court judges whether there are any grounds for opening the enrolment; and the overruling the demurrer is *there* considered as giving leave to file the bill.(*b*) Our practice, in this particular, is variant; as stated by a note of the *Reporters* in 2 *Hen.* & *Munf.* 591. *Ellzey* v. *Lane's Executrix*, to which I beg leave to refer. That variation, however, does not change the *principle*, as deducible from the *English* cases. In *England*, the plea is of the *decree* itself, (and of it only, not of extraneous matters in relation to the progress of the cause,) accompanied by a demurrer objecting to opening the enrolment, on the ground that there is no error in the *decree* thus pleaded. This brings us to inquire, whether the matter now objected, in this additional point, is *properly to be considered as a part of the decree*, or ought regularly to have been made a part thereof; or, in other words, whether the decree is erroneous in not having stated on its-face, that all the requi-

(*a*) 2 *Atk.* 584. *Gould* v. *Tancred.*

(*b*) *Ib.*

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sitions of the law for maturing a cause for trial, had been complied with.

In 1 *Harrison's Ch. Prac.* 108. (old edit.) it is said, that, in drawing the decree, it is not held to be sufficient to recite therein the bill and answer, and then add that, upon reading the proofs, and *hearing what was alleged on either side*, it was decreed so and so; but that the *facts* which were *proved and allowed by the Court to be proved*, must be particularly mentioned in the decree. It is nowhere said, however, that it is necessary, or proper, to insert in a decree, that all the previous and preliminary measures necessary to prepare a cause for hearing had been complied with, and therefore the omission of these in the decree would be no objection thereto. In the same book, p 110. the *form* of a decree is given us, in which the substance of the *proofs* is stated in the decree, together with that of the *bill* and *answer;* but no other matters of the character last mentioned are stated therein.

If, then, circumstances of this last description form, *properly*, no part of the *decree* of the Court, even in *England*, where the decrees are drawn very particularly and minutely by the register; and a bill of review of the kind we are now considering is confined to matters of error apparent on the face of the decree itself; an omission similar to that now alleged is no ground for a bill of review; for such circumstances neither *do* appear in practice, nor ought they properly to appear on the face of the decree itself.

We are told, in 1 *Harr. Ch. Prac.* 290. that a bill of review is in nature of a writ of error at common law. In a writ of error it is held, that a man shall never assign that for error which he might have pleaded in *abatement*, for it shall be accounted his folly to have neglected the proper time of taking this exception.(*a*) Again, it is said, that, if there be an omission of any writ or process, &c. yet, if judgment be not given thereupon, but the party appears and pleads to issue, and judgment is given on the verdict, this is not erroneous, because he had not taken advantage of this before pleading to issue.(*b*)

(*a*) 2 *Bac.* 492. *Gwil.* edit.

(*b*) *Ib.*

In the case before us, it is proved, on the contrary, by Mr. *M'Craw*, that the cause was *set for hearing*, which we are to intend was regularly done, by consent or otherwise, as the appellant has not shewn the contrary; especially since the first answer of the *only acting executor* was sworn to near five years before the decree was pronounced, and therefore there was sufficient time for that purpose. The analogy from these cases in relation to writs of error, shews, that, whatever remedy the party may have had in proper time, (or may now have,) for the *alleged* irregularity in carrying the cause to trial, such irregularity is not a proper ground for a bill of review.

This view of the case supersedes the necessity of considering the second question; namely, whether this particular ground of exception, if material, ought to have been distinctly assigned and pointed out in the bill of review; as to which I give no opinion, especially as the Court is so thin at present. My opinion, therefore, on this preliminary question is, that the additional point made by the appellant's counsel is not competent to warrant the bill of review, nor can be relied on in support thereof. With respect to the absence of counsel being a just ground for a bill of review, to say nothing of the frauds which would be produced thereby, this ground is interdicted by the criterion I have already mentioned, namely, that bills of review must be either for *new* matter recently discovered, or errors apparent on the face of the decree. That criterion explodes the pretension in question, as a ground for a bill of review.

Judge TUCKER concurred.

By the Court, (Judge FLEMING not sitting in the cause,) the order of the Chancellor disallowing a bill of review, was AFFIRMED.