REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

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

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. Volume II. By William W. Hening and Wil- "liam Munford."

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

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

MARCH, 1808.

Thursday, March 10.

Woodson and Royster *against* Barrett and Company.

M. having won money of W. at cards, and J. having won the same sum of M. the bond of W. given at the request of M. to J. for that sum is void by the act to prevent unlawful gaming.

THIS was a joint bill of injunction presented by *Joseph Woodson* and *William Royster* to the late Judge of the High Court of Chancery; the case stated in which was, in substance, the following:

Sometime in the year 1783, *Woodson* gamed at cards with *Thomas Miller*, and lost to him the sum of 1400*l.* in officers' certificates; and *Miller*, having about the same time lost at *gaming* to a certain *John Jouitt*, junior, nearly the same sum, requested *Woodson* to pay the aforesaid sum in certificates to *Jouitt*. Some short time afterwards, they were all three together, and *Jouitt* was expressly told, that the debt from *Woodson* to *Miller* was for certificates lost at *gaming*. It was then proposed by *Miller*, that *Woodson* should, out of that debt, pay the *gaming* debt which *Miller* owed to *Jouitt*; whereupon *Woodson* agreed to become the paymaster to *Jouitt* in *gaming bonds*. He gave his own bond for 1400*l.* officers' certificates, payable the 1st of *May*, 1784; but *Jouitt* agreed to deliver it up to him in exchange for *other gaming bonds*; and a day was appointed for a meeting between them to effect the exchange. Previously, however, to that day, *Jouitt* received from him an order on General *Charles Scott* for 600*l.* (being also a *gaming debt*, known by *Jouitt* to be such,) for the amount of which a credit was indorsed on the bond. At the day appointed, *John Barrett* (instead of *Jouitt*) met *Woodson*, and presented the bond, which *Jouitt* had assigned to *John Barrett* and Company. *Woodson* immediately offered him *gaming bonds* in exchange; alleging it was a part of his bargain with *Jouitt* that such an exchange should be made; but *Barrett* refused to take them, and brought suit against him in *Henrico* County Court. "From the embarrassed

The *assignee* of a bond for money won at gaming cannot recover, though the assignment was for a valuable consideration, and though he had no notice of the *origin* of the bond; unless the obligor, before the assignment, induce him to take the bond by promising to pay him the money.

In such case, a judgment having been obtained against the obligor, a writ of *elegit* issued against his lands, a suit brought by the assignee against the sheriff for an error committed in executing such writ, and a judgment obtained; a court of equity will still relieve the obligor and the sheriff also, on the ground of the turpitude of the original transaction.

" situation of his affairs, he was unable to give such in- " structions to his attorney, in defending the said suit, as " would have defeated the plaintiffs," who obtained a judgment, and issued a writ of *elegit* against his lands, directed to the sheriff of *Goochland*, which writ came to the hands of *William Royster*, (who was then sheriff,) but was defectively executed by *William Royster, jun.* one of his deputies; in consequence whereof a suit was brought against *him* by *John Barrett* and Company in the *Richmond* District Court. " His witnesses were absent on the trial," and damages were recovered against him to the amount of 446*l.* 10*s.* 10*d.* He alleged that the whole of *Woodson's* land not exceeding 360 acres, and there being no personal estate taken under the *elegit*, no greater quantity of the said land could be assigned to *Barrett* and Company than about 180 acres, the value of which did not exceed four dollars per acre, that is to say, 216*l.* for the said moiety. The bill prayed an injunction to the last-mentioned judgment, for the amount of which, or for a part whereof, *Woodson* was advised that his own person and personal estate might ultimately become liable to *Royster*.

The answer of *John Barrett*, (who alone appeared on behalf of *John Barrett* and Company,) denied that he had any information at the time of the assignment, that the bond was given for *gaming;* alleging that *Jouitt* informed him that he had sold horses to some person, and had agreed to receive payment in the hands of *Woodson*, and that the bond was given on *that account*. He also stated, that, shortly after the assignment, *Woodson* was informed of it, and several applications were made to him for payment, " at none of which did he mention that the bond was " founded on a gaming consideration, but said he was en- " titled to some credits for payments made in part, but did " not shew that he had paid a single shilling, or any other " sum, except what was entered on the back of the bond;" that, some time in 1786, (*as well as the respondent recollected,*) he, for the first time, pretended that he had a right

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The affidavit of *Thomas Miller*, which was read in the cause, fully proved the truth of the statement in the bill concerning the *origin* of the bond; *but no evidence appeared that Barrett had any notice of it previous to the assignment.* Several affidavits of *jurors* impannelled on the *elegit* shewed that the jury valued the land at too high a rate, through a mistake. It was also proved by *William Royster*, that at the trial of the suit against *William Royster*, *senior*, in the *Richmond* District Court, his counsel was out of Court when the cause came on, and did not come in till part of the jury was sworn; that the counsel then endeavoured to get a continuance, on the ground of the absence of some material witnesses, but was refused it by the Court, on account of part of the jurors' being sworn.

On the 4th of *October*, 1802, the cause was heard, by *consent* of parties, on the bill, answer, exhibits and *affidavits;* and the Court (" being of opinion that an obligation " of *Woodson*, acknowledging himself a debtor to *Jouitt*, " of money, or other thing, won at gaming, which *Miller* " owed, and requested *Woodson* to pay to *Jouitt*, although " this *obligee* knew *Miller* to have been a losing gamester, " and thereby to have become indebted to *Jouitt*, is not " void by the statute to prevent unlawful gaming, not more " than it would have been void if *Miller* had paid the mo- " ney to *Jouitt*, and he had immediately lent it to *Wood-* " *son*, taking his obligation for repayment thereof,") adjudged and decreed that the bill be dismissed at the costs of the plaintiffs; who thereupon appealed.

Wickham, for the appellant. This was clearly a gaming debt: and, although the money was won by a Mr. *Miller*, yet the bond was given to *Jouitt*, who knew of the consideration. If the doctrine laid down by the Chancellor be correct, the gaming law is a dead letter. The act of 1748(*a*)

(*a*) *Virginia Laws*, Edit. 1769. p. 243.

completely embraces the case; and that of *Oct.* 1779, ch. 42.(*a*) does not repeal the former, but fortifies it. By those acts, all contracts whatever, where any part of the debt was money won at play, are *absolutely void.* Suppose this were an action of *indebitatus assumpsit;* stating the same case, would not the plaintiff fail? Certainly.

(*a*) *Chancellor's Rev.* p. 119.

The only case which has any semblance to the Chancellor's doctrine is in 2 *Mod.* 279. and that is against the principle which he has laid down. *Lowe and others* v. *Waller*(*b*) appears to overrule even that case; for, there, it was decided, that a bill of exchange, given upon an *usurious* consideration, was void, even in the hands of an indorsee for valuable consideration without notice of the usury. In the case in *Mod. Rep.* the bond was *payable, for a bona fide debt,* to an *innocent* man, who did not know of the gaming: but, here, *Jouitt did know,* and it was given to him to pay a *gaming debt.* In *Bowyer* v. *Bampton*,(*c*) it was determined that a promissory note given for money knowingly lent to *game* with, is void in the hands of an indorsee, although for valuable consideration and without notice. In *Buckner* v. *Smith and others*,(*d*) the docrine is laid down, that the assignee of a gaming bond stands in no better situation than the obligee would have stood, unless he was induced to purchase it by assurances from the obligor himself that he would pay the money. Of course the bond is equally void, whether the assignee knew of the gaming, or not. The case of *Hoomes, executor of Elliott,* v. *Smock*,(*e*) also proves the same principle; for there the Court decided in favour of *Elliott's* executor, upon the ground that *Elliott* was induced to take the bond by the *debtor,* who renewed it without disclosing his objection. In *Norton* v. *Rose*,(*f*) and *Pickett* v. *Morris*,(*g*) it is settled that the assignee of a bond, though for valuable consideration, and without notice, takes the same subject to all the equity of the obligor. The case of *Rawden* v. *Shadwell*,(*h*) shews, that if a bond be given for gaming, and part of the money be paid, the obligor may recover in

(*b*) *Doug.* 735.

(*c*) *Strange,* 1155.

(*d*) 1 *Wash.* 299.

(*e*) Ibid. 389.

(*f*) 2 *Wash.* 233.

(*g*) Ibid. 255.

(*h*) *Ambl.* 269.

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equity the money so paid, and have his bond cancelled. And, as to this, according to the cases already cited, the *assignee* is in the same situation as the *assignor*.

It may be objected, that *Barrett* and Company (the defendants in equity) had obtained the advantage at law, and that it does not appear that the gaming act was pleaded. The cases of *Ambler* v. *Wyld*,(a) and of *Pickett* v. *Morris*,(b) are fully, *in principle*, an answer to that objection. Again, *Miller*, unless he would voluntarily give evidence, could not be compelled, being not bound to criminate himself; and that may have been the reason for *Woodson's* not defending himself at law.

(a) 2 *Wash.* 36.

(b) Ibid. 255.

But the act of assembly states, that *judgments* obtained for gaming debts shall be void; and this rule must be established, or parties, by having a judgment entered, might defeat the statute. In the case of *Buckner* v. *Smith*, before cited,(c) there was a *judgment*, but no objection to relief was made upon *that ground*. So, in *Elliott's executor* v. *Smock*,(d) there was no objection on the ground of the *judgment;* but the Court refused relief, on another ground altogether.

(c) 1 *Wash.* 299.

(d) Ibid. 389.

But *Royster* is certainly entitled to relief. The verdict against him was by *surprise*, and a new trial should have been granted. The *damages* too were excessive, amounting to more than the value of the land; and if the *land* had been worth more, they were still excessive; for all that *Barrett* and company had lost by the error committed by the sheriff was *one year's* profits; since they might have had a new writ of *elegit*, the first being quashed; and *that only* should have been the measure of the damages.

Copeland, for the appellees. Two grounds are relied on by the appellant. 1. That this is a gaming debt. 2. That the damages are excessive as to *Royster*.

On the 1st point, he relies on the case of *Buckner* v. *Smith and others*;(e) but the principle of that case is in *our favour;* for the answer of *Barrett* states that, after the bond

(e) 1 *Wash.* 299.

was assigned, applications for payment were frequently made, and no pretence, that it was a gaming debt, was set up by *Woodson*, during *two years*. This was a concealment of truth, and should bind him; for by that conduct, he injured the appellees; and it ought to be considered as equal to a promise previous to the assignment. I admit that the assignee stands in the same situation as the obligee, unless some conduct of the *obligor* changes the ground: and, here, there was such conduct; for payment claimed and *indorsed* on the bond was calculated to induce the appellees to suppose it a *bona fide* bond.

The case in *Ambler*(*a*) is not like this. Would the Judge, in that case, have decreed the money to be refunded, if paid to an *assignee* who knew nothing of the gaming? Certainly not.

(*a*) P. 269.

In this case *Woodson* had a complete remedy *at law*, of which he did not avail himself; and therefore ought not to be aided *in equity*. And, let me ask too, why, so long after the judgment, was the application for an injunction delayed? Even now, the injunction is only to the judgment against *Royster* for his misfeasance in office. The bill does not pretend that *Woodson attempted* to defend himself; and it appears, *now*, that he came here only at the instance of *Royster*.

As to *Royster's* equity: The affidavits of *jurors* were not proper to be received to impeach their own verdict; and such evidence, if legal, might have been used in the Court of law. If the verdict was by *surprise*, a motion for a new trial could and ought to have been made to the Court of *law*, and not *here*. But the affidavit of *William Royster*, *junior*, the deputy-sheriff for whose improper conduct the high sheriff was charged, ought not to be received to prove this point; since he is an interested party, being ultimately responsible to the appellant *Royster*.

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Randolph, in reply, took two grounds: 1. That if *Woodson* alone had applied for the injunction, he ought to have been relieved. 2. That *Royster* was entitled to all the equity of *Woodson*, and also to a further equity.

As to the first point: *Woodson* was still bound for the balance of the debt on the original judgment, and therefore had an interest in the subject of controversy sufficient to warrant his obtaining the injunction.

It is said, that the case of *Buckner* v. *Smith* shews that the conduct of the obligor in a gaming bond may bind him to pay the money to the assignee. But that is only where there is a new contract, (*previous* to the assignment,) consisting in his promising to pay the money, and thereby *inducing* the assignee to take the bond.

As to the argument of *concealment* by *Woodson*, the fact is not proved, except by the allegation in the *answer*, which, not being responsive to the bill, is not evidence; and, *besides*, is not *positive* as to this point.

Woodson was not *bound* to apply for his injunction sooner than he did, and ought not, for his delay, to be refused relief; especially as all the witnesses are still living. If he ought to have defended himself *at law*, the utmost that can be contended is, that, for obtaining relief *in equity*, he should pay the *costs;* for the gaming act is complete to entitle him to relief, even after *judgment*.

2. *Royster* has all the equity of *Woodson;* and is, moreover, entitled to relief upon the ground of excessive damages. The jurors who served on the inquest were competent to give evidence; for they served out of Court, and erred through misdirection, and for want of proper information. Considering this, the argument for admitting them as witnesses was stronger than in *Cochran* v. *Street*.(a) Mr. *Wickham* has given a sufficient answer to the objection that *Royster's* defence should have been relied on *at law;* but it may be added, that, the suit being against him for the misfeasance of his deputy, he could only have got *full* relief *in equity;* for *he* could not have pleaded, that the judgment against *Woodson* was for a *gaming* debt.

(a) 1 *Wash.* 79.

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Tuesday, March 15. The Judges delivered their opinions.

Judge TUCKER. The bill states, that in 1783, *Miller* gamed with the appellant *Woodson*, and won of him 1,400*l.* in officers' certificates; that *Jouitt* had won about the same sum of *Miller;* that *Miller* requested *Woodson* to pay *Jouitt* the 1,400*l.* and that *Woodson* gave his bond to *Jouitt* for that sum, *Jouitt* at the time knowing that it was for this gaming debt. This bond was afterwards assigned to *Barrett* and Co. who say they had no information that the bond was for gaming at the time of the assignment, nor does *Barrett*, who alone answers, admit that it was founded on a gaming consideration. The proof that it was, is very abundant.

The question upon this case is, whether the assignee of a bond given for money won at gaming, for a valuable consideration, without notice of the nature of the debt, is barred from recovering the money, by the act to prevent unlawful gaming.

By the acts of 1748, c. 25. and *Oct.* 1779, c. 42. all promises, agreements, notes, bills, bonds, OR OTHER CONTRACTS, JUDGMENTS, mortgages, or other securities, or conveyances whatsoever, where the whole, or *any part* of the consideration shall be for money, or other valuable thing whatsoever, won at gaming, or for the repayment of money lent to game with, shall be *utterly void, frustrate, and of no effect*, to all intents and purposes whatsoever.

It may not be amiss to observe, that although our statute is generally supposed to be a transcript from the statute of 9 *of Anne* against gaming, yet there is a material difference between them, in the insertion of the word *contracts*, in our law, which was omitted in the statute of *Anne*. It was upon the omission of that word in the statute, that the judgment in *Robinson* v. *Bland*,(a) proceeded. But, even in that case, the Court held, that the bill of exchange which *Sir John Bland* drew upon himself in *France*, payable at ten days sight *in England*, was a *void security*, and

(a) 2 *Burrow*, 1077. and 1 *W. Black. Rep.* 234. 256.

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no recovery could be had upon it against his administrator, he dying in *France* without returning. In the case of *Bowyer* v. *Bampton*,(a) it was decided, that the innocent indorsee of a gaming note cannot recover against the drawer. And the same decision was made as to the innocent indorsee of a bill of exchange drawn for money won at gaming, in *Lowe* v. *Waller*.(b) The decisions in the cases of *Rawden* v. *Shadwell*,(c) and *Bones* v. *Booth*,(d) proceed upon the same principle, that the security is absolutely *void*. Now where any instrument is absolutely *void* in its *creation*, it cannot, I conceive, be made valid by any subsequent transaction immediately arising out of it. It is not like a security given by an *infant*, which is only *voidable;* for that may be revived by a promise after he comes of age. In the cases of *Buckner* v. *Smith*, and *Hoomes* v. *Smock*,(e) this Court relied on particular circumstances in the conduct of the defendants respectively, which distinguished those cases from the general principle settled in those I have before cited. There are no such circumstances in this: the naked question is, whether the mere want of notice that a bond or other security was given for money won at gaming, will entitle the assignee without notice to recover in an action brought upon a bond. I am of opinion that it will not, and I conceive that a contrary decision would be tantamount to a declaration that the statute against gaming was of no force or obligation whatsoever. Those who deal in bonds, if thus given, or who allow a valuable consideration for them to persons, with whom, or whose circumstances, they are unacquainted, ought to be well assured that they are such as are not illegal. If they take them upon the credit of the *assignor*, they may have their remedy against *him*, if they have given a valuable consideration, and the money is not recovered. The *circulation* of gaming bonds is an evil no less to be discountenanced than the *giving* of them. And no means are more likely to prevent the *giving* of them than to put an effectual stop to their *circulation*. I am therefore of

(a) 2 *Strange*, 1155.
(b) *Douglass*, 713.
(c) *Ambler*, 269.
(d) 2 *W. Black.* 1226.
(e) 1 *Wash.* 299. and 389.

opinion, that the decree of the Chancellor ought to be reversed, and a perpetual injunction awarded, as to both judgments; for the first against *Woodson* being *void*, no damages can be given against the sheriff for any errors he might have committed in levying the execution founded thereupon.

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Judge ROANE said it was a plain case; and that, in his opinion, there was less reason for taking it out of the statutes against gaming than appeared in the cases cited from *Washington*.

Judge FLEMING concurring, the decree was reversed, and injunction made perpetual.

Price *against* Crump and others.

Friday, March 11.

WILLIAM PRICE, on the 11th of *September*, 1802, exhibited his bill in the Superior Court of Chancery, for the *Richmond* District, against *Julius Crump*, *Benjamin Sheppard*, and *Daniel Burton*; in which, among other things, he stated that a judgment obtained in *Henrico* County Court by a certain *Thomas Catlett* against *Crump*, had been assigned to him for a valuable consideration, by *Robert Brooke*, agent for the said *Catlett*, with liberty to sue out any execution thereon, in the name of the said *Catlett*, for his own benefit, against the said *Crump*; that, by virtue of the said agreement and assignment, he took out a writ of *fieri facias* against *Crump*, on the 11th day of *August*, 1801, which, "*on the same day*, was de- "livered to *Benjamin Sheppard*, deputy-sheriff, acting un- "der *John Harvie*, sheriff of *Henrico* County;" that *Crump* was also indebted to him in two bonds, assigned to him, on which he had brought suits then depending, in the same County Court; that on the said 11th day of *August*,

Money *bona fide* lent to a sheriff, and applied by him to his own use, prior to his receiving a writ of *fieri facias* against the lender is not liable to satisfy such execution, either at law, or in equity; notwithstanding the same money was *originally* deposited in his hands as a *pledge* for certain purposes.