REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME III.

BY WILLIAM MUNFORD.

NEW-YORK:

PUBLISHED BY I. RILEY, No. 27 WILLIAM-STREET,

Van Winkle & Wiley, Printers.

1816.

Southern District of New-York, ss.

BE IT REMEMBERED, that on the twenty-first day of August, in the forty-first year of the Independence of the United States of America, Isaac Riley, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. III. By WILLIAM MUNFORD."

In conformity to the act of the Congress of the United States, entitled, "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 herein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled an act for the encouragement of learning, by securing the copies of maps charts and book to the authors and proprietors 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."

THERON RUDD,
Clerk of the Southern District of New-York.

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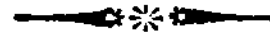
effect; and that the said decree is erroneous; therefore, it is decreed and ordered that the same be reversed and annulled, and that the appellees pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, it is further decreed and ordered, that possession of the premises in question be delivered up to the appellants, that the rents and profits thereof be accounted for by the appellees, and that they release all their right in the premises to the appellants. And it is ordered that the cause be remanded to the said Court of Chancery to be finally proceeded in pursuant to the foregoing opinion and decree."



Tuesday, March 17th, 1812.

Franklin *against* Wilkinson.

1. After an injunction has been wholly dissolved, *if the cause be set for hearing on motion of the defendant in equity,* he cannot take advantage of the cirumstance that the bill should have been dismissed under the Act of Assembly.

☞ See *Pitts* v. *Tidwell, ante.*

2. It is no ground for a bill of review, that the party was prevented from proving certain important facts, by wrong advice of one of his counsel; or that the other was unable to attend to the cause when called for trial, which circumstance was unknown to the party, until after the decree.

UPON an appeal from a rejection, by the Superior Court of Chancery for the *Richmond* district, of a motion for leave to file a bill of review.

The decree, which the appellant wished to have reviewed, was founded on a bill of injunction to stay proceedings on a judgment at law in his favour against the appellee. The equity relied upon by the complainant in that bill was, that a bond, on which the judgment was obtained, was given for money won at *gaming* between him and a certain *Davis Booker;* that before the said bond became due, he became the creditor of the said *Booker* for a larger sum of money, upon a *similar* consideration of *gaming*, and offered to discount the same, which the said *Booker* agreed to, but said he had not the bond then with him, but would, when he went home, destroy it, or return it, on sight; notwithstanding which,

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he assigned it to a certain *Alexander Hunter*, who afterwards assigned it to *Owen Franklin*, the appellant.

The material allegations of that bill not being admitted by the answer, and no evidence in support of it being filed, the *injunction was dissolved* on the 17th day of *March*, 1806. At Rules in the clerk's office, in the same month, the complainant replied generally, and commissions to take depositions were awarded. The bill was not dismissed according to the Act of Assembly;(a) neither does it appear from the record, that *cause was shown at the next term against such dismission;* but, at Rules, in the month of *December*, 1806, the cause was *set for hearing on motion of the defendant, by his counsel;* and, at *March* Term, 1807, on hearing the bill, answer, exhibits, and examinations of witnesses, the Chancellor adjudged and decreed, that the *injunction be perpetual.*

(a) *Revised Code*, 2d vol. p 29. ch. 29. sec. 3.

The reasons suggested for reviewing this decree were, that "the appellant gave a valuable consideration for the said bond in a wagon and team of horses, estimated at cash prices, and never knew, or heard, until after the assignment of it to him, and delivery of the said wagon and team, that it was suspected to have been given for a gaming consideration; that he would not accept the said bond, until he received an assurance from the said *Wilkinson* that it was good for twenty shillings in the pound; that he *was prepared* to prove these facts, but, *being informed by one of his counsel, that he need not take any depositions, and the other, who succeeded to his business, being unable, from a domestic misfortune, to attend to the cause when it was called for trial,* the decree perpetuating the injunction was rendered without any opposition, or any statement of facts which might have been made for a continuance. The appellant was advised, that, however *new, in strict fact*, this case might be, yet, *in principle*, it falls within the cases allowed to be proper for bills of review; because he charges, 1st. That the indispensable absence of his counsel at the trial was unknown to him, until long after the decree of perpetua-

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tion; 2d. That he was prevented, by causes which he had no means of controlling, from taking the necessary testimony; and, 3d. That *that testimony, now taken upon notice, and here produced*, proves that he was induced to take the said bond upon the assurance of the said *Wilkinson* himself.

The Chancellor, "being of opinion that there was no error in the decree sought to be reviewed," refused permission to file the bill.

Hay, for the appellant, observed, that he should press the point, that *misinstruction of counsel*, by which the client was prevented from availing himself of testimony, is a sufficient reason for a bill of review; but felt himself precluded by the cases of *Theveat's administrator* v. *Finch*, and *Eastham* v. *Britton*, lately decided. He would therefore only contend, that the injunction having been wholly dissolved, and no cause shown, at the next term, against the dismission of the bill, it *stood dismissed of course*, under the Act of Assembly. The *clerk's neglecting* to *enter* such dismission was a breach of *his duty*, but could not keep the cause on the docket, against the positive words of the law, "that the bill should *stand* dismissed, of course, with costs." All the subsequent proceedings were, therefore, *coram non judice;* the suit, in contemplation of law, being at an end.

No counsel for the appellee.

Thursday, *March* 19th, 1812, Judge Roane delivered the following opinion of the Court.

"It appearing that the cause was set for *hearing* upon the motion of the *appellant*, by his counsel, the Court is of opinion, that he cannot now be received to insist on the absolute dismissal of the bill of the appellee, under the Act of Assembly; and it not appearing that any sufficient ground is alleged in the bill of review, to entitle the appellant to a reconsideration of the decree perpetu-

ating the injunction, the Court, without deciding on any other point in this cause, is of opinion, that there is no error in the said order rejecting the bill of review: therefore it is decreed and ordered, that the same be affirmed."

Darby *against* Henderson and Duncan, Administrators of Drummond.

Thursday, March 12th, 1812.

1. An appellate Court ought not to reverse a judgment, without proceeding to give such judgment as the inferior Court should have given. See *Blane* v. *Sansum*, 2 *Call*, 496. and *Muntz* v. *Hendley*, 2 *H. & M.* 308 *pl.* 7. to the same effect.

2. A *Sergeant of a Corporation* has not the right to sue for money due to an insolvent debtor. See an important law on the subject of recovering the debts due to insolvent debtors, in Acts of 1812, c. 26. p. 36.

THIS was an action of *assumpsit* in the Corporation Court of *Fredericksburg*, on behalf of *Adam Darby*, *Sergeant of said Corporation*, against the administrators of *William Drummond*, deceased; the declaration charging the defendants, on the ground that their intestate was indebted, by simple contract, for work and labour, &c. to a certain *John Blanton*, who was taken upon a *capias ad satisfaciendum*, and discharged from custody, as an *insolvent* debtor, having subscribed and delivered in a schedule of his estate, and taken the oath prescribed by the 38th section of the Execution Law of 1793.(*a*) It was stated in the declaration, that the schedule contained a statement of the sum of   , due to the said *Blanton* from   ; by reason of which premises, the defendants were duly, and according to the directions of the 41st section of the same act, summoned to appear before the Court of the said Corporation, at a Court to be held "on the   day of   , 180   ; and they the said defendants appearing accordingly, and not confessing any thing to be due to the said

(*a*) *Rev. Code*, vol. 1. c. 151. sect. 303.

☞ As to the effect of *blanks* in declarations, see *Blane* v. *Sansum*, 2 *Call*, 494. *Stephens* v. *White*, 2 *Wash.* 203. *Taylor & Co.* v. *M'Clean*, 3 *Call*, 557. *Craghill, &c.* v. *Page*, 2 *H. & M* 446. *pl.* 4. *Digges* v. *Norris*, 3 *H. & M* 268.; from all which it appears, that the circumstance that the *damages* are left blank is unimportant; but if the *gist* of the action be blank, it is fatal.