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 III.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-second day of January, in the thirty-fourth 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 III. by "William W. Hening and 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 "therein 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 books, 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."

WILLIAM MARSHALL,

(L. S.) Clerk of the District of Virginia.

dy being complete) a *mandamus* will not lie; but seemed to admit that, in the latter case, the party might proceed by *mandamus*. I cannot, I own, perceive the force of the distinction, being of opinion, from a number of authorities in the books, that where the important office of Clerk of a Court of Record is the object, a *mandamus* is the proper remedy in either case. But admitting the argument and distinction to be correct, and to give them their full weight, they do not apply to the case now under consideration; because the appellant is seeking to be *restored* to an office he has once exercised and enjoyed, and of which he has been wrongfully deprived.

On every view of the case, then, I am of opinion, that the General Court erred in discharging the rule, and that a *mandamus* ought to be awarded to restore the appellant to the office of *Clerk* of the District Court, at the *Sweet Springs*, on his giving bond and security as required by law; as was done in the case of *James Bland*, who, in the year 1786, was by *mandamus* restored to the office of Clerk of the County Court of *Westmoreland;* the record of which is now in Court; and this is the opinion of a majority of this Court.

Pope and others *against* Oliver Towles, who was Executor of Thomas Towles, who was Executor of Nicholas Lewis.

Wednesday, October 19.

AN appeal from a decree of the Superior Court of Chancery, for the *Richmond* District, pronounced by the late Judge of that Court, dismissing, with costs, the bill of the complainants.

If a suit in Chancery abate by the death of the defendant after *answer* filed, and the cause set for hearing; *it seems*, that his executor cannot regularly demur to the equity of the bill, or plead any matter which the testator himself might not have pleaded in that stage of the proceedings; but, if no objection be made, and the parties afterwards proceed to take depositions, it will be an implied waiver of any objection to such irregularity.

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Nicholas Lewis, being indebted by bond to *John Wily*, the latter brought suit thereon, in the General Court, and employed Mr. *Duval*, an attorney of that Court, to conduct it. Pending the suit, he gave Mr. *D.* (to whom he is stated to have been indebted,) an order on *Lewis* for 12,000lbs. of tobacco, which appears to have been the principal of the debt mentioned in the bond. On the same day, he drew an order on *Duval* for 4,500lbs. of tobacco, in favour of Mr. *Pope*, and at subsequent periods it is alleged that he drew two separate orders on him, in favour of the two other complainants; all which Mr. *Duval* accepted conditionally.

Wily's order on *Lewis* is not pretended to have been accepted by him, or even presented to him, in his life-time, and probably was only meant as an *authority* to Mr. *D.* to receive the debt of *Lewis*, when recovered, and to pay himself out of it. *Lewis* died after a judgment was confirmed in the office, but before the ensuing term, as is alleged. The Clerk probably not being informed of his death, the judgment was entered up, as a final judgment of the *October* term of 1783. No abatement of the suit was ever entered, nor any execution sued out upon it, nor any *scire facias* to revive it, as far as appears. It stands as a regular judgment of that Court; though, if the fact as above stated be true, liable to have been reversed by a writ of error, *coram vobis*, if applied for in due time. The bill states, that *Thomas Towles*, the executor of *Lewis*, being informed of the above circumstances, often promised Mr. *D.* that if he could be satisfied the tobacco "recovered by the said judg-"ment," was not due on account of *gaming*, he would discharge the same, provided he should recover certain slaves of one *White*, for which he had brought suit; and that he gave the like assurances to Mr. *Pope*, and to *Chiles*, another of the plaintiffs, if they would wait with him till the event of the suit, against *White*, should be known, and he should recover the slaves; to which the complainants and *Duval* agreed: after which, the latter procured an affidavit of one *Charles Yancey*, and the certificate of one *William Pettit*, each shewing that the tobacco due on the bond, was on a

fair contract, for value received; of which he gave notice to *Thomas Towles*, the executor, who thereupon promised to pay the tobacco, if he should recover the slaves of *White;* which he did, prior to the year 1788: after which he refused to pay the tobacco. "Whereupon, the complainants directed the said *D.* to commence an action for the recovery of the said tobacco, *in the name of the said John Wily*, but for *their* benefit, *as Duval's own claim against Wily was* THEN OTHERWISE *discharged.*" That he did bring an action accordingly, in which sundry depositions were taken, which, with sundry other papers are annexed to the bill, and prayed to be taken as part thereof; on some of which, with the indorsations thereon, they rely to shew, that the said *Thomas Towles*, the executor, after *Wily* had become insolvent, and after he knew it, (which they aver to be *facts*,) fraudulently, and in order to defraud the complainants, procured from *Wily* an order to dismiss that suit, in consideration of a horse, not worth 25*l.* "all which is contrary "to equity," &c. They then proceed to interrogate him, whether he did not promise to discharge the tobacco *due upon the said* BOND, for the use of the complainants, *in case it should be* PROVED *that the same was* NOT GIVEN *for a* GAMING DEBT, &c. and whether the said *bond* was given for a gaming debt? Whether he had not recovered the slaves; and whether the complainants had not waited the event of that suit as by agreement? Whether the depositions were fairly taken; and whether they do not contain the truth? Whether *Wily* was not insolvent, and known to him to be so, at the time he procured from him the order for dismissing the suit brought in his name? And, after some other questions, the bill concludes with a prayer for particular and general relief.

The answer of *T. Towles* states, that he recollects *W. D.* called at his house some time between the years 1781 and 1785, on the subject of the *bond due to Wily*, by his testator *Lewis;* that, as well as he can now recollect, (*May*, 1798,) *Duval* attempted to convince him the bond was not

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due for a gaming consideration; but does not *recollect* that he promised to pay the same, if he recovered the slaves from *White*, though he might have said that, if they were recovered, *there* would be enough *to pay the bond;* nor does he *recollect* having promised the complainants, at any time afterwards, that, if they could convince him the bond was not for a gaming consideration, he would discharge it, if they would wait, &c. nor did he, after seeing *Yancey's* affidavit, and *Pettit's* certificate, promise that he would pay the bond; of which he is convinced, because he does not recollect, that he was, any time, before or after, *convinced* that the bond was not given for a gaming consideration; that, when he made the payments to *Wily*, he knew nothing of his insolvency, *and believed him* to be *justly*, *and* SOLELY entitled to receive the payments, if any person was entitled to the amount due on the bond; that he made several payments, exclusive of the horse, in money and tobacco; that he always suspected the bond to have been given for a gaming debt, but was not convinced of it until some time after the payment to *Wily*, as will appear by the depositions of *A. Parker* and *T. Davenport*, annexed; to *which he refers* as a part of his answer; as also *T. Wash's* deposition; all of which were taken in *Wily's* suit against him; and that he does now believe the bond was given for a *horse lent to game with*, as stated in those depositions; that he does not know that *Wily* was insolvent when he gave the order to dismiss the suit; and is informed he carried several negroes out of the State when he removed; admits he recovered the negroes; believes *Pettit's* certificate was intended to deceive him, inasmuch as it differed from a deposition made by him, which, however, does not appear in the record.

To this answer the plaintiffs replied generally, in *June*, 1798, and commissions were *then* awarded the parties to take depositions; but no depositions appear to have been taken in the cause, at that time, except those of *William Burrus* and *Anthony New*, both of which relate to a transaction between *Wily* and *Burrus*, in 1782, in which, *New*

was *Wily's* security for about 25*l.* which he was afterwards obliged to pay with interest, in 1784, 1785, and 1786; after which *New* states, that he made frequent inquiry, and understood and believed that he continued insolvent. And in *March*, 1799, the cause was *set for* HEARING on the PLAINTIFF'S motion.

On the 5th day of *March*, 1801, the suit was abated by the death of the defendant, *Towles*; a subpœna to revive was awarded; and a bill of *revivor* filed against *Oliver Towles*, executor of the former defendant, *Thomas Towles*, deceased.

The bill prays, that the suit may be revived against him, and that the whole of the proceedings may stand as against him, in the *same* STATE and PLIGHT, as they stood against *Thomas Towles*, in his life-time, and that the complainants may have the same relief against him, as against his testator, unless the said *Oliver shall shew cause* to the contrary.

To this bill of revivor, the executor, *Oliver Towles*, appeared, and put in a demurrer, plea, and answer; to the admission of which no objection appears to have been made. The Chancellor dismissed the bill; and the complainants appealed to this Court.

Warden, for the appellants, contended; 1st. That the demurrer and pleas of *Oliver Towles*, came in too late to be received and made the grounds of a decree, after an answer by his testator, containing no such matter, and after the cause had been once set for hearing. 2d. That it was necessary to resort to a Court of Equity, to obtain a discovery from *Thomas Towles*, whether he had recovered the negroes from *White*, or not; therefore, so much of the demurrer as objected to the jurisdiction of the Court, would not avail; that the plea of the act of limitations could not be sustained, because this suit was instituted the moment the action at law of *Wily* v. *Towles* was dismissed; that the act of *frauds* could have no effect, because *Towles* was not called on to pay out of his own estate; and that the statute against *gaming* could not avail, because *Towles*

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promised to pay the money, if proof were exhibited that it was not a gaming debt; and the proof to that effect was very abundant.

The Attorney-General, for *Pope*, insisted, that as the bill expressly charged a promise by *Towles* to *Pope*, which the answer did not deny, but only evaded, there ought to have been a decree in *Pope's* favour; especially as *Towles* had recovered the negroes from *White*, in which event he was bound to pay; and had, moreover, by his promise of payment, prevented recourse to *Wily*; that the conduct of *Towles*, in paying *Wily* himself, after he was cautioned against it, ought to subject him to the payment of the money out of his own estate. On the point of the demurrer and pleas, he cited *Mitford's Pleadings*, 31. 77. 114. 112. 107.

Williams, for the appellee, relied on the following points: 1st. That the promise stated in the bill was never made by *Thomas Towles*, and, even if it had been, that it was not such a one as ought to bind him; it being a verbal promise made by an executor, and the object of the suit being to subject him to payment out of his own estate. 2d. That the claim is barred by the act of limitations, if it ever did exist. The promise, as charged, was made in 1785; the suit of *Wily* v. *Towles*, was dismissed in 1791; and this suit brought in 1797. 3d. That if the appellants have any claim, the remedy is purely at law, and not in equity; and 4th. That the bond from *Lewis* to *Wily*, having been given for a horse, clearly proven to have been lent to game with, at the time of playing, was void by the act to prevent unlawful gaming.

Friday, *November* 4. The Judges pronounced their opinions and decree.

Judge TUCKER, after stating the case as above, proceeded as follows.

The first point stated by the appellant's counsel, as a ground of complaint against the decree, is, that the de-

murrer and pleas of *Oliver Towles*, the executor of *Thomas*, came in too late to be received, and made the grounds of a decree, *after an answer* by his testator, containing neither; and after the cause had been once set for hearing.

As this appears to me to be an important point relating to practice, I shall consider it, before I proceed to the other questions relating to this cause.

If a suit abate by the death of a defendant, before he has put in his answer, and thereupon a *subpœna* to revive is issued against his executor, it would seem, upon principle, (and I make no doubt the practice is according thereto,) that the executor is entitled to defend himself in *any* and *every* way that his testator could have done. We are then to inquire what defence the testator, *Thomas Towles*, could have been admitted to make after answer filed, a general replication, a commission to take depositions awarded, and executed; publication of those depositions made; and the cause set for hearing thereupon? I presume, no further defence could be admitted, at this stage of the proceedings, unless some NEW MATTER *utterly unknown to the defendant* at any *former* period, or stage of the proceedings, should have been *discovered* by him, since the last step which had been taken in the cause.

Upon suggestion of this NEW MATTER, in the nature of a plea *puis darrein continuance* at common law, he might, I presume, be admitted to plead the same, if proper for a plea, or to file an amended answer, stating the NEW MATTER thus discovered, but nothing more: as in the case of *Bacon* v. *Lewis*, senior, (during the present term,) where the defendant, the executor, was permitted, after the cause was set for hearing, to file an amended answer, in consequence of his having discovered a memorandum, written by his testator with a pencil, in an old pocket-book, of which he had no knowledge before. A demurrer, which always lies to a bill for the defects apparent upon the face of it, would then appear to be inadmissible in such a case, and so would a plea, or answer, as to any matter which the defendant might or could have offered in his defence be-

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fore. Upon these grounds, I conceive the executor had no right to demur, plead, or answer to the bill, for or on account of any defect, or cause, of which the testator, *Thomas Towles*, might have availed himself, in either of those modes of defence, before the cause was set for hearing. But, this objection, like every other, may be removed by consent of the opposite party, either express, or NECESSARILY *implied.* There is no express consent, nor even leave of Court, given to the filing of the demurrer, plea, and answer filed by the executor, *Oliver Towles*, to the bill of revivor. But there is, in the record, what, I conceive, concludes the plaintiffs, the now appellants, from making any objection thereto, in this Court. The *subpœna* to revive was executed, *August* 4th, 1801, and the answer of the executor was sworn to, *April* 2d, 1802; the time of filing it does not appear; but, six days after, we find the deposition of *William Duval*, taken in *Richmond*, in the suit between the complainants, and *Oliver Towles*, the executor; on which occasion, both Mr. *Pope*, the complainant, and the defendant, appeared to have attended, and examined the witness. *Alexander Parker's* second deposition, appears to have been taken in the same manner, at *Fredericksburg*, *July* the 6th, following; and the cause was not heard till the 26th of *September*, 1803, and no objection whatsoever appears in the record to any, or either, of these proceedings. I think, therefore, the plaintiffs must be considered as assenting, or at least, waiving all objections, to the proceedings below, subsequent to the return of the *subpœna* to revive; and, therefore, that it is too late to make the objection here.

But, suppose it were otherwise, and that the cause now stood upon the original bill, answer, exhibits, and depositions. It is difficult to conceive how an order, drawn by *Wily*, on *Nicholas Lewis*, which was neither accepted, nor even presented, to pay to his attorney a debt, for which he had actually brought suit, should attach upon *Lewis's* executor, so as to make him liable, further than the bond itself might make him so. It is still more diffi-

cult to conceive how that executor could be made responsible for the amount of ORDERS not drawn upon his testator, (or known to him,) but upon the drawee's own attorney, who had the conduct of the suit against *Wily*, and probably, (as the general practice is,) had the bond in his possession at the very time these orders were drawn.

If it had been *Wily's* intention to have transferred the debt to *Duval*, why did he not assign the bond itself to him? The answer might be found in *Duval's* deposition; but I shall not notice it, because that deposition was not taken till after the suit was revived; and I am now considering the case as it stood before. As to all that passed between Mr. *Duval*, Mr. *Pope*, and the executor, *Thomas Towles*, *as charged in* the bill, it relates only to the payment of the judgment, which had been entered up by mistake, after *Lewis's* death, or of the bond: not a word is said about these orders. *Towles's* promise amounted, then, to no more than what the law itself would compel him to perform, viz. to pay the BOND, if not founded upon a gaming consideration, provided he should have assets, which he admitted would be the case if he should recover the slaves. The complainants evidently understood it so; for they allege that they directed Mr. *Duval* to bring suit upon it, after *Towles* recovered the slaves, and still refused to pay the bond. Suit was brought; but in the name of *Wily*, the original obligor; why did they not, then, get an assignment of the bond, if the tobacco due thereon, belonged to them? But, they charge that the suit was brought for *their benefit*. But they do not charge that *Towles* knew of that matter, otherwise than by referring to Mr. *Duval's* deposition, annexed to the bill, and prayed to be taken as part thereof. The defendant's answer, "that at "the times he made the payments to *Wily*, he believed "him to be justly, and solely entitled to receive them, if "any one was," appears to me to contain a sufficient answer to a charge thus indirectly made, and of which there is no proof whatsoever, except that deposition taken in a suit at *common law*, between *Wily*, plaintiff,

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and *Towles*, defendant; but whether upon the bond in question, or any other, does not appear; there being no copy of any part of the record in that suit, except the dismission of it at the plaintiff's costs. The depositions taken in that cause, though annexed to the bill, as exhibits, and prayed to be made a part of it, certainly can be no evidence against *Towles* in *this* cause, without something more to substantiate them. The answer then stands wholly uncontradicted in every particular; even as to the defendant's knowledge of *Wily's* insolvency, if that were the fact. Taking the case then as it stood at the time the suit abated, I am of opinion that the bill ought to have been dismissed. But, if the irregularity of the proceedings, after the suit was revived, be cured by the complainant's consent, *necessarily* implied from the circumstances before noticed, I can entertain no doubt that the bond was given for the value of a horse lent to game with, at the time of playing, and therefore void, under the statute against gaming;(a) and that there is nothing in this case to take it out of the statute; consequently, that the decree of dismission ought to be affirmed.

(a) *Laws Virginia*, 1794, c. 96.

Judge Roane. There is no error in the decree; and it ought to be affirmed.

Judge Fleming. It appears by the depositions of *Alexander Parker* and *Thomas Wash*, that the bond executed by *Nicholas Lewis* to *John Wily*, in *August*, 1781, conditioned for the payment of 12,000lbs. of tobacco, (which bond is the foundation of this controversy,) was given on a *gaming* consideration, (of which *Thomas Towles*, executor of *Lewis*, had always a strong suspicion,) being for a horse worth about 12*l.* or (at that time) about 3,000lbs. of tobacco, and lent by *Wily* to *Lewis* for the express purpose of gaming; with this condition, that, if the latter lost the horse, he should pay him 12,000lbs. of tobacco, which being the case, he,

next morning, with *Samuel O. Pettus*, and *Gabriel Poindexter*, his securities, executed the bond to *Wily*.

Whatever irregularities may have taken place in the proceedings in Chancery, subsequent to the revival of the suit against the appellee, as executor of *Thomas Towles*, the case being *rotten* in its foundation, cannot be supported. I am therefore of opinion, that the bill was very properly dismissed, and am for affirming the decree, which is the unanimous opinion of the Court.

Newby's Administrators *against* Blakey.

A *plaintiff* in detinue, who, after having had five years' peaceable possession of a slave, acquired without force or fraud, loses that possession, may regain it on the mere ground of his previous possession; on the same principle that a defendant may protect himself, on that length of possession, under the act of limitations. But such recovery will not affect the rights of others, not parties to the suit.

THE appellants instituted an action of detinue in the District Court held at *King* and *Queen* Court-House, for the recovery of the following negroes, viz. *Charles*, *John*, *William*, *Butler*, *Solomon*, and *Milsey*. The defendant pleaded *non detinet*, on which issue was joined. At the trial, the parties agreed a case, from which the following statement is extracted.

William Chowning, in the year 1783, made a division (without deed) of certain of his slaves among his children, in which the negro *Priscilla* fell to the lot of his daughter, *Elizabeth Chowning*. In *July*, 1784, he made his will, whereby he devised to his children the several slaves which he had given up to be divided, and particularly *Priscilla* to his daughter, *Elizabeth*, with the following clause or proviso. "But if either of my above mentioned daughters "should die, without LEAVING issue, then their parts to "be equally divided between my surviving daughters." He died in 1786, and appointed *John Chowning*, *Henry Chowning*, and the present defendant, *Churchill Blakey*, his executors, all of whom qualified as such.

Elizabeth Chowning, the daughter, survived her father. In *January*, 1784, she made her will, whereby she directed that her estate should be divided between her sisters and