REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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fence, which he might have set up to the action. It could never have been their intention that what would be a good plea to one suit, should not be a good plea to another suit for the same thing.

Upon calculation it will be found, that there was an aggregate of five years, during which there was a competent person to sue and be sued. On both grounds, therefore, the judgment was right; and ought to be affirmed.

LYONS, Judge, to WARDEN. Is there any case where a motion of this kind has been allowed against executors?

WARDEN. I do not recollect.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the Court, that the judgment of the District Court was to be reversed, and that of the County Court affirmed; because, this Court considered the act of limitations as not applying, inasmuch as the plaintiff might have sued the Sheriff's bond; and, as that right of action was still existing, it could not be true that the act of limitations would bar the motion.

THORNTON *v.* CORBIN.

Saturday, April 17th, 1802.

Quære. Whether a suit which has been dismissed by mistake, can be re-docketed at a subsequent term. See *post,* 232, S. C. where the question is decided in the affirmative.

This was a motion to set aside an order of this Court, for dismissing an appeal by Thornton from a decree of the High Court of Chancery. The facts were, that Mr. Marshall had been retained as counsel for the appellant before his appointment to the office of Chief Justice;* but had omitted to mark himself on the docket, or to inform the gentleman who was to finish his business. In consequence of which the appeal was dismissed, at April term, 1801, for want of prosecution. At October term, 1801, a rule was obtained by Thornton to shew cause, at this term, why the order of dismission should not be set aside, and the cause re-docketed. [222]

[* January 31st, 1801.]

WARDEN, for the appellee.

The appellant ought always to be ready, and as it was notorious that his former counsel was appointed to a public station, he ought to have employed another, or applied to the gentleman who finished the business of Mr. Marshall. Besides, the Court have no authority to set aside the dismission.

CALL, contra.

There appears to have been a surprise on the appellant, who supposed that the cause would have been attended to; and therefore, if the Court have power to correct the mistake, it ought to be done. But it is clear that, at common law, the Court does possess the power of setting aside any order or judgment which has been obtained by fraud or surprise. 21 Vin. Abr. 535; 1 Ventr. 78; Barne's Notes, 239.

These cases clearly prove the principle, and establish the power of the Court at common law. Nor does the act of Assembly, R. C. 69, make any difference. For, § 18 relates to the cases enumerated in § 17; and it means where appeals, writs of error and supersedeas which have not been brought up within two terms, and have for that reason been dismissed, that there, no new appeal, writ of error, or supersedeas shall be allowed; and not a dismission where the cause has been brought up in time: and, there is a good reason for the distinction: namely, that in those cases the dismission is to be [223] unless cause be shewn to the contrary, and, therefore notice is required, and the appellant, if he wishes it, heard against the dismission. After which, he ought not to be allowed to insist upon the same matter over again. But, here he has never been heard at all; and, therefore, there is not the same reason for disallowing the motion to set aside the order which was obtained by surprise, and to re-docket the cause.

WARDEN and WICKHAM, in reply.

The cases cited do not apply, as they were all cases of plain fraud, and there was none here. The practice would be attended with dangerous consequences; for, if allowed, it may be carried to an alarming extent. Thus, if an office-judgment be obtained, the defendant may insist that he employed counsel to defend him, who failed to appear, and for that reason set aside the judgment, although regularly obtained. Some difficulty, too, may arise from the order having been transmitted to the Court of Chancery, where it has probably been entered, and an execution issued in conformity thereto.

CALL.

No inconvenience of the nature mentioned on the other side, is to be apprehended from the precedent; because, the judgment will never be vacated but for fraud or surprise; nor then, without the applicant has substantial justice on his side. For, an application merely for delay, would not be countenanced. But, with this limitation the practice is useful, tends to promote justice, and is agreeable to the principles of the law: like the case of [*Jeffereys* v. *Walter*,] 1 Wils. 170, where the defendant instructed his attorney to plead that the bond was given for a gaming consideration, but he omitted to do so, and on affidavit of these facts, the plea was allowed after the usual time. In the Federal Court, two judgments were set aside, at subsequent terms, upon the same ground that the application is made in the present case, which shews the general opinion entertained of the law in such cases.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the Court. That whatever might be their opinion in other cases of [224] this kind, in the present instance, they were clearly of opinion that Thornton had not made such a case as should entitle him to have his cause re-docketed. For, he does not shew that he was under any surprise, or that he gave himself any trouble about the matter. It is only stated that Mr. Rootes applied; but by what authority, or why application was not made to counsel, after Mr. Marshall left the bar, does not appear.

Rule to be discharged.

CALL then moved, that the order might be suspended until the arrival of Mr. Rootes, to see if the defect of evidence, as to the surprise, could not be supplied; and read the certificate of Mr. Marshall, in these words: "I am told that it is questioned whether I was employed for Thornton, in the Court of Appeals, from the Court of Chancery. I was employed, and certainly should have appeared, had I been present when the case was called. I had not received the fee, but attributed that entirely to my being so frequently from home, and certainly felt no difficulty on that account with Col. Thornton. I did not think, from my idea of the state of the docket, that the cause could have been heard so soon, as I understood it was dismissed; but I really thought I had been marked."

PER CUR. That is not sufficient. Mr. Thornton ought to have applied to counsel himself, after Mr. Marshall's appointment.

Rule discharged.*

[* See *Post*, 233, S. C.]