REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

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.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

RICHMOND: CHAS. H. WYNNE, PRINTER.

WARDEN, for the appellee, was stopped by the Court; who held clearly that the notice was sufficient to warrant the judgment.

Judgment affirmed.*

[* See *Wilson* v. *Stevenson's adm'r*, ante, 213.]

STANNARD *v.* GRAVES ET AL. EXECUTORS OF BLAYDES.

Wednesday, November 5th, 1800.

After three verdicts, the Court of Chancery did right in decreeing according to the opinions of the juries.

If the Court, before which the issues are tried, is dissatisfied with the verdict, this dissatisfaction must be certified on the record by the Court; or if refused, it should be put on the record by a bill of exceptions; 'tis not to be supplied by affidavit, especially of counsel in the cause.

The discretion of the Chancellor is to be exercised on sound principles, of which this Court may judge.*

This was an appeal from a decree of the High Court of Chancery, where Stannard brought a bill against Graves and others, executors of Blaydes, to be relieved touching judgments upon two bonds given by him to Blaydes, for some carpenter's work done by the latter. After answer, replication, and commissions to take depositions, the cause was heard upon the bill, answer, exhibits, and the depositions, which were very numerous: when the Court of Chancery dissolved the injunction as to part of one of the bonds, and directed "issues to be made up between the parties, to enquire, whether the dispute between the plaintiff and the testator concerning breaches of the articles of agreement entered into by them, and referred to in the bill, was adjusted at the time when the plaintiff executed the two bonds on which the judgments were obtained; and, if not, to enquire, whether the testator was guilty of a

* A Court of Equity is not bound to grant a new trial of an issue out of Chancery, on the law—Judge's certificate that the weight of evidence was against the verdict: especially after two verdicts for the same party. *Ross* v. *Pines*, 3 Call, 568; and *M'Rae's ex'or* v. *Wood's ex'or*, 1 H. & M. 548.

Other cases on issues out of Chancery—*Paynes* v. *Coles*, 1 Mun. 373; *Marshall* v. *Thompson*, 2 Mun. 412; *Bullock* v. *Gordon, adm'r*, 4 Mun. 450; *Carter* v. *Campbell*, Gilm. 159; *Brent* v. *Dold*, Gilm. 211; *Knibb's ex'or* v. *Dixon's ex'or*, 1 Rand. 249; *Nelson's adm'r* v. *Armstrong, &c.*, 5 Gratt. 354; *Beale* v. *Digges et als.*, 6 Gratt. 582; *Isler and wife* v. *Grove and wife*, 8 Gratt. 257.

Cases in which issues should not have been directed—1 Mun. 373; *Samuel* v. *Marshall, &c.*, 3 Leigh, 567.

breach of those articles, and to assess damages for such breach; and also, to enquire whether any agreement was made between the plaintiff and the said testator at the time
[370] of executing those bonds, or before, other than the first, that the latter should perform other work for the former, and whether such work was performed accordingly; and, if not, to assess the damages sustained, by the breach of that agreement." The jury found, "That the dispute between the plaintiff and the testator of the defendants concerning breaches of the articles of agreement, entered into between them and referred to in the first issue, was adjusted at the time when the plaintiff executed the two bonds, on which the judgments were obtained. And that an agreement was made between the plaintiff and the testator of the defendants, before the time of executing the two bonds mentioned, that the said testator should perform other work for the plaintiff, and that the second agreement was adjusted in the amount of the two bonds aforesaid, when executed."

Upon the verdicts being certified into the Court of Chancery, that Court, for reasons appearing, set aside the verdict, and ordered a new trial of the second issue. And, "setting aside so much of the several orders as is inconsistent with what followeth," directed a jury to be impanneled between the parties to enquire, "Whether the testator of the defendants, at the time of the execution of the bonds, on which were rendered the judgments sought to be injoined, did agree to make good any defects in the building of the plaintiff's dwelling-house mentioned in the first agreement between the said testator and the plaintiff: and, whether such defects were made good accordingly; and, if not, to ascertain the damages occasioned by breach of that agreement: to enquire whether the said testator did perform the work, which he had agreed to perform, over and above the building of the dwelling-house in a faithful and workman-like manner; and, if not, to enquire what damages the plaintiff sustained, by non-performance of
[371] that work and infidelity of the builder; and, lastly, to enquire whether the damages sustained by the plaintiff, for either or both of those breaches, were satisfied, allowed, accounted for, or otherwise adjusted between him and the said testator, at the time of executing the forementioned bonds."

Upon these last issues, the jury found: "That the testator of the defendants did not agree, at the time of the execution of the bonds, to make good any defects in the building of the plaintiff's dwelling-house: That he did not perform all the work which he had agreed to perform, over and above the

dwelling-house: But, that there was a complete settlement between the plaintiff and the testator of the defendants, at the time of the execution of the bonds, and that no allowance was made by the plaintiff to the testator of the defendants, at the time of executing the said bonds for any work, which was not done."

Upon this last verdict being certified into the Court of Chancery, the plaintiff moved that the verdict might be set aside, upon two affidavits which he filed; but the motion was rejected by that Court, which decreed, "if the money for which the injunction was dissolved, had been paid, that the injunction as to so much should be perpetual; but, for the whole of that money, or the part thereof yet unpaid, the judgment, which was to be discharged by payment of £179, do remain as a security, and the bill was to be dismissed as to the other judgment."

From which decree, Stannard appealed to this Court.

One of the affidavits, referred to in the decree, stated, that the witness, after the last verdict, moved the District Court to certify, that it was contrary to evidence; and that one of the Judges, (Mr. White,) after they had considered the motion, said it was unnecessary, as it would appear from the account stated between the parties, which would be sent to the Chancery Court, that the verdict was against evidence.

The other affidavit stated, that, after the last verdict, one of the jurors, in a conversation with the witness, [372] mentioned, that, as the said Stannard had given his bonds to Blaydes, if all the proof in the world had been given in the said Stannard's favor, he would have given judgment against him; and that the rest of the jury were led to give judgment from the same principle.

NICHOLAS, WARDEN, and WICKHAM, for the appellants,

Contended, that the evidence contained in the record was clear; and, therefore, the Chancellor ought to have decided on it himself. Consequently, that he either ought to have directed no issue at all; (*Southall* v. *M'Keand*, from the order book,) [1 Wash. 336,] or, if any, that it ought only to have been an issue to ascertain the damages. That one of the Judges who tried the cause, thought the verdict wrong; and when asked for a certificate to that effect, declined it, saying that the account would shew it.

RANDOLPH, for the appellee,

Contended, that the whole was a question of fact; and, therefore, proper for the determination of a jury. 2 Com.

316, 626. Consequently, that the issues were properly directed; and, after three verdicts, that the question ought to be at rest: That there was certificate, or other record, of the opinion of the Judge; and no other evidence of it was admissible. Besides, the reason ascribed to him, for the opinion which he was said to have expressed, was not sufficient.

PENDLETON, President, delivered the resolution of the Court as follows:

The question made was, whether the Chancellor erred in directing an issue to be tried in this case at all; or, at least, other than to ascertain the damages!*

The appellant's counsel were correct in stating that the dis-
[373] cretion of the Chancellor, upon this, and all other occasions, is to be exercised by him, upon sound principles of reason and justice;† and that this, as an appellate Court, has a right to judge whether he has so exercised his discretion in the present case? But they are unlucky in the application.

The observation urged, that the evidence was so plain the Chancellor ought to have been satisfied, might have been repelled by the event, since two verdicts had been given against this plain evidence. But how did it then appear?

The points in dispute had been submitted to a jury, in a suit on the bond; whether properly or improperly,‡ is immaterial: most of the same witnesses were examined; particularly those of the appellant, Long and Thorp, the most material; and a verdict passed against the claim. Three jurymen had sworn they gave little credit to their testimony, for reasons which they were the judges of; no matter what. Was the Chancellor to shut his eyes to this strong bar against the claim, and say with the counsel, the evidence was plain, and the credibility of those witnesses not in question? Strange supposition!

He might probably have been justified in dismissing the bill, as the subject had passed a jury;§ but, considering that the jury might have been embarrassed by the bond, he more wisely directed an issue, framing it so as to avoid that embarrassment.

A verdict is again found against this plain evidence, as it is called; and the appellant was indulged with a third jury, who

[*See *Pryor* v. *Adams*, 1 Call, 382.]

[†See Ld. Ch. Eldon, in *Hampson* v. *Hampson*, 3 Ves. & Beam. 42.]

[‡See PENDLETON J., in *Smith, ex'r.* v. *Walker*, 1 Call, 33; *Taylor* v. *King*, 6 Munf. 358; *Wyche* v. *Maclin*, 2 Rand. 426; *Chew, ex'r.* v. *Moffett et ux.* 6 Munf. 120.]

[§See *Fenwick* v. *M'Murdo et al.* 2 Munf. 244.]

still find an according verdict: And why should not the Chancellor be satisfied at last?

Perry speaks of a conversation with a juryman, intimating that he decided upon improper principles; a conversation probably mistaken, or garbled, and not to be regarded on any view of propriety.

Mr. Brooke moved for a certificate that the verdict was against evidence. Mr. White, the junior Judge, [374] said it was unnecessary; for the account would shew it, and Mr. Brooke acquiesces. The other Judge was silent, and might not think it against evidence.

The certificate must appear of record, and from the Court; or upon a bill of exceptions, if refused, and is not to be supplied by affidavits, especially of lawyers; a most dangerous precedent.

Where is the account which justifies Mr. White's opinion? The private accounts of the parties, in the record, prove nothing; not being authenticated themselves, but mere *ex parte* statements.

The verdict stands unimpeached; was the third upon the subject; and all of them agreeing. It was, therefore, high time the matter should be put at peace. This is done by the decree, which is affirmed.

Cooke *v.* Simms.*

Thursday, October 27, 1796.

The first judgment of the Court of Appeals in this cause was as follows:

"This day came the parties, by their counsel; and transcript of the record of the judgments aforesaid having been maturely considered, the Court is of opinion that the judgment of the said District Court is erroneous. Therefore, it is considered that the same be reversed and annulled, and that the appellant recover against the appellee his costs by him expended in the prosecution of his appeal aforesaid [375] here, and this Court proceeding to give such judgment as the District Court ought to have given, being of opinion that there

*Ante 39, 42. It was thought that printing the above would make the former statement in page [42] more perfect.