REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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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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land, during the term of the lease. *That*, therefore, the change of owners would not affect their interest. For, whether the possession of the land was with the remainder-man or the lessee, their claim was still the same. So, that if the remainder-man had retained the lands he would, after the surrender, have been liable for the rents, or else he must have yielded possession to the daughters; and, therefore, the defendant, who had less equity, must do the same. *That* the rents being for a liquidated sum, ought to carry interest; for, the uncertainty of the amount is the only reason why interest is not generally allowed.

Cur. adv. vult.

LYONS, Judge.

Delivered the resolution of the Court, that there was no error in the decree upon the merits; and as to the interest, that it was discretionary in the Court to allow it or not. [253] But, in this case, the defendant had no title to have it taken off, as he had endeavored to defeat the rents altogether, and thereby delayed the payment.

Decree affirmed.*

[* See next case.]

SKIPWITH *v.* CLINCH, EXECUTOR, AND OTHERS.

Thursday, April 24th, 1800.

A. takes a lease of B. in May, 1777, for twenty years. In August, 1778, a similar lease of the same estate is executed. The rents are to be settled by the scale of May, 1777.

Interest upon the rents refused.*

This was an appeal from a decree of the High Court of Chancery; where Clinch, as executor of Holt, together with the children of Holt, brought a bill against Skipwith, stating, that on the 23d of May, 1777, Skipwith leased of Holt, an estate for twenty years, at £150 per annum, with a proviso for payment of the further sum of £50 per annum, provided there

* See note to p. 249 *ante*; and Supp. to R. C. of 1819, p. 256, § 3; Code of 1849, p. 568, § 7.

should be peace between G. Britain and America; the said £50 to commence with the peace. That another lease was afterwards executed between the said parties, in every respect like the former, except that the latter is dated on the 31st of August, 1778, instead of the 23d of May, 1777. That the only reason for executing the second lease was, that the first had not been recorded. That the plaintiffs can prove that *specie* and not *paper money* was contemplated in the said lease. The bill states the plaintiffs' rights to the rents under the lease; the deed for which it states to have been lost: And prays, that the defendant may be compelled to pay the rents and perform the other covenants in the lease, and for general relief.

The answer admits the two leases; but states, that the second was a new contract, as there had been a misunderstanding between the parties relative to the first. [254] Denies that it was a *specie* contract; and says, it would not have been worth above a fourth or third of the nominal rent, had it been payable in specie. States, that the taxes, owing to the unjust valuation of the land by the commissioners, are excessively high, with other circumstances and difficulties, which have attended the contract.

The deposition of a witness states, that Skipwith informed him that there was a lease of a date prior to that of August, 1778, but, that the last had been executed at the particular request of Holt, although there was very little variance between them.

Another witness says, he understood from all he could learn from either party, that the rent was to be paid in *specie*, or (what he understood by that expression,) *good money*.

Another witness says, he witnessed the original lease, which he has lately seen; and at the bottom was a note, in the handwriting of Holt, as the deponent was informed, in these words, "this lease renewed the 31st of August, 1778;" but the deponent knows nothing of the last mentioned lease.

Another witness says, the plaintiff, Clinch, told him that the defendant had paid Holt the first year's rent in *paper money*, as appeared by Holt's books; and that he believed the reason why he did not annually pay it, to have been, because Holt would not receive it.

Another witness says, he lived with the defendant in 1778, and wrote the last lease, which he attested as a witness.

The two deeds appear to be the same, except as to their dates.

The Court of Chancery was of opinion, that the rents were
[255] payable according to the value of money at the date of the first lease, and that the plaintiffs were entitled to the same benefits under the last lease, as if it has been executed on the date of the first. That Court, therefore, decreed the defendant to pay to the plaintiffs, £300 of the present current money of Virginia, for the arrearages of the rents on the 1st of January, 1784, (taken for the date of the peace;) and £1,044 of like money for the arrearages to the 1st of January, 1797, with liberty to sue writs of *scire facias* from time to time to recover future arrears, and that upon all trials at law, the defendant should admit the deed of 31st of August, 1778, to be of like force as if executed in May, 1777: From which decree Skipwith appealed to this Court. And the plaintiff likewise petitioned for an appeal, because the Court had scaled the rents instead of decreeing them in specie; and because interest was not allowed upon the rents.

RANDOLPH, for the appellant.

There is no pretext for considering this as a specie contract; as there is in fact nothing to shew that it was meditated by the parties, and the answer denies that it was a specie contract. The true way is to consider it as a contract of the date of the last deed, and subject to the scale of that period. That is the only legal notion, and the circumstances lead to a belief that the parties intended it as a new substantive contract of that date. Consequently, the depreciation is to be settled by the scale at that time; and none of the cases in this Court are against us. *Pleasants* v. *Bibb*, 1 Wash. 8, is rather in our favor; because, the principle which it establishes is, that you cannot antedate the period of depreciation, unless there is something upon the face of the instrument to authorise it; but, here, there is nothing. The same doctrine was held by the Court in stronger and more explicit language in *Bogle, Somerville & Co.* v. *Vowles*, 1 Call, 244, and there, evidence
[256] of the date of the original contract was actually refused: which was an express determination on the very point contended for by us; because, there is nothing particular in our case to take it out of the common rule. Finally, the principles laid down by the Court in *Watson* et al. v. *Alexander*, 1 Wash. 340, instead of militating against the position we contend for, will on due examination be found to be consistent with it. Interest was properly disallowed by the Court of Chancery under all the circumstances of the case; for, the full value of the rent was agreed to be given, had there been

no change in the property; and in event, it has proved a very hard bargain.

WICKHAM, contra.

The style of the last deed, evidently shews that the drawer had the first before him; and that the latter was intended merely as a renewal of the first, the time for recording of which had expired. Consequently, *Pleasants* v. *Bibb*, 1 Wash. 8, cited by the appellant's counsel, operates against him, and in every point applies in our favor. For, the last deed is for payment of rent from a day anterior to the date. The case of *Bogle, Somerville & Co.* v. *Vowles*, is very different from this, and cannot affect it; because, there was nothing in that case to form a ground of enquiry into the date: for it was a naked case, unattended with circumstances. As to *Watson et al.* v. *Alexander*, the spirit of that determination is clearly in our favor. Besides, all those were cases at common law where more strictness obtains; but, this a case originating in the Court of Chancery, and, therefore, to be governed by the principles of equity. At the least, we are entitled to the value of the money at the date of the first deed. But, there is strong ground to infer that specie was intended by the parties; for, the lease was a long one, and probably to last beyond the period of the war: and at the close of that the rent was to be increased. All which circumstances lead to a belief that specie was the object of the parties. Interest [257] ought to be allowed upon the rents, because they were liquidated and certain; in which case, and especially where there have been long delays, interest has been given. [*Litton* v. *Litton*,] 1 P. Wms. 542; [*Morris* v. *Dillingham*,] 2 Ves. sen. 170; [*Newman* v. *Auling*,] 3 Atk. 579; [*Batten* v. *Earnley*,] 2 P. Wms. 163.

RANDOLPH, in reply.

Pleasants v. *Bibb* was fully considered in *Bogle, Somerville & Co.* v. *Vowles;* which makes the authority of the latter more conclusive. That those were cases at common law, does not alter the rule; because the act makes no difference between a Court of Law and a Court of Equity in this respect. On the contrary, it gives equal power to both Courts to decide according to Equity. The circumstances of this case are particularly hard; and therefore, interest ought not to be allowed.

Cur. adv. vult.

LYONS, Judge. Delivered the resolution of the Court, that there was no error in the decree, in establishing the date of the contract; and as to the interest, that the plaintiffs were not entitled to it. Because, if it was certain, they might have distrained, and therefore should not have lain by and suffered the interest to accumulate; and if it was uncertain (as they themselves plainly shewed it was, by contending, at one time, that it was specie, and at another, that the lease was to be considered as of a different date from that admitted by the defendant, and therefore they did not venture to distrain,) then, according to the very cases relied on by the plaintiffs' counsel, interest was not demandable.* Nor ought the plaintiffs to have interest from the time of the decree;† because they had themselves appealed as well as Skipwith; and therefore contributed to rendering the amount uncertain and undetermined still.

Decree affirmed.

[**Dow* v. *Adam's adm'rs.* 5 Munf. 21; *Newton* v. *Wilson et al.* 3 H. & M. 467, and *Obermyer* v. *Nichols*, 6 Binney, 159.]
[†See post, *Deanes* v *Scriba et al.* 419.]

TALIAFERRO *v.* ROBB ET AL., EX'RS. OF GILCHRIST.

[258] *Tuesday, April 18th,* 1800.

What is an insufficient averment in a declaration against an executor.
What a sufficient consideration to support an executor's written assumpsit of testator's debt.
A. executor of B. writes to C. a creditor of B. that as soon as he is able to dispose of his crops, he will pay the claim, or will let him have any property in his possession at a moderate valuation:—this will not bind A. in his own right, without an averment of assets, or a forbearance to sue, or of some other consideration.*

The executors of Robert Gilchrist brought an action on the case, in the District Court, against Taliaferro, and declared for this, to wit: "That whereas John Taliaferro, deceased, in

*Though the promise or agreement be in writing, that is not enough to bind, under the statute of frauds, unless there is a consideration also. Yelv. 11—*Rann v. Hughes*, 7 T. R. 350, 2 Wms. Abr. 284. Note—*Colgin* v. *Henley*, 6 Leigh, 85. But to make the promise binding, it is not requisite that the consideration be expressed in the writing. 6 Leigh, 85.