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.

OCTOBER, 1808.

Thursday, October 20.

Pollard *against* Patterson's Administrator.

The true construction of the 29th section of the act reducing into one the general acts concerning the High Court of Chancery (*Rev. Code*, 1 vol. p. 66.) is that, if it appear from the face of a bill that the matter thereof is not proper for a Court of Equity, it should be dismissed; even "after answer filed and no plea in abatement to the jurisdiction of the Court."

A CONTROVERSY having arisen between *Robert Pollard* and *David Patterson*, concerning the proceeds of a sale of 75,000 acres, belonging to the latter, which the former had sold to *Robert Morris*, of *Philadelphia*; a compromise took place between them, on the 22d day of *September*, 1796, by a written covenant under their hands and seals, which recited the sale to have been made "in *December*, 1794, for six pence, *Virginia* currency, per acre, "payable, the sum of 300*l.* in sixty days, the further sum "of 300*l.* in ninety days, and the balance at three equal "annual payments, for which the said *Morris* gave his "bonds to the said *Pollard*;" stated "the land to have been "the property of the said *Patterson*, and conveyed by the "said *Pollard through mistake*;" and then proceeded thus: "Now these presents witness that, to accommodate all differences between said *Patterson* and *Pollard*, the said "*David Patterson* obliges himself to make to *Robert Pollard* a general warranty deed for the land, and the said "*Robert Pollard* hereby obliges himself, his heirs, &c. to "pay to said *Patterson*, the sum of six hundred pounds in "specie, deducting therefrom his acceptances to *James Ternan* and *Lauchlan M'Lean*; one hundred pounds of "the money to be paid to his order, in *Philadelphia*, by "the first of *November* next, and the balance as said *Patterson* may call for it. The residue of the sum due for "the sale of the land, he is to furnish notes of *Robert Morris*, or *Morris* and *Nicholson's*, allowing interest on them "from the time those granted to *Robert Pollard* became "due; and the said *Pollard* hereby relinquishes all claim "for commission, which, under an agreement with *David Patterson*, he had a right to charge."

It appeared that the money which *Pollard* was to pay under this contract, was all paid on and before the 25th of *October*, 1796, on which day he also assigned to *Patterson*;

OCTOBER 1808.

Pollard v. Patterson's Administrator.

a bond of *Robert Morris*, dated *December* 11th, 1794, and payable *December* 11th, 1796, for 425*l. Virginia* currency, (which bond appears to have been one of those taken for the purchase-money of the land,) but with a credit indorsed of 400*l.* on account of a purchase of military lands. The assignment was "*without recourse*," and attested by *David Patterson*, junior. On the 24th of *January*, 1797, *Pollard* wrote to *Patterson*, informing him that he had contracted with a gentleman in *Philadelphia*, for the same amount of *Morris's* and *Nicholson's* notes that he owed him; and, fearing his son might leave that place without his seeing him, had requested the notes to be sent to himself by post; and that he, the said *Patterson*, should be advised as soon as they should arrive. To this letter no answer from *Patterson* appears in the record. In the month of *March*, following, *Pollard* sent him a note of *Robert Morris*, indorsed by *John Nicholson*, for 1,350*l.* payable the 5th of *March*, 1798, a few months after *Morris's* last bond became due; the sum expressed in which note was equal to the principal and interest of the notes expressed in the agreement: but *Patterson* refused to accept it, (*Morris's* notes having at that time greatly depreciated,) and afterwards brought suit in the late High Court of Chancery, against both *Pollard* and *Morris*.

In his bill he stated a variety of circumstances concerning the transactions between *Pollard* and himself prior to the compromise, but did not allege any *fraud* to have been practised upon him, *in obtaining the compromise*, except "that *Pollard* assured him of his confidence in the credit of "*Robert Morris*, (to whom he had sold the said land,) and "thus induced him to enter into the agreement. He further "stated, that, living in a part of the world remote from "mercantile information, he continued in the determination "to receive the notes of the said *Robert Morris*, until the "month of *March*, 1797, when the note for 1,350*l.* was "offered him which he refused to accept;" "that the said "*Robert Pollard* was perfectly acquainted from time to time "with the decline of the credit of the said *Morris* and

"*Nicholson;* that in *March*, 1797, their notes were depreciated to almost nothing, and the note for 1,350*l.* was "acquired by the said *Pollard* at not more than one shilling "in the pound, or thereabouts, and not for the lands aforesaid; that the said *Pollard* had actually made great benefit "from the bonds which he had received on account of the "land aforesaid; that *Robert Morris* was seised in fee-"simple of the said land; that, if he, the plaintiff, had no "recourse against the said *Morris*, it must be because the "notes or bonds given by the said *Morris*, had been duly "satisfied; and, if they had been duly satisfied, the advantage taken of him, the plaintiff, by the tender of a paper "depreciated to the lowest degree, was, in the said *Pollard*, "against conscience; and, if the price stipulated by the "said *Morris*, had not been duly paid, then the said lands "were liable to the plaintiff for the purchase-money unpaid." The prayer of the bill was, that both the defendants should be held to answer, &c. that *Pollard* should discover the value of the military lands purchased with the 400*l.* part of the bond aforesaid, which the plaintiff alleged were of great value; should state how he had disposed of the other bonds, or notes, given for the said purchase-money; what was the market value of those bonds and notes when he received them; and what was the like value of the note for 1,350*l.* when tendered as aforesaid; that *Pollard* might be decreed to pay the real value of the 75,000 acres of land aforesaid, with interest, after deducting the payments already made; or, otherwise, that the land might be subject, in the hands of *Morris*, as a security for such value.

No answer was put in by *Morris;* and no further steps appear to have been taken against him.

The defendant, *Pollard*, filed his answer, in which he gave a detail of the circumstances, prior to the compromise, differing in many respects from the allegations in the bill, and stated that he believed the bonds which he took of *Morris* for the purchase-money of the 75,000 acres, *still remained unpaid*, except the credit of 400*l.* indorsed by him for the purchase of military lands; that the contract of

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

September 22d, 1796, was fair on his part, and he was ready and willing to comply with it; that, never having bought or sold any of *Morris's* or *Nicholson's* paper, except the note in question, he knew nothing of their value from time to time, and never practised or meditated any thing like fraud or imposition in any part of the transactions which took place between him and the plaintiff.

An amendment to this answer was filed on the 11th of *January*, 1799, stating that, after the sale had been made of the 75,000 acres belonging to the plaintiff, it was agreed to substitute other 75,000 acres, the property of the respondent, which agreement was dissolved by mutual consent, and that of *September* 22d, 1796, was formed in its stead; that the "*respondent had repeatedly offered to reinstate the* "*former agreement, and was still willing to convey to the* "*plaintiff the said last mentioned tract of* 75,000 *acres, on* "*his returning the money paid him by the respondent.*"

Many depositions were taken in this cause; from some of which it appeared that, in *September*, 1796, *Morris's* notes were worth about 6*s.* 8*d.* in the pound; that, in *February*, 1797, they were offered for sale at 1*s.* 6*d.* in the pound; that their decline in value was gradual and *notorious* in the City of *Richmond*, during the interval between those dates; and that the bonds which *Pollard* took of *Morris* for the land as aforesaid, had been traded away by him, but had never been satisfied to those who received them.

The deposition of *Lauchlan M'Lean* was, that in *June*, 1796, he received a letter from *Patterson*, mentioning that he would stand to *Pollard's* sale of the 75,000 acres of land sold at eleven cents per acre; that, before the deponent saw the said *Patterson*, he went to *Richmond*, and there met with *Robert Pollard*, to whom he shewed the said letter; the said *Pollard* observed that he did not know by what authority the said *Patterson* could mention *eleven* cents per acre for the 75,000 acre tract which was sold through mistake to *Robert Morris* of *Philadelphia*, in *December*, 1794; one thousand dollars payable at sixty days, another thousand dollars in ninety days, and the balance at distant

payments; and that the said *Patterson* had insisted on the sale of his own land, when he, the said *Patterson*, could have got ten cents per acre in *Swann's* notes, which were good; that *Pollard*, at the same time observed, the reason why the sale did not take place was, that the said *Patterson* refused to make the warranty required; that the deponent had a right to claim at ten cents per acre for his interest in the said 75,000 acres, and that, by the said *Patterson's* insisting on the sale to *Morris*, the said *Pollard* had a right to oblige *Patterson* to take *Morris's* notes for the balance over the two thousand dollars which the said *Pollard* had received from *Morris*: the deponent then asked the said *Pollard* what difference it would make; he replied he did not know; but that he should make considerably by it, as *Morris's* notes due at so long a period *could be bought very low*; the affairs of *Morris* and *Nicholson* being looked upon by many persons to be in a bad way; that *Pollard*, at the same time, expressed considerable resentment against *Patterson*, and said "I wish you may work him well;" that the deponent asked him what he would make out of *Patterson*, to which he replied (to the best of the deponent's recollection) three thousand dollars; that, in an after conversation on the same day, the deponent asked him *in confidence*, whether he thought it would not be well for him to exchange *Swann's* notes, which were considered of equal value to any, for *Morris's*, calculating upon getting a difference between them; whereupon, *Pollard* spoke favourably of *Morris*, and seemed to recommend the measure from his good opinion of him, observing, at the same time, that he had done considerable business with him, or for him; that the deponent's idea of the exchange of the notes was, that he was to get *two or three for one*, though this was not communicated by him to *Pollard*; and that the deponent had formerly been interested in the land, about which the suit was depending, but was no longer; *Patterson* having purchased out his interest and fully paid him for it by two drafts on *Pollard*, drawn in *April* and

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

June, 1795, for 350*l.* and 60*l.* and by the payment of 90*l.* to the Surveyor of *Patrick* County.

From the testimony of *John Preston*, of *Montgomery* County, it appeared that *Patterson* applied to and engaged him to locate and have surveyed the lands in question, and informed him that he had engaged with *Pollard* to furnish the warrants, or a part, and they should be laid on a survey of 150,000 acres, the lines of which had been designated shortly after the first contract, and shewn, perhaps, to said *Patterson* with a description of it, and another survey of 40,000 acres which stood in the same state; and that, at or about the time of sending or delivering the said warrants to the deponent, the said *Patterson* employed him to locate and have surveyed a further quantity of 75,000 acres, in the name of *Robert Pollard.* The deponent being asked what he knew respecting *Pollard's* warrants being placed on lands of inferior quality, answered, "as to this, the deponent "cannot say any thing material, for *quality* was not sought "for in these surveys, in any instance; nor did it appear to "be a consideration with Mr. *Patterson;* and neither the "survey of 150,000 acres, nor the one of 75,000 acres, "was *said or supposed to be land fit for cultivation.*"

The decree of the Court of Chancery was, "the Court "being of opinion that the defendant, *Robert Pollard*, ought "not to have tendered to the plaintiff notes of *Morris* and "*Nicholson*, which that defendant procured after he knew "the value of them to be decreasing, but is bound in equity "to pay to the plaintiff so much money as is equal to the "value of those notes in *Richmond*, on the 22d day of *Sep-* "*tember*, 1796;" that the said value be ascertained and reported to the Court by one of its commissioners; from which decretal order, *Pollard* prayed an appeal, which was allowed him; and the suit having afterwards abated by the death of *Patterson*, the appeal was revived against his administrator.

This case was ably and elaborately argued by *Call*, *Hay*, and *Williams*, for the appellant, and *Wickham* and *Randolph*,

for the appellee, chiefly on two points ; 1. Whether the bill had presented a proper subject for the jurisdiction of a Court of Equity ; and 2. If it had not, whether, under the act of 1787, c. 9. s. 2.(*a*) it was now too late to take advantage of the defect ; no plea in abatement to the jurisdiction of the Court having been filed.

1. The counsel for the appellant insisted that, *on the face of the bill*, there was no ground for the interference of a Court of Equity ; no *fraud* being charged to have been committed by *Pollard* in obtaining the written contract of *September* 22d, 1796, which, therefore, settled all disputes prior to its date ; the allegation that *Pollard* induced the plaintiff to enter into the contract, by assuring him of his confidence in the credit of *Morris*, not necessarily implying any charge of *fraud* or *concealment ;* because *Pollard* might have thought his assurances well founded, and the plaintiff, being a land speculator, and having a son residing in *Philadelphia*, had the same means of information, which *Pollard* had, concerning the value of *Morris's* notes.

The proper remedy in this case, (if the plaintiff was entitled to any,) was by action of covenant at common law : for this was not a bill for *discovery ;* no discovery *concerning the contract* being wanted from the defendant, and the plaintiff being as fully possessed of his case before the answer filed, as after it ; for it appears, from his own shewing, that he knew his land had been sold by *Pollard* to *Morris*, and was sufficiently apprised of the circumstances previous to the agreement.

If this should be alleged to be a bill to *rescind the contract*, the case stated is not such as to authorise it : but, in fact, the plaintiff sets up the contract of *September* 22d, 1796, as the ground of his action, and avails himself of it, at the same time that he seems to wish to rescind it. Neither can it be supported as a bill for *specific performance ;* for, though it be true that such a bill will lie where the specific performance is such as a Court of Equity will enforce conformably with its rules, yet this is where the recovery of

(*a*) See *Rev. Code*, 1 vol. c. 64. s. 29. p. 66.

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

the specific thing itself is the object of the suit; not where it is brought, as in this case, for *damages*, or something else in lieu of it.

The fraction of the bond, due from *Morris*, which *Pollard* assigned to the plaintiff, was not a sufficient ground for his coming into equity; because it does not *appear* from the evidence, though alleged in the bill, that the land remained in the hands of *Morris*; neither had his claim on *Morris* any thing to do with his claim on *Pollard*; for the bond was assigned "*without recourse*," and there can be no question that bonds may be sold without the person selling being liable for the ultimate responsibility of the obligors.

On none of these grounds, then, was the bill sufficient to give the Court jurisdiction; neither did the evidence supply its defects, by making out a proper equitable case.

2. As to the effect of the act of 1787. The words of the act are very broad; and, unless their construction should be limited, would confer jurisdiction upon a Court of Equity in all possible cases; such as to enforce payment of money due by bond, or to recover damages in trespass. But the construction of the act should be limited, according to the evident intention of the Legislature, to cases where a plea in *abatement* is necessary, and should not be extended to those where the want of jurisdiction is apparent without such plea. The object of the law was to provide for three descriptions of cases; 1. Where the bill is properly shaped to give the Court jurisdiction, but the plaintiff omits to produce evidence on the point, and the defendant does not except to the jurisdiction by a plea in abatement; 2. Where the Court is one of limited jurisdiction, (a Corporation Court, for example,) and, the subject of the bill being, *in general*, proper for the jurisdiction of a Court of Equity, the defendant fails to plead the *particular* exception in abatement; 3. Where the plaintiff omits to allege facts requisite to make his case proper for a Court of Equity, but afterwards proves them, and the defendant fails to take advantage, by a plea in abatement, of the omission in the bill. In all these cases, the effect of the law is that if the

plaintiff's claim be sustained in other respects, the objection for the want of *jurisdiction* is not to be taken after *answer* filed. But where nothing of the kind just mentioned exists in the case; where, upon the face of the bill it appears that a Court of Equity had no jurisdiction, and that a *demurrer* properly lay; it is impossible to suppose that the Legislature intended to give jurisdiction. Such a construction would be unconstitutional; for, where the case is obviously such that a Court of Law has jurisdiction, the party has a right to a trial at law by a Jury. The expression of the act, "that the Court shall not delay *justice*," means that kind of justice which a Court of Equity is competent to administer.

A plea in *abatement* either denies the facts alleged to give jurisdiction, or brings into view some *extrinsic* circumstance to defeat it: but a *demurrer* is for a defect apparent on the face of the bill; and, even after a *demurrer overruled*, the question of jurisdiction is still open for discussion, at the final hearing on the whole evidence, or in the appellate Court.(*a*) In this case the bill was susceptible of a *demurrer;* and it is a universal rule of pleading, that the defendant need never *plead* that the plaintiff has no cause of action, when it appears from his own shewing.(*b*) Suppose the defendant does not appear, when the bill itself gives no jurisdiction; can the plaintiff go on and get a decree? Here, though the matter of fact is taken as confessed, yet, surely, no decree for the plaintiff can be entered: for even consent of parties cannot give the Court jurisdiction.(*c*)

(*a*) *Pryor v. Adams*, 1 *Call*, 387. 391.

(*b*) 5 *Bac. Abr. Gwil.* ed. 352.

(*c*) *M'Call v. Peachy*, 1 *Call*, 55.

3. It was contended that *Pollard* had a right to tender *Morris's* notes at the time he did; because no time for the tender was limited in the contract, and a reasonable time to procure such notes ought to have been allowed: indeed, he had a right to do it, at any time, before demand and refusal. It may be said that the note which he offered had some time to run, and therefore, was not such as *Patterson* was bound to receive: but the contract does not say that the notes delivered should be such *as were due*, but *any notes* were to

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

be received; provided the difference of interest should be made up.

4. If the plaintiff be entitled to a specific relief, all that can be done is to direct *Pollard* to procure and deliver him such a note, or notes, as the contract describes.

On the part of the *appellee*, it was said, that *he* would have appealed if *Pollard* had not; because the decree had not given him the full relief to which he conceived himself entitled. Its true measure was the value of the bonds received by *Pollard* from *Morris*, and traded off by him; which bonds, having been taken for the *appellee's* land, were in equity, his property, and ought not to have been applied by *Pollard* to his own use. It was urged that *Pollard* was originally a *trustee*, (having sold the land as agent for *Patterson*,) and was bound in conscience to pay him what he received for it; and that there was no proof that the land had been sold by *mistake*, as he pretended: yet, at the time of the contract in *September*, 1796, he concealed the circumstance that he had actually parted with the bonds taken for it, and farther imposed on *Patterson*, by assuring him there was no doubt of *Morris's* credit; thus giving his note for the payment of 1,350*l.* of depreciated notes, for so much of *Patterson's* money then in his hands. Here was both *suppressio veri*, and *suggestio falsi*, sufficient to entitle the appellee to have the contract rescinded on the ground of fraud and imposition.

If the bill did not *expressly* charge *fraud*, it alleged that *Pollard* had acted *against conscience;* and the doctrine of Lord *Hardwicke* in the case of the Earl of *Chesterfield* v. *Jansen* is, that, where the circumstances of a case evolve fraud, it is immaterial how it is charged; and, in *Mitford*, p. 41. it is said that the plaintiff's claim may be charged in general terms. In this bill there is a general prayer for relief; and it is unimportant what the prayer is, if a sufficient ground for equitable jurisdiction be made out.

The bill, moreover, prayed a discovery of the value of the military lands, purchased with 400*l.* part of one of the

bonds, and of the true sum which *Pollard* had received for the other bonds. This, of itself, presented a sufficient case to give a Court of Equity jurisdiction; so that a demurrer to the bill should have been overruled.

But, even if the Court had not jurisdiction, the defendant having failed to plead in abatement, or to demur to the bill, is prevented by the act of 1787, from now taking exception for the want of jurisdiction. This act (being a *remedial* one) ought to be liberally construed, and not technically confined to pleas in *abatement* only, but extended to *demurrers* also; for the evil is the same of permitting the objection to the jurisdiction to be made, after answer filed and *no demurrer* to the bill, as, after answer filed and *no plea in abatement*. This law was taken from the acts of 1787, p. 12. and the *preamble* ought to be taken into view; which shews that the evils it contemplated to avoid, were the same with those presented by the case now before the Court. Is it not a most intolerable evil that the defendant should waive his demurrer to the bill, permit the plaintiff to go on to a final hearing, and then turn him round to a Court of common law?

In *reply*, it was observed that the contract of *September* 22d, 1796, shewed that *Patterson* knew the land had been sold to *Morris*, and on what terms; for those terms were expressly recited therein; that by acceding to that contract, he relinquished all claim to the *bonds* which had been taken of *Morris;* having agreed to take 600*l.* in money and *Morris's* notes, or those of *Morris* and *Nicholson*, in lieu of those bonds; that he had sanctioned the contract by receiving the 600*l.* in *specie*, and finally refused to accept the note for 1,350*l.* not because he had been *defrauded*, but because *Morris's* notes had *depreciated;* that the *contract itself* declared the land to have been sold by *mistake*, and therefore, no farther evidence was necessary; that all the circumstances prior to the contract, were closed and settled by it, and the plaintiff had no right to found a claim upon them; no *fraud in obtaining the contract* being either alleged or proved.

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

As to the hardship of turning the plaintiff round to a Court of common law, after a final hearing, when a *demurrer* might have been filed in the first instance;—the difference between a *demurrer* and a plea in *abatement* is, that the former objects to the jurisdiction, *on the face of the bill*, admitting the truth of its allegations; the latter, either denies them, or sets forth some extrinsic matter, known, perhaps, to the defendant only, to shew that the Court ought not to take cognisance of the case. The *former* is proper where the plaintiff, *from his own shewing*, does not make out a case for a Court of Equity; the *latter* where the defect *does not appear in the bill*, but is disclosed by the allegations of the defendant. Now, where a plaintiff makes a case not proper for a Court of Equity, it is his own fault, and he ought not to complain if the exception be taken at any time: but, where the objection must be shewn *by the defendant*, (as in the case of a plea in *abatement*,) if he fails to shew it in that way, it is not right to permit him to do so, after answer filed.

Tuesday, *November* 8. The Judges pronounced their opinions.

Judge TUCKER. This was an appeal from the *Richmond* Chancery Court.

A preliminary question submitted to the Court on the argument of this cause, depends upon the construction of the act of Assembly,(*a*) which declares, "that after answer "filed, and no plea in abatement to the jurisdiction of the "Court, no exception for want of jurisdiction shall afterwards be made; nor shall the High Court of Chancery, "or any other Court, ever thereafter, delay or refuse justice, or *reverse* the proceedings for *want of jurisdiction*, "except in cases of controversy respecting lands lying "without the jurisdiction of such Court, and also of infants "and *femes covert*."

(*a*) *Rev. Code*, 1 vol. c. 64. s. 29.

The remarks of Judge *Taylor*, in the cases of *Guerrant* v. *Fowler and Harris*,(*b*) and again in the case of *Harris* v.

(*b*) 1 *Hen. & Munf.* 5.

Thomas,(a) appear to me to be founded on sound reason, and are, I think, well supported by those of Judge *Pendleton*, in *Pryor* v. *Adams*,(b) and in *Terrell* v. *Dick*,(c) as well as by the rules of practice in Chancery, mentioned in *Mitford's Pleadings*, 112. 117. 171. 176, 177. 181, 182. I, therefore, am disposed to adopt the Chancellor's interpretation, that the clause is to be confined to those cases where the jurisdiction of a Court of Equity must be excepted to, by a *plea in abatement*, and not by *demurrer*.

(a) 1 *Hen. & Munf.* 18.
(b) 1 *Call*, 391.
(c) *Ibid.* 554.

The parties in this suit, having had some considerable disputes, on the 22d of *September*, 1796, entered into a compromise. The object of the bill seems to be to open the old controversy again, but without relinquishing the advantages he had already received from that compromise; but I am of opinion, this Court ought not to permit the matters, which it was the object of the compromise finally to adjust and settle, to be again opened. Of this opinion was Lord *Hardwicke*, in the case of *Puller* v. *Ready*,(d) in which he says, "There is nothing more mischievous than "for this Court to decree a forfeiture after an agreement, "in which, if there is any mistake, it is the mistake of all "the parties to the articles, and no one is more under an "imposition than the other. This Court is so far from assenting to set up the forfeiture again, that they would rather rejoice at the agreement, because it has absolutely "tied up the hands of the Court from meddling in the question:" and in the case of *Hook* v. *Ross*,(e) I understood this Court to be unanimously of the same opinion. The compromise in the present case, upon the face of it, appears to have been a perfectly fair one, both parties being fully apprised of every circumstance relative to the dispute between them. The complainant acquiesced in it, received 600*l.* on account of it, and, as he alleges in his bill, continued in a determination to receive *Morris's* notes until *March*, 1797. *Pollard* informed him by letter of *January* 24, 1797, that he had procured one for the amount he had to pay, which he had directed to be forwarded by post, fearing the *complainant's* son might have left *Philadelphia*. The note was

(d) 2 *Atk.* 592.

(e) 1 *Hen. & Munf.* 321.

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

tendered and refused the 25th of *March*. From the whole complexion of the transactions, as they appear in the record, *Patterson* was as well acquainted with the character and credit of *Robert Morris*, and his notes, or at least had the means of information concerning them, as fully in his power as Mr. *Pollard*. They were notorious objects of speculation, and the whole complexion of the original transaction shews it to have been a job of the same description; for the surveyor, in answer to the question respecting the relative quality of the two tracts of 75,000 acres each, answers, "that upon that subject, he can say nothing materi-"al: for QUALITY was not sought for in those surveys, in "ANY INSTANCE; nor did it appear to be a consideration with "Mr. PATTERSON; and neither the survey of 150,000 acres, "nor that of 75,000 acres, was SAID or SUPPOSED TO BE "*land fit for* CULTIVATION." Suppose there had been no compromise, would this Court, as a Court of EQUITY, interfere to settle a controversy between parties engaged in such a business? I should suppose it would say to them, settle your disputes, as you can, between yourselves; this Court will not interfere in the division of your spoils. On these grounds, I think, we ought not to go back beyond the compromise; and there is no circumstance whatsoever, either in the answers, depositions, or exhibits, which appears to me to warrant the idea, that there was any fraud or concealment on the part of Mr. *Pollard*, or any surprise on *Patterson*.

The deposition of *Lauchlan M'Lean* may, perhaps, be considered as proving some duplicity on the part of Mr. *Pollard*. There is no date fixed to the conversation between him and the witness. If it were before the compromise of *September* 22d, it must have had relation to the matters which that compromise put an end to. The witness who was, perhaps, then interested with *Patterson*, ought, if he thought that conversation of importance, to have communicated it to *Patterson:* whether he did or did not, does not appear. *Pollard's* observation respecting the low price at which *Morris's* notes could be got, does not ap-

pear to have shaken Mr. *M'Lean's* opinion of them, for he asks *Pollard's* opinion as to exchanging the notes of *Swann*, which he seems to have had by him, for *Morris's*. It was in answer to that inquiry that *Pollard* expressed his good opinion of *Morris*, (in which he probably was not singular,) and recommended the exchange to *M'Lean*. No time was limited within which *Pollard* was to procure *Morris's* notes for the balance of 4,500 dollars. He writes *Patterson* that he had purchased them, just four months after the date of the compromise; and *Patterson* never announces his determination not to accept them, till *March* 25th, (two months after,) when actually presented to him. The depreciation to 6*s*. 8*d*. in the pound, in *September*, was probably not unknown to *Patterson*, for he was in *Richmond*, the theatre on which they were constantly exhibited to the view of all the world. It was a reasonable supposition that a paper, already so depreciated, would soon fall much lower; and, where any man makes a contract under such circumstances, he must abide by the event, be that what it may. It ought not to pass unnoticed, that Mr. *Pollard*, in his amended answer, states, that after the sale of the 75,000 acres, belonging to the plaintiff, as stated in his original answer, it was agreed to substitute in the place thereof other 75,000 acres, the property of *Pollard*, which agreement was *dissolved by mutual consent*, and that of *September* 22d, formed in its stead; that he has repeatedly offered to reinstate that agreement, and is now willing to convey to the plaintiff the said last mentioned tract of 75,000 acres, on his returning the money paid him by the defendant. This offer, in my opinion, was such a submission to the jurisdiction of the Court, upon this case, as the defendant could not afterwards retract; and put it into the power of the Court to make such a decree, as a Court of Equity might well make, upon such a bill and answer; but which, in my judgment, it could no otherwise have made, without this concession, than by dismissing the plaintiff's bill. For, as was well observed at the bar, if the object of the bill was

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

not to have the contract of *September* 22d *rescinded*, it must be to compel a specific performance of that which had *already* been specifically performed, as far as depended upon the defendant; (of course the bill would not hold on that ground;) or to obtain *damages* for the non-performance of it as soon as the plaintiff had a right to expect; which it is the peculiar province of a Court of *Law* to afford, and which it is incompetent to a Court of *Equity to assess.*

The only decree then which it was competent for a Court of Equity to make, was, to direct the delivery of the note tendered to the plaintiff, (it being in possession of the Court,) and thereupon to dismiss his bill with costs. But when Mr. *Pollard* had submitted to convey to the plaintiff the 75,000 acres mentioned in his last answer, the Court, I conceive, ought to have adapted its decree to that offer, giving to the plaintiff the alternative of accepting it within a limited time; in which case, each party ought to have borne his own costs; or, if that part of the alternative were rejected, or, being accepted, should not be complied with, on the part of the plaintiff by the repayment of the money, then the second branch of the alternative, the acceptance of the note deposited in Court, might also have been permitted within a limited time; and, if that were rejected, then the bill should have stood dismissed with costs; and such, I conceive, is the decree which this Court ought now to make; leaving to the plaintiff, if so advised, to pursue his remedy at law, for any damages to which he may suppose himself entitled by the defendant's delay in making the payment stipulated between them to be made in *Morris's* notes, in case he shall reject the alternative thus offered; or in case Mr. *Pollard* shall have parted with the 75,000 acres of land, (which he offered in lieu of the other,) and shall thereby have disabled himself now to convey the same. For, as that offer was neither accepted by the plaintiff, nor made the foundation of the Chancellor's decree, I conceive Mr. *Pollard* was at perfect liberty to dispose of the lands as he might think proper.

Judge ROANE. The question made in this case, upon the construction of the act of 1787, is very important, has often occurred in this Court, and ought now to be settled, although, perhaps, the case could well go off without it. This question, as it is *contended* to arise out of the circumstances in this cause, is, whether the omission to plead to the jurisdiction of the Court, gives a power to a Court of Equity to decree in favour of a plaintiff upon a case appearing upon the face of the bill to be merely a *legal* question.

There is no doubt but that the act *concerning the Court of Chancery*, in which this provision is found, contemplated, *only*, cases in equity. It is clear also that, whatever shades of difference may be found to exist in different adjudged cases on this subject, the partition line between the two jurisdictions is as firmly established by the successive decisions of Courts of Equity, as any point whatsoever. It is as well established that a Court of Chancery ought not to hold cognisance of a case which has no ingredient of equity in it, as in a case where the *value* of the thing in controversy is below the standard established by the act relating to the subject. The established positions, on each subject, should be alike respected by Courts, in forming a construction; and neither should be considered as repealed, but by express words, or a clear and necessary implication. Where the consequence is to be, the prostration of the line of partition between the two jurisdictions, and the letting in *all* cases to the *forum* of the Court of Equity, those words, or that implication, should be extremely strong and clear.

Bearing these considerations in mind, let us consider the question before us. The words of the section are: "After "answer filed, and no plea in abatement to the jurisdiction "of the Court, no exception for want of jurisdiction shall "ever afterwards be made, nor shall the High Court of "Chancery, or any other Court, ever thereafter delay or "refuse justice, or reverse the proceedings for want of ju- "risdiction, except in case of controversy respecting lands

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

"lying without the jurisdiction of such Court, and also of "infants and *femes covert*."(a) The question is, whether the omission to plead *in abatement* to the jurisdiction of the Court, will extend to a case plainly appearing, *upon the face of the bill*, to be proper for the cognisance of a *Court of Law only*, and not of ANY *Court of Equity*. In such case, the ground of defence being apparent on the face of the bill itself, the proper mode of defence is by *demurrer*, and not by *plea*.(b)

(a) *Rev. Code*, p. 66. s. 29.

(b) *Mitford*, p. 99.

And again, we are told, more particularly, that where it appears by the bill that the subject of the suit is not within the jurisdiction of A Court of Equity, the proper mode of defence is by *demurrer*.(c) On the other hand, when the objection to the bill is not apparent on its face, the defendant, if he means to take advantage of it, ought to shew it by plea or answer. It is true that this writer, in stating the grounds of defence by plea, admits, *inter alia*, that a plea is proper, where "the subject of the suit is *not* within the jurisdiction "of A Court of Equity;"(d) but I presume that, in such case, that fact is to be made out *aliunde*, and not from the face of the bill itself; and a plea of this kind is also considered as a plea *in bar*, and not merely *in abatement*.(e) The question then is, whether the Legislature, in this section, contemplated any other case than those in which a *plea in abatement*, (or at least a *plea*,) was proper? Of which description of cases there are several, as, where the case is proper for A Court of Equity, but not THIS particular Court; or where there is no objection to the *case* made by the bill, but yet the suit ought to be abated or barred by reason of some circumstance attending the situation of the plaintiff or defendant, or the like. Could the Legislature, when they used this particular expression, (*plea in abatement* to the jurisdiction of the Court,) have contemplated a case to which a *demurrer* (or, at most, a *plea in bar*) was the only proper defence? The other class of cases just alluded to, will satisfy the expressions of the act; and this construction is also supported by the *exceptions* in the clause, in relation to lands lying without the jurisdiction of the Court, and infants and

(c) *Ibid.* 102. 176.

(d) *Ibid.* 178.

(e) *Ibid.* 179.

femes covert: these exceptions fall entirely within that class, in which *pleas* are proper; and the exception in this case proves the rule.

But it is said that the *general* words in the latter part of the clause, are so strong as to comprehend every thing. I answer, in the first place, that it is a sound rule of construction, that *general* words in a statute are to be expounded, by reference to the actual case in the contemplation of the Legislature, as evidenced by their words, which here was a ground of defence to which a plea *in abatement*, (or at least *in bar*,) and not a demurrer, was properly applicable; 2d. That the Legislature is to be presumed conusant of the just rules and doctrines of pleading, and to know the extent and import of any technical terms used by them; and, 3d. That neither are the words of the act, perhaps, more strong, nor the reasons in favour of a qualified construction less operative, than in other analogous cases in the law, where a restricted construction has been adopted. For example, in the act of *jeofails*, it is said that no judgment after verdict shall be arrested, "for omitting *the averment of any matter* "without proving which, the Jury ought not to have given "such a verdict." Now it is clear, that, in *assumpsit*, the Jury ought not to find for the plaintiff, unless a promise be proved; and yet this clause has been construed not to extend to cases in which a promise is not laid in the declaration. If it be proper that the declaration of a plaintiff at law should (notwithstanding the unqualified terms of the act of *jeofails*) state, in legal form, the ground of controversy, it is certainly equally necessary, that the case exhibited to a Court of Equity should be of a CHARACTER to confer jurisdiction upon that Court.

There is a strong analogy, then, between these two cases; and as, in a case at law, the Court will not give judgment, (notwithstanding the objection has not been taken,) upon a declaration radically defective, as exhibiting no cause of action; so although a *demurrer* (for a *plea* in this case would be improper) has not been opposed to a bill containing *on its face* no case for A Court of Equity, but,

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

on the contrary, the defendant answers thereto; yet the Court will not grant relief upon hearing the cause.(a) The necessity of having all averments essential to shew a cause of action, in a declaration at law, and that the case submitted to a Court of Equity should be of a character adapted to that jurisdiction, are land-marks which we ought not to lose sight of, in forming a construction upon the acts in question.

(a) *Mitf.* 100.

I am therefore warranted in saying, that the act before cited, does not authorise a Court of Equity to decree in a case, as made by the bill, of a purely *legal* nature.

As to the particular bill before us, it is, on its face, fully adequate; and, if it were supported by the testimony, or if the facts set out in it were admitted by a demurrer, I should see no objection to sustaining it. It charges fraud and concealment, which, if made out by proof, or admitted, would be competent to give a jurisdiction; but there is no demurrer in the case, and the proofs fall short of the charges contained in the bill.

The agreement of *September*, 1796, closed the previous subject of controversy: the appellant was not bound to state to the appellee what he had done with *Morris's* BONDS; and the appellee does not state that he made any inquiries on the subject, but, on the contrary, agreed to take *Morris's notes* for the amount of the sale. It is not shewn that these notes were to be payable *on demand*, and the contrary is rather inferrable, from the agreement to "allow interest" thereupon, from the time those given by *Morris* to *Pollard* became due.

Pollard, therefore, complied with his agreement, by tendering the notes mentioned in the proceedings; but having, by his answer, made an offer to convey the other 75,000 acres of land, it should be optional with the appellee to accept the one or the other, in case the land has not been sold since the offer was made, which was not then accepted.

I am, therefore, of opinion, that the decree be reversed, and another rendered conformable to the above mentioned ideas.

Judge FLEMING concurred, and said that, on the point of jurisdiction, he wished it to be understood that the Judges were unanimous in their opinions that, whenever it appears from the face of the bill, that the matter was not proper for the jurisdiction of a Court of Equity, the bill should be dismissed, notwithstanding the defendant did not plead in abatement.

The opinion of the Court was entered, that the decree of the Chancellor was erroneous in this, "that the defendant, *Robert Pollard*, was thereby bound to pay to the plaintiff so much money as is equal to the value of the notes of *Robert Morris*, or of *Morris* and *Nicholson*, in *Richmond*, on the 22d day of *September*, in the year 1796, which value one of the Commissioners was directed to ascertain and report." The decree was therefore reversed; "and this Court proceeding to pronounce such decree as the said Court of Chancery ought to have pronounced: it was further decreed and ordered that, as the said defendant, in his answer of the 11th day of *January*, 1799, had stated, 'that he had repeatedly offered to reinstate the former agreement between the parties, and was then willing to convey to the plaintiff the last mentioned tract of 75,000 acres of land, on his returning the money paid him by the defendant;' the representatives of the said plaintiff (who is now dead) shall have their option either to accept the note dated at *Philadelphia*, the 5th day of *March*, 1793, drawn by *Robert Morris*, in favour of *John Nicholson*, and indorsed by the said *John Nicholson*, payable three years after date, for four thousand five hundred dollars, and tendered to the said plaintiff, on the 25th day of *March*, 1797, by *John Staples*, agent for the said defendant, in full discharge and satisfaction of the said contract of the 22d day of *September*, 1796, or to refund to the said defendant, or to his assigns, the money received of him, in consequence of the said last mentioned agreement, with legal interest thereon from the re-

OCTOBER, 1808.

Pollard v. Patterson's Administrator.

" spective dates of the receipts thereof, until the same shall " be repaid; on the repayment of which, that the said de- " fendant do convey to the representatives of the said plain- " tiff, *David Patterson*, deceased, the last mentioned 75,000 " acres of land, with a general warranty; unless the said " defendant shall have parted with those lands in conse- " quence of the non-acceptance of that offer: and that the " representatives of the said *David Patterson* do, on or be- " fore a certain day to be appointed by the Court of Chan- " cery aforesaid, make their election which of the before " mentioned alternatives they will abide by and perform; " and, if the said representatives shall not, on or before the " day so to be appointed by the said Court of Chancery, " make such election, and pay or tender unto the said *Ro-* " *bert Pollard*, or to his assigns, the money by him so paid " to, or advanced for the said *David Patterson*, with inte- " rest as aforesaid, then the said bill to be dismissed with " costs." And the cause was remanded to the said Court of Chancery, for further proceedings to be had thereon agreeable to the principles of this decree.