REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
Printed by THOMAS NICOLSON
M,DCC,XCIX.

To The PUBLIC.

THE caſe of *Maze* and *Hamilton*, with one other, I had intended to publiſh in an appendix to this volume. But the manuſcript having been unfortunately depoſited in a houſe which was lately conſumed by fire. I have great reaſon to apprehend that it was either burnt, or by ſome other means deſtroyed.

PAGE.	LINE.	
11	41	*For* hinder *read* hinders.
54	26	*Inſert* by *before the words* the owner.
66	4	*Strike out the comma after* mother *and put a period.*
—	12	*Strike out the ſemicolon after* it *and put a comma.*
68	5	*For* empowed *read* empowered.
69	36	*For* 1 *read* 3.
70	17	*For* appellant *read* appellee.
71	2 & 3	*For* appellant *read* appellee.
87	8	*After* teſtimony *inſert* of.
98	17	*After* regarded *inſert* it.
99	31	*After* rule, *ſtrike out the mark of interrogation and put a period.*
106	12	*For* lands *read* land.
122	44	*For* forfeiled *read* forfeited.
139	7 & 14	*For* ſecurity *read* ſurety.
140	4	*For* principal *read* plinciple.
163	32	*Before* ſuperior *read* the.
182	21	*For* laws *read* law.
206	4	*After* it *inſert* to.
—	21	*For* principal *read* principle.
209	14	*For* determination *read* termination.
212	11	*After* but *inſert* where.
224	37	*After* idea *put a ſemicolon.*
225	40	*After* that *inſert* of.
227	3	*Strike out* not.
—	34	*After* endorſer, *ſtrike out a period and put a comma, after* 443 *ſtrike out the comma and put a period.*
242	14	*Strike out the ſemicolon after* fault.
243	24	*After* not *inſert* an.
244	41	*Strike out the ſemicolon after* declarations.
249	2	*For* is *read* as.
255	10	*For* prices *read* price.
—	12	*After* Johnſon, *ſtrike out the ſemicolon and put a comma.*
261	19	*Strike out the comma after the word* Stockdell, *and put a period.*
263	37	*For* law *read* all.
266	25	*For* points *read* point.
270	27	*Strike out the comma & put a period after the word* plea.
278	9	*For* 2 *read* 1.
288	40	*For* ſurvices *read* ſervices.
289	1	*For* ſtronger *read* ſtrong.
—	14	*For* centinental *read* continental.

39 *For*

Page	Line	
289	39	*For* colluſion *read* colliſion.
292	22	*For* deciſſion *read* deciſion.
——	30	*Strike out* of *after the word General.*
——	31	*For* Hooker *read* Hocker.
293	19	*After the word* intended *inſert*)
——	21	*For* legal *read* regal.
295	23	*After* Carolina, *put a comma inſtead of a ſemicolon, and ſtrike out the ſemicolon after the word* loci.
——	38	*For* deſribed *read* deſcribed.
296	8	*Strike out the comma after* bills.
——	35	*For* there *read* theſe.
300	11	*For* legal *read* regal.
301	26	*After* damages, *put a period.*
302	8	*For* is due *read* iſſue.
——	22	*After* verdict *inſert* ought.

PHILIP M'RAE,

againſt

RICHARD WOODS.

THIS was an appeal from the High Court of Chancery, in a ſuit inſtituted there, by the appellee againſt the appellant. The bill ſtates, that the plaintiff in the year 1769 had a lottery, the higheſt prize in which was ſome improved lots in *Charlotteſville* and a tract of land, which property, in the ſcheme of the lottery was eſtimated at £440. That *Roderick M'Rae* purchaſed two tickets, *Henry Mullens* one, to which the plaintiff added another, the whole forming a joint property, in which *Roderick M'Rae* owned one half. That one of the partnerſhip tickets (No. 69) drew the higheſt prize, and was therefore entitled to the property above mentioned. But the ticket ſo ſoon as its good fortune was known, was forcibly taken from the ſaid *Roderick M'Rae* by the defendant *Phillip M'Rae*, who claimed the entire benefit of the prize. That the plaintiff and *Mullens* having ſold their intereſt in the prize to *Roderick M'Rae*, the plaintiff conveyed the whole property to the aſſignee of *Roderick*. That about fifteen years after this, the defendant commenced a ſuit againſt the plaintiff at law, and in the abſence of the plaintiff's witneſſes, who could have proved the tortious manner in which the plaintiff acquired the poſſeſſion of the ticket, a verdict was rendered againſt him for £451:18:4 damages, for the *whole value* of the ticket. The bill prays an injunction to the judgment at law.

The anſwer ſtates, that half of the ticket in queſtion was purchaſed by *Roderick M'Rae* for the defendant, the day before the drawing, and that after it was known to have been fortunate, it was delivered to the defendant by the ſaid *Rederick*. That the defendant never claimed more than one *half of the prize* drawn by this ticket.

The evidence, as to the right of *Philip M'Rea* and the manner of his obtaining poſſeſſion of the ticket, is extremely contradictory.

The ſubject of diſpute was ſubmitted to arbitration by the two *M'Rea's* (as appears by the teſtimony of ſome of the arbitrators,) and a deciſion was given in favor of *Philip M'Rea's* title to one half of *Roderick's* intereſt in the prize. One of the jurymen who tried the cauſe depoſes that his intention was to give

give damages for the whole value of the ticket. Another juryman depoſes, that the jury gave to the appellant Philip M'Rea, damages, for the intereſt which Roderick M'Rea held in the ticket. The declaration filed in the action at law claims the whole ticket; and the verdict is general, "that the defendant did aſſume upon himſelf as the plaintiff hath declared againſt him and aſſeſs the damages to £ 451 : 18 : 4."

THE CHANCELLOR upon the hearing of this cauſe, directed the iſſue between the parties in the action at common law, to be tried again; from which decree the defendant appealed.

MARSHALL for the apellant: I ſhall object 1ſt, to the decree in *toto*; or if I am wrong in that, then 2dly, to ſo much of it, as directs a trial of *the right* of the appellant to any part of the ticket in diſpute.

Upon the firſt point I contend, that the bill ought to have been diſmiſſed. The equity ſtated is, that the appellant was entitled to *no part of the ticket*, but having obtained the poſſeſſion of it tortiouſly, he thereby acquired *prima facie* an evidence of right, which on account of the appellee's want of teſtimony at the trial, he was unable to controvert. The equity now ſet up, (namely, that the appellant was only entitled to a *fourth of the ticket*,) not being ſtated in the bill, he had no opportunity given him of controvering it by his anſwer, nor was it neceſſary for him to do ſo; and therefore, whatever proof the appellee might produce as to the extent of the appellant's intereſt, it was improper for the Chancellor to decide upon it. The appellee might have amended ſo as to put in iſſue the point for which he now contends; but not having done ſo, he is confined to the equity ſtated in the bill.

The court are not now at liberty to ſay, that the verdict is wrong ſo far as it gives to the appellant the value of a moiety of the ticket. All the teſtimony in the cauſe proves the right of Philip M'Rea to a moiety, unleſs it be the award, which is made upon the principles of accommodation, and to which the appellee having objected, it would be improper to allow it any weight in the cauſe, by conſidering it as evidence of the rights of the parties.

The Chancellor therefore erred as I conceive in ſetting aſide the verdict. The trial before the jury was a fair one. The appellee does not even charge in his bill that he was ſurprized, otherwiſe than by a general aſſertion, that he was unprovided with teſtimony, without ſetting forth who were the witneſſes, the benefit of whoſe teſtimony he wanted, or what they

could have proved. It does not appear that there was any evidence before the Court of Chancery which was not given to the jury, and they having decided upon the right, the verdict ought not to have been set aside.

But admit the court should be satisfied that the appellant was only entitled to a fourth of the ticket, then I insist secondly, that the Chancellor ought not to have set aside the verdict, but should have injoined one half of it.

In cases where a verdict is vicious in all its parts, or where no standard is furnished by which to modify it, I admit it ought to be set aside in the whole. As in cases where it is unfairly obtained, or where the action is merely founded in damages, as in trespass and the like. But in this case, if Philip M'Rae was entitled to only one fourth, instead of one half of the ticket, then he is as certainly entitled to one half of the amount of the verdict, as in the other instance he would have been to the whole.

As to the part of the ticket for which the jury gave him damages, there is no sort of uncertainty. The whole testimony in the cause proves, that the appellant claimed only one moiety of the ticket. One of the jurymen proves that the damages given, were for that part. A single juryman depose, that he intended the damages for the whole ticket. Consider what a dangerous precedent it would establish, if in any instance, a single juryman, or even two, should be permitted after a fair trial to set aside the verdict, by saying, that he intended to find in this, or in that way. Such a decision would be in direct opposition to that laid down in the case of Cochran *vs* Street (ante vol. 1, p. 79,) where the court went entirely upon the evidence of a *large majority of the jurors*, which proved that they decided upon a mistake.

In opposition to this solitary juryman, is not only the evidence of another juryman, as well as that of many other witnesses, but the amount of the damages assessed, plainly proves, that the verdict was for a moiety only of the value of the property, *with interest* from the time it was withheld from the appellant.

The right of the appellant to interest, cannot I presume be contested. If the appellee had not wrongfully conveyed the property to Roderick M'Rae, and the appellant had resorted to a Court of Chancery to compel a conveyance of the part belonging to him, the mesne profits would have been decreed, and it would have been error to have refused. Having sued for damages,

mages, he was upon the ſame principle entitled to intereſt in lieu of the profits. And if the jury ought to have given intereſt, the court will preſume they did do ſo, and not that they gave damages for the whole value of the ticket, which the appellant did not claim.

Why then ſhall the verdict be ſet aſide, and the appellant put to ſea again to eſtabliſh his title, which has once been fairly aſcertained? If he be entitled only to a fourth, his right to a fourth ought not again to be put in jeopardy, ſince the jury, having given damages for a half, have furniſhed this court with a rule to go by, in aſcertaining the exceſs which ought in equity to be injoined.

But if it were neceſſary for the court to direct an iſſue at all, it ought to have been one to aſcertain the *value of the fourth part*, and not one, which was to bring the appellants right to *any thing*, again into queſtion.

CAMPBELL for the appellee. A ſhort attention to the hiſtory of this tranſaction, will furniſh a ſufficient anſwer to the firſt point.

In the ſuit inſtituted at law by Philip M'Rae againſt Woods, he claimed the whole of the ticket, and recovered a judgment for the whole, in damages. Woods applied to the Court of Chancery, ſetting forth, that tho' Philip M'Rae was in poſſeſſion of the ticket, yet he obtained it tortiouſly, and had no title whatever to it. Philip M'Rae, in his anſwer, admits himſelf entitled only to one half of the ticket, and upon theſe proceedings it neceſſarily and properly became a queſtion with the Chancellor, whether Philip M'Rae was entitled to any, and to what part of the ticket?

There appears to be two ſubjects of enquiry now before the court. 1ſt, Can the verdict already found be eſtabliſhed? And if not, then 2dly, How ought the court to proceed after ſetting it aſide?

1ſt, That the verdict cannot ſtand as it is, is what I confidently inſiſt upon. If it were intended to give the appellant damages for half the ticket, it is unwarranted by the teſtimony in the cauſe, which goes completely to prove, that if he were entitled to any thing, it could only be to a fourth.

If damages for the whole ticket were intended, then the appellant's counſel does not attempt to maintain it. Yet one of the jurymen has depoſed, that he intended the damages for the whole of the property. This teſtimony is objected to by Mr. Marſhall, who ſeems to conſider a juryman in ſuch a caſe, as an incompetent witneſs. Let me aſk, if a bye ſtander had proved miſbehavior

would

would the court who tried the cauſe, or a court of equity have heſitated to ſet aſide the verdict? It is admitted, that if many jurymen had concurred in proving the ſame fact, that their evidence would have deſerved weight. But let me aſk, can the influence of truth depend upon numbers? Or can teſtimony coming from a juryman be leſs worthy of credit, than if given by a ſtranger? If he had been himſelf miſtaken, or if he knew of a miſtake in any of his brethren, it was his duty to expoſe it, that the error might be corrected.

2d, If then the verdict is to be ſet aſide, what is the court to do? It is entire, and cannot be ſet aſide in part and confirmed in part. It is either for the whole, or for a half of the ticket. Both are wrong. But whether it be for the one, or the other, this court can at moſt only conjecture. One juryman ſays the firſt, the other the laſt. Where then is the ſtandard which Mr. Marſhall ſpeaks of, by which the court can divide the verdict?

The court muſt decree either upon the evidence, or upon the verdict. Not upon the laſt, becauſe that is avowedly wrong. If that be given up, and the court ſuppoſe they can with propriety look into the evidence and decide upon that, I am ready to go into it. There is a caſe in Morgan's Eſſays, of an action upon a bill of exchange. There were two counts in the declaration, upon one of which, the jury found for the plaintiff; upon the other, there was an improper finding for the defendant. The plaintiff deſired to ſet aſide the ſecond finding, and to retain the firſt. But the court refuſed, as the verdict was entire. It is argued that the jury are to be preſumed to have given intereſt, becauſe they ought to have done ſo. But I do not think they ought. Philip M'Rae complains that Woods conveyed to Roderick M'Rae inſtead of himſelf. But this aroſe from the neglect of Philip M'Rae, who had improperly acquired the poſſeſſion of the ticket, and without which no verdict could have been obtained. But Woods did right in conveying to Roderick M'Rae to whom he had ſold the ticket. What conſiderations then prevailed with the jury in forming the verdict cannot certainly be known by the court.

As to the value fixed upon the property in the ſcheme of the lottery, it furniſhes no ſtandard by which the intention of the jury can be explained.

MARSHALL in reply. That a verdict is entire at law cannot be denied. But that a court of equity may, when there is a guide to go by, ſet it aſide in part only, is every day's practice.

tice. If the verdict be improper in the whole, as if the trial be unfair, or the whole finding be inequitable, or if it be wrong in part, but the court has no ſtandard by which to diſtinguiſh the good from the bad, in ſuch caſes the whole verdict ought to be ſet aſide. But if, as in the caſe of a bond, the plaintiff has recovered too much at law, what does a court of equity do? Not ſet aſide the whole verdict, but injoin ſo much of it as the obligee in conſcience is not entitled to. If it be neceſſary to direct an iſſue, the court does ſo as to the part diſputed, but never ſets aſide the verdict which in the firſt inſtance is preſumed to be right.

There is a great difference between evidence to prove miſbehavior in the jury, and the evidence of a juryman given long after the trial, as to his ſecret intentions at the time of giving his verdict. The former might be ſeen or heard, and with reſpect to which, compleat evidence might be adduced. The latter is concealed from all the world but the juror himſelf. No other perſon can know what were the ſecret workings of his mind. If the juryman in queſtion went upon a miſtake, it does not appear that he diſcloſed it to any perſon at that time. To permit him now, when impreſſions have been made upon his mind by one of the parties, to ſet aſide the verdict, would be to eſtabliſh a moſt dangerous principle, and ſuch as muſt prove fatal to the purity of the jury trial.

I ſtill inſiſt, that the jury were right in giving intereſt, ſince it was the duty of the appellee to make the deed to the perſon *who had poſſeſſion of the ticket*; he acted improperly in conveying to Roderick, and by taking upon himſelf to decide the rights of the parties, he is liable to the appellant for the meſne profits, or for intereſt in lieu of them.

FLEMING, J.—In this caſe there is a great contrariety of evidence. The arbitrators gave Roderick M'Rae half of the ticket, and Philip M'Rae avers, that he claimed no more. But the declaration demands the whole, and it is probable that the verdict was for the whole, ſince the amount of the damages very little exceeds the price affixed to the property by the ſcheme of the lottery. To explain the principles by which the jury were governed, two of that body have been examined, and they differ from each other upon the main point. Objections were made to the examinations of the jurors; but it is not only uſual, but I think proper to admit ſuch evidence for the purpoſe of diſcovering errors which the jury may have committed. In this caſe, I ſhould not feel an inclination to be over ſcrupulous in

admitting

admitting teſtimony, when I reflect, that the appellant acquieſced for fifteen years without aſſerting his right to the property in queſtion, until better evidence might be loſt. I am well ſatisfied that Philip M'Rae, is entitled only to one fourth of the ticket, independantly of the award and evidence of the juror. He has recovered one half if not the whole, and as I can diſcover no ſtandard by which to decree him what he is really intitled to, there ſeems to be no way left, but the one adopted by the Chancellor to do eſſential juſtice to the parties. I am therefore of opinion that the decree is right.

LYONS, J.—I think this caſe has come up too early. The Chancellor does not ſet aſide the former verdict, but only directs an iſſue to be tried to ſatisfy his conſcience. The queſtion tried and decided by the jury was the right of the appellant to the ticket. The poſſeſſion was conſidered, and certainly was at law *prima facie* evidence of title. But the queſtion is, did the jury give a verdict for the whole of the ticket, or for a part, and for what part? How was the Chancellor to aſcertain this with certainty? It is admitted, that the appellant was not entitled to the whole. No way remained, but to direct an iſſue to try the queſtion for the information of his conſcience.

But before the iſſue is tried, and before it is known what would be the decree of the Chancellor, the party appeals. Ought the Chancellor to be reſtrained from directing iſſues to inform him whether a fact be one way or the other? Surely not, and therefore the appeal in this caſe is certainly premature. The inquiry is merely as to the extent of Philip M'Rae's right. It is nothing to the court of equity how Philip M'Rae came by the ticket; but it is eſſential to know to what part he is entitled, and the value of it. At preſent it is impoſſible for the court to aſcertain that point. I therefore think the decree right.

THE PRESIDENT.—As I am of opinion that the appellant had no ground to come here at all, I ſhall not inquire whether he has done it too early, or not. Amidſt the claſhing teſtimony in the cauſe, it is evident to me, that Philip M'Rae had not a right to more than a fourth. As ſoon as the lottery was drawn, the two M'Rae's began to diſpute reſpecting this ticket. My own impreſſions are, that Philip M'Rae has no right at all; but I would not for this reaſon award a new trial, ſince the verdict which has been fairly found, is in his favor: But the extent of his right is not aſcertained.

If then Philip M'Rae was entitled to no more than a fourth, the verdict which gives him much more ought to be corrected. We

were

were anxious to do this if we could without disturbing the verdict. But we could discover no certain standard by which the court could make the correction. We looked for it in vain in the value affixed to the property in the scheme of the lottery: We then looked for it in the sales, with no better success. The next chance was the verdict; but that appears to be for the whole, because the declaration claims the whole. We next referred to the testimony the jurors; but they differ upon the subject. The appellant attempted to account for the sum found by the verdict by supposing, that the jury had allowed interest upon the claim, because they ought to have done so, but this is equally unsatisfactory. It is entirely discretionary with a jury, whether they will give interest or not. And whether they meant to give it or not, is perfectly uncertain. My own opinion is, that in this case, interest ought not to have been allowed. Woods gave notice to Philip M'Rea that he would not convey to him, but having together with Mullins sold their interest to Roderick M'Rea, he made a conveyance to him. In 1771, the land is sold as the property of Roderick; it is advertised in the neighbourhood of Philip, and the property is passed from hand to hand; In 1769, Philip having received notice from Woods, seems to have abondoned all intention of recourse against him and applies to Roderick. They agree to a reference, and in 1784, Philip M'Rea for the first time shews an intention to resort to Woods, having no prospect of recovering any thing against Roderick. Woods in consequence of this unreasonable delay has now no chance to recover against Roderick, and therefore ought not to pay interest.

Another mode was thought of by the court, and that was, to direct the jury to value a fourth of the ticket; but against this a considerable difficulty occurred on the subject of interest, in which we thought we had no right to controul the jury.

Upon the whole, I concur with the other judges in approving the decree.

Decree affirmed.

NEWELL