

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.

THE SECOND EDITION, REVISED AND CORRECTED BY THE AUTHORS.

VOLUME I.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (N. Y.)
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.....
1809.

DISTRICT OF VIRGINIA, TO WIT :

BE IT REMEMBERED, That on the fifth day of April, in the thirty-third 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. The second edition, revised and corrected by the
“ authors. Volume I. 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 proprie-
“ tors 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.”

(L. S.)

WILLIAM MARSHALL,
Clerk of the District of Virginia.

Nelson against Suddarth,
The same against the same,
and
Nelson against Cocke.

JUNE, 1807.

Tuesday,
June 23.

THESE three causes were heard together, being appeals from decrees of the late Judge of the Superior Court of Chancery for the *Richmond* District.

The first suit was brought by *Suddarth* against *Robert Nelson* for the purpose of reviewing a decree obtained in a former suit brought by the said *Nelson* against a certain *John Syme, Mildred Syme*, and — SUDDOTH; of recovering back a sum of money paid by him the said *Suddarth*, under influence of that decree; of obtaining a discharge from an obligation given by him in consequence of the award of certain arbitrators, to whose opinion he had submitted the value of so much of an estate in land, (to which the said *Nelson* claimed title, under the said decree,) as was in his the said *Suddarth's* possession; and of setting aside so much of that decree as would have compelled him to surrender the said land to the complainant, if the matter in controversy had not been submitted to arbitration.

The second suit was brought by *Nelson* against *Suddarth* for a specific performance of the award.

The original decree, and all the consequences flowing from it, were founded on a mistaken idea of the Chancellor, that *John Syme* the elder was tenant by curtesy of certain lands which were entered and surveyed by his wife's father.

The circumstances were these.—*John Syme* the elder intermarried with *Mildred Meriwether*, an infant daughter of *Nicholas Meriwether* deceased, and his sole heiress. The said *Nicholas Meriwether* had made an entry for 1,600 acres of land in the then County of *Goochland*, now *Albemarle*; but he dying in the year 1741, before a patent had issued, and his widow having married *Dr. Thomas Walker*, that gentleman obtained it on the 28th of *August*, 1746, in the name of his step-daughter *Mildred Meriwether*.

refunded, and the obligation to be surrendered.

Where, by mistake, the vendor of a tract of land delivers to the vendee possession of other land which does not belong to him, and the vendee is evicted from such other land; he is not to be compelled to pay rent to the vendor for the time he remained in possession thereof; although he continues to hold the full quantity which he bought by certain metes and bounds.

An attachment having been served to compel performance of a decree in Chancery, which was erroneous, in consequence of a mistake of the Chancellor, and was also improperly obtained against one of the defendants, on whom no process had been served; and the said defendant having been induced, under influence of the decree and duress of the attachment, without knowing of his rights, to pay a sum of money and execute an obligation for a farther payment; on a bill of review, the money was correctly decreed to be

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After her marriage, and while she was yet under age, the said *Syme* (her husband) sold the land to *William Nelson*, father of the appellant. She died in 1754, leaving three children, of whom *John Syme* the younger was the eldest and her heir.

The conveyance from *John Syme* the elder to *William Nelson* bears date the 26th of *April*, 1755.

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*The patent to *Mildred Meriwether* and conveyance from *John Syme* to *William Nelson* describe the land as 1,600 acres, by certain metes and bounds; but *Nelson* settled his plantation not within those limits.

Nicholas Meriwether had made another entry for 400 acres of land, which were surveyed, on the 28th of *March*, 1740, adjoining the said tract of 1,600 acres, and including the plantation settled by *William Nelson*. This entry had escaped the notice of *Dr. Walker*; but *John Syme* the younger, having attained his full age, made the discovery; and, after the establishment of the Commonwealth's land-office, had those 400 acres resurveyed, for the purpose of ascertaining their identity; and was proceeding to obtain a patent on the original survey, when he was restrained by a caveat entered at the instance of *Robert Nelson* the appellant.

William Nelson the elder being then dead, and having devised the 1,600 acres of land to the appellant, he had obtained from the said *John Syme* the younger a deed of confirmation which neither abridged nor extended the boundaries of the original tract. *William Nelson* the younger (brother of the appellant) made an entry for the same 400 acres of land, had them surveyed, and sued out a caveat to prevent the emanation of a grant to the appellant; after which the appellant dismissed his caveat against *John Syme*, jun. and a patent issued on the 31st of *July*, 1788, to *William Nelson*, who thereupon conveyed the land to the appellant. *John Syme*, jun. as soon as he was informed of the dismissal of the appellant's caveat, proceeded to obtain a patent, which bears date the 20th of *June*, 1791, for the same 400 acres of land, on the ancient survey of his grandfather *Nicholas Meriwether*; stating his descent, and deriving his title through his mother; but soon afterwards sold the land to *Suddarth*, and put him in possession.—After this sale and delivery of possession, *Suddarth* hearing of the claim of *Nelson*, refused to pay the purchase money; whereupon *John Syme*, jun. brought a suit in the late High Court of Chancery against *Robert* and *William Nelson*, stating his title to the said 400 acres of land; his sale thereof to *Suddarth*; and the manner in

which the defendant *William Nelson* had obtained a patent for the same, and conveyed it to *Robert Nelson*; which he charged to have been by fraud and collusion between the two brothers. He therefore prayed that the patent to *William Nelson* should be set aside and the land decreed to him; and that the defendant should account for the rents and *profits during the time that they and their father had held possession.

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The answer of *Robert Nelson*, stated that his father had purchased of the complainant's father, and devised to him the defendant, who, long afterwards, discovered that 400 acres (possession of which had been delivered by the agent and guardian of the complainant's mother, thirty years before) were surveyed for the complainant; and, thereupon, he, the defendant, had caveated the same and taken measures to obtain a patent therefor:—that, if the Court should be against him on this point, his title was still good, during the life of the complainant's father, *John Syme* the elder, who had paid a valuable consideration to the complainant to induce him to confirm his sales.

The depositions taken in the cause proved that *Dr. Walker*, who was supposed to be the agent of *John Syme* the elder, shewed the lands to the agent of *William Nelson* the elder: but *Dr. Walker* declared that he shewed them as the friend and not as the agent of *Syme*, and that he did not know the situation of the tract in dispute, till he heard it was caveated. *John Syme* the elder deposed that he sold the land to *William Nelson* the elder as described in the deed, and no other.—Another witness stated only that *Dr. Walker* and himself shewed the land; and that, if there had been any entry in favour of *Syme*, he thought he would have known it.

John Syme, jun. having died intestate, the suit (which abated by his death) was revived on the day of *March*, 1793, by consent, in the names of *John Syme* his son, and *Mildred Syme* his daughter, by *Nicholas Syme* their next friend.

On the 18th of *March*, 1797, *Robert Nelson* brought his suit against the last mentioned *John Syme*, his sister *Mildred*, and — *Suddoth*.

The bill stated that *John Syme* the elder being seised in right of his wife sold the land in question to the complainant's father, who devised it to the complainant; but it was discovered in 1787, that 400 acres of it had not been patented;—that, in consequence of this discovery, *John Syme*, jun. entered for those 400 acres; but the complainant caveated; and *William Nelson* the younger obtained a

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patent for, and conveyed the same to the complainant ; that *John Syme* the younger afterwards obtained a patent, and brought suit against the complainant for the same land, although the complainant ought to be considered as a purchaser of the fee-simple ; but, if that were not the case, *at least for the life of *John Syme* the elder : that *John Syme*, jun. had sold to *Suddoth*, who refused to pay the complainant the value of the land, although when he bought of *John Syme*, jun. he had notice of the complainant's right.

The prayer of the bill was, therefore, that *Suddoth* should be compelled to deliver possession of the 400 acres to the complainant, and that the defendants should account for the rents and profits, from the time when *John Syme*, jun. obtained possession.

The answer of the defendants, *John* and *Mildred Syme*, insisted that the 400 acres of land were not comprehended in the deed from *John Syme* the elder to *William Nelson* the elder.

The exhibits filed in this cause were the patent to *Mildred Meriwether* for 1,600 acres of land ; a deed of release from *Robert Nelson*, the complainant, to *John Syme*, jun. for a tract of land which was mortgaged to *William Nelson* the elder, by *John Syme* the elder, as an indemnity against his wife's title ; the patent to *William Nelson* the younger, which was for 481 acres of land ; the patent to *John Syme*, jun. for 400 acres ; and the deed from *John Syme* the elder to *William Nelson* the elder.

These two causes came on to be heard together, and the Chancellor decreed that the patent to *William Nelson* the younger should be vacated, as having been obtained by fraud ; but that *John Syme* the elder, being tenant by the *curtesy*, his sale and conveyance to *William Nelson* the elder passed an estate, at least for the life of the said *John Syme* the elder ; (which interest he had a right to sell ;) and that *Robert Nelson*, as devisee of his father, *William Nelson* the elder, was entitled to hold the land for that time ; that after the death of the said *John Syme* the elder, it was to be delivered up to *John Syme* the younger ; but, until that event should happen, *John Syme* the younger should deliver possession to *Robert Nelson*, and account to him for the rents and profits, from the time when he had taken possession, until he should so deliver it up.

In the above decree, the sale from *John Syme*, jun. to *Suddarth* was not mentioned, nor did the name of *Suddarth* occur in it : yet an attachment was issued against and levied upon him, to compel him to surrender the land, and

to pay the intervening profits thereof, between the time when the occupation by *John Syme, jun.* commenced, and the date of the decree. This was the first legal notice of the suit which *Suddarth* had, except a service of the decree upon him. He was taken into custody, on the attachment, *by the sheriff, on whose advice he agreed to pay a certain sum of money to *Robert Nelson*, for the intervening profits of the land; and, moreover, engaged to pay whatever should be considered, by men chosen for the purpose, the value of the estate by the curtesy of *John Syme* the elder. The former of these sums was paid before *Suddarth* had better advice.

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Suddarth then filed the bill of review first above mentioned, making *Robert Nelson, John Syme*, (an infant,) by *Nicholas Syme*, his guardian, *William Cochran* and *Mildred* his wife, (which *John Syme* and *Mildred* were children and co-heirs of *John Syme, jun.* aforesaid,) and *Elisha White*, sheriff of *Hanover*, to whose management the personal estate of *John Syme, jun.* had been committed, parties defendants.

The answer of the defendant, *John Syme*, admitted the sale to the complainant, but not that all the purchase money had been paid: that of *Cochran* and wife referred to that of *Syme*: that of *White* the sheriff merely stated that he had no property of the estate of *John Syme, jun.*

Robert Nelson, in his answer, stated that the blank for the complainant's christian name, in the former suit, was left through want of information, and not from design; and that his surname was mistaken through ignorance: that the complainant knew of the suit, and, while it was depending, was served with a notice not to pay any money to *John Syme, jun.* He pleaded the decree on which the attachment issued, and stated that the complainant thereupon purchased his, the defendant's, interest in the land, with which bargain he appeared well pleased.

The cause was heard on the bill and answers, and the following exhibits; viz. *Nelson's* receipt to *Suddarth*; the award of the arbitrators concerning the back rents; *Nelson's* notice to *Suddarth*; the obligation of the latter to secure the payment of those rents: and transcripts of the records in the two suits abovementioned.

The Chancellor admitted his decree to have been erroneous, because *Robert Nelson* had no title to the land; declared that *Suddarth* was never bound thereby, because he was no party to the suit; and that the attachment against him (which occasioned the compromise with the appellant) had emanated improvidently; and therefore di-

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rected that *Robert Nelson* should repay to the complainant the money he had received, (170*l.*) with interest from the date of the receipt ; should release the obligation for rent, and pay the costs to which the complainant was subjected by *the attachment, as well as the costs of the present suit. *Suddarth* thereupon dismissed the bill as to the other defendants. From this decree *Nelson* appealed to this Court.

The second appeal was from a decree rendered in a suit brought by *Nelson* before that just mentioned, for the purpose of enforcing the compromise above stated. The answer of *Suddarth* was filed after he had exhibited the bill in the suit brought by him against *Nelson* and others. That bill is made a part of his answer in this suit, which answer confesses the compromise, but prays that it may be set aside, because obtained from him by *duress*, and without an adequate knowledge on his part, either of his own rights, or of those of the said *Nelson*. The Chancellor dismissed the bill, and *Nelson* in like manner appealed.

The third appeal was from a decree dismissing the bill of the appellant, in a suit brought by him against *James P. Cocke*. The cause was set for hearing upon the bill and answer, without a replication. *Nelson* filed his bill, alleging that he had sold to *Cocke* the tract of *patented* land, containing 1,600 acres, and had delivered to him, by mistake, 400 acres, (for which there was only an *entry*,) as part of the *patented* land ; that *John Syme* the younger was entitled to the *entry*, after the death of his father, *John Syme* the elder, from whom the title to the *patented* land was deduced to *Nelson* ; but that *Nelson* was entitled to possession of the *entry*, during the life of *John Syme* the elder ; that *Cocke* had occupied this *entry* for several years, and therefore rent was demanded from him.

The answer of *Cocke* stated that the *entry* was a part of the *South Garden* tract which *Nelson* sold to him ; that on this *entry* were all the houses of the plantation, and the first clearings on it ; that *Cocke* believed the *entry* belonged to him, as possession thereof had been delivered by *Nelson* ; and that he never should have occupied it, but for such delivery ; that, upon the discovery of an adverse title to the 400 acres, *Nelson* insisted that they should be considered as part of the land which *Cocke* had bought ; and, upon a reference to arbitrators, it was decided, that *Cocke* should allot to *Nelson* other four hundred acres, part of the *patented* land, when *Nelson* should be able to

make a title to the *entry*; but if *Nelson* should never be able to make such title, that *Cocke* should retain the whole of the patented land in lieu thereof: that *Nelson* was not able to make a title of the *entry*, and *Cocke* assigned to him all the rents which were due from tenants, which *Nelson* accepted. The affidavits of two witnesses shewed only the amount of rents which had been received. The cause having been referred to a commissioner, he charged *Cocke* with the rents, and interest on the rents; both of which charges were specially excepted to.

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The Chancellor dismissed the bill; whereupon *Nelson* again appealed.

Call, for the appellant, contended, that the patent of *William Nelson* the younger, being prior in date to that of *John Syme* the younger, should be preferred; and, therefore, that *Robert Nelson's* title under it was unexceptionable; that *Nelson's* title being superior to that of *Suddarth*, the latter was bound by the compromise founded on the decree against him, in the suit brought by *Robert Nelson*; although a blank had been left for his christian name: and, consequently, that his subsequent purchase and agreement to pay the rent were obligatory on him.

As to the case of *Cocke*, he said, that all parties understood that the 1,600 acres of land passed by the deed from *Nelson*; but, the 400 acres having been delivered by mistake, and occupied so many years by *Cocke*, it was but right that he should pay rent for the use of them.

Warden, for *Suddarth*, (after stating the case,) observed, that in the suit which gave rise to that brought by *Suddarth* against *Nelson and others*, *Suddarth* had been condemned in a decree, without being heard. No process was ever served upon him; nor did he ever hear of the suit till he heard of the decree. Being in the custody of the sheriff on the attachment, he had no alternative, as he supposed, but to go to prison, or submit to such terms as *Nelson* thought proper to prescribe. Under false impressions, both as to his own situation and the title of *Nelson*, he made the bargain with him, which the Chancellor had, very properly, set aside. In the former suit, there was a blank for the name of baptism, and the surname was mis-spelt. An entire *misnomer* is error, both in law and equity.

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As to the principal point, he need only say, that *John Syme* the elder, having never reduced the 400 acres of land into possession during the coverture, and *John Syme* the younger having obtained a grant under the entry, which *had been made in favour of his mother, his father, *John Syme* the elder, was not entitled to curtesy. The Chancellor's first decree was, therefore, erroneous, which went to charge *Suddarth*, in consequence of the estate, by the curtesy of *John Syme* the elder; but the last decree was correct in saying that the money which had been paid by *Suddarth*, under the influence of that decree, should be repaid, and that he should be released from all his obligations to *Nelson* in consequence thereof.

As to the compromise, *Suddarth* was under *duress*, in the possession of the sheriff, whose advice he followed when it was entered into. This is the very definition of *duress*; and, as nothing is valid which the party does under such circumstances, the Chancellor's other decree dismissing the bill of the appellant, filed to enforce that compromise, was also correct.

Call, in reply. With respect to the main point in this cause, whether *Nelson's* patent takes precedence of that obtained by *John Syme* the younger, the law is clearly with us. *Meriwether's* survey, on which the patent of *John Syme* the younger was founded, was made in 1740. *Nelson* and those under whom he claims, were in possession from 1755. This case is precisely within the principle of *Johnson v. Buffington*(a) and *Curry v. Burns*.(b) In the latter case, it is expressly said that an entry not pursued for eleven years is void. In the present case more than eleven years had elapsed; and *Nelson* was put in possession, under a supposed right from *Syme* himself. If *Syme*, having an old entry, did not choose to carry it into a grant, in due time, can he say that *Nelson* has been guilty of a fraud in attempting to get a grant, when the land had been so long in the possession of *William Nelson* the elder, as for a descent to have been cast on his heir?

(a) 2 Wash. 116.

(b) 2 Wash. 121.

Warden. In 1746 or 1747, *Nicholas Meriwether* died: his daughter *Mrs. Syme* died while under coverture and in infancy, leaving her son *John Syme* the younger an infant only three years old. Besides, the war intervened, which put a stop to the issuing of patents till the establishment of the Commonwealth's land-office. *John Syme* the younger was born in 1752; in 1773 he was of age, and the King never issued any grant after *May, 1774*. In 1779, the Com-

monwealth's land-office was established. Taking into view the coverture of Mrs. *Syme*, the infancy of her son, *John Syme* the younger, and the extension of the time *granted by the Legislature for obtaining patents on surveys of land, *John Syme* the younger was not barred, by any limitation, from suing out a grant at the time when it issued. He referred to the case of *Picket v. Dowdall*,^(a) to shew that a younger patent founded on an older survey takes place of an older patent founded on a younger survey.

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(a) 2 Wash.
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Call. The case of *Curry v. Burns* is decisive on this case. The register of the land-office was not authorised to issue a grant to *John Syme* the younger, he having abandoned his entry and survey. *Syme* should have caveated *Nelson*; and the whole question would have been whether an old entry and survey, which had been abandoned, could have been set up against an entry and survey which had been regularly made and pursued with due diligence.

The case of *Nelson v. Cocke* was submitted without farther argument, on the part of the appellant. Mr. *Call* considered it as depending on the main point in the case of *Nelson v. Suddarth*.

Randolph and *Warden*, for *Cocke*, contended that the cases were different. The bill demands nothing more than the curtesy of *John Syme* the elder. The suit was brought to recover rent from *Cocke* for the time he cultivated the land; on a supposition that *Nelson* was entitled to the curtesy of *Syme*. *Cocke* improved the 400 acres of land: *Nelson* thought he had sold them: *Cocke* thought he had bought them: the mistake of *Nelson* led *Cocke* into a mistake. It was an imposition upon *Cocke* for which *Nelson* is not entitled to relief. At the time the Court awarded to *Robert Nelson* the land of *John Syme* the elder, an account was directed in this case. The Master reported 96*l.* to be due from *Cocke* for rent. He excepted to the report upon two grounds. 1st. That affidavits had been read which were taken without notice; 2dly. That interest had been allowed on 84*l.* part of the rent; which allowance was contrary to the decisions of this Court. The Chancellor in his subsequent decree says, the former decree was erroneous, so far as it went to say that *Nelson* was entitled to the curtesy of *John Syme* the elder. It has been said, in the argument

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of *Nelson v. Suddarth*, that *John Syme* the elder was not entitled to curtesy, because he was not seised during the life of his wife. *Nelson* was *never entitled to any estate in fee in this land; and his title was founded entirely on the erroneous decree of the Chancellor. On the special circumstances of this case, *Nelson* is not entitled to recover. He was in possession of 2,000 acres of land, and sold 1,600 acres to *Cocke*. Upon delivery, he gave *Cocke* possession of 400 acres to which he was not entitled.

Can he then compel *Cocke*, who only contemplated a purchase of 1,600 acres, to pay rent for what by his own mistake, and not the fault of *Cocke*, was erroneously put into his possession.

Curia advisare vult.

Friday, July 3. The decrees in all three of the suits were unanimously AFFIRMED, by the whole Court, consisting of all the Judges.

Judge FLEMING delivered the following opinion.

From an attentive examination of the records in these suits, it appears to me that neither the appellant, nor either of those under whom he claims, had ever any *equitable* title to the 400 acres of land in question; nor a *legal* one, until, by a piece of artful management, not much to his credit, he got a friend to obtain a patent for it, in the year 1788; during the pendency of his *caveat* against the rightful owner, which he, in his answer to *Syme's* bill, says, "was afterwards dismissed, because there was found to be considerable difficulty in bringing it to trial." But, as I conceive, because, pending the *caveat*, his friend had obtained a patent for the land, which was conveyed to him.

Let us examine his equitable title, which he conceives to be indubitable. His father, under whose will he claims, in the year 1755, purchased 3,560 acres of patented land contained in two grants; the one for 1,900 acres, lying in the *North Garden*, and the other for 1,600 acres, lying in the *South Garden*, and adjoining the land in controversy. This land was purchased of the late Colonel *John Syme*, who had therein only a life estate, in right of his wife, then an infant, not more than 15 or 16 years of age; and who, for the sum of 800*l.* sold the land to the late Mr. *William Nelson*, (father of the appellant,) and gave a mortgage of another estate to the purchaser, to secure the title at a fu-

ture day ; and thus defeated the inheritance of his own offspring.

*Possession of the land, so purchased, was immediately given to Mr. *Nelson*, who, supposing the land in question (for which there was an entry and survey in the name of *Mildred Meriwether*, then the infant wife of Colonel *Syme*,) to have been included in his purchase, actually settled his people thereon—neither he nor Colonel *Syme* having any knowledge that such an entry and survey (which were made in the year 1740) ever existed. And this mistake of Mr. *Nelson*, or his agent, in settling land which of right belonged to another, (owing entirely to their own inattention and negligence, as the boundaries of the purchased lands are minutely described in the patents,) was to give the appellant an equitable title against the infant presumptive heir of an infant *feme covert* ; which heir had already been defeated of his inheritance of 3,500 out of thirty-nine hundred acres of land ! Of what, it may be asked, has the appellant to complain ? His father, under whom he claims, purchased, and supposed he had purchased, 3,500 acres of land, *only*, of which he was put into immediate possession, and the title secured ; and there is not even a suggestion that there is a deficiency in quantity.

The *reasoning* of the appellant on the subject seems to amount to this—“ I have purchased, and paid for your coat, and have (through mistake, and without your knowledge) almost worn out your cloak ; and am therefore entitled to that also.”

Let us now take a short chronological view of the title of *John Syme*, the son, who was father of the appellees, *John Syme* and *Mildred Syme*, (now *Mildred Cochran*) and heir of *Mildred Meriwether*, who died the wife of *John Syme* the elder, about the time she came of age ; in whose name, and for whose benefit, the entry for 400 acres of land (now the subject of controversy) was surveyed the 22d of *March*, 1740. But neither of the parties had any knowledge of such entry and survey until many years after *John Syme*, the son and heir, came of age ; soon after which, he, by indenture, bearing date the 1st of *September*, 1777, confirmed to the appellant a complete title to the lands purchased by his father of *John Syme* the elder, and thereby obtained a release of the estate mortgaged by the latter, to secure that title.

Some time in the year 1787, *John Syme*, the son and heir, found among the papers of his grandfather, *Nicholas Meriwether*, the entry and survey beforementioned, which was the first discovery he ever made of them ; and, on the

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8th of *October*, the same year, he returned them to *the register's office, in order to obtain a patent thereon. A warrant was laid on the land, and a survey thereof made, in the name of *William Nelson*, the 23d of *November*, which was returned to the land-office the 18th of *December* following; and, on the 4th of *April*, 1788, the appellant entered a *caveat* against the patent of *Syme*, which he says, in his answer, "was really to contest the right between them"—and, had that been truly the case, there would have been nothing blameable in his conduct: but we have already seen, that, pending the *caveat*, his friend obtained a patent from the survey of *November*, 1787, and, soon after, made him a conveyance of the land. How long it was afterwards before the *caveat* was dismissed does not appear; but *Syme* did not obtain his patent until the 20th of *June*, 1791.

I shall make no comments on these transactions, farther than to observe, that it is clearly my opinion that *Syme's* equitable title is paramount to, and ought to supersede the legal title of the appellant, thus surreptitiously obtained; who, I conceive, never had even the shadow of equity in his favour; and he may think himself fortunate, that he has not been compelled to account for the rents and profits, whilst the land was in his occupation.

(a) 2 *Wash.*
106.

The case of *Picket v. Dowdall*(a) was cited in the argument, by the appellant's counsel; but the circumstances in that case were so widely different from this, that it seems unnecessary to take further notice of it.

And upon the whole, I concur in the opinion, that all three of the decrees ought to be affirmed.



Wednesday,
June 24.

Roe against Crutchfield.

If there be several counts in a declaration, and any one of them

THIS was an action brought by *Crutchfield* against *Roe*, in the County Court of *Spotsylvania*.

The declaration contained two counts:—the first charged the defendant as the remote assignor of a bond which had
good, though all the rest be faulty, a general demurrer to the declaration ought to be overruled, and judgment entered for the plaintiff, provided the counts can be properly joined in the same action.

In such case, if a writ of inquiry be executed, after overruling the demurrer, it seems the defendant may, nevertheless, object to the admission of evidence applying only to the faulty counts, and tender a bill of exceptions or demurrer to the evidence; or may apply to the Court to instruct the Jury to disregard such faulty counts. But, if no such step be taken, and entire damages be given, the verdict is good, and judgment ought not to be arrested.