

DECISIONS OF CASES  
IN  
VIRGINIA,  
BY THE  
HIGH COURT OF CHANCERY,  
WITH REMARKS UPON DECREES,  
BY THE  
COURT OF APPEALS,

REVERSING SOME OF THOSE DECISIONS.

BY GEORGE WYTHER,

CHANCELLOR OF SAID COURT.

SECOND AND ONLY COMPLETE EDITION, WITH A MEMOIR OF THE AUTHOR, ANALYSIS  
OF THE CASES, AND AN INDEX,

By B. B. MINOR, L. B., OF THE RICHMOND BAR.

AND WITH AN APPENDIX, CONTAINING

REFERENCES TO CASES IN PARI MATERIA, AND AN ESSAY ON LAPSE;  
JOINT TENANTS AND TENANTS IN COMMON, &C.,

By WILLIAM GREEN, Esq.

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RICHMOND:  
J. W. RANDOLPH, 121 MAIN STREET.  
1852.

BETWEEN  
 JAQUELIN AMBLER, *appellant*,  
 AND  
 THOMAS WYLD, the younger, *appellee*.

1. Motion for a new trial on the ground that a paper offered in evidence and rejected by the Court, had been taken out by the jury and influenced their verdict. The paper was a certificate of three of the witnesses in the case and did not vary from their *viva voce* testimony. A new trial should not be granted.
2. A county court has no power to interfere by bill in equity, with a verdict in another court; but the H. C. C. having possession of the case by appeal from a bill improperly brought in the County Court will proceed with it, as if originally commenced there; and
3. New facts being disclosed, which might have procured from the jury a different verdict; or from the court that tried the case a new trial, the H. C. C. will grant a new trial. Issue directed to be tried again in County Court of Henrico.
4. *A.* had sold *W.* houses and lots in Yorktown, valued at £1000, one-half payable in 12 months:—during which great depreciation had occurred and the main question was whether *W.* should be allowed to pay in paper money. See *Yates v. Salle*, ante p. 163, and *Hamilton v. Urquhart*, post.

THE parties in August, 1778, had agreed, the appellant to sell, and the appellee to buy, the lots and houses of the former in York town, for the price, to which they should be valued by three men appointed by mutual consent, and which price should be paid one half at the time of valuation and the other at the expiration of twelve months thereafter.

The men appointed reported their estimate in these words:—*York september 18, 1778, we the subscribers, by desire of mr. Ambler and mr. Thomas Wyld, junior, have, this day, viewed the*

lots and houses belonging to *mr. Ambler*, where he formerly resided, and are of opinion that, in the present situation of the lots and houses, they are worth one thousand pounds. *Mat. Pope, Corbin Griffin, Wm. Reynolds.*

Five hundred pounds of the purchase money were paid as appeareth by this paper, *october 20, 1778, received of mr. Thomas Wyld the sum of five hundred pounds, current money, in part payment of the tenement in York town, purchased of the subscriber. and mr. Wyld agrees, on his part, not to demand a title to the said tenement until the remaining sum of five hundred pounds is paid. witness our hands. J. Ambler, Tho. Wyld, jun.* and in autumn, 1779, the appellee, by an agent, offered to pay five hundred pounds more, in paper money, to the appellant who declined acceptance of them, saying he should see *mr. Wyld* that afternoon.

The appellant afterwards procured (a) from the valuers a paper, on which was written the following words: *some time in the year 1778, the underwriters were called upon by mr. Thomas Wyld, to value the house and tenement, in York town, then the property of mr. Jaquelin Ambler, which house and tenement the said Ambler, as we were informed, had agreed to sell the said Wyld at such a price as disinterested persons should determine the same were worth. agreeable thereto the underwritten did value the aforesaid houses and tenement at one thousand pounds. and it being contrary to the laws of the land, at that time in force, to make any difference between paper money and specie, we the underwritten do further declare that we did then, and do now, think the aforesaid houses and tenement were worth one thousand pounds specie. in testimony whereof we have hereunto set our hands, this tenth day of february, 1782; and to which paper the names of the valuers were subscribed.*

An action, which had been commenced by the appellant against the appellee, in the general court to recover the money due, was discontinued, for want of prosecution, the 20 day of October, 1783.

The appellant afterwards commenced action against the appellee, in the county court of Henrico. the declaration contained three counts, the first upon a promise to pay 600 pounds for

(a) This paper is stated to have been procured by the appellant, because, in answer to a part of the bill alleging that to have been the fact, and propounding this interrogatory, whether he, *Jaquelin Ambler*, or some person for him, did not procure the valuation to be signed by the men whose names are subscribed to it? he, after explaining his motives for what followeth, says, he requested that a certificate of the valuers might be obtained and shewn to the complainant stating the ideas on which the valuation was made.

lots and tenements, lying in York town, sold by the appellant to the appellee; the second, upon a promise for lots and improvements, lying in York town, sold by the appellant to the appellee, to pay so much money as they were worth, with an averment that they were worth 600 pounds; and the third, upon a promise to pay six hundred pounds for so much money expended by the appellant for the use of the appellee.

The appellee pleaded that he did not assume, upon which the issue was joined, the appellant consenting that the other party might give any special matter in evidence.

On trial of the issue, the appellants council offered in evidence to the jury the paper before mentioned, dated the 10 day of february, 1782, subscribed by the three valuers. the council of the other party excepted to it, and the court would not allow it to be delivered to the jury. notwithstanding which, the jury took the paper with them, when they were sent out of court to consult of their verdict.

The jury found a verdict for the appellant, assessing his damages to 374 l. 1s. 7½.

The council for the appellee moved for a new trial, shewing, for cause, that the jury, without permission of the court, carried that paper with them. the motion was rejected, because, as is stated in the bill of exceptions signed by one the judges, *the three men who subscribed the paper were present in court, to give full testimony of the import of the same, which paper having been read to the court, after the return of the verdict, appeared to be a certificate signed by three of the witnesses in the cause, and not to vary from their viva voce testimony:* and this rejection of the motion for the new trial; and, in consequence, the judgement for the damages, upon an appeal to the general court, were affirmed the 22 day of june, 1789.

The appellee, on the 16 day of march, 1791, filed a bill in equity against the appellant, in the county court of York, stating, in addition to the matters herein before mentioned, and several others omitted here, because now thought unimportant, that, on trial of the issue before the county court of Henrico, he produced witnesses to contradict the witnesses on behalf of the appellant, or rather to invalidate their testimony, by proving the valuers to have acknowledged, that they made their estimate in current money, and had not specie in their contemplation at that time; but that the court would not suffer the witnesses of the appellee to be examined; and also stating that the valuation of september, 1778, which was required by the appellees council to be produced, was denied by the appellants council to be in existence; and praying to be relieved

against the judgement, by which the appellee was condemned to pay the damages assessed by the jury, which, aggravated with the additional damages upon affirmance, and with the costs, amount to 550l. 12s. 1 $\frac{3}{4}$ .

The appellant, by answer, declared, that the trial before Henrico court was fair, as he believes, admitted a valuation in september 1778, but said how or in what manner that valuation was expressed he did not recollect; did not say any thing in answer to the allegation of the bill, repeated interrogatorially, concerning the suppression of the valuation in 1778, unless it be by these words, *had they (the valuers) even pretended to make their certificate of 1782 the foundation of this respondents clame, which is not the fact, the real valuation must have been brought forth*, by which words the suppression is understood to be admitted; that he acquiesced in the verdict, feeling himself bound by it, although it gave him less than he thought himself intitled to; contended that no court hath power to interpose, and wrest from him the benefit of his verdict; especialy as the court before whom the trial was, shewed their approbation of the verdict by denyng the motion for a new trial, conceived the reason of rejecting testimony on behalf of the appellee, if it were rejected, to have been that the testimony was inadmissible; and, with respect to the proof that the valuers had said they estimated the tenement in current money, the appellant observed the contrary was never contended; that the valuers thought the property worth so much specie, and rated the current money at par with specie, which was the only matter insisted on.

The appellee replied to the answer, and several witnesses were examined.

Samuel Eddins deposed, that doctor Mathew Pope, being charged by Wyld with injustice in signing the paper of the 10 day of february, 1782, the substance of which was then rehearsed, declared it to be wrong, and that neither he nor those with whom he was joined in the valuation of 1778 thought of specie at that time; and that when he signed that paper his intention was that Wyld should make the second payment of 500 pounds equal to the first, and said that it would come to one hundred pounds specie, according to the scale of depretiation, and that mr. Ambler had a right to no more. the same witness deposed, that doctor Corbin Griffin, whom Wyld charged in like manner with injustice, denied his signature to a second valuation or certificate, but being reminded that his signature was attested by Hugh Nelson, acknowledged he had signed a paper presented by mr. Nelson in behalf of mr. Am-

bler ; and said, if it contained a word of specie, it was wrong and an oversight, for neither he nor the other two thought of specie in the valuation of 1778, adding he was confident the houses would not sell for that money in specie. the same witness deposed, that he had heard those men declare, since the trial in Henrico court, that they did not value the houses in specie but in current money.

Thomas Gibbs deposed that he heard doctor Griffin declare that the houses were not valued in specie, and that the valuers at that time dared not to have mentioned specie in their valuation, paper money being the legal circulating medium.

Laurence Gibbons deposed that he had often heard the valuers of the houses, since the trial in Henrico court, declare, that they did not value them in specie.

Corbin Griffin, to this interrogatory, propounded to him by the appellatant, *did you not, at the request of said Wyld and said Ambler, value the houses and tenements as aforesaid, in august, 1778, for the sum of one thousand pounds, good money?* made answer in these terms :

*Some time in the autumn of 1778, i was appointed with doctor Mathew Pape and mr. William Reynolds to value the houses aforesaid, and their value was fixed at one thousand pounds : and*

*To this interrogatory, what was intended by the term, 'good money ;' did you suppose the houses and tenements worth one thousand pounds at the depretiation of five for one, or of the value of one thousand pounds in specie ; or the value thereof in paper currency according to the scale of depretiation ?* made answer in these terms :

*I knew of no depretiation, nor of any diffirenee between paper and specie.*

William Reynolds, to the former of the two interrogatories mentioned to have been propounded to Corbin Griffin, made answer in these terms :

*I was appointed one of three to value the houses, and fixed them at one thousand pounds current money of Virginia ; and to the other of those interrogatories, made answer in these terms*

*I knew of no depretiation at the time, but valued them in the money then in circulation.*

Several witnesses deposed that the houses, which had been used for barracks, when Wyld bought them, were so ruinous as not to be then tenentable, without being repaired. and one witness deposed, that in 1784, before which time the houses appear to have been repaired by Wyld, at considerable expense, when the houses and lots were exposed to public sale, at the price of five hundred pounds, no bidder offered more.

And Thomas Gibbs deposed, that the court of Henrico county would not permit him and two other witnesses to be examined in order to invalidate the testimony of the witnesses who were examined for the appellant.

The county court of York decreed the appellant to pay to the appellee 395 l 11s. 7½, with interest thereon, to be computed, after the rate of five per centum per annum, from the 10 day of June, 1789, till payment, and the costs.

The high court of chancery, before which the cause was brought by appeal, the 28 day of september, 1793, delivered this

### OPINION AND DECREE,

That, if the appellee were injured by the verdict of the jury, and judgement of the county court of Henrico stated in his bill, the only mode by which he could regularly obtain redress was a new trial of the issue between the parties in the action at common law, and consequently that the decree of the county court of York, which seems to have thought the principal money recovered by that decree so much more than the appellant ought to have received from the appellee, is erroneous; and therefore this court doth reverse the said decree. but this court supposeth that if certain facts now appearing by the testimony in this cause had been known to the jury who tried the issue, or to the court who rejected the motion for a new trial, either the former might not have found such a verdict, or the other, if they had found it, might have awarded another trial: and is of opinion, that, although the county court of York perhaps had no power to award such new trial, this court retaining the cause may procede in it, as if it had been originally commenced here; and therefore this court doth direct the said issue to be tried again before the said county court of Henrico, and the verdict thereupon to be certified to this court. and the appellee here in court doth consent, without which consent the new trial would not have been awarded, that if the damages which shall be assessed upon such trial excede the damages assessed on the former trial, which may be the event, this court may decree him to pay the excess and award execution against him for the same.

The facts unknown to the court of Henrico, and to the jury who tried the issue, are

That the men who signed the paper, dated the 10 day of february, 1782, signed it at the request of one party, without giving notice of it to the other party, and when they were not together, and are proved by three witnesses, since the trial, to have contradicted the matter affirmed by them in that paper;

and that two of them (the other being dead) who were examined on oath in this case, did not give a categorical answer to an interrogatory propounded explicitly to extort from them such an answer, to the only material question in controversy.

The appellants council objected, that the jury's having taking with them the paper of february, 1782, ought not now to be adjudged by this court a good cause for another trial for two reasons, one, that the same matter had been determined by another court, of competent jurisdiction, not to be a good cause for a new trial. which adjudication this court hath no power to correct. which reason perhaps would not have been mentioned, because it ought not to have been mentioned, if the objector had recollected that the bill of exceptions stated the viva voce testimony of the valuers not to have varied from the paper. whence is inferred that the court would have awarded a new trial, if they had known the facts now disclosed, that is, the manner of procuring that paper, and the use which was made of it, and that the viva voce testimony and paper vary from what those men afterwards confessed to be the truth.

The other reason mentioned by the council for the appellant for disregarding the jury's taking the paper, is that it did not govern them in their verdict. for if it had governed them, they would have assessed more damages. which reason was not thought satisfactory. that all the jurors were not governed by the paper with the concurrent testimony of the witnesses who signed it was indeed manifest. but that some of them were governed by it, and that it had influence on the assessment, is probable; and if it had influence, that is conceived to be good case to award another trial.

How the jury formed their estimate of the damages can only be conjectured. the admission into that estimate of fractional quantities, whose denominators were so low as farthings, shews the estimate to have been the result of a calculation somewhat complex. If they allowed interest upon the money remaining due to the appellant as they are believed to have done, the principal, with which they charged the appellant, was about 292 l. 17s. 6d. for the sum of that and the interest from september, 1779, to the day of finding the verdict, being 81 l. 4s. 1½ is equal to the 374 l. 1s. 7½ assessed. the jury, differing in their estimates according to a mode of adjustment said to be frequently practised where unanimity is desperate, are supposed to have agreed, that the sum of their estimates added together being divided by their own number, the quotient should be the measure of their damages.

If five jurors had been guided by the paper of february,



1782, and three by the statutory scale of depreciation, and the other four, neglecting both, had fixed on what they thought the true value of the houses and lots, the calculation might have been made in this manner:  $5 \times 500 + 3 \times 100 + 4 \times 178$  l. 12s. 6d. their sum would be 3514 l. 10s. and this being divided by 12, the quotient would be 292 l. 17s. 6d.

This although merely conjectural shews a probability at least, that some of the jurors were governed by that paper; and a probability that they were governed by such a paper and its corroborative evidence, as this last now appeareth, is deemed a good cause for a new trial.

The appellee stated in his bill other matters, of which notice was not taken in the opinion or decree of the high court of chancery, but which perhaps deserved notice.

One was, that on trial of the issue in Henrico court, the valuation in september, 1778, was required by the appellees council to be produced, but was denied by the appellants council to be in existence. the only part of the appellants answer which is responsive to this allegation, if any part be responsive to it, seems to admit implicitly that the paper could have been produced, but that it was not produced by the appellant. when this matter was mentioned in the high court of chancery, the appellants council observed that the appellee had the valuation of september, 1778, for it appears by the transcript of proceedings before the county court of York to have been one of his exhibits. but this doth not prove that he had it at the trial in Henrico court, which was in april, 1785.

The other matter stated in the bill, and unnoticed in the opinion or decree, is that the witnesses offered by the appellees council to prove that Griffin, Pope and Reynolds had invariably acknowledged, that they made the valuation in currency, and that they never thought of specie at that time, were rejected by the court of Henrico: and the fact, which is neither confessed nor denied by the appellant, is proved by a witness.\*

[\* The case of *Ambler v. Wyld*, 2 Wash. 36, decides, —

1. If the parties in an action at law, are at liberty by the issue to go fully into the examination of evidence, and having done so, a verdict is found after a fair trial, a court of Chancery ought not to interfere by directing a new trial.—*Aliter*, if part of the evidence was suppressed by the court.

2. The court of one county may relieve against a judgment at law rendered in another, by way of original jurisdiction; and though it cannot award a new trial at the bar of that other court, yet it may direct an issue to be tried at its own bar. And if the relief be afforded without the trial of an issue where that was necessary the High Court of Chancery, upon an appeal, may after reversal retain the cause, and direct an issue to be tried at the bar of that, or any other court.

3. The 5th section of the act for scaling debts &c. was not intended to let men loose from their contracts, but to allow a departure from the established scale, in cases, where it is necessary in order to meet the real contract of parties.

See *Hamilton v. Urquhart*, in this volume, *post.*, and *Yates v. Salle*, *ante.*—*Ed.*]