

REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME VI.

RICHMOND:

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QUESNEL *v.* WOODLIEF & *al.*

In 1788, W. owning a tract of land called *Sion Hill*, held by him and his forefathers under a survey upwards of 100 years old, advertised it for sale, as containing *about* 800 acres; and believing that, as it was an old survey, it would probably contain more than 800 acres, he afterwards sold it to Q., according as it had been held by him and his ancestors under the old survey, for £3200, (equal to £4 per acre,) offering to survey it, if Q. would pay, at the same rate, for the excess; which the latter, (who also believed that it contained more than 800 acres, as it was an old survey,) declined. Subsequent to the execution of the deed, Q. had the land surveyed, and found it to contain much less than 800 acres: Whereupon, he filed a bill in chancery, for a deduction from the purchase money, proportionable to the deficiency in the land: which W. resisted, upon the ground, that the purchase was, in fact, of 800 acres, *more or less*. The court was of opinion, that although there was no fraud in the sale, yet as both parties acted under a mistake as to the quantity, the deficiency was too great for a purchaser, notwithstanding the sale was for 800 acres, *more or less*; and therefore, decreed a deduction from the purchase, in proportion to the deficiency, upon the ground of mistake. And W. was likewise decreed to give Q. an indemnity against all charges and incumbrances on the estate.

Noel Quesnel filed a bill in the high court of chancery, against *Woodlief* and others, stating himself to be a native of France, but then a resident of the county of Prince George, in the state of Virginia. That late in the year 1786, he came to reside in the town of Blandford, in the county aforesaid, as a merchant, and soon became acquainted with the defendant *Thomas Woodlief*, of *Sion Hill*, in the said county; and placed great confidence in him. That *Woodlief* grew embarrassed in his affairs, and offered his said tract of land, called *Sion Hill*, for sale, always speaking of it as containing 800 acres; and by public advertisement, of the 6th of March, 1788, asserted it to be that quantity, or *thereabout*. That the plaintiff hearing the same from *Woodlief* himself, entered into a treaty with him for the purchase thereof. That, upon the first mention of the subject, *Woodlief* asked £4000 for it, amounting to £5 per acre; which being more than it was worth, the plaintiff refused to take it at that price; but offered, afterwards, by

letter of the 25th of April, 1788, (in which he mentioned that his counsel should examine the deeds,) £ 3200, believing, at the time, that the tract contained 800 acres. That, under these impressions, he subsequently became the purchaser of the same, for the said sum of £ 3200, equal to £ 4 per acre, payable as follows, viz : £ 500 in October 1788, £ 500 in December 1789, £ 500 in December 1790, £ 500 in December 1791, £ 600 in December 1792, and £ 600 in December 1793 ; for which said several sums, (except the first,) he gave his bonds to the said *Woodlief*. That the plaintiff, after the purchase, intended to require a survey of the land ; but, having understood that it had been in *Woodlief's* family for many generations ; and, having never heard, that any part of it had been sold, he omitted to do so, determining, however, to have the deed prepared by *William Davies*, his counsel, as he himself was a foreigner, not well versed in the American language, and still less acquainted with conveyancing. That the contract was not finally concluded until *Monday* the 28th of April, 1788, when the plaintiff being at the house of *Edmund Ruffin, jr.* the defendant, in the said county of Prince George, a deed was proposed to be drawn for the said tract of land, by the said *Ruffin*, as well as a deed of trust upon the same, to secure payment of the purchase money : to which, the plaintiff at first objected, as wishing to have the aid of his counsel, the said *Davies* ; but, being pressed thereto by *Woodlief* and *Ruffin*, (who declared himself capable of preparing the deed,) he at length assented, believing *Ruffin* to be both capable and disinterested : and the deeds for the said tract of land called *Sion Hill*, describing it as containing 800 acres, “ *more or less,*” were accordingly executed upon that day, the deed of trust, however, expressing the quantity to be 800 acres, without the addition of the said words, “ *more or less.*” That the plaintiff believed, at the time, that there were 800 acres ; and, as possession was not to be delivered until a future day, he intended to have it surveyed before he occupied it ; of which *Woodlief* was not ignorant. That

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1796. the plaintiff, immediately after the execution of the deeds,
November. and before possession was delivered, sent for *Harris*, the
Quesnel surveyor of the county, for that purpose; but *Woodlief*
v. being from home, the survey was not made until September
Woodlief. 1788; when, to the astonishment of the plaintiff, the tract
was found to contain only 510 acres, although, by an after
survey, it appeared to contain 577 acres. That *Woodlief*,
in asserting the tract to contain 800 acres, must have relied
on general opinion, although he could not have been igno-
rant, that two parcels of land had been conveyed at different
times, between some branches of the family nearly allied to
him; which having finally come into his possession, or the
possession of his brother, from whom he inherited the es-
tate, he had himself conveyed, a part thereof, to his brother
Peter Woodlief, who was then in possession of 230 acres,
formerly parcel of the tract; and which, added to the quan-
tity then held by the plaintiff, would make up the 800 acres.
That this was corroborated by the circumstances. For it
appeared by a patent dated the 25th of July, 1638, that the
ancestors of the defendant *Thomas Woodlief*, were in pos-
session of the tract of land, called *Sion Hill*, before that
period. That *John Woodlief*, being in possession of the
said tract of land, on the 11th of February, 1737, devised
his whole *real* estate, and the greater part of his personal,
to his son *John*. That the said *John Woodlief*, the son,
(by the name of *John Woodlief*, senior), and *Catharine* his
wife, on the 14th February, 1761, conveyed 202 acres to
Campbell: which, from the boundaries, did not appear to
have been part of *Sion Hill*. That the said last mentioned
John Woodlief, on the 10th of March, 1761, conveyed to
Peter Woodlief, his near relation, 100 acres, called *Deep*
Bottom; which joins the land conveyed to the plaintiff, and
made part of the original tract; and, on the 15th of De-
cember, 1770, conveyed, to his eldest son, *John Woodlief*,
junior, 130 acres, being also part of the *Sion Hill* tract:
Which two tracts of 100 and 130 acres, added to the 577,
make up the 800 acres sold to the plaintiff. That the said

last mentioned *John Woodlief*, junior, being in possession of the 130 acre tract, on the 17th of February, 1775, devised, to his nephew, *John Woodlief*, son of *Peter Woodlief*, and elder brother of the defendant, *Thomas Woodlief*, the residue of his estates, which included the lands called *Sion Hill*; and, in order to re-unite the *Deep Bottom* tract to *Sion Hill*, devised to his nephew, *Peter Woodlief* (brother to the said last named *John Woodlief*, and the defendant, *Thomas Woodlief*), £250, provided he conveyed, to his brother *John* aforesaid, the said *Deep Bottom* tract of 100 acres. That the said last mentioned *John Woodlief*, on the 4th of February, 1777, devised several personal legacies charged (as well as the personal legacies left by his uncle, the said *John Woodlief*,) upon his lands; all of which he gave, by the residuary clause of his will, to the defendant, *Thomas Woodlief*. That the defendant, *Thomas Woodlief*, had never paid the £250; and had actually conveyed the said tract of 130 acres to his said brother, *Peter Woodlief*, who still kept the *Deep Bottom* tract. Which proved that the *Sion Hill* tract, although spoken of as 800 acres, was, in fact, but 570 acres; and was called 800 acres, only, when the said two tracts of 100 and 130 acres were united to it. That, on the 28th of April, 1788, it being suggested that the defendant *Thomas Woodlief's* estate was pledged to the defendant, *Edmund Ruffin*, junior, and his father, *Edmund Ruffin*, senior, an endorsement, by way of release, was made on the back of the deed, but no consideration was expressed. That the said *Edmund Ruffin*, junior, on the 3d of May, 1788, undertook to guarantee the title to *Sion Hill*, so far as the said incumbrances might extend: which added to the plaintiff's confidence, that there were 800 acres, as the said *Edmund Ruffin*, junior, and *Edmund Ruffin*, senior, his father, had both lived adjoining to it. That the defendant, *Thomas Woodlief*, having passed away one of the plaintiff's bonds to *Claiborne*, the defendant, *Edmund Ruffin*, junior, gave the plaintiff notice not to pay it. That 60 acres of the *Sion Hill* tract had been sold by

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1796. the sheriff of Prince George for the taxes of 1787; and
 November. *John Baird* had a claim for 50 acres. That, on the 2d of
 Quesnel October, 1708, a certain *John Woodlief*, senior, conveyed
 v. Woodlief. 70 acres of land to *Stainback*, described to be part of the
 manor plantation, bounded by Deep Bottom run. That, on
 the 27th of October, 1788, the plaintiff gave the defendant,
Edmund Ruffin, junior, notice, that he would not pay the
 bonds, and that he claimed an allowance for the deficiency
 in the land sold to him by *Woodlief*: Which notice he also
 gave to the said defendant, *Thomas Woodlief*, requiring
 that he should either make the deduction, or annul the con-
 tract. But that the said defendants, *Thomas Woodlief* and
Edmund Ruffin, junior, had directed *Harrison*, the trustee
 named in the deed of trust, to proceed to sell the land,
 in order to satisfy the bonds for the purchase money. The
 bill, therefore, interrogating the defendants as to the matters
 aforesaid, and particularly whether *Quesnel* was shewn the
 boundary lines, before he purchased, prayed for an injunction,
 and for general relief.

The answer of the defendant, *Thomas Woodlief*, states,
 that after having previously advertised *Sion Hill* for sale,
 he, about the month of April 1788, contracted to sell it to
 the plaintiff for £ 3500; but, as the contract was by word
 of mouth only, and no witnesses to it, the plaintiff refused to
 comply, as he knew the defendant's embarrassed situation;
 to relieve which, he afterwards sold it to the complainant for
 £ 3200. That he had, repeatedly, offered the said tract of
 land, to the plaintiff, at the supposed quantity of 800 acres;
 or to survey it, if the plaintiff would pay for the excess;
 which the plaintiff, *after going over the land*, refused; and
 has since declared, that he thought, *from the boundaries*,
 that there must be more than 800 acres in the tract. That,
 on concluding the bargain, the deeds drawn by col. *Davies*,
 not corresponding with the intention of the plaintiff and de-
 fendant, were rejected; and the defendant, *Edmund Ruffin*,
 jr. was requested, by the parties, to draw others for that
 purpose; which he consented to do: and *Monday*, the 28th

of April, 1788, was fixed on, by the plaintiff, as most convenient to him, to attend at the house of the said *Edmund Ruffin, jr.*; which he did, and the deeds were, there, executed, the plaintiff declaring himself better pleased with them, than with those prepared by col. *Davies*, whose assistance, he did not express any desire to have; and sometime afterwards, declared himself satisfied with the purchase, and wished people would suffer him to make his own bargains. That several years, before the date of the sale to the plaintiff, the defendant had listed 900 acres of land with the commissioner; and, prior to the said sale to the plaintiff, had sold the tract of 130 acres to his brother, the said *Peter Woodlief*; leaving the supposed quantity of 770 acres, which justified his advertising the *Sion Hill* tract, as containing 800 acres, or *thereabout*: but, at the time of the advertisement, he verily believed that it contained fully 800 acres. That the tract of 130 acres lies on the south side of Deep Bottom run; never was considered as part of the *Sion Hill* tract: and was in possession of the said *Peter Woodlief*, for some time, before the treaty between the plaintiff and the defendant commenced. Denies combination, &c.

The answer of the defendant, *Edmund Ruffin, jr.*, states, that in April 1788, he was informed by the defendant, *Thomas Woodlief*, that he was about to conclude a bargain with the plaintiff for *Sion Hill*; and was requested to attend at Blandford, in order to see part of the purchase money paid; which was to discharge two executions, against *Woodlief*, on replevy bonds, to which the plaintiff was security. That the defendant did attend; when the plaintiff refused to pay the money, unless the defendant would relinquish all claims, the defendant, or *Edmund Ruffin, sen.*, his father, had upon the land; which the defendant readily did, as he knew there were none at that time; all such having been previously cancelled, without ever having been recorded. That the plaintiff, thereupon, paid part of the purchase money; but, before he did so, he and the defendant went to

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1796. col. *Davies*, and observed to him, the variance between
 November. the actual contract, and the deeds, which the said *Davies*
 Quesnel had drawn. That some conversation ensued ; after which,
 v. the plaintiff and defendant left him ; and returning to the
 Woodlief. store of *James Campbell*, the plaintiff agreed to make the
 payment. That it was then proposed, that the deeds should
 be drawn by the defendant ; for which purpose, the plaintiff
 furnished memoranda of the terms of the bargain ; and in
 conformity thereto, the defendant prepared the deeds. That
 the parties met at the house of the defendant, on the 28th of
 April, 1788, (being *Monday*) the day fixed on by the plain-
 tiff himself for the purpose : at which time, the defendant
 delivered the deeds to the plaintiff, who, assisted by *William*
Ragsdale, jr. (a young gentleman who wrote in the clerk's
 office, and was tolerably well acquainted with conveyancing)
 perused them ; and expressed his approbation of them, in
 the presence of several disinterested persons, adding that he
 was better pleased with them, than with those which had
 been prepared by col. *Davies*. That, while the plaintiff
 was perusing the said deeds with *Ragsdale* as aforesaid,
 when they came to the words, "*more or less,*" he asked
 whether *Woodlief* would not make a deduction for any de-
 ficiency in the quantity of land, provided, upon survey, the
 tract proved to contain less than 800 acres? To which
Woodlief answered, that he would, provided the plaintiff
 would pay for the excess. That the plaintiff, who appeared
 not to relish the proposition, made no reply ; but executed
 the deeds and bonds, without being pressed thereto by any
 person. That the defendant believes, that both *Woodlief*
 and the plaintiff thought the tract would contain more than
 800 acres, from the circumstance of its being an old survey.
 That the defendant had no inclination, or inducement, to
 deceive the plaintiff, as there would have been land enough
 to pay him, notwithstanding the deficiency, which he did not
 suspect, and he had other ample securities. That the de-
 fendant believed, at the time, there were 800 acres ; and,
 under that impression, had, theretofore, taken two deeds of

trust upon it, as containing that quantity, *more or less*, as by the said deeds, cancelled previous to the sale to the plaintiff, will appear. That the tract of 130 acres, and the *Deep Bottom* tract of 100 acres, were no part of the *Sion Hill* tract, which was entailed; and therefore could not be aliened before the year 1776. That the *John Woodlief*, who sold the 130 acres to the said *John Woodlief* of *Sion Hill*, was no relation of that family; but was the husband of the said *Catharine* mentioned in the bill. That the defendant does not believe that *Baird* has any title to the said 50 acres of land referred to in the bill. That the defendant wrote the wills of *John Woodlief* the elder and younger; and is confident that neither of them meant to charge the real estate with the payment of the legacies; which would have been useless, as the personal estate of both was fully sufficient to pay them; and the defendant knows that a considerable part of them has been actually paid. That the bond, in the hands of *Claiborne*, was withdrawn from the defendant *Woodlief*, under a promise to return it.

The answer of *Harrison*, the trustee, admits the deed of trust; and *Ruffin's* direction to him to sell the land, in order to satisfy the purchase money.

There was a general replication to the answers; and the following depositions were taken.

William Ragsdale, jr. says, That, on *Monday*, the 28th of April, 1788, he was desired, by the defendant, *Edmund Ruffin, jr.* to draw a deed, from *Thomas Woodlief* to *Noel Quesnel*, for the *Sion Hill* tract of land; and did so. That the plaintiff requested him to read it, to him the said plaintiff, that he might compare it, with that drawn by col. *Davies*, which the plaintiff held in his hand; and when the deponent had finished reading it, the plaintiff expressed his satisfaction with it; and said he liked it better than the one col. *Davies* had drawn. That when the deponent, in reading the deed to the plaintiff, came to the words "800 acres, *more or less*," the plaintiff asked *Thomas Woodlief*, if there should not be the full quantity of 800 acres, he would make

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a deduction from the purchase money, for whatever land might be wanting? To which *Woodlief* answered, he would, if the plaintiff would pay for whatever surplus land there might be at the rate of £ 4 per acre. That the deponent wrote the bonds, or great part of them, for the purchase money; saw them executed; and heard the plaintiff express no desire, to have the land surveyed.

James Campbell. That, on *Quesnel's* telling him and his partner *Wheeler*, that he had purchased *Sion Hill*, they advised him to consult col. *Davies*; and have a proper right made to him. That *Quesnel* told them "the tract contained 800 acres; but as it was an *old survey*, he supposed it would contain more land, having been told that was common in *old surveys*." That some time afterwards, *Quesnel*, *Woodlief* and *Ruffin, jr.* called at *Campbell & Wheeler's* store, about the land, and the tract was said to contain 800 acres; but that there might be *more or less*; and the first was most probable. That *Quesnel* afterwards told the deponent, "he had taken the land, as Mr. *Woodlief* held it, for 800 acres, *more or less*."

Luke Wheeler. That *Quesnel* consulted him and *Campbell* about the purchase; and they advised him to consult col. *Davies*, respecting the titles. That *Quesnel*, at that time, informed him, there was *computed* to be 800 acres of land; but being an *old survey*, it was expected to contain more, as he understood such surveys generally contained more than the grant expressed."

John H. Fitzgerald. That he was present at the execution of the deed, from *Thomas Woodlief* to *Quesnel*; and heard *Quesnel* say, he was better pleased with it, than with that drawn by col. *Davies*; and that he wished people would let him make his own bargains. That, after it had been discovered by *Harris's* survey, that there was a deficiency in the land, the deponent heard *Quesnel* say, he had bought *Sion Hill* for 800 acres, *more or less*.

Francis Eppes. That he was present when the deeds for the land were executed; and always understood that *Quesnel* had bought it for 800 acres, *more or less*.

Peter Woodlief. That the sheriff and commissioner were not upon the 60 acres of land, when they were sold for the taxes. That the said 60 acres are part of the *Deep Bottom* tract, and of the 130 acre tract. That they are not part of the *Sion Hill* tract; and that there was sufficient personal estate of *Thomas Woodlief*, on the land, at the time of the sale by the sheriff, to satisfy the taxes.

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William Davies. That *Quesnel* (who appeared to understand very little of the English language) advised with him about the purchase; and he drew a deed and mortgage for the land: which *Quesnel*, afterwards, told him were objected to by the other parties, who required a deed of trust; and the deponent cautioned him against the execution of it; but he did not readily understand the distinction, which the deponent endeavoured to impress upon him. That he seemed to be confident, as to the quantity of the land; and appeared to be anxious to make the purchase.

Ulrick Mark. That *Quesnel* came to reside in Petersburg in the latter end of the year 1786, as a merchant; and was so unacquainted with English, that he stood in need of an interpreter in his commercial transactions.

Francis Stainback. That he was overseer for *John Woodlief* at *Sion Hill*, until 1777; and, afterwards, for *Thomas Woodlief*, until discharged: And that he always thought the *Deep Bottom* tract was part of *Sion Hill*, "as that was the part of the land on which we lived, and where *Peter Woodlief* now lives."

The court of chancery ordered a survey to be made by the county surveyor: And *Robert Turnbull*, the surveyor, on the 15th of September, 1794, returned a plat and survey; by which it appeared that the *Sion Hill* tract contained 608 acres, 1 rood, and 13 perches.

The exhibits, filed in the cause, were,

1. *Thomas Woodlief's* advertisement for the sale of *Sion Hill*, dated the 6th of March, 1788; and describing it, as containing "about 800 acres."

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2. The deed, from *Thomas Woodlief*, to the plaintiff, for the *Sion Hill* tract of land, dated the 28th of April, 1788; the consideration £ 3200; and describing it as "containing eight hundred acres, *more or less*, being the same tract of land devised to the said *Thomas*, by his late brother, *John Woodlief*, excepting a small tract sold by the said *Thomas* to his brother *Peter Woodlief*." There is a covenant in the said deed, that *Woodlief* had a good title to the land, free from incumbrances; had power to convey the same to the plaintiff in fee simple; would make further assurance when reasonably required; and would defend the title.

3. The release from *Edmund Ruffin*, sen. and *Edmund Ruffin*, jr., dated the 28th of April, 1788.

4. The deed of trust from *Quesnel* to *Harrison*, to secure payment of the purchase money to *Woodlief*, dated the 28th of April, 1788, and describes the land as "containing, *by estimation*, eight hundred acres, being the same land lately purchased, by the said *Noel Quesnel*, of the said *Thomas Woodlief*."

5. The survey made, by *Harris*, on the 10th of September, 1788, making *Sion Hill* to contain 510 acres only.

6. The will of *John Woodlief*, senior, dated the 11th of February, 1737; which, after devising some personal property to his wife, makes his son *John* residuary devisee of "all the rest of his estate, both real and personal."

7. The deed from *John Woodlief*, senior, and *Catharine* his wife, to *John Campbell*, dated the 14th of February, 1769, for 202 acres of land; which the bill admits does not appear, from the boundaries, to be any part of the *Sion Hill* tract.

8. The deed from *John Woodlief* to *Peter Woodlief*, dated the 10th of March, 1761, for "one hundred acres of land commonly called and known by the name of *Deep Bottom*, and now in possession of the said *Peter Woodlief*, and is the tract of land which he now lives on."

This is the tract of land conveyed by *Peter Poythress* to *John Woodlief*, by deed of the 12th of November, 1754;

which describes it, as "one hundred acres of land, more or less, commonly called and known by the name of *Deep Bottom*, situate, lying and being in the said parish of *Martins Brandon* and county of Prince George, and is bounded as followeth, on the north side by *Deep Bottom run*; on the south side by *Richard Bland's* land; on the east side by *John Woodlief's* land; and on the west side by *Thomas Poythress's* land." Which necessarily shews it was not part of the *Sion Hill* tract, then owned by the said *John Woodlief*.

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9. The deed from *John Woodlief*, senior, and *Catharine* his wife, to *John Woodlief*, jr., for 130 acres, dated the 15th of December, 1770.

This *John Woodlief*, senior, the answer of *Ruffin* says, was no relation of the *Sion Hill* family. Consequently, these 130 acres never were part of the *Sion Hill* tract, which had been entailed for ages; and, therefore, could not be aliened prior to the year 1776.

10. The will of *John Woodlief* of *Sion Hill*, dated the 17th of February, 1775; which devises as follows, "if my nephew *Peter Woodlief*, shall, so soon as he has attained the age of twenty-one years, make a good and sufficient deed to his brother *John Woodlief*, for that tract of land and plantation known by the name of *Deep Bottom*, which land was devised to the said *Peter Woodlief*, by the last will and testament of his father *Peter Woodlief* deceased, then, and in that case, I give and bequeath to my said nephew *Peter Woodlief* two hundred and fifty pounds." And, after some personal legacies to his other nieces and nephews, devises "all the rest and residue of his estate both real and personal to his nephew *John Woodlief*."

11. The deed from *Thomas Woodlief* to *Peter Woodlief* his brother, dated the 21st of July, 1787, for the 130 acre tract of land.

12. *Ruffin's* obligation to re-pay the first payment to *Quesnel*, if the *Sion Hill* tract should appear to be incumbered.

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13. *Quesnel's* notice to *Ruffin*, on the 27th October, 1788, that he would not pay the full amount of his bonds for the purchase money, as the land, upon a survey made, had proved deficient in quantity.

14. A notice by *Quesnel*, in the newspapers, on the 28th of October, 1788, to the same effect.

15. The alledged memorandum of the *proposition* of *Quesnel* to *Thomas Woodlief*, to purchase the *Sion Hill* tract of land at £3200; which requires the land to be surveyed, and warranted not to contain less than 800 acres.

This paper is without date, is not signed, nor in any manner authenticated; and the answer denies it.

16. The letter which the plaintiff alleges he wrote to *Woodlief* on the 25th of April, 1788, in these words, "Mr. *Woodlief*, you tendered me at Mr. *Armstead's* some propositions for articles of agreement between you and me, respecting the purchase of your land. You have signed them, but before I either agree to them or sign them, I wish to have them or a copy to take counsel upon them, as I am not well acquainted either with the language or the laws of the country. If I like them, I will inform you, if not, I will return them to you some time this evening or to-morrow morning, if you will let me know where to find you in town. I am desirous to purchase your land, and am only anxious to be safe in what I am doing. I wish to have the business concluded as soon as possible, as delays are inconvenient to me, and no doubt disagreeable to you."

This paper is not signed; nor, in any manner, authenticated.

17. A copy of a declaration, for the benefit of *Peter Woodlief*, upon the guardian's bond given by *Thomas Woodlief*, as guardian of the said *Peter Woodlief* and *George Woodlief*. But the date of the suit, or whether it was still depending, does not appear.

18. The notice from *Edmund Ruffin, jr.* to *Quesnel*, not to pay the bond in *Claiborne's* hands.

19. A certificate from the commissioner of the land tax, that *Thomas Woodlief*, in the year 1786, listed his lands, as containing 900 acres.

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20. *Ruffin's* receipt to *Woodlief*, dated 8th August, 1788, for *Quesnel's* bonds for the purchase money; which was to be applied to the discharge of debts due to *Ruffin* and his father.

21. Copy of a bill in chancery filed by *John Cox* and *Hannah* his wife, late *Hannah Woodlief*, against *Thomas Woodlief*, (as residuary devisee of *John Woodlief*,) *Noel Quesnel*, *Edmund Ruffin, jr.*, and *Edmund Harrison*, claiming payment out of *Sion Hill*, of a legacy of £ 500, left the said *Hannah*, by the said *John Woodlief*. But there is no certificate, or other evidence, that the suit is still depending.

22. A paper purporting to be articles of agreement between *Thomas Woodlief* and *Noel Quesnel*, dated the — day of April, 1788, stating, "That *Thomas Woodlief* hath bargained with and sold to *Noel Quesnel*, a tract of land lying on James river, whereon the said *Woodlief* now resides, for the sum of three thousand two hundred pounds, to be paid, &c."

This paper is not signed by the parties, or otherwise authenticated. There is, however, endorsed upon it, what purports to be a release by the two *Ruffins*, dated the 28th of April, '88, and signed by them, with the initials of their names; but it is without any witnesses, or other authentication.

23. A copy of the auditor's certificate, relative to the sixty acres of land sold for taxes by the sheriff of Prince George county.

24. A paper purporting to be a bond from *Woodlief* and *Ruffin, jr.*, dated 28th April, 1788, for the indemnity of *Quesnel*, in case *Sion Hill* should prove to be incumbered by deed or mortgage.

25. A copy of the deed from *Peter Poythress* to *John Woodlief*, dated the 12th of November, 1754, for the *Deep Bottom* tract of land of 100 acres.

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26. An old cancelled mortgage, or deed of trust, dated the 21st of October, 1784, from *Thomas Woodlief* to *Edmund Ruffin*, senior, and *Edmund Ruffin*, jr., upon *Sion Hill*, which it describes as "containing 800 acres, *more or less*."

27. The patent to *John Woodlief*, (probably the father of him who afterwards sold the 202 acres to *Campbell*, and who was no relation of the *Sion Hill* family,) for 200 acres of land.

28. Deed from *John Woodlief*, senior, to *William Stainback*, dated the 2d of October, 1708, for 100 acres of land; which it describes as part of the plantation on which *Woodlief* then dwelt; and as being "part of a tract of land taken up and patented by my father captain *Woodlief* deceased; and by my eldest brother Mr. *George Woodlief*, conveyed and made over to me, ye 15th September, 1671, bounded on the north side of the running water of the Deep Bottom; west on the dividing bounds between Mr. *Poythress's* lands and mine; east on the lines it parts my cosson *John Woodlief's* land and mine; south to the said Deep Bottom running water, on the line that parts Mr. *Bland's* land and mine, bearing by patent 100 poles in breadth; by estimation seventy acres more or less."

29. The deed of mortgage, (drawn by colonel *Davies*,) from *Quesnel* to *Woodlief*, to secure payment of the purchase money; which describes the land, as "all that tract of land lying in the county aforesaid, containing eight hundred acres, *more or less*, bounded on the east, by the land of *Richard Bland*, on the south by the land of *Peter Woodlief*, on the west by the land of *Edmund Ruffin*, senior, and on the north by James river, being the same tract or parcel of land conveyed by deed of indenture by the said *Thomas Woodlief* to the said *Noel Quesnel*, bearing even date with these presents."

The deed (drawn by colonel *Davies*) from *Woodlief* to *Quesnel*, is not in the record, although called for by *Ruffin's* answer.

There is no evidence that *Baird*, or any other person, ever set up a claim to the fifty acres mentioned in the bill. 1796.
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The high court of chancery dismissed the bill, upon a hearing, with costs; and *Quesnel* appealed to the court of appeals. Quesnel
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Wickham, for the appellant. There was direct fraud practised upon *Quesnel*, who was a foreigner, and unacquainted with the language and customs of the country: Whereas *Woodlief* was a native, resided on the land, and was well acquainted with the title and boundaries, of which *Quesnel* was ignorant. *Woodlief* both advertised and spoke of the land, as containing eight hundred acres; but the surveys which have been since made, prove that there was much less. *Campbell* says, that *Woodlief* and *Ruffin*, at the meeting at his store, spoke of the tract as containing eight hundred acres, and probably more, as it was an old survey; which is not produced: And the vendor must have known, that there was less than that quantity; for his own possession, added to his familiar acquaintance, must have convinced him of it; and his deed to his brother, *Peter Woodlief*, had taken off 130 acres. The circumstances, which took place, at *Ruffin's*, when the deeds were executed, shew that there was a misgiving, in the mind of *Quesnel*, as to the quantity; and that, bereft of the aid of his counsel, he fell a victim to the influence of his adversaries.

But, if there was no actual fraud, there was, at least, misrepresentation without guilt; that is to say, such a representation as, though not fraudulently made, misled the appellant; and that produces the same consequences. For the purchaser acted under delusion, and contracted under ignorance of the true circumstances: Which ought to have been unfolded to him, and opportunity given to consult his counsel. But as this was not done, he is not precluded from relief; for the deficiency in the land is excessive; and he ought not to have been exposed to the hazard of it, with-

1796. out all the time to deliberate and consult his counsel, which
November. a man, in his isolated situation, had a right to require.

Quesnel Besides, there was a concealment of an important fact ;
v. for *Quesnel* was not apprized of the sale of the sixty acres,
Woodlief. by the sheriff, for the taxes : And whether this arose from design, or inadvertence, will make no difference ; for either way, it was a fact, which *Quesnel* was interested in knowing ; and therefore, he ought to have been informed of it.

But waving all this, and coming to the actual contract between the parties : *Quesnel* alledges, that he meant to give £ 3200 for eight hundred acres ; and that he never intended to pay that sum for less : Which is not contradicted by any testimony in the cause : for if he did not agree, at *Ruffin's*, to *Woodlief's* offer to survey, he did not disagree ; and the insertion of the words *more or less* in the deed, is not important, for they are the usual language in all conveyances, and are confined to small deficiencies.

The diminution of the land is so great, that it produced such an inadequacy in the contract, that, if there had been no deed, a specific performance, upon a bill filed by the vendor, would not have been decreed, without a correspondent deduction from the purchase money : And the conveyance is but a form, which only changes the plaintiff into a defendant, but does not bar the equity ; for the same principle exists, and entitles the vendee to relief, notwithstanding the deed. 2 *Ves.* 155. *Pow. Contr.* 152, 156.

But there was an actual defect of title in the vendor ; for the land was liable to the legacies left by the two *Woodliefs* : which are not proved to have been satisfied : So far from it, *Cox's* suit shews, that that due to his wife never has been paid ; and whether the rest have been discharged, does not appear.

Call, contra. There was no fraud practised upon *Quesnel*, who has the benefit of the contract, precisely, as he made it. For there is not the slightest proof of any deception. *Woodlief* never spoke of any thing, but the *Sion*

Hill tract: which he honestly believed to be more than 800 acres; advertised it, as containing *about* that quantity; and offered to survey it, which *Quesnel* declined. The execution of the deeds was mutually voluntary; and *Quesnel* was under no embarrassment; for the whole subject had been previously discussed and settled in Blandford, after a conversation between himself, *Ruffin* and col. *Davies*, relative to the nature of the contract, and the provisions of the deeds: And he met, according to his own appointment, at the house of *Ruffin*, to execute those that were to be drawn by that gentleman; which are as well and faithfully drawn, as any counsel could have drawn. Nor did he ask for time to deliberate, or consult his counsel, but declared himself better satisfied with them, than with those prepared by col. *Davies*; which he held in his hand, and compared with the new deeds, prior to the execution thereof. After which, it is in vain to say, that he was imposed upon, or that he stood in need of time to deliberate, or consult his counsel.

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Neither was there any misrepresentation. For the whole communication on the part of *Woodlief* was, that it was the ancient family seat, which had been held for a long succession of generations, under the old survey; and the whole of this proves to be true. Under these circumstances, and with a full knowledge of every thing, *Quesnel* purchased upon his own view of the area; for the bill interrogates the defendants, whether the plaintiff was “shewn the boundary lines of the tract of land, previous to his purchase?” And the answer of *Woodlief*, which is responsive in that respect, expressly states, “that the complainant went over the land, seemed well satisfied both with the quality and *quantity*, and rejected the offer of having it surveyed, as had been proposed by the respondent; and has since declared, in the presence of several persons, that he thought, *from the boundaries*, that there must be a greater number than eight hundred acres.” He purchased, therefore, upon his own judgment, after an inspection of the premises, the extent of the boundaries, and a perfect knowledge of every thing relating

1796. to them, which it was in the power of the vendor to com-
 November. municate. This, necessarily, bound him ; for it is a general
 Quesnel rule of law, that when the vendee purchases upon his own
 v. judgment, after a view of the subject to be sold, the vendor
 Woodlif. is not responsible for defects, 2 *Esp. Nis. Pri.* 629, cites
Chandelor v. Lopus, Cro. Jac. 4.

There was no concealment on the part of *Woodlif*, who disclosed every thing he knew. 1. Because the 60 acres of land, sold by the sheriff for taxes, were not part of the *Sion Hill* tract, but of the 130 acres sold to *Peter Woodlif*. Besides, the sale was utterly void, on account of the irregularity in conducting it : for it was not duly advertised, nor made upon the premises, in the presence of the high sheriff ; and there was personal property enough to pay the taxes. *Acts October Session 1787, ch. 42.* 2. Because it is proved, that the *Deep Bottom* tract, *Stainback's* 70 acres, and the 130 acre tract, were not part of the *Sion Hill* tract. The two first never ; the last for a short time only ; and excepted in the deed from *Woodlif* to *Quesnel*, being at that time the residence of *Peter Woodlif*, as *Stainback's* deposition proves ; and which, therefore, the plaintiff must have seen, when he inspected the land, before his purchase.

There has been no departure from the contract : which the plaintiff, as before observed, enjoys, precisely, as he made it, 1. Because *Ragsdale, Campbell, Fitzgerald* and *Eppes* prove that he purchased the land, for 800 acres, *more or less* ; and the two first, that he declined a survey, when it was offered him, at the time of executing the deeds. *Wheeler*, too, says, that, on the day that he and *Campbell* advised him to consult col. *Davies*, he reasoned upon the probability of an excess, from its being an old survey. 2. Because the deed of mortgage, drawn by col. *Davies*, is for 800 acres, “ *more or less,*” without any provision for a deduction from the purchase money, in case of a deficiency of the land ; and he must have drawn it according to directions ; which is corroborated, by the confidence which he says, in his deposition, *Quesnel* afterwards shewed, as to the quantity. 3. Because the deed, to the plaintiff, executed at *Ruffin's*, is

also for "*more or less*;" without any provision for deduction, from the price, in case there were not 800 acres: And it was accepted by *Quesnel*, after a discussion whether there should be any such deduction, and after his declining to accept the offer of a survey. 4. Because the whole proceedings shew, that the plaintiff purchased according to the old survey, and the long possession of the *Sion Hill* family under it. It is no objection, that the original survey is not produced, because it was not called for by the bill, and the title to the land was not controverted; nor could have been controverted after a possession, which the bill states to have been upwards of a hundred years. The argument of the appellant's counsel, upon the words *more or less*, has no weight; for whatever may be their effect in common deeds, they were meant, upon the present occasion, to exclude responsibility for quantity.

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The supposed inadequacy of the contract has no influence. For it is not true, that *Quesnel* would not have been compelled to a specific performance, without a deduction from the purchase money: because it was a bargain of hazard, and fair upon both sides. If the land held out more than 800 acres, the purchaser was to gain; if it fell short of that quantity, he was to lose. It was what the civilians call *Emptio spei*; that is to say, it was a purchase of the contingency as to the excess; which, according to several authorities, is a good ground of contract; for the hazard is mutual; and, if there be a full disclosure of the circumstances, as there was in this case, neither can complain.

The supposed inequality of the situation of the parties has no weight. For, in point of fact, *Quesnel* was the more sagacious man of the two. He spoke English intelligibly; and wrote it better than *Woodlief* could, as the papers written by him, in the record, shew.

The alledged defect of title consists in the supposed lien for the personal legacies, but *Ruffin's* answer affirms that he knows most of them have been paid; and the bill only states, that the plaintiff is informed, that "*one of the legacies*" remains unsatisfied. The suit of *Cox* is neither re-

1796. referred to in the proceedings, nor is it certified to be still de-
 November. pending; and therefore the probability is that it has been
 Quesnel discharged.

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Cur. adv. vult.

LYONS, Judge, delivered the resolution of the court as follows :

The bill charges, that a fraud was practised upon the plaintiff, in the sale of a tract of land called *Sion Hill*; which it asserts the defendant *Woodlief*, fraudulently misrepresented, as containing 800 acres, although he knew that to be more than was actually comprehended in the tract at that time, as several parcels had been previously conveyed to other persons, without that fact being disclosed to *Quesnel*, who purchased under a belief that there were actually 800 acres; but that upon a survey, since made, there appears to be much less. The fraud and misrepresentation are denied by the answers; and the evidence does not support the allegations of the bill with respect thereto; but proves clearly, that the parcels conveyed were not parts of the original *Sion Hill* tract; which was the estate *Woodlief* contracted to sell; and which there is every reason to believe, he actually thought contained, at least, 800 acres. For the land had been the family seat for ages, and *Woodlief* supposing it to be held under an old survey, which he and his predecessors had always estimated to comprehend 800 acres, advertised it as containing about that quantity; and *Quesnel* relying upon those circumstances, purchased it, under a belief, that there were that number of acres in the tract. Both parties, therefore, appear to have acted innocently; and there is, consequently, no cause for relief, upon the ground, either of fraud or misrepresentation. But, as both vendor and vendee proceeded under *mistake*, each believing that the tract, certainly, contained 800 acres, and perhaps more; that constitutes a proper ground for relief in equity: which adjusts and equalizes contracts, according to the exigencies of the case. The mistake, therefore, ought to be rectified, and a deduction made from the purchase

money, proportioned to the deficiency of the land. But, as the original survey is not produced, the court is unable to ascertain, what the real quantity contained in the *Sion Hill* tract was, further than the record shews; and, by *that*, the survey, made under the direction of the court of chancery, reduces it to 608 acres, 1 rood, and 13 perches: which is too great a loss for a purchaser to sustain, under an agreement for an *estimated* quantity, notwithstanding the words "*more or less*," inserted in the deed; which ought to be restricted to a reasonable, or usual, allowance, for small errors in surveys, and for a variation in instruments. A correspondent deduction, from the purchase money, is consequently to be made. And *Quesnel* ought moreover to be indemnified against the claim of *Cox* and wife, and all other existing incumbrances, if any: which is not only agreeable to the general principles of equity, but the deed of *Woodlief* to the plaintiff, expressly covenants, that he has a good title; and that he will make further assurance, and defend it. So that there was no necessity, as the appellees' counsel contended, to suggest that suit, or any incumbrance, specifically in the bill; for a reasonable apprehension, appearing at the trial, was, upon the principles of *quia timet*, sufficient. In conformity to these ideas, the following decree has been prepared by the judges, and is to be entered as the judgment of the court:

"The court is of opinion, that the appellee *Woodlief*, not having surveyed the tract of land in the bill mentioned called *Sion Hill*, before he advertised the same for sale, or sold it to the appellant, but that *supposing* there had been an old survey, which he has not produced, or referred to, and does not appear in the proceedings in this cause, under which the land had been long held, as he suggested, by the former proprietors of the said land, and estimated, *by them and him*, as containing eight hundred acres, he advertised it as containing about that quantity, and the appellant was thereby induced to purchase it, *expecting* it would contain that full quantity; and the appellee *Woodlief* having, afterwards, asserted his *belief* thereof, occasioned the appellant to accept

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1796. of a deed for the same as containing eight hundred acres,
November. *more or less*, and it appearing from the survey made by *Robert Turnbull* and returned to the high court of chancery, Quesnel *bert Turnbull* and returned to the high court of chancery, *n.* pursuant to an order of the said court, in this cause made, Woodlief. for ascertaining the exact quantity of land in the said tract called *Sion Hill*, that the same contains only six hundred and eight acres, one rood and thirteen perches, *so that both parties were mistaken* in the quantity and number of acres contracted for, the said *mistake* ought to be rectified in a court of equity, and the appellant allowed a deduction, from the price agreed by him to be given for the said land, for the deficiency in quantity, that deficiency being too great for a purchaser to lose under an agreement for a *reputed* quantity, notwithstanding the words, '*more or less*,' inserted in the said deed, which should be restricted to a reasonable, or usual, allowance, for small errors in surveys and for variations in instruments; the value of the deficiency, when ascertained under the direction, and to the satisfaction of, the said high court of chancery, to be deducted from his bonds for the purchase money in the hands of the appellees *Woodlief* and *Ruffin*, or either of them, if sufficient to satisfy the same; and, if more than sufficient, the injunction to be dissolved for the residue, but if not sufficient, the appellee *Woodlief* to be decreed to refund it, with interest, and also to secure and indemnify the appellant from the suit and claim of *John Cox* and *Hannah* his wife, in the proceedings mentioned, and from all charges or incumbrances on the said land made by himself, or by any other person or persons, from or under whom he derives his title to the said land, before the said injunction be dissolved; and that the said decree is erroneous: Therefore it is decreed and ordered that the same be reversed and annulled; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here; and it is ordered that the cause be remanded, to the said court of chancery, for a final decree to be entered therein, according to the principles of this decree."