REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME III.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

NEW-YORK:
Printed and published by Isaac Riley.
1810.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-second day of January, in the thirty-fourth year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of "Virginia: with Select Cases, relating chiefly to Points of Practice, decided by "the Superior Court of Chancery for the Richmond District. Volume III. by "William W. Hening and William Munford."

IN CONFORMITY to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts "and books, to the authors and proprietors of such copies, during the times "therein mentioned;" and also to an act, entitled, "An act, supplementary to an "act, entitled, an act for the encouragement of learning, by securing the copies "of maps, charts and books, to the authors and proprietors of such copies, "during the times therein mentioned, and extending the benefits thereof to the arts "of designing, engraving and etching historical and other prints."

WILLIAM MARSHALL,

(L. S.) Clerk of the District of Virginia.

Jones's Devisees *against* Roberts.

The purchaser of an *agreement* for a lease and those under whom he claims, having committed such acts as would have amounted to a forfeiture, had a lease been actually executed with such covenants as were usually inserted in leases to other tenants of the same estate, shall not have the aid of a Court of Equity, to enforce a specific performance, against a judgment at law recovered by a purchaser of the fee-simple estate.

THIS was a revived appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced by the late Judge of that Court. The cause was fully argued in *October* term, 1805; but before the Judges were prepared to give their opinions, the appellant (the honourable *Joseph Jones*) died, and the cause stood continued for proper parties, and for decision until the present term.

Joseph Jones, the testator of the present appellants, was the purchaser of an estate in fee-simple, incumbered with some leases, and contracts, or promises for leases made by those under whom he claimed. *Roberts* bought a tenement, or lot, of one of the persons claiming by the last mentioned species of right; and being in possession, relied on this dormant equity, refusing to come to any terms with *Jones*. Whereupon an ejectment was brought, and *Jones* having recovered a judgment at law, *Roberts* filed his bill in equity praying for an injunction, for a specific execution of the agreement for a lease, made by a prior owner of the fee-simple estate.

The acceptance of rent after a forfeiture accrued, is an equivocal act, and may, or may not, amount to a waiver of the forfeiture, according to the *quo animo* with which the rent was received.

The case, as collected from different parts of the record, appeared to be as follows.

Robert Carter of *Nomini*, being possessed of a large estate in *Loudon* County, employed one *James Lane* as his agent or steward, with authority to collect the rents, and contract for leases, &c. The leases appear to have been usually for three lives, with covenants on the part of the lessees for certain improvements, and a clause in restraint of alienation without license from *Carter*.

February 25th, 1767, *William Musgrove* took the lot in question for three lives, as appears by a memorandum in the hand-writing of *James Lane*, of that date, signed by him. *Musgrove* dying in *December*, 1777, application was made by *Nathaniel Smith*, his administrator, for a lease pursuant to that memorandum. *Robert Carter* made the following endorsement on *Lane's* certificate: "JOHN *Musgrove*,

"No. 1. No. 4. *J. Lane's* certificate good." By this endorsement it was probably meant, that the lease promised to *William Musgrove*, now dead, should be made to his eldest son, *John Musgrove*, to whom Mr. *Carter* appears to have thought the right to the lease descended as *heir* to his father, for the lives of the said JOHN *Musgrove* and *Valendar Musgrove; William*, the third person whose name was to have been inserted in the lease, being now dead. No lease, however, appears to have been made, nor any further application to Mr. *Carter* on the subject. In this state matters remained until *August* 14th, 1789, when upon a compromise of a suit brought by *Charles Carter* for the above estate, *Robert Carter* made him a deed for one moiety, including the lot in question. *Smith*, in behalf of *William Musgrove's* estate, appears to have paid the rents regularly to *Robert Carter's* agent; the last receipt bearing date in *August*, 1790.

JOHN *Musgrove* having come of age, sold the lot in question to *Roberts*, the complainant in Chancery, and executed a deed, *September* 23d, 1791; *Nathaniel Smith* "at the time "of the sale having given him all the information he pos- "sessed relative to the title." JOHN *Musgrove's* deed to *Roberts* (which does not appear to have been recorded) recites the title to the lease in *William Musgrove* as above, and that the same by his death fell to JOHN, as his son and *heir*. This deed bears date about two years before a third writ of *elegit*, hereafter mentioned, was levied upon the lot in question; though the first writ was levied about the time of the deed.

August the 11th, 1791, Mr. *Pendleton* being about to levy an *elegit* on this estate, constituted *Thomas Pollard* his agent to superintend the levying of the same; with full powers, and directions to receive the attornment of the tenants to him, and to receive and give acquittances for their rents, as they should from time to time become due: engaging to confirm whatsoever he should do in the premises. Two writs of *elegit* were executed in *September*, 1791; and in *September*, 1793, a third was executed, which included the

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lot in question, then *occupied* by the complainant in Chancery, *Roberts*. *Pollard* states in his deposition that he received the rents from the *several* tenants (making no exception) for the years 1791, 1792, 1793, and 1794; Mr. *Pendleton*, in his letter of *February* 6th, 1794, requesting him to continue receiving the rents until a proposition made by *Charles Carter* to him, to sell as much of the land as would pay off his debts, should be completed. *December* 18, 1794, *Joseph Jones* the appellant, having full notice of the three *elegits*, purchased the whole estate of *Charles Carter*, subject to the same; and on the 31st of *March*, 1795, Mr. *Jones*, for the consideration of 1,240*l.* obtained from Mr. *Pendleton* a release of his claim, under the several writs of *elegit*. In *Charles Carter's* deed there is a covenant that the estate is free and clear of all incumbrances made by him except these *elegits*.

It is expressly charged in the bill, and put in issue, that Mr. *Jones*, before his purchase, went over the lands; knew that the complainant was in possession of the lot; often conversed with him about the estate, knowing him to be a tenant therein; had heard of the claims set up by the tenants; and he is expressly interrogated, what he knew or what he had heard of the claim and possession of the complainant before his purchase from *Charles Carter*. To these charges and interrogatories he pointedly answers that he is a stranger to the transactions between *Robert* and *Charles Carter*, previous to his purchase; that he does not recollect that *Charles Carter* consulted with him, or made any other communication respecting his claim or title to the lands, than might have been made to any indifferent person; that (with respect to what he had heard or been informed respecting the tenants' right before he purchased) he had always understood from *Charles Carter* that after *he* acquired a title to the land, *he* found some of the tenants had no leases, or other pretence to continue on the land, than that of *promises*, as they said, from *Robert Carter*, or his collectors; and, wanting the land to cultivate himself, he demanded possession, but they refused to yield it, under pre-

text of promises from *Robert Carter*, or his agents; and that he should have proceeded to eject them, but from a conviction that he should soon be compelled to part with the land. He also states, that, after the purchase made by *himself*, he visited the tenants, and requested information on what terms they held their tenements: when he discovered that the complainant had no lease for the lot in question, or *produced none to him;* that to ascertain the fact, he examined the records of *Loudon* and *Fairfax* Counties, and could find none; that finding several other tenements in the same situation, he informed those tenants that unless they would give up their lots, *or come upon terms with him for renting them*, he would have ejectments served to obtain the possession, which the complainant refused to do, relying on his right to hold the land, on a promise from *Robert Carter*, or some agent or collector of his. And that he was unacquainted with the terms on which the tenants respectively held their tenements, until *after* he purchased the lands and the above investigation took place. The Chancellor perpetuated the injunction and directed that a lease should be made for the lot in question; from which decree *Jones* appealed to this Court.

[This cause having been argued before the period when the present reporters commenced the publication of the decisions of the Supreme Court of Appeals, the arguments of counsel are of course omitted.]

Tuesday, *April* 25, 1809. Judge TUCKER (after stating the case as above) proceeded:

That JOHN *Musgrove*, the son of *William*, (or *Smith* his administrator,) had an equitable title to a lease from *Robert Carter*, for the lives of himself and *Valendar Musgrove*, is, I think, fully proved, by the answer of *Robert Carter*, the deposition of *Nathaniel Smith*, and that of *Benjamin Dawson;* and that, until *January*, 1788, when *John Musgrove* came of age, no *laches* is imputable to him, for not taking some steps to procure a legal title to such a term.

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But, *from that period* it is imputable to him; for in agreements of this nature, both parties are agents. It was therefore equally incumbent upon *John Musgrove* to demand a lease, as upon *Robert Carter* to tender one. Eighteen months elapsed before *Charles Carter* became the purchaser; and in all that time, nothing was done by *Musgrove* towards obtaining a lease. He does not even appear to have given *Charles Carter* notice of his claim. But in *September*, 1791, three years and a half after he became of age, and two years after *Charles Carter* had purchased the land, without any communication with, or license from him, he sells the lot to the complainant *Roberts*, puts him in possession, and makes him a deed, which is found among the exhibits; recites the nature of *Musgrove's* claim; and must have given the complainants full notice, if such notice had not also been proved by *Nathaniel Smith* in his first deposition. *Roberts* then was a purchaser with full notice of the nature of *Musgrove's* title. Now, although *Musgrove* had an indubitable claim upon *Robert Carter* for a lease, when he came of age to demand it; it was a mere equitable title that he had to one, and that subject to all the covenants and conditions which it was mutually understood between *William Musgrove*, the father, and *Lane*, the agent of *Robert Carter*, were usually inserted in the leases which he granted. Among these was a covenant or condition against alienation without license, by which condition, *William Musgrove* and after his death *John* his son, were equally bound in equity as *Robert Carter* was to grant the lease for the three lives. *Roberts* had, or must be presumed to have had, full notice of all this when he bought the lot and took an assignment of *John's* right. *John Musgrove* therein engages to give every assistance in his power to *Roberts*, towards obtaining a lease. Why did not *Roberts* apply to *Charles Carter* for a lease, during the two years that intervened between his taking this assignment, and the levying the *elegit* upon the lands? And why did he not apply or make known his claim, either to *Charles Carter*, or Mr. *Pendleton*, for eighteen months after; and before Mr. *Jones*

had become a purchaser from *Carter;* and a still longer period before he purchased the right of the tenant by *elegit?* Lastly; why did he not shew the deed of assignment from *Musgrove* to Mr. *Jones*, when requested to communicate his title? but, on the contrary, why did he studiously and mysteriously conceal it? Was it that he might drive him to bring an ejectment, and when he had got a judgment against him for his lands, conjure up this dormant equity, the evidence of which had slept for near twenty years, for the purpose of saddling him with the whole expense of a suit at law, and another in equity? This *wilful concealment* on his part, in my opinion, ought not to operate to his advantage, and to the vexation, delay, and injury of a person pursuing his legal rights, without knowledge of this dormant equity, and without the possibility of discovering it by his own researches and exertions. No fraud, collusion, neglect, or other fault whatsoever, is imputable to Mr. *Jones* in the whole transaction; yet, (if I understand the course of the Court of Chancery, though not expressed or even noticed in the decree,) may he be condemned to pay the costs of both suits. The rule *caveat emptor*, applies to *legal*, not to latent, and much less to wilfully concealed, *equitable* rights.(*a*) Had the complainant made known the nature of his claim to the defendant, when he desired it, and proposed to come upon terms, all the trouble, expense, and delay, which have ensued from his refusal would probably have been avoided. Having defended his title at law, instead of acceding to so reasonable a proposal, or at once bringing his bill for a lease, I conceive that he is not entitled at this day to the aid of a Court of Equity; his own conduct throughout being a violation of its rules.

(*a*) 1 *Wash.* 217. 338, 339.

But this is not the only ground on which I think *Roberts* not entitled to the aid of a Court of Equity. Being the purchaser of an equitable title only, with full, or, at least, strong presumptive notice, that the tenant was restrained from alienation without license. No equivocal act of a

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fair purchaser, for a valuable consideration, of the fee-simple estate, not having notice of the nature of his title, ought to have any effect upon his case, unless it shall appear to the satisfaction of the Court that such act could not have been done *diverso intuitu* from that which is contended for. The acceptance of rent from the alienee, or assignee of a tenant who is restrained from alienation without license, is one of those equivocal acts, which may, or may not, amount to a recognition of his title, and a waiver of the forfeiture, according to circumstances. *Roberts* purchased at the very time that Mr. *Pendleton* sued out his first and second writs of *elegit*, and though neither of these writs were levied upon the lot in question, it no where appears that he ever paid any rent to *Charles Carter*, nor indeed to Mr. *Pendleton*; all the receipts taken, up to the 21st of *February*, 1795, which was after *Jones's* purchase from *Charles Carter*, being in the name of *Nathaniel Smith*, who, as administrator of *William Musgrove*, had paid the rent for the space of nearly one and twenty years before; the first receipt to him bearing date *March* 13th, 1774. The acceptance of rent by Mr. *Jones* himself (as stated in the bill itself, and therefore need not be proved on his part) was on a condition that it should not affect his title.(a) The presumption that the rent was accepted *from Roberts, with a full notice of the nature of his title*, is thus completely done away; and having gained a possession contrary to the equitable condition annexed to *Musgrove's* title, of which he must be presumed to have had full notice, he is to be regarded as a mere tenant at sufferance, or, at most, as tenant at will. In neither of these characters would he have any pretensions to a lease from the appellant. But his possession has been relied on, as sufficient notice to the purchaser, that he must take the land with peril in equity of every right which the holder can assert against the seller. To this it is enough to answer, that every person who occupies the land of another as *tenant*, is in law a tenant at will, unless he can shew a lease of his lands, whereby his term is rendered certain. I have already shewn that the purchaser

(a) See *Cowp.* 245.

made every inquiry and scrutiny which a knowledge of that possession would have led to. And to me it appears that *Roberts's* equity, be it what it might, would have been, and was, destroyed by his subsequent conduct to the appellant, for the reasons already mentioned.

A further reason why *Roberts* appears to me not to be entitled to the aid of a Court of Equity, arises from this circumstance. If he was entitled to a lease at all, it was such a one as the Chancellor has directed to be made, with covenants, as in *Robert Carter's* lease to *Henry Taylor*. I have before said that *John Musgrove*, and, I will now add, all who claim under him, were in equity equally bound by the terms and covenants which were to have been contained in the lease, as they would have been at law, if the lease had been executed by both parties and recorded. Among the covenants contained in *Taylor's* lease, one was that the lessee should, within three years from the date of the lease, build thereon a good dwelling-house, of certain dimensions, another house of certain dimensions, as good as common tobacco-houses, and plant fifty apple-trees, and fifty peach-trees, inclose the same with a lawful fence, and at *all times* during the term, well and sufficiently maintain and keep all and singular the messuages, buildings, and fences, &c. in good and sufficient repair. Another covenant is, that the tenant should not, without license in writing, work more than four labouring hands; nor commit or suffer any waste; nor sell or dispose of the premises without license; nor suffer any of the wood or timber thereon to be disposed of otherwise than for the building fences, and necessary uses of the plantation; and finally, that in case of breach or failure of any part of the above covenants, the lessor, his heirs and assigns, might reenter, and hold the land, as if that deed had never been made.

Equity considering that to be done which ought to have been done, will refer the commencement of the lease to the time when *Robert Carter* made the promise to *Smith*, to grant a lease to *John Musgrove*, for the two remaining lives. Although it should be contended that the infancy of

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John Musgrove should protect him from forfeiture, on account of the non-performance of the covenants on his part; yet his infancy expired, as I have before noticed, in *January*, 1788. From that period his infancy could be no protection: *Roberts* purchased in *September*, 1791, three years and a half after *John Musgrove* came of age, six months after the time when the improvements ought to have been made, supposing *John Musgrove's* lease to have been dated the day he came of age. Two years and a half more elapsed before *Jones's* purchase from *Charles Carter* and from Mr. *Pendleton* was finally completed. In his answer, by way of defensive allegation, and as a reason why he should not be compelled to make a lease according to the prayer of the bill, he states, "that there are no improve-"ments on the lot in dispute, such as required by the leases, "and the land is very much cleared, and abused." The fact thus put in issue by the answer goes to a full denial of the plaintiff's equity. The depositions of *John Taylor*, *Nathaniel Smith*, *Thomas Pollard*, and *Daniel Ficklin*, establish the fact beyond the possibility of doubt, there being no conflicting testimony with respect to it. The latter mentions, "that he once saw *Roberts* setting up a large "kiln of wood for coals, which have since been burnt "and carried away, and believes he saw another." This was not merely permissive, but wilful waste. It is a principle in equity, that he who demands the execution of an agreement ought to shew that there has been no default in him, in performing all that was to be done on his part. For, if either he *will not*, or, through his negligence, *cannot*, perform the *whole* on his side, he has no title in equity, to the performance of the other party; since such performance could not be mutual; nor will equity decree a specific performance, in his favour, *especially if circumstances are altered.*(a) To say nothing of the non-performance of the covenants respecting buildings, orchards, and keeping the premises in repair, what compensation can *Roberts* now make for the waste and destruction which it is thus proved he has committed? Will equity decree in favour of a party who

(a) 1 *Fonb.* 391, 392.

comes into its Court with such unclean hands? Will it declare that the appellant was not equally entitled to the benefit of the covenants intended to have been comprised in the lease, as the appellee? And, if so, will it relieve the appellee against a judgment at law, which, for aught that appears to the contrary, the appellant might have been entitled to, though *Robert Carter*, *Charles Carter*, or *Edmund Pendleton* had sealed the lease which the Court of Chancery have directed the appellant to execute; I think not, and for all these reasons am for reversing the decree, and dissolving the injunction, &c.

Judge ROANE. This case, considered independently of any unauthorised acts of commission or omission, in relation to the promises, on the part of the appellee, or those under whom he claims, and supposing the legal title acquired by Mr. *Jones*, to be out of the case, would be very strong in favour of the appellee. I should, in that view, *probably* get over the objection that the *particulars* of the title of the appellant are not set out and deduced in the bill; nor should I have much doubt but that the case of the appellee (taking *Taylor's* lease as a model, and founding a construction upon the *whole* instrument) would justify the title and entry of *William Musgrove's heir*, from whom the appellant claims. The case, however, as it is, and considered in relation to *Jones*, lies within a narrow compass, and I shall not, therefore, enter particularly upon the above topics.

It cannot be doubted but that *Musgrove's* lease, had it been obtained, would have contained stipulations on his part for the building and repairs of houses, and the planting of orchards; as also for the keeping a *limited* number of hands on the premises, and against the destruction and carrying away of timber, &c. Considered as a lease for *lives*, which might *at any time* expire, the former stipulations ought to have been forthwith performed, else there might have been no houses nor orchards on the premises for the *next* tenant, and thus a beneficial lease to others might

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have been prevented; and the covenants of the latter class, if broken, inflicted a lasting damage upon the inheritance.

On the testimony, none of these stipulations have been complied with, and yet the appellee has to contend against a *legal* title. It is supposed that a cause of forfeiture in the premises, incurred by those under whom *Roberts* claims, and not waived by some act of *Jones*, or those under whom he claims, would bind *Roberts*, as much as one committed by himself, and in the time of the present appellant. But it is shewn in evidence, in addition, that there is not only a neglect to build, and plant orchards, and keep them in repair, by *Roberts*, after *Jones's* title accrued, and up to the present time, but also that *Roberts* himself burnt coal and carried it off the premises. This (to say nothing of the injuries committed on the land by extensive clearings) was long after any of those acts of *Robert Carter* or *Charles Carter* which have been relied upon to import a waiver of the forfeitures. There is nothing, after this, which can be set up as having that effect, but the receipt of rent by *Pendleton's* agent. As for such acceptance on the part of *Jones*, he expressly denies that he ever received any after the purchase from *Carter*: the only question on this ground then, is, whether the receipt of rent by *Pollard* for *E. Pendleton*, of 21st of *February*, 1795, (or, indeed, any other receipt for rent,) could have that effect.

It is here to be remarked, that, by *Taylor's* lease, the rent was to be paid at the house of the lessor in *Westmoreland* County: and can it be reasonably inferred that the lessor *knew of* breaches of covenants committed, perhaps, two hundred miles off, or that he meant to release them? Certainly not. The case of *Doe, ex dem. Cheny*, v. *Batten*,(a) shews us that the question always is, *quo animo* the rent was received, and what was the real intention of both parties. To say that this acceptance amounted to waiver of the forfeiture incurred by non-performance of the covenants, which were to be performed on the land, would amount to a release of such covenants in *all* cases, unless indeed the lessor had changed his stipulation as to the place

(a) *Cowp.* 245.

of receiving the rents, and agreed to receive them on the premises, or had *bound himself* to keep an agent on or near the premises; neither of which he has done, or was bound to do, in this case.

On the ground, then, that the *mere* acceptance of rent has not the effect of waiver in the case before us; that the appellant has got the law on his side by the recovery in ejectment; and that the appellee, or those under whom he claims, have committed material wrong and injury, in relation, as well to the temporary, as the permanent interests of the inheritance, I am of opinion, that the appellee is not entitled to arrest the legal title of the appellant, and that the decree should be reversed and bill dismissed.

Judge FLEMING. There being a judgment at law against the appellee for the land in controversy, he comes into a Court of Equity for relief, in which he states his equitable title to the premises to be, that in *February*, 1767, *James Lane*, the agent of *Robert Carter*, then proprietor of the land, gave to *William Musgrove*, under whom the appellee claims, a written promise that he should have the lot in question for three lives, and put him in possession: that about the year 1779 or 1780, (*William Musgrove* being then dead,) *Robert Carter* promised *Nathaniel Smith*, the administrator of *Musgrove*, and guardian to his children, to make a lease, conformably to the paper signed by *Lane*, and send it up; which paper was left with the said *Robert Carter*, for that purpose; but a lease was never made: that afterwards *Robert Carter* conveyed the land, by a deed of compromise, to *Charles Carter*, who sold and conveyed it to *Joseph Jones*, the appellant. The most favourable situation in which *Roberts* can expect to be put, is, that he stand in the place of *Musgrove*, and Mr. *Jones* in the place of *Robert Carter*; and that a lease should have been made by the latter immediately after the written promise of *Lane*, or in the year 1779 or 1780, when *Smith*, the administrator of *Musgrove*, and guardian of his children, applied for one. We are next to inquire what kind of a lease he had a right to expect, and the only guide we have on the subject is a copy of a

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lease from *Robert Carter* to *Henry Taylor*, another tenant on the land, dated the 16th of *October*, 1755, referred to in the decree, and spread upon the record, in which there are several important covenants to be performed by the tenant, as have been stated by one of the judges who has preceded me. It is presumed that neither *Musgrove*, nor those who claim under him, had any just pretensions to a lease on terms more favourable than those in that above recited; and when the appellee came into a Court of Equity, for relief against a judgment at law, he should have appeared with clean hands and a pure front, and shewn that he had himself done equity, by fulfilling the several covenants contained in the recited lease; but so far was he from having done so, that it is in evidence, by the testimony of four witnesses, to wit, *Taylor*, *Smith*, *Pollard*, and *Ficklin*, that the premises are in a ruinous state, that neither fruit-trees have been planted, nor houses erected, agreeably to the covenants aforesaid, and that such as have been erected, were, at the time of taking the depositions, rotting and tumbling down. And it is moreover proved by the deposition of *Ficklin*, that the present tenant, *Roberts*, committed actual waste, by cutting wood, and burning charcoal, and conveying it off the premises.

It seems almost unnecessary to remark, that it is of the highest importance to the proprietors of lands, let out on leases, and especially on long leases, that the covenants contained in them, for the improvement of the lands, and for the prevention of waste, should be strictly and punctually fulfilled; and I shall only add, that it is my opinion that the appellee, by his unwarrantable conduct in failing to erect the buildings, and to plant the fruit-trees mentioned in the covenants; and also in not only permitting, but actually committing, waste on the premises, has forfeited his equitable title, if any he had, and that the decree ought to be reversed, the bill dismissed, and the appellant, or his representatives, (he being dead,) allowed the benefit of the judgment at law.

By the whole Court, the decree of the Superior Court of Chancery reversed, and the bill dismissed.