REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

Entered according to act of congress, on the twenty-eighth day of October, in the year eighteen hundred and thirty-three, by ROBERT I. SMITH, in the clerk's office of the district court of the eastern district of Virginia.

1804. *October.*

Staples v. Webster.

content myself with observing that he who comes into a court of equity for relief must prove fraud in the defendant, and uprightness in his own conduct: But *Staples* shews neither; and therefore I am for affirming the decree.

CARRINGTON, Judge. It is unnecessary to consider the conduct of *Staples* in these transactions; because it is clear that *Webster* has at least equal equity; and he has the legal title besides. Therefore I concur that the decree ought to be affirmed.

Decree affirmed.

HORD *v.* DISHMAN.

1804. *November.*

If the defendant is taken sick on his way to the trial of the cause, and is thereby prevented from making an affidavit that the original deeds are lost; and for want of such affidavit the court refuses to receive copies of the deeds in evidence; the court of chancery may relieve against the verdict and judgment obtained by the plaintiff.

Dishman filed a bill in the court of chancery to be relieved against a judgment obtained by *Hord* in a writ of right, upon the ground that the court refused to receive in evidence, some copies of deeds, the originals of which he would have deposed were lost, if he had not been prevented, by sickness, on his way to the trial. The answer insisted, that the verdict was conclusive. The court of chancery directed another trial of the issue; which being found in favour of *Dishman*, the chancellor granted a perpetual injunction; and *Hord* appealed to the court of appeals.

Wickham, for the appellant. The whole subject was cognizable at law, and therefore equity could not interfere. The only matter insisted on, by the plaintiff, *Hord*, is the

1804. November.

Hord v. Dishman.

pretended surprize, and that if present he could have given proof of the loss of the original; but there was no attempt to continue the cause, and the opinion of the court rejecting the copies of the deeds, was excepted to: Of course, if there was an error in the judgment it might have been corrected by appeal, or *supersedeas*. Therefore as the whole subject was completely open to the common law courts, the chancellor ought not to have interposed. But, upon the merits, the plaintiff has not made out a case for relief. There is no proof of his having the title; and therefore it was unimportant, whether the trial was regular or irregular. Consequently the court of chancery ought not to have awarded a new trial. It does not appear, that the land, in question, was comprehended in the grant to *Spicer;* and *Dishman* had a patent for it in the year 1715. The affidavits of the jurors, relative to the mode of making up the last verdict, are very strong; and they are not contradicted by any testimony in the cause. But such proceedings ought not to be countenanced, and therefore the chancellor ought not to have been satisfied with the last verdict. Thus much for *Hord's* case; and *Fitzhugh's* is clearer still: For there is not even an allegation of the plaintiff's absence, or of any other matter relative to his ability to have satisfied the court as to the loss of the deeds.

Warden, contra. The lands in question are within *Spicer's* patent. The defendants were completely surprized: which prevented them from shewing that these numerous demandants could not have maintained a writ of right: and worse still, the defendants thereby lost an opportunity of having their cause fully considered by the jury. For the testimony was not suffered to be laid before them, although a full hearing upon the merits was expected, and was only prevented by some misunderstanding at the trial, which occasioned proof of the loss of the originals to be called for, when the defendants had no reason to calculate upon such an event: But what makes these observations the more im-

portant is, that the difficulty would have been removed had not the sickness of *Hord* prevented him from being present to make the necessary affidavit: which was an accident that equity ought to relieve against. Therefore the court of chancery did right in granting the injunction; so that the merits of the cause might be brought before the jury, who had not been in possession of the whole case. It is not important upon what ground the jurymen agreed; for their agreement is the only thing required; and it appears that they did ultimately concur in the verdict. It is not like the case of *Street* v. *Cochran*, 1 Wash. 79; for there some of the persons were informed, by the rest, that the opinion of the majority was to prevail; and therefore they only concurred with the majority, upon a supposed rule of law: But, here, was no imposition, no misinformation, as to any rule of law; for each juror, with full information of the subject, subscribed to the opinions of the others. The defendant has not pleaded to the jurisdiction of the court; and therefore he cannot now except to it; for the act of 1787 bars him.

Randolph, on the same side. *Dishman's* answer shews that he knew the copies of the deeds were genuine, and yet he objected to them: of course the court of chancery did right in interfering upon the ground of the defendant's suppressing a fact which he knew to exist. 2 *Com. Dig.* 686. 2 *Ves.* 552. 2 *Wash.* 41. 1 *Call*, 155. In both of these two last cases, the question arose upon bills of exception. Besides, the defendant took the chance of the second trial, without appealing from the order; and, therefore, ought not to be allowed, afterwards, to object to it. Equity will always relieve where the whole evidence was not before the jury, unless it was withheld *ex proposito*, or through fraud. 1 *Ves.* jr. 135. 2 *Wash.* 272: And, in the present case, it was not withheld *ex proposito*, or through fraud; but accident prevented the introduction of it. The effect was, that there was a clear surprize upon the defendant; who had

1804. *November.*

Hord v. Dishman.

the merits of the case with him, and yet lost the cause by an unforeseen event. The practice of examining jurors leads to tampering with them; and therefore ought not to be encouraged. *Cochran* v. *Street*, obviates Mr. *Wickham's* objection upon that ground.

Wickham, in reply. It is not stated in the bill, that *Hord* intended to go to court in order to make an affidavit of the loss of the deeds; and therefore it cannot be called an accident, or surprize; for he relied upon the copies being sufficient, without the affidavit. But *Fitzhugh* has not even this excuse; for his is a naked case, without any allegation in his favour. These interferences of the court of chancery tend to create a double jurisdiction in the country; so that every party will first take the benefit of a trial at law, and then a chance in equity. But the merits do not appear to have been in favour of the plaintiffs; which, at least, ought to have been shewn, before the solemn judgment of a court of competent jurisdiction, was disturbed. The second trial appears to have been a mere scramble, and therefore the chancellor ought not to have been satisfied with that verdict. The case of *Cochran* v. *Street*, proves that the affidavits of jurors will be received to impeach the verdict; especially as the doctrine is, that the court of chancery will set aside a verdict, found upon an issue directed there, upon slighter grounds than a court of common law will.

Cur. adv. vult.

TUCKER, Judge. The equity stated in the appellee's bill of injunction is merely, That, upon the trial of the writ of right in which the now appellants were demandants and himself defendant, at which he intended to have been present, and was on his way, but was attacked by a fit of the gout, and obliged to return, his counsel offered in evidence to support his title, the copy of a deed from *Charles Carter* to him, and the copy of a survey thereto annexed, and also the

copy of a deed from *John Spicer* to *Robert Carter*, under whom the said *Charles* held the lands in controversy; but that the same being objected to by the counsel for the demandants, the court of Essex county, where the trial was had, refused to suffer them to go to the jury, as will more at large appear by a copy of the record, to which he refers as a part of his bill. That if he had been present he could have made the necessary affidavits, that the original deed from *Carter* to him, and the survey thereto annexed, were lost; and that the original deed from *Spicer* to *Carter* could not be found. That in consequence thereof, and for want of the necessary affidavit, the jury found for the demandants, who had obtained a writ of possession, and dispossessed him of the lands with the crops growing thereon, and have sued out an execution for the costs. He therefore prays for an injunction to the said judgment and execution until further order, and for a new trial of the cause; and if there be a verdict in his favour, that the demandants may be decreed to restore the lands, and pay for the crops, and for general relief. The chancellor awarded an injunction, and afterwards granted a new trial, directing the verdict to be certified to the high court of chancery. Upon the second trial, a verdict being found for the tenant, the chancellor rejected a motion for another trial, grounded on the affidavits of two of the jurors, stating an agreement among the jury, to render a verdict according to the opinion of a majority; and awarded a perpetual injunction to the judgment, with a restitution of the lands: From which decree there is an appeal to this court.

Among the exhibits in this record, is the record of the proceedings in Essex county, referred to in the complainant's bill; which contains a bill of exceptions offered at the first trial, by the tenant's counsel, stating, That the defendant, by his counsel, offered a copy of a deed from *John Spicer* to *Robert Carter*, in these words, "this indenture, &c.," as also a copy of a deed from *Charles Carter* to *John Hord* (the tenant) in these words, "this indenture, &c.," as evi-

1804. *November.*

Hord v. Dishman.

dence to the jury, but that the court would not allow the same to go to them, as they considered the original deeds ought to have been produced: To which opinion he excepted, &c. Among the exhibits in this suit, are office copies, certified in the usual manner, of a deed from *John Spicer* to *Robert Carter*, dated March 13th, 1717; and one from *Charles Carter* and wife, to *John Hord*, dated May 25th, 1787; which I presume may be the deeds severally referred to in the bill of exceptions. And, as these copies, by the long established usage in this country, are held, (where there is no suggestion of fraud,) to be admissible as evidence, although the originals be not proved to be lost, I was at first of opinion, that the chancellor ought not to have awarded an injunction, since there was error, upon the face of the record, sufficient to have reversed the judgment, and afforded the tenant the benefit of a new trial; but it being suggested in the bill, that the demandant had obtained a writ of possession, and dispossessed the tenant of the land, with the crops thereon growing; and the bill praying a compensation for those crops, as at the time of executing the writ of possession, I think the injunction was properly awarded upon that ground, inasmuch as a court of error could not, I apprehend, have awarded such a recompense, although it should have appeared proper to reverse the judgment, and award restitution of the land itself.

I shall now state the titles of the parties, as they either appeared from the exhibits in the cause, or may be conjectured to be, from presumptions arising out of those exhibits.

The demandants produce a patent granted the 16th of June, 1714, for 816 acres of land; of which, 560 acres were formerly granted to captain *Alexander Fleming*, by patent bearing date Sept. 4th, 1667; and the courses, distances and corners of this patent, by the late survey, agree as well with the survey made an hundred years, or more, after the first grant, as is usual in grants of lands. This patent appears, from this circumstance, to have been an inclusive patent; and its operation, as to the part formerly

granted to captain *Fleming*, must, I presume, be referred to the date of his original patent, viz. Sept. 4th, 1667. This inclusive patent was granted to *Samuel Dishman*, the demandant's ancestor; who, by his will dated November 15, 1726, devised all his lands in Essex, to be equally divided between his sons *David* and *Peter* in feesimple. And, from the testimony of *James Dishman* his son, it appears that these lands were all he had in Essex county; and that *David Dishman* paid quit-rents for 800 acres in 1740, appears from an exhibit in the record.

1804. *November.*

Hord v. Dishman.

In what manner the demandants deduced their title from *David* and *Peter*, the devisees of the original grantee, does not appear. Nor can it be material, after the release of errors, provided they shall now shew an equitable title superior to the tenant's. Nor does it from the evidence in this record appear, whether any evidence was given of an actual adverse seisin in either party, except that the answer states, that satisfactory testimony, as to the complainant's possession, was given at the first trial, but leaves it wholly to conjecture what that satisfactory testimony was.

It appears, both from the bill of exceptions and the answer of the defendants, that the only title which the tenant shewed at the trial, was his possession, and a deed from *John Spicer*, dated March 13th, 1717, three years later than *Dishman's* patent, dated the 16th of June, 1714; and a deed from *Charles Carter* and wife, to *Hord*, dated May 25th, 1787: of a more important defect in which, I shall take notice hereafter. And, with respect to the tenant's possession, the answer expressly avers, that the demandants produced satisfactory testimony to that point; which indeed after a general verdict must be presumed.

If then, these deeds, which were excepted to, had been permitted to go to the jury as evidence, they ought, notwithstanding such evidence, to have found, as they did, a verdict for the demandants. For, unless the tenant's title was regularly deduced from an older patent than that under which the demandants claim, the demandants, unless barred by length of time, were unquestionably entitled to a verdict.

1804. November.

Hord v. Dishman.

If it be true, that courts are to judge, "*secundum allegata et probata*," only, on the coming in of the answer, the chancellor ought to have dissolved the injunction, and dismissed the complainant's bill. For the deeds presented an inferior title only; and the answer, which was not disproved, shewed that the tenant had not a sufficient length of possession to protect his seisin.

To judge from the exhibits in this cause, the tenant founds his right, first, upon his possession; secondly, upon a deed from *Charles Carter* and wife to himself, dated May 25th, 1787; thirdly, upon a deed of lease and release from *John Spicer* to *Robert Carter*, dated in March 1717; fourthly, upon deeds of lease and release from *Thornton* (whose title does not appear) to *Spicer*, dated in December 1714; fifthly, upon a patent granted to *Thomas;* and, by him, assigned, without any consideration mentioned in the assignment, to *Spicer*, Oct. 28, and March 10th, 1697; and lastly, upon a patent to *Spicer*, April 29th, 1693; which was forfeited for not seating, as appears by *Thomas's* patent.

1. The tenant's possession may be presumed to have commenced under the deed from *Charles Carter* to him in May 1787. His bare possession therefore, was no bar to the demandants; it not having been long enough to have barred an ejectment; and much less a writ of right.

2. The deed from *Charles Carter* has two fundamental defects, supposing these lands in controversy, to lie in the the county of Essex, where the suit was brought; for the lands in that deed are not said to lie in Essex, but in Caroline. Consequently, if the suit was brought in the right county, that deed was wholly inadmissible; for Caroline county being taken from Essex, the court would officially take notice that lands in Caroline could no longer lie in Essex, although the original grants might have been made of lands in Essex. For although ancient patents and deeds for lands in Essex county may well be given in evidence in Caroline, that county having been taken from Essex, yet deeds for lands in Caroline, can never be given in evidence

1804. *November.*

Hord v. Dishman.

for lands in Essex, because they must have been made since the division of the latter county. On the other hand, if *Carter's* deed be right, and the lands in controversy actually lie in Caroline, the suit was brought in the wrong county. And if that were made appear to the court, they should have directed the plaintiff to be called; for this matter, I apprehend, might have been given in evidence at the trial under our act of assembly. *Virg. Laws, ch.* 27. So that the verdict in this case, was either against evidence, (*Carter's* deed being inadmissible if the lands in controversy lie in Essex,) or the verdict was *coram non judice*, and therefore void. In either case, then, the verdict ought not to stand.

A second fundamental defect in *Carter's* deed to *Hord* is, that it does not convey a whole tract of land, (in which case the metes and bounds of former deeds, or of the patent, might establish the bounds of the lands with certainty,) but a small part only of a very large tract, without mentioning any metes and bounds whatever; the words are, "all that tract or parcel of land in the county of Caroline, being part of a larger tract called Powmansued, and containing according to the survey made by *Richard Dixon*, and hereto annexed, 1143 acres, more or less, within the bounds contained by the survey aforesaid." But there is no such survey in the record, nor among the exhibits, as that referred to. The deed itself, without the survey, is void for uncertainty. Whether the survey was actually annexed to the deed when proved and recorded, does not appear. But, if the lands lie in Essex, it was recorded in the wrong county, namely, in Caroline. The quantity contained in *Spicer's* patent, being nearly or quite three times the quantity contained in *Carter's* deed to *Hord*, and no metes and bounds being mentioned in the deed, and the survey referred to not appearing, the jury had no guide whereby to locate the lands granted to *Hord;* and consequently were not authorized to presume that they were within those limits of *Spicer's* patent, which might possibly overreach the bounds of *Dishman's* patent.

1804. *November.*

Hord v. Dishman.

But were the case free from these objections, I should not, from the survey made in this cause, be satisfied that *Spicer's* patent was properly laid down. The courses and distances do not appear to me to agree. A more extensive survey, commencing at the beginning, mentioned in the patent, appears to me to be necessary. For, although the double Poplar may, perhaps, be a corner of *Spicer's* patent, yet I think that fact will better be ascertained by going round the courses as they are laid down in the patent, than by reversing two or three lines, as has been done in this case.

Upon all these grounds, I am clearly of opinion, that the last decree of the chancellor ought not to stand. But I am somewhat in doubt, what decree ought to be made.

1. For, if the lands really lie in Caroline, the trial in Essex, being *coram non judice*, would be no bar to *Hord's* recovering back the lands even by an ejectment, if the actual possession be in him. If then, the court should decree that his bill be dismissed, he will have an immediate remedy at law to reinstate him in his possession.

2. If the lands do not lie in Caroline, I doubt very much whether this court, sitting as a court of equity, can, upon the circumstances disclosed in this record, direct the court of Essex to admit a deed importing to be for lands in Caroline, upon the trial of a writ of right in Essex county.

3. If the survey referred to in *Carter's* deed, was not annexed to, and proved and recorded with it, I still further doubt, whether even a court of equity could sustain it, as proper evidence between contending parties; being of opinion that it would, in such case, be merely void, as a conveyance, for uncertainty, although possibly good, between the parties thereto, as a covenant.

4. As the counties of Caroline and Essex lie in different districts, there would be the same objection, if the lands lie in Caroline, to a trial in the district court of Essex; and, if they lie part in one, and part in the other of those counties, the same objection will still remain; the only jurisdiction competent to the trial at law, in such a case as that last

1804. *November.*

Hord *v.* Dishman.

mentioned, would, I apprehend, be the general court. *Virg. Laws*, 1794, *ch.* 65, *sect.* 3.

If then, the court should be of opinion that the bill ought not to be dismissed, I think the cause should be remanded to the court of chancery, with directions to that court, to permit the bill and answer to be amended, so as to bring the whole case fully before the court: and if it should then appear to that court that the lands actually lie in Caroline, that the complainant's bill be dismissed without prejudice. But if it should appear that the lands lie in Essex; and, if that court should be of opinion that *Carter's* deed to *Hord*, with the survey therein referred to and said to have been annexed, or a copy thereof, attested by the clerk of Caroline court, ought to be admitted in evidence upon a new trial to be had between the parties, that a new trial be had accordingly, and such evidence admitted, and the verdict of the jury certified to the high court of chancery. But if it should appear to that court, that the lands lie partly in Caroline and partly in Essex, and that a new trial ought to be had, and the evidence above mentioned admitted, then such new trial to be had in the general court, with similar directions.

ROANE, Judge. New trials in equity are not held to such strict terms as those at law. The object being to satisfy the conscience of the chancellor, considerable latitude is allowed to answer that purpose. In cases where the issue is moved for on the ground of a surprize at the trial, if the party applying were the plaintiff, the new trial will, in general, be refused, because the party had a more direct course to pursue, viz. by suffering a non-suit. *Richard* v. *Symes*, 2 Atk. 319. Ours, however, is the case of a defendant. The same authority, by proving that a new trial shall not be grounded on an alledged surprize arising from the production of evidence which the party had reason to believe would be produced, and which therefore he ought to have been prepared to meet, is supposed to have estab-

1804. November.

Hord v. Dishman.

lished the general doctrine on the converse of the proposition. At least that doctrine is founded in good sense.

Let us try the present case by it.

I presume that *Hord* and his counsel had reasonable ground to conclude, when they went into the trial, that their copies would be admitted as evidence. To say nothing of the question of law on this subject, the univeral practice authorized such a conclusion. *Hord* might therefore reasonably have inferred that his presence would be unnecessary. He could not foresee the course the business would take, nor that this objection would have been produced, as it seems to have been produced, by the conduct of his counsel. When he first heard of the event of his suit, the court had probably risen, or, if not, the members had probably changed, so that an application for a new trial to that court would have been ineffectual. His counsel, it is true, had taken an exception to the opinion of the court, but it is holding *Hord* to too strict a measure to subject his cause to the event of the decision of that legal question. He had a safer course to pursue, and which would have been pursued, had not the unusual objection to his deeds been made, and he prevented by accident from being present.

Under these circumstances, the appellee was condemned without a hearing; notwithstanding, as now appears from the event of the second issue, that he had right on his side.

Will a court of equity be satisfied by a verdict and judgment obtained under such circumstances? I think not. Without therefore undertaking to say that a court of equity will, as was argued, rejudge a mere legal question, a power heretofore disclaimed by this court, this case comes before us under circumstances which rendered the interposition of a court of equity proper. I think, therefore, that the chancellor was right in awarding a new trial.

Whether he ought to have been satisfied with the verdict returned upon that new trial, is a question upon which my judgment has vibrated. The best opinion I can ultimately form is that he ought to have been so satisfied. As for the affidavits of the two jurymen, it would be extremely dan-

gerous to admit them to have the effect to impeach the verdict. No case on this subject has gone so far. What else is there? The opinion of the court of Essex on the second trial, rejecting some of the appellee's deeds, is certainly no ground whereon the appellant can apply for a new trial, however it might be *e converso:* Nor is it any ground for the appellant's application, that the division of the court, upon the admissibility of his deed, injured him, by making an unfavourable impression on the jury. That deed was nevertheless submitted (in which case the appellant fared better than the appellee); and a pretence of this kind might as well be set up in every case of a division of opinion by the court.

It has been said, from a quarter entitled to great respect, that, inasmuch as the lands in question lie in Essex, it was improper in the court to admit in evidence *Carter's* deed to *Hord*, which speaks of lands lying in Caroline.

This description in that deed is an imperfect and an incomplete one. It is imperfect, because the deed also refers for the bounds of the land to *Dixon's* survey, said to be thereunto annexed. If that survey were so annexed, or were given in evidence, and shewed the lands in question to lie in Essex and not in Caroline, can any person doubt but that it would control the imperfect description before stated? Certainly not. But even if this survey had not been mentioned in the deed, would not parol evidence be admissible to shew that some part of the tract, described to lie in Caroline, actually lay in Essex?

A much greater latitude than that has been sanctioned by this court. In *Eppes* v. *Randolph*, 2 Call, 130, in a deed, the consideration whereof was expressed to be natural love and affection, the grantee was nevertheless allowed to aver and prove the real consideration to have been marriage, thereby giving a new and overreaching influence to the deed.

In the case before us, the clerk of Essex has subjoined a transcript of the papers read in evidence on the second trial, among which *Dixon's* survey is not: We may therefore conclude that that survey was not, in fact, exhibited;

1804. *November.*

Hord v. Dishman.

and the question is, Whether an omission to produce it was fatal? Whether it could not be supplied by other testimony?

It is a sound principle, that that is certain which can be rendered certain. In a grant of lands according to *its known and reputed boundaries at such a day* (without specifying them in the deed) is certainly good, and these bounds are to be made out by evidence at the trial. In the deed before us, the case is left less at large as to boundaries; they are not to depend upon inferences to be drawn from testimony in general, but are made to depend upon the bounds contained in *Dixon's* survey. That survey is not declared to be a part of the deed, and although it is said to be *hereunto annexed*, it is only by way of identifying the particular paper which contains the boundaries.

I admit that regularly this survey ought to have been shewn in evidence; but if it were proved that this survey was lost, and no authenticated copy could be produced, might not the bounds of that survey be proved by other testimony? Such for example as the testimony of the surveyor *Dixon*, attending in court with his field book, or the acknowledgment of the alledged bounds on the part of the appellants. If we are in quest of substance, and not forms, and the survey is not part of the deed, but only a standard referred to therein for the ascertainment of the bounds, shall we not suppose, in the absence of all objection on the part of the appellants at the trial, that the survey, if not produced, was supplied? Why shall a latent objection, not made at the time, surprize us, when, if made, we might have shewn of record that our case would stand the test of objection.

I cannot suppose, therefore, that improper testimony was exhibited. I will presume the contrary. With respect to the actual identity of the boundaries of this land, I presume not to form an opinion. It is sufficient for me that the jury have passed upon it. I do not see that their verdict is contrary to the right of the cause. That jury had testimony and light which are not now before us. It is on account of the incompetency of the judge to decide the merits himself, that he sends the issue to a jury, who may have con-

flicting testimony to adjust, and credibility to determine. The verdict is therefore entitled to respect.

On the ground therefore of this verdict being unimpeachable, as to its fairness; of there being no erroneous opinion of the court except in prejudice of the party prevailing, which therefore makes his case the stronger, and of this being a cause depending perhaps very much upon testimony which is wholly shut out from us, I am for permitting the last verdict to be conclusive, and affirming the decree.

The case of *Fitzhugh* must stand or fall with that of *Hord.*

CARRINGTON, Judge. Accident suppressed the plaintiff's evidence, and therefore the chancellor was authorized to interfere. *Ross* v. *Pines*, 3 Call, 568. *Ambler* v. *Wyld*, 2 Wash. 36. It does not appear that any part of the lands lie in Caroline, which obviates all objections upon that score. The second trial was not only fairly conducted, but there might have been other testimony before the jury than that which appears in the record: and, as there is no proof to the contrary, I presume that every thing was properly transacted, and am for affirming the decrees.

LYONS, President. The interposition of the chancellor was right, as accident and surprize prevented the introduction of the copies. The defendant submitted to the new trial; and therefore comes with an ill grace, after taking his chance for a second verdict, to object to the order directing the issue. There is nothing to impeach the second trial; for the affidavits of the two jurors that they did not agree to the verdict, is of no weight. Such testimony ought to be received with great caution, as it would lead to tampering with juries; and therefore ought not to be encouraged. In all other respects, the trial was according to the usual course; and, as it seems to have been entirely fair, every presumption ought to be made in support of the verdict.

Both decrees are to be affirmed.