REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. III.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

CHAS. H. WYNNE, PRINTER, RICHMOND.

Mills *v.* Bell, Executor, and others.

Monday, November 1st, 1802.

Where the title to part of the lands purchased, during the paper money age, but not conveyed, was evicted; and owing to the purchaser's laches in not punctually paying some of the last instalments, the vendor's executor was prevented from buying up the adverse title; this Court decreed a conveyance of the lands not evicted, and proportioned the loss arising from the eviction on the whole purchase money: Instead of making the vendor's estate liable for the value of the land at the time of eviction; which would have been the rule, if there had been a conveyance with warranty.*

John Mills, as heir and devisee of Robert Mills, filed a bill in the High Court of Chancery against Joseph Bell, as executor of David Bell, and the executors of Robert Mills, stating that Robert Mills purchased of David Bell, in his life-time, two tracts of land, one of 210 acres, and the other of 100 acres, for the sum of £500, of which 220 had been paid, £120 were tendered at the time the same fell due, and the payments of the residue suspended until a title to the lands aforesaid should be made. That a judgment was afterwards recovered by one Francis, against Robert Mills, for the 210 acre tract. That the defendant has refused to make the plaintiff a title for the other tract, or to compensate him for the value of that recovered. The bill, therefore, prays for a conveyance of the 100 acre tract, reparation for the other, and for general relief.

The agreement, which is referred to in the bill, after reciting the names of the parties, states that "the said David

* When land, conveyed with general warranty, is evicted, the warrantee's measure of damages is the value of the land at the time of the warranty—not at the time of eviction. *Stout* v. *Jackson*, 2 Rand. 132.

More accurately—The measure of damages is *the purchase money*, with interest from the time of eviction, the costs of defending the title, and such damages as the evicted warrantee may have paid, or be shewn to be clearly liable to pay, to the evictor. *Threlkeld's adm'r.* v. *Fitzhugh's ex'x*, 2 Leigh, 451.

In sales of land under the tax-laws, the Commonwealth warrants neither the title nor the description of the land sold; but the rule *caveat emptor* applies to the buyer. *Hoge* v. *Currin*, 3 Gratt. 201.

Measure of damages on warranty of soundness of a chattel sold, see *Thornton* v. *Thompson*, 4 Gratt. 121.

H. sells *his claim* to land, and warrants the title *as it was vested* in *his* vendor, but adds that if the title prove insufficient, his vendee is "to have no recourse." This does not estop H. from buying another, adversary title to the land, and setting it up against his vendee. *Wynn* v. *Harman's Devisees*, 5 Gratt. 157, '8.

See a warranty of ancestor held to bind his heirs, so as to affect land which they took not from him, but as purchasers from *his* and *their* devisor: other land having descended to them from the warrantor. *Dickinson* v. *Hoomes, &c.*, 8 Gratt. 353. And see 1 R. C. of 1819, p. 368, § 21; and Code of 1849, p. 501, § 7.

Bell hath sold unto the said Mills the two tracts of land which he bought of Ro. Wylie and John Francis, except a neck of about 20 or 30 acres of Wylie's tract, which said Bell sold John Hall. Captain Bell agrees the land sold to contain 300 acres. Robert Mills covenants to pay him £500 Virginia money for the same, in manner following: £100 immediately down; £60 next November; and £60 every year following, until the said 500 is fully paid. Captain Bell promises to make Robert Mills a sufficient title next November. They do hereby bind themselves and heirs, unto each other, in the penal sum of one thousand pounds, under their hands and seals, this 20th of February, 1778."

The answer of Bell states, that Robert Mills, about the 15th of June, 1781, offered him £60 in paper money, as one of the instalments, which, not finding any papers relative to the sale of the land, he declined taking till he should be better advised. That in December, 1781, the plaintiff offered him £120, saying it was for two other instalments then due; which the defendant proposed to accept if he would pay the balance in specie; but the plaintiff declined it. That the defendant afterwards offered, if all the money was paid according to the scale, to give his own bond for the title of the whole land, as he had reason to believe he could purchase the 220 acre tract of Francis; but the plaintiff said he could not pay the whole money, although he should never ask a title until he paid up the money according to the instalments. That the defendant has never refused to convey the 160 acre tract, if he could settle as to the other. [321]

A witness says, that in a conversation between the plaintiff and defendant, the latter said if the former would pay the money, he thought he was still able to make a title to the land; and that the plaintiff tendered the amount in specie, according to the scale.

Some other witnesses speak about the tenders, &c., and there are receipts for four payments of £60 each.

The County Court decreed a conveyance of the 100 acre tract, and compensation for the tract which was recovered by Francis. From which decree the defendants appealed to the Court of Chancery, where, by consent of parties, the decree was opened, the suit retained, and ordered to be prosecuted as an original suit. Whereupon a new bill and answer were filed, and some new depositions taken, which did not materially alter the case. The Court of Chancery upon the hearing directed an issue to ascertain the value of the lands; and upon the return of the verdict, affirmed the decree of the [322]

County Court as to the conveyance of the small tract, but reversed it as to the residue, and dismissed the bill. From which decree of reversal, Mills appealed to this Court.

CALL, for the appellant.

The plaintiff ought to have a decree for the ninety acres, and damages for the loss of the 210 acres. That the payments actually made were in paper money; two other instalments tendered in that medium; and the balance offered according to the scale, only, are circumstances which will not affect the case: because the plaintiff performed his contract throughout; for he stipulated for the currency of the country, and therefore ought to have the benefit of the contract, on payment of that kind of money. In this respect it differs from the case of *White* v. *Atkinson*, 2 Wash. 94; because, there, the purchaser had wholly neglected to perform the engagements on his part, which was the foundation of the Court's opinion in that case; for, having failed to perform himself, the Court could deny its aid, unless upon equitable terms. But here no injustice will be done, as the appellant has not been guilty of any neglect to the injury of the seller. For the contract was made when paper money was current; and it was current, also, at the time of payment, and of the tender. So that what he contracted for, he actually received, and had tendered to him. It therefore resembles the case of *Taliaferro* v. *Minor*, 1 Call, 524; in which, the difference between performance and non-performance by the purchaser, was distinctly admitted. Of course, that case regulates this, unless the purchaser having been a defendant and not a plaintiff there, may be supposed to constitute a difference. But that circumstance ought not to alter the case, if the plaintiff has fulfilled his contract, without any negligence or fault; for, having performed the contract himself, he has a right to insist on fulfilment by
[323] the vendor. The decree, therefore, ought to have been founded on the paper money contract, and, of course, damages, according to the verdict of the jury, ought to have been allowed; that is to say, the 90 acres should have been deducted at its value by the verdict, and the balance of the verdict decreed, after a re-batement of the purchase money, according to the scale.

WICKHAM, contra.

The case does not depend on precedent, but upon immutable principles; for, a Court of Equity may retain or dismiss bills, at its discretion; and there is nothing which entitles the plain-

tiff to favor in the present case. It does not appear that he has laid out money in improvements, or been put to inconvenience in consequence of the purchase. He asks strict law; and, therefore, should shew performance on his own part. He does not do so, however; for there was not only failure to tender some of the payments on the day, but the bill actually shews a suspension of payments. If the injury is compensated for at all, it should be at the time for conveying the complete title; and not at the time of the verdict. But why should the plaintiff receive damages, as he was not to pay for the deficiency? In this view of the case, the Commissioner's report ought to be corrected, having regard to the balance of the unpaid purchase money. The case does not resemble *Taliaferro* v. *Minor;* because, there, all the purchase money, but the shares of the purchasers, was actually paid; and the purchasers did not come into equity to ask a favor, so as to enable the Court to lay them under terms; for they were defendants to the cause.

CALL, in reply.

With respect to the damages, the verdict affords the fairest rule; because the question was, probably, more fully investigated at that time. But if this be rejected, the report of the County Court Commissioners, which is expressly declared to be for the damages sustained, and, therefore, in the nature of a verdict in an action for breach of the contract, ought to be taken as a measure of the damage. There was [324] no default in Mills as to his payments. Several were actually made, and two others tendered: and, although it does not appear that the tender for the £60 due in 1781, was made on the very day; yet, that may have arisen from the death of the seller, and the delay in his executor to qualify; which is the more presumable, as no objection appears to have been made, on the ground of the failure to pay at that day.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the Court, as follows:

The foundation of this suit is an agreement entered into, in February, 1778, between David Bell and Robert Mills, both since dead, by which Bell agreed to sell to Mills, two tracts of land, which he bought of Wylie and John Francis; which he agreed should contain three hundred acres, and for which, he was to make Mills a sufficient title the next November. Mills

was to pay £500 Virginia money, and £100 down; £60 the next November, and £60 every year following, until the whole was paid. The prompt payment was made, and so were those of November following, and that of November, 1779, but none of the subsequent payments were made. That for the £60 payable November, 1780, was tendered in June, 1781, when the depreciation, according to the scale, had increased from 74 to 250, and, in December, 1781, that £60 and the £60 for November, 1781, were tendered; when either the paper was called out of circulation, or which is the same thing, the scale was at 1000 for one. If the subsequent payments had been made in specie, Bell would have been made amends for former disappointments; and there appears some reason to suppose such was the intention of the parties, but it is not so sufficiently proved as to be the ground of a decree. The depositions [325] prove the tender of the paper money, and two witnesses say, that whilst the suit of *Francis* v. *Mills*, was depending, in conversation, Joseph Bell said if Mills would parade the money, he thought he was still able to make a title to the land; and, after that suit was tried, Bell told Mills, the plaintiff, that, if he would comply with his uncle's agreement, he was willing to receive the money; upon which, Mills said here is your money, agreeable to the scale, if you will make me a title. Bell replied, you are going to take advantage of me, and hastily went out of the room; upon which, Mills put a sum of specie into the hands of one of the witnesses, who counted it, and found it sufficient to discharge the debt, according to Mills' report of the amount, but the sum is not mentioned. This evidence of a tender is too uncertain to enable the Court to say that the non-payment was owing to the creditor, so as to relieve the debtor under the fifth section of the scaling act. And, upon the whole, the contract is to be adjusted according to the second section of that act. It appears, that Bell had not paid for the land purchased of Francis, nor obtained a conveyance; that Francis, by ejectment, recovered 210 acres of the 300 sold to Mills, who retained only 90 acres; and that even this was not conveyed to him by Bell. Upon which, the plaintiff, nephew and heir of Robert Mills, in 1780, commenced this suit against Joseph and Florence Bell, executors of David Bell and William Bell, his heir, at law, to have a conveyance of the land, and an indemnification for all losses sustained or to be sustained in consequence of the breaches of the agreement on the part of Bell. Joseph Bell alone answers the bill, which is taken for confessed as to William Bell, the heir at law. A replication is filed, and the de-

positions of witnesses taken: upon the hearing, a decree is made, that William Bell, the heir, should convey to Mills the 90 acres, and that the executor of David Bell should pay to Mills what should be recovered for the mesne profits of the 210 acres upon a suit then depending; and Commissioners were then appointed to value the 210 acres recovered, and to enquire what injury Mills had sustained, from the reduced value of the remaining 90 acres. The Commissioners having reported, that the value of the lands recovered, and the damages were £185, the Court decreed, that Bell's executors should pay the same, and that the cause should be continued, till the action for the mesne profits was determined; which they afterwards say was decided by a verdict for Francis, for £6 and costs: and their final decree is, that the heir convey the 90 acres, and the executors pay the £185, the £6 for mesne profits, and £9 9s. 6d. for costs; and, also, the costs of suit. On an appeal to the High Court of Chancery, by consent of parties, the suit was retained, to be prosecuted as an original suit. A new bill and answer of Joseph Bell were filed, and several witnesses examined; which do not seem to change the case materially, from what it was in the County Court. The Chancellor directed an issue to be made up and tried in the District Court of Staunton, to ascertain the value of the lands mentioned in the articles of agreement. The jury's verdict upon that issue is, "that the whole land is worth £634 10s.; the 90 acres worth 6 dollars an acre, and the 210 worth 7½ dollars an acre." On the hearing, the Chancellor affirmed the decree for the conveyance of the 90 acres, but reversed it as to the residue, and dismissed the bills, with costs in that Court. He afterwards reversed this decree, on a new argument; from which there is an appeal to this Court. The first point which presents itself to the consideration of the Court is, by what ratio the compensation to be made to Mills for the land evicted, is to be adjusted? Whether the value of them at the time of eviction, or at the time the purchase was made? The former would be the rule, if a conveyance had been made with warranty; since the purchaser is entitled, on the covenant, to the increased value of the estate, as well as for any improvements he may have made on it.* But when, [326]

[* See *Nelson* v. *Matthews*, 2 H. &. M. 164; *Humphrey's adm'r.* v. *M'Clenachan's adm'r.*, 1 Munf. 500; *Crenshaw* v. *Smith & Co.*, 5 Munf. 415, and the recent case of *Stout* v. *Jackson*, (December 15, 1823,) 2 Rand. 132-174, in which this subject was much discussed, though not finally settled. Judge GREEN, after a very elaborate consideration of the question, expressed his opinion, that "the measure of damages is, and ought to be the same, in case of eviction, whether they be claimed in an action upon a warranty or covenant of seisin, or of power to convey, or for quie

as in this case, the contract is executory, a Court of Equity will adjust it upon principles of equity, according to [327] the circumstances: and since Mills appears to have been faulty in his payments, which, if regularly made, might have prevented the loss, it ought to be adjusted by proportioning the loss to the value of the whole purchase money, for the whole land: a rule which does not appear to have been observed in either of the Courts below. In the County Court, they gave the present value of the land lost, and that without even deducting the balance of the purchase money; and the Chancellor has dismissed the bill as to the compensation, without allowing Mills for the money over-paid for the 90 acres, or his costs in defending the suits by Francis.

This Court having fixed the rule of compensation, and that the contract is subject to the legal scale, proceeded to adjust the dispute between the parties in this manner: The £500 purchase money reduced at five for one, is £100: the proportion of 210 acres lost so reduced is £70, leaving £30 specie to be paid for the 90 acres. Mills paid £220; which, reduced by the same scale, is £44; so that he overpaid £14 in November, 1779; which he is certainly entitled to recover, with interest. The mesne profits and costs are rejected, because he received the profits himself, and should have paid them without suit. The damages for his disappointment are also rejected; because, if he had been punctual in his payments, the title of Francis might have been purchased in, and a loss prevented. Therefore, the decree of dismission ought to be re-

enjoyment; that this measure was settled by the common law, upon principles of justice and sound policy, to be the value at the time of the contract, without regard to the increased or diminished value, or to improvements; and the rents and profits, for which the tenant is responsible to the successful owner; that, as to any rents and profits, for which he may not be so responsible, the vendor would not be responsible, since the purchaser would have enjoyed them by virtue of his contract; and as to his improvements, if reasonable, they will be discounted against the rents and profits; if not, the vendor should not be responsible for them, and so the vendor cannot, in any case, be responsible for improvements: and that, with us, the value ought to be ascertained, (owing to the circumstances of our country,) not by the English rule, according to the issues beyond reprises, but according to the value in gross, the best standard of which is, in general, the price agreed upon by the parties at the time of the sale. And, that when it does not otherwise appear what was the value of the rents and profits recovered from the purchaser, or for which he may be responsible, interest upon the purchase money from the time that such responsibility for rents and profits existed, should be given in *lieu* of rents and profits."—Judge BROOKE's impressions accorded with the opinion of Judge GREEN. See the opinion of Luther Martin, in *Sumner* v. *Williams*, 4 Hall's Am Law Journ. 129, 147, &c.; *Staats* v. *Ten-Eyck's ex'rs.*, 1 Caine's N. Y. Rep. 111; *Pitcher* v. *Livingston*, 4 Johns. R. 1; *Bender* v. *Fromberger*, 4 Dall. R. 441; and *Talbott* v. *Bedford's heirs*, (Sup. Ct. Tenn.,) 5 Hall's Am. Law. Journ. 330. Judge COALTER, was of a contrary opinion. See *Bickford* v. *Page*, 2 Mass R. 455; *Gore* v. *Brozier* 3 Mass. R. 523; *Caswell* v. *Wendall*, 4 Mass. R. 108; *Harris* et al. v. *Newell*, 8 Mass. R. 262; *Horsford* et al. v. *Wright*, Kirby's Conn. R. 3; *Liber* et ux. v. *Parson's ex'rs.* 1 Bay's R. 19; *Guerard's ex'rs.* v. *Rivers*, Ibid. 265.]

versed, with costs, and a decree entered for Mills for £28 (being the £14 and interest for twenty years;) and the decree as to the conveyance of the ninety acres, affirmed. The costs in both Courts, in Chancery, to be borne equally by the parties.

The decree was as follows: [328]

"The Court is of opinion that the purchase money agreed to be paid by Robert Mills for the lands in the proceedings mentioned, ought to be reduced to specie, according to the legal scale at the time of the contract, since none other appears to have been contemplated by the parties at the time; and that, as the contract remained executory at the time the appellant was evicted of part of the land, since it is probable that the title of Francis might have been purchased in and the dispute avoided, if Robert Mills or the appellant had been punctual in their payments, the compensation to the appellant for the lost land ought to be adjusted according to the value at the time of the agreement, of which there is no evidence, except the consideration agreed to be paid; which, therefore, ought to be the rule; and that proportioned according to the quantities of the lands lost and saved, which allots to the land lost seventy pounds specie, and to the ninety acres saved, thirty pounds; and the appellant having paid two hundred and twenty pounds, which reduced amounts to forty-four pounds specie, by which fourteen pounds are over-paid for the ninety acres, that sum, with interest, ought to have been decreed to the appellant; and the decree of the High Court of Chancery is erroneous in dismissing the appellant's bill as to that claim, with costs. The claim of the appellant for the mesne profits recovered by Francis, is rejected, because those profits were received by the appellant himself; and he ought to have paid them without suit. Nor is he entitled to damages for disappointment in the loss of the land recovered, since it probably was occasioned by his own default; and that there is no error in the residue of the said decree. Therefore, it is decreed and ordered, that so much thereof as respects the conveyance of the ninety acres of land, be affirmed; and that the residue be reversed. And this Court, proceeding to make such decree, as to the residue so reversed, as the High Court of Chancery should have pronounced; it is further decreed and ordered, that the executors of the said David Bell, out of his estate in their hands to be administered, pay to the appellant the aforesaid sum of fourteen pounds, with interest thereon for twenty years; and that the costs in the County Court, and the said Court of Chancery, be equally borne by the parties." [329]