Tennessee Reports.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF TENNESSEE.

BY

GEORGE S. YERGER.

VOLUME X.

A NEW EDITION, WITH NOTES AND REFERENCES,

BY

WILLIAM FRIERSON COOPER,

CHANCELLOR OF THE SEVENTH CHANCERY DISTRICT.

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debtors may be reached by their non-resident creditors, and give a bill in chancery for that purpose upon the production of a judgment at law and execution thereon against the debtor, and the 4th section directs the practice to be pursued in cases of this kind before a decree shall be given. The 14th section creates no new powers; [178] it merely reiterates what had been previously provided for, to wit, that in all cases, except debts contracted in other states, and which had been provided for in the previous section of the statute, upon a return of *non est inventus*, publication should be made as heretofore, that is, as had been provided for by the act of 1787, ch. 22.

There being nothing, then, by which the court has obtained jurisdiction of the persons of Luke Tiernan & Sons, the court below committed no error in abating the bill, and we affirm the decree.

Decree affirmed.

PEARL *and others v.* CORPORATION OF NASHVILLE.

Nashville, December, 1836.

CHANCERY JURISDICTION WHERE THE REMEDY AT LAW IS EMBARRASSED, AND TO PREVENT MULTIPLICITY OF SUITS. That the remedy at law is embarrassed or inadequate, and would require a multiplicity of suits, are sufficient grounds for coming into equity; as, for example, where the defendant, a municipal corporation, had made two contracts, at different times, with different parties, but in connection with each other, and for a common purpose—the erection of water-works for the city—and the bill alleged that the defendant had taken possession of the lot, and now has and enjoys the use and occupation thereof. [See Pearl *v.* Nashville, Meigs, 605, where this case is cited.]

CHANCERY JURISDICTION IN MATTERS OF ACCOUNT. *Per* GREEN, J. Account is a head of equity jurisdiction, but it is so only in cases where there are mutual accounts, and not where the items are all on one side; unless, indeed, proof of the items is only to be had of the defendant, in which case equity, having possession of the cause for discovery, will retain it, and give full relief; or unless the remedy at law be inadequate or embarrassed. [*Dicta* carried into our digests because embodied in the original head-notes of Mr. Yerger.]

[179] In the early part of the year 1826, Avery and Ward entered into a covenant with the corporate authorities of the town of Nashville, whereby the said Avery and Ward undertook to complete a contract which one Samuel Stacker had previously made with the corporation, for the purpose of supplying said town with water, to be raised from Cumberland river by means of steam machinery, and distributed, from a reservoir to be provided, through pipes along particular streets mentioned in the contract, at the different intersections of which, and also at the corners of the public square, [180] public hydrants were to be erected. The said contract with Samuel Stacker had been put an

end to between him and the corporation, after a partial execution of the same, or some imperfect attempt at execution, by him, the said Samuel Stacker. The covenant of the said Avery and Ward bound them to complete the said water-works on or before the 1st of January, 1827; and they contracted to pay the corporation, by way of damages, $100 per month for the time said water-works might be incomplete, or left unfinished, after the said 1st of January, 1827. The corporation was to furnish a piece of ground adjacent to the river, for the erection of the machinery necessary in raising the water from the river, and which they did furnish. The said Avery and Ward were to have the use of said ground, also, for the erection thereon of any machinery of their own which they might choose to put in operation. The said Avery and Ward erected on said ground a saw-mill, and so attached it to the machinery of the water-works as to cause it to be propelled by the same engine which raised the water from the river for the use of the town. The corporation, by the terms of said covenant, were to advance to said Avery and Ward the sum of $5,000, to be used by them for the space of ten years, without interest; and, at the end of the ten years, the principal of the said $5,000 was to be accounted for by said Avery and Ward in the expenditures made by them upon said enterprise, and whatever excess of expenditure there might be over and above said sum of $5,000 the corporation was to pay to the said Avery and Ward. The said sum of $5,000 was to be advanced through the year 1826, as the said water-works were in progress, and in discharge of claims against the said Avery and Ward on account of the construction of them; and it was so advanced, as admitted by the bill. The said Avery and Ward were likewise to have the exclusive privilege of supplying water from the pipes, which were only to be laid in the streets, to individuals, upon their private account, for the space of ten years, upon such terms as they, the said Avery and Ward, could make with individuals. At [181] the end of said period of ten years from the completion of the water-works, the corporation was to take the said works into their own possession, paying to the said Avery and Ward such sum (if any) as they might have expended in their construction, beyond said $5,000, up to the period of the completion thereof, under the contract. It was further covenanted "that if said works should get out of repair at any time after their completion, and so remain for the space of ninety days, so that the town was not supplied with water as herein provided, then the mayor and aldermen for the time being may take possession of said works in behalf of the corporation, and use and occupy the same as their own, and shall only, in such case, be liable to pay to Avery and Ward the one-half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as above stated."

The 1st of January, 1827, came about, and the said water-works were not completed. Avery and Ward dissolved partnership; and in September, 1827, the water-works not being yet completed, the corporation and Avery alone entered into another covenant supplemental to the former, whereby the time for the completion of said water-works was extended to the 1st of January, 1828; and the damages which had accrued under the first contract, in consequence of the failure to complete the water-works by the time agreed on, were remitted. The second contract also provides that, for the purpose of enabling Avery to proceed in the completion of the water-works, the corporation is to loan him $1,000 more, for the space of one year, at the end of which time it was to be refunded, with legal interest. And, in order to secure the repayment of said sum of $1,000 and interest, the covenant declares that the corporation is to be considered as having a lien upon all the machinery and furniture attached to the water-works, and also the saw-mill. The said sum of $1,000 was to be paid to the order of the said Avery, in such sums and at such times as the said Avery might call for the same, in which he was to be regulated by his progress in the completion of the water-works, as far as practicable. The said second covenant furthermore provided [**182**] that, on failure of the said Avery to complete said water-works on or before the 1st day of January, 1828, in manner as had been agreed on by the first covenant, he, the said Avery, was to pay to the corporation, for his failure therein, the sum of $5 for each day thereafter during which the said works might remain unfinished, or the said Avery might fail to have a good and sufficient supply of water in the reservoir for the use of the town.

The bill alleges that, after the water-works were completed, on the 1st of January, 1828, the said Avery proceeded to supply, and did supply, the said town of Nashville, according to contract, with water, without intermission except for the necessary repairs of machinery, until about the 9th of March, 1830, when the buildings attached to the said works, and the saw-mill, were accidentally destroyed by fire, and the machinery of the establishment, upon which the supplies of water depended, was thereby rendered useless; that to reconstruct the said works would have required a large sum of money, which the said Avery was too poor to raise, and the corporation would not advance it; that, therefore, the said works have never been rebuilt, and that the corporation has taken possession of its ground upon which the works stood.

The bill claims of the corporation the sum of $1,987.14, as the balance due Avery on account of expenditures made by him in the erection of the works, after crediting the corporation with said sum of $5,000 advanced by it, and with the further sum of $640 advanced under the second covenant. The complainant annexes to his bill a complete statement of the account under the two contracts.

It was alleged in the bill that Avery assigned the contracts to complainants, Dyer Pearl & Co. There was a demurrer to the bill, which was sustained by the chancellor.

J. Campbell, for complainants.

T. Washington and *Geo. S. Yerger*, for defendant.

[183] GREEN, J., delivered the opinion of the court.

The first question presented for discussion is whether, in any form of proceeding, the complainants are entitled to recover. It is contended for the corporation that the true construction of these covenants gives to Avery, or those claiming under him, no remedy to recover any part of the cost of erecting the water-works, because the buildings attached to the water-works were destroyed by fire in 1830, which was a contingency not in the minds of the parties when the contract was made, and was not provided for in the covenant. The words of this part of the covenant are: "And they further contract that if, at any time after the completion of said works, the same shall get out of repair, and so remain for the space of ninety days, so that the town is not supplied with water as herein provided, then the mayor and aldermen for the time being may take possession of said works in behalf of the corporation, and use and occupy the same as their own, and shall only in such case be liable to pay to Avery and Ward the one-half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as before stated." It is argued that the water-works were destroyed by fire, and that the defendants could not take possession of them, which they must have done in order to give Avery and Ward a right of action. This argument is wholly gratuitous, and is founded upon the supposition of facts not stated in the bill. Upon this subject the bill alleges "that about the 9th of March, 1830, the buildings attached to the said works, and the said saw-mill, were destroyed accidentally by fire, and the machinery of the establishment, upon which the supplies of water depended, was thereby rendered useless." It is subsequently alleged that the mayor and aldermen had taken possession of the lot of land on which the water-works were erected, having dispossessed the tenants in possession by action of ejectment. The statement of the bill is that the houses and saw-mill were destroyed, and the machinery thereby rendered useless. This machinery was not destroyed, but remained upon the lot unrepaired, and, when the defendant took possession [184] of the lot, possession of the machinery was obtained, and of everything else appertaining to the water-works which was not destroyed. It would be too absurd for the defendant to contend that, had a single article of machinery which was necessary to the complete operation of the works been destroyed, and had remained unrepaired for ninety days, and it had then taken possession, as it has done in this case, it would not have been a possession of the water-works, within the meaning of this cov-

enant. But it would be necessary so to contend in order to maintain the position assumed. The water-works did not consist only of the house which was destroyed. The house, the engine and the machinery for working it, the reservoir, the pipes, the hydrants, were but parts of the entire thing denominated water-works. If one hydrant had been knocked down and destroyed, or a pipe for conducting the water had been removed, the water-works would have been out of repair. There is no semblance of propriety, therefore, in contending that the destruction of the house was a destruction of the water-works, and that consequently the defendant did not take possession of them.

The water-works were finished and in full operation, according to the terms of the second contract. The buildings attached to the said works were destroyed by fire, and the works were thereby out of repair, and so remained for more than ninety days, and the mayor and aldermen took possession of the works in behalf of the corporation, and consequently became liable to pay the half of the amount they cost, over and above the $5,000 which had been advanced by it to Avery and Ward.

The statement of the facts of the case, in connection with the terms of the contract, would seem to present a case too plain for debate; nor are there any extrinsic facts which should induce a construction different from that which the face of the covenant would indicate.

The next enquiry is, has a court of chancery jurisdiction of the case? The first ground upon which its jurisdiction is sought to be supported is that of account. It is true, account is a head of equity jurisdiction, but it is so only in [185] cases where there are mutual accounts, and not where the items are all on one side. 1 Story's Eq., §§ 458, 459; 6 Ves. 687, 688. Here the items are all on one side, and consequently the jurisdiction cannot be supported on that ground. It is true, where proof of the items is to be had only from the defendant, and a discovery is sought and obtained, in such case equity, having possession of the cause for that purpose, will retain it and give full relief. 1 Story's Eq. 458. In this bill there is no discovery asked for, and, therefore, jurisdiction cannot attach on that ground. There are, however, cases where, the remedy being embarrassed at law, and full relief cannot be afforded there, equity will take jurisdiction. 1 Story's Eq., § 457. But, so far as the question upon the subject of account is presented, we perceive no other difficulties in this case than must exist in every case where there are many items to be proved.

But, in another point of view, we think there would be much difficulty and embarrassment in prosecuting this claim at law, even if relief could at all be administered there. In the first place, as Avery and Ward did not finish the works by the time stipulated in the covenant, they could not maintain an action on the covenant alone, because they could not aver a performance on their part; nor could the subsequent contract

with Avery, by which the non-performance of the first was waived, be relied on by them to excuse an averment of performance. That contract was not made for them, nor for their benefit. It was made with Avery alone, as an individual, and for his individual benefit. An action upon the first covenant could not be sustained by Avery alone, because it was made jointly with him and Ward. He could not couple the agreement which was made with him alone with the first covenant, and sue in his own name; for, although Ward relinquished his interest in that agreement to Avery, that only vested in him an equity in the covenant, and not a legal right to sue in his own name. A suit by Avery on the second covenant would be unavailing, because it contains no stipulation to pay the moneys expended in the works. Upon the whole, whether these views would have been taken and enforced had the remedy been sought in a court of law, or not, [186] still it cannot but be perceived that much difficulty and embarrassment would have attended an attempt to enforce these agreements at law, and that the remedy would not only have been embarrassed, but inadequate; and this of itself is a ground of equity jurisdiction. Besides this view of the case, it is clear that, if suits could have been sustained at law, two suits would have been necessary, and equity interposes its jurisdiction to prevent a multiplicity of suits. 1 Story's Eq., §§ 438, 457. Let the decree of the chancellor be reversed, the demurrer of the defendant overruled, and the cause will be remanded to the chancery court for answer and further proceedings.

Decree reversed.

HIGH AND WIFE *v.* BATTE AND BRADLEY.

Nashville, December, 1836.

VENDOR'S LIEN—BILL TO ENFORCE—PARTIES. A vendor of land may enforce his lien for unpaid purchase money by a bill against purchasers from his vendee, without first having obtained a judgment at law, and without making the personal representative of his vendee, who had died, a party defendant. [Acc. Edwards *v.* Edwards, 5 Heisk. 123; Harris *v.* Vaughn, 2 Tenn. Ch. 484, the last citing this case.]

The facts upon which the judgment of the court is predicated are fully stated in the opinion.

A. Wright, for complainants.

W. A. Cook and *Combs*, for defendants.

REESE, J., delivered the opinion of the court.

The bill alleges that the wife of complainant High contracted to convey, and did convey, to one Harris a tract of land, and that for a large portion of the consideration he executed to her his bill single; that Harris sold and conveyed by deed the tract of land, in several por-