REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

RICHMOND:
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(see ante p. 274) where a voluntary conveyance by a father to a child, being cancelled by the father, was restored to its legal validity:

1st, In that case the father was proprietor of the estate, and had a power to convey. In this the grandfather had no title and this original defect was to be supplied in equity by the consent of the father, and so liable to be opposed by superior equity.

2dly, In that case the deed was delivered into the daughter's keeping, who was of full age, and was privately cancelled by the father, without her consent; in this, the children, if they were in being, had no hand in the transaction, nor had they even the deed. The father who consented to accept it, relinquished it the next day, and gave it up to the donor.

3dly, The defendant in that case, was a mere volunteer, here, he is a fair purchaser, for a valuable consideration, so that the cases are wholy dissimilar, and the decree perfectly reconcileable.

Decree affirmed.

SMALLWOOD,

against

MERCER & HANSBOROUGH.

THIS was an appeal from the High Court of Chancery, dismissing the bill of the appellant. The case was as follows.—Mercer being in possession of a tract of land, to a part of which Hansborough was entitled as heir to his mother, (and which had been sold to the father of Mercer, by the father of Hansborough, without the privy examination of the mother) proposed selling it to Smallwood, who hearing of the title of Hansborough, objected thereto. Mercer, to remove this obstacle, applied to Hansborough, and a bond dated March 26th 1783, was entered into, with a condition, the material parts of which are as follows, viz: "whereas certain matters of controversy "now depend, and subsist between the above named Mercer, "and the above bound Hansborough, that is to say, a claim "which the said Hansborough pretends to have to 133½ acres of "land, now in the possession of the said Mercer, and which the "said Hansborough claims as heir at law to his mother Lettice, "whom the said Mercer admits to be one of the daughters and "co-heiresses

" co-heireſſes of Joſeph Sumner deceaſed; and alſo admits the " ſaid land to be the ſame, which the late John Mercer, father " of the ſaid Mercer, purchaſed of the father of the ſaid Hanſ- " borough, as, and for, the reverſion of one third of 400 acres, " called the dower of the widow of the ſaid Joſeph Sumner; " alſo a claim the ſaid Mercer has, or may have againſt the ſaid " Hanſborough, as executor of his father, for the value of the " ſaid land, in caſe the ſame ſhall be adjudged to the ſaid Hanſ- " borough,—he the ſaid Hanſborough, hereby acknowledging " aſſets in his hands ſufficient to make ſatisfaction for the ſaid " 133⅓ acres, and alſo acknowledging the ſaid Mercer to have " all the right of his father, under the deed from the ſaid Hanſ- " borough, which ſeveral diſputes the ſaid Mercer and the ſaid " Hanſborough have agreed to ſubmit to the arbitration &c. of " Joſeph Jones, Alexander Roſe and Andrew Buchanan, or a- " ny two of them, to be adjudged &c. and in manner following, " viz: if they ſhall adjudge the ſaid Hanſborough to be entitled " to ſaid land, they ſhall award the ſaid Mercer to pay the ſaid " Hanſborough, the value thereof in money, upon receiving " a conveyance of the ſaid land from ſaid Hanſborough; and " as to the diſpute between the ſaid Mercer and the ſaid Hanſ- " borough, as executor of his father, it is agreed, the ſame " ſhall be adjuſted as follows, viz; if the ſaid arbitrators ſhall ad- " judge the eſtate of the ſaid Hanſborough liable to make good " the value of the ſaid land, they ſhall adjudge what value ſhall " be paid, and may allow the ſaid Hanſborough to retain ſuch " value in his hands, in full, towards the conſideration they " ſhall adjudge to be paid for the ſaid lands. The condition is, " if the ſaid Hanſborough ſhall in all things do and perform the " award &c. which the ſaid arbitrators ſhall make touching the " premiſes, (provided the ſame be made in writing ready to be de- " livered *on or before the 30th of June next*) then &c. &c. To " which was annexed the following memorandum, viz: " It " is agreed, if the legatees of the ſaid J. Hanſborough, (the fa- " ther) ſhall diſſent from the claim of the ſaid Mercer, againſt " the ſaid Hanſborough, on the covenants in the deed of the ſaid " J. Hanſborough being arbitrated, then the arbitrators ſhall be " diſcharged from that part of the buſineſs before ſubmitted to " them. And it is agreed, the ſaid Hanſborough ſhall " enter an appearance at the ſuit of the ſaid Mercer, in an acti- " on of covenant in the General Court, and allow the ſame to " go on with all legal diſpatch to a judgment, 'till when, ſaid " Hanſborough agrees to wait with ſaid Mercer, for whatever-

" the

" the ſaid arbitrators ſhall adjudge the ſaid Mercer to pay for the " ſaid 133⅓ acres, and then to diſcount therefrom what may be " recovered in the action of covenant; and further, the ſaid " Hanſborough agrees that he will make the ſaid Mercer deeds " for the ſaid lands, immediately upon payment of the value to " be awarded, or upon receipt of a bond for the ſame, with ſuch " ſecurity as the ſaid Hanſborough ſhall agree."

This bond being ſhewed by Mercer to Smallwood, the latter after conſulting counſel was induced to make the purchaſe, and paid the conſideration money agreed upon. The award was never made, on account of the refuſal of one of the arbitrators to act, becauſe he had previouſly given his opinion to Hanſborough with reſpect to his title. Mercer offered to concede the title to be in Hanſborough, and to give him bond and ſecurity to pay as much per acre for the 133⅓ acres, as he was to receive from Smallwood for the whole tract, which offer was refuſed. Hanſborough brought an ejectment againſt Smallwood, upon which Smallwood exhibited this bill praying for an injunction and conveyance. Upon the inſtitution of this ſuit, Mercer brought an action of covenant againſt Hanſborough as executor to his father.

MARSHALL for the appellant. This bond contains a poſitive agreement on the part of Hanſborough to ſell the land in queſtion, and the agreement as to the ſale, could not be dependent upon the award, the object of which was, merely to decide upon *the title of Hanſborough*, to fix the price of the land, and the damages to be paid by Hanſborough out of the aſſets of his father, for the breach of his contract, in not warranting the title of the land. The circumſtances which attended the giving of that bond, prove inconteſtibly, that this was the intention and deſign of the bond. Hanſborough knew of Smallwood's intention to purchaſe, and his objection on account of Hanſborough's claim to the land. To remove this objection, he gave the bond, which was ſhewn to Smallwood, and it had the expected effect. A third perſon paying his money in conſequence of this agreement, ought not to be affected by the fault either of Hanſborough, or of Mercer, in failing to adjuſt thoſe other matters of diſpute, which only concerned themſelves. The proviſo, that the award ſhould be made, and delivered within a ſtated time, does not alter the caſe, becauſe it could only relate to the matters ſubmitted, which were the *price and damages*, not the *ſale*, which is poſitively ſtipulated for, whatever might be the event of thoſe ſubjects of diſpute. But further; Hanſborough, by appointing a referee

referee, who he knew could not act, committed a fraud, and he will therefore be bound to submit to some other equitable mode of adjusting the price.

CAMPBELL for the appellee. If this court be called upon to decree a specific execution of an agreement, it must be done in the way agreed upon by the parties, and in no other. For otherwise, it would be to *make*, not to *execute an agreement*; and if, from any circumstance, it cannot be executed in that way, this court must leave the parties to their legal remedy. It is to be observed, that Smallwood, knowing of Hansborough's title, can stand in no better situation than Mercer would, if he were plaintiff. This obligation is to be binding in the whole, or not at all. Now what does Hansborough bind himself to perform? The award of the arbitrators. That is, if they say, he hath a title, they are to decide upon the price which Hansborough shall take for the land. But upon what condition is Hansborough bound to sell for that price? That the decision be made *within a limited time*. If this condition be not performed, he is not bound at law, and upon what principle can he be bound in equity? He might, for the purpose of putting an end to litigation, and with a view of receiving the value of the land within a short period, be disposed to sell his right, which otherwise he would not have been induced to do, if kept in suspence beyond that time. But after that time is passed,—litigation still hanging over him,—the purchase money at this day unpaid, and he forced at length to assert his right in a court of law;—after so great a lapse of time, and after he has been compelled to incur all the trouble and expence, which he so anxiously wished to avoid;—can it be just or equitable, that he should be still bound to sell, tho' he agreed to do so upon a condition only, which has not been performed? It is impossible. But what can this court do? They cannot appoint referees; for they may not be agreeable to the parties. And if the court could appoint them, still the award cannot now be made within the time fixed upon by the parties, and consequently, the prayer of the bill which is for a specific execution of that agreement, cannot be decreed. The result of the whole is, that this court must remain neuter between the parties, and leave them to the law.

MARSHALL in reply. I yet insist, that the agreement to sell is absolute. The business of the arbitrators is stated in the preamble to the condition, namely, to decide the right of Hansborough to the land, the price to be paid by Mercer, and Mercer's claim

claim to damages. But the arbitrators are not to decide, whether Hanſborough is to ſell, or not. If they were, then I admit the full operation of the proviſo. But that is not ſubmitted: the bond itſelf is compleat evidence of a prior agreement to ſell; for in all bargains, it is uſual for the vendor to agree to ſell, before the price is ſpoken of. This previous point being ſettled, the conſideration and terms follow next, and is either fixed by the ſtipulation of the parties, or left to depend upon other modes of aſcertainment. I admit, that the court cannot appoint referees; but if it be clear, that a ſale was agreed upon and that the award which was to fix the price, has been prevented by accident or fraud, this court may compel a ſpecific performance as to the ſale, and direct a jury to ſettle the price. In the caſe of Roſs and Anderſon in this court, a ſimilar decree was made transfering this power from arbitrators to a jury. With greater reaſon ought it to be done in this caſe, where the party himſelf prevented the award by appointing an arbitrator, who he knew could not, or ought not to act, and knowing too, that Mercer's view in obtaining the bond was to enable him to ſell to another.

The PRESIDENT delivered the opinion of the court.

The queſtion is, whether a Court of Equity, upon the agreement, and the facts ſtated, will compell Hanſborough to convey his land, upon receiving the value thereof, to be aſcertained either by the price which Smallwood gave Mercer; by appointing new valuers, or by a jury.—It is to be premiſed, that Smallwood, is in no better, or worſe ſituation than Mercer, ſince he purchaſed with notice of the written agreement, without any further information, or promiſe from Hanſborough, who is not bound by any miſtaken opinion formed of that agreement, either by Smallwood, or by his counſel. He ſeems to have conſidered as fixed, ſundry events, then contingent; namely, that the arbitrators would decide the title, and, if in favor of Hanſborough, that they would aſcertain the price to be paid for the land, and that Mercer would, in caſe that price was not diſcounted by his claim, pay the value, or give bond with ſatisfactory ſecurity for the ſame. If all theſe things had been done Hanſborough would indeed have been compellible in equity to convey. But Smallwood never could conceive, that Hanſborough was to convey his land at all events, without even knowing the price he was to receive for it, or without having any ſatisfactory aſſurance, that he ſhould ever get any thing. Such a

conveyance

conveyance I believe no Court of Equity ever compelled a defendant to make.

It was contended by Mr. Marshall, that the *sale* was not refered to arbitration, but was made by the parties themselves, and that the arbitrators were only to settle the value. It would seem a strange sale, in which such necessary ingredients, as price, and the vendor's right to sell, were in suspence. It would be more properly described, by calling it an inchoate contract for a sale, provided the arbitrators determined in favor of the vendor's title, fixed the price, and that the other requisites were complied with, none of which were done, and consequenly the contract never was compleated.

In cases of bonds to perform awards, there are two remedies, 1st, at law upon the bond, in which, a plea that the arbitrators made no award, would, if true, defeat the plaintiff's action. 2dly, If any act be awarded to be done, for which a compleat remedy cannot be had at law, such as to make a conveyance, a bill in equity for a specific performance of the award is common and proper. But how the Court can decree the specific performance of the condition of a bond to perform an award, when in fact no award has been or can be made, is not discernible. But the bond is relied upon, as containing an agreement to sell, which agreement is sought to be specifically executed. That agreement it has been shewn was only a treaty, never brought to perfection, for want of the award. And that this was the effect of the arbitrators refusing to act, seems to have been well understood, both by Mercer and Hansborough. The former makes new propositions which the other declines, and brings his ejectment, and Mercer brings his action of covenant, each pursuing his original remedy, as if no agreement had ever subsisted. It is true, if the agreement had been perfect, (since Smallwood purchased under it, and both the defendants knew it,) and they had consented to dissolve it, it would have been a fraud upon the plaintiff, against which, a Court of Equity would have relieved. But no such ingredient appears, and every thing depends upon the original agreement. That agreement never having been perfected, there is no foundation for the interposition of the Court of Equity, and therefore we

affirm the decree.

BUCKNER