REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

NEWYORK:

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MARCH, 1811.

Page's Executor v. Winston's Adm'r.

lon's Practice is misconceived; relating only to judgments by default.

Thursday, May 16th. The court affirmed the judgment.

Thursday, May 16th.

Page's Executor *against* Winston's Administrator.

1. A contract of sale is not considered, *in equity*, as binding on the parties by the execution of a *bond* for the purchase-money, if it appear that the seller failed to perform what was to be done on his part in order to consummate the contract.

EDWARD WINSTON, in his lifetime, obtained an injunction from the late Chancellor *Wythe* to stay proceedings upon a judgment in favour of *William Fleming Gaines*, surviving executor of *Robert Page*, deceased, against him.

The bill set forth an offer by the complainant to buy sundry claims, under escape-warrants, against *John C. Littlepage*, and an agreement by the defendant to sell them, at par, upon a credit of twelve months, with interest thereon from the date; the complainant executing a bond therefor, together with *Macon Green* (who was then not present) as his surety; that, it being unknown to the complainant whether he could procure that person as a surety, it was stipulated that he should then sign a bond, with a blank therein for the said surety; and that, if the same was not given, the contract was to be void;

2. G. having agreed to sell W. certain escape-warrants upon W.'s giving bond and good security for the purchase-money; W. executes a bond, with a blank for the name of the surety, to be filled up at a certain time and place, when and where the escape-warrants are to be assigned and delivered by G.; if W. fail to give the surety, a court of equity will not permit G. to take advantage of the *bond*, without proof of his *assigning and delivering, or tendering* the escape-warrants, within a reasonable time, and before commencing suit upon it; as to which, the *onus probandi, in equity, lies on him.*

3. If a bill of injunction to stay proceedings on a judgment, charge the plaintiff at law with having *failed to do an act on which the equity of his claim depends*, and, in his answer, he take no notice of that allegation, the court, *on the hearing*, will consider this an *admission* that he has not done the act in question, and will decree against him without any exception to the answer, or any interlocutory order taking the bill for confessed in part.(1)

(1) Note. This appears to be a proper modification of the rule laid down by the chancellor, in *Dangerfield* v. *Claiborne*, 2 *H. & M.* 17. it being reasonable that in a case where the *onus probandi* lies on the *defendant*, he should not delay the plaintiff by an omission in his answer.

but if the said security was given on or before the then ensuing *Hanover* court, (at which time and place the said bond was to be produced for that purpose,) then the defendant was to assign and deliver to the complainant the said escape-warrants, and thereby the said contract to take effect; that *Macon Green* refused to be the surety, whereby the contract became void; that the complainant endeavoured to get such other security as he supposed might be unexceptionable, but could not; that, hearing no more from the defendant until after the bond had become due, and considering the contract as absolutely void, he proceeded to supply himself with other claims against *Littlepage* to the amount he wanted; that nevertheless, when he afterwards saw the defendant, (for the first time since the contract,) the latter, to his astonishment, affected to consider it as absolute and obligatory, although more than twelve months had then elapsed since it was made, and no application had been made to the complainant concerning it, other than through an agent, (as he believed,) at the *Hanover* court, when the surety was to have been given as aforesaid, and at which time the said agent was informed of *Macon Green's* refusal to become bound in the bond. Against this unreasonable conduct the complainant remonstrated, because it was well known to the said *Gaines* "that he had not vested any, the least, shadow of a right in the complainant to the said escapes, and that no value whatsoever had been received by the complainant for the said bond; and, moreover, that he had been obliged to supply himself elsewhere;" but the defendant persisted in urging his claim to the money, and threatened a suit, "upon which the complainant replied, that, if such was the determination of the said defendant, (which he conceived to be unjust,) he demanded a delivery and assignment of the said escape-warrants;" which the defendant positively refused, and thereupon commenced his action at law, and obtained judgment on the bond; "still withholding from the

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complainant the said escape-warrants, with an assignment of the same, which alone could enable him to take measures for his indemnification."

The defendant, by his answer, admitted the agreement stated in the bill, but denied its being conditional, or that he ever restricted the complainant to *Macon Green*, or refused to receive any other good and sufficient man as security; alleging that "he merely observed that, as he was not very well acquainted with the generality of the people in *Hanover*, he would take the said *Macon Green*, whom they both knew; but never had an idea of making the validity of the bargain to depend on the willingness of the said *Green* to sign the bond, or not." He proceeded to pray that *Humphrey Brooke's* affidavit, corroborating the above statement, might be received as part of this answer, stating that he had acted by *his* advice, as attorney at law, "and as one interested in the estate of *Robert Page*, deceased;" "that he put the bond into his hands for the purpose of getting the blanks filled, either by the said *Green*, or by some other person whom he might approve of as security, but that his said attorney had always informed him that his applications to the complainant had ever been evaded by some excuse or other." The respondent "conceiving that he had fully answered the most material allegations contained in the complainant's bill, and denying all fraud, &c. prayed to be hence dismissed," &c.

No depositions were taken on either side, but that of *H. Brooke*.

The present chancellor perpetuated the injunction on the hearing, without any order, taking the bill for confessed in part; whereupon the defendant appealed.

Warden, for the appellant, admitted the escape-warrants never came into *Winston's* hands, but said that *Gaines* was always ready to assign them, upon his giving good security, or paying the money.

The Attorney-General, contra. *Gaines* ought to have gone on, and executed the contract on his part, as he chose to avail himself of the bond, without security. He says not a word in his answer about readiness or willingness to assign the escape-warrants. It was either a bargain or no bargain. If it was no bargain, *Gaines* had no right to sue on the bond; if it was a bargain, he was bound to assign the warrants.

Saturday, *June* 1st. The president delivered the following as his opinion, and that of the court:

The only evidence in the cause, except the answer, is the deposition of *Humphrey Brooke*, who, the appellant acknowledges, is an interested witness.

The appellee, however, had no cause to complain that the appellant would consummate the contract, upon his simple bond, without security; and had the latter tendered, within a reasonable time, and before the commencement of the suit, the escape-warrants against *Littlepage*, with proper endorsements thereon, the contract, I conceive, would have been binding on the parties: but *Winston* expressly charges in his bill that "the defendant had not vested any, the least, shadow of right in the complainant, to the said escapes; and no value whatever had been received by him for the said bond;" and, further, "that when the appellant threatened him with a suit on his bond, he demanded a delivery of the said escape-warrants; but which he positively refused; and still withholds from him the said escape-warrants, with an assignment of the same." To this very important charge in the bill, the defendant made no answer, but contented himself with saying "that he has fully answered the most material allegations contained in the complainant's bill." But, in my conception, "that he refused to deliver the escape-warrants, properly endorsed, when demanded," was the most material allegation in the bill; and the main hinge on which the merits of the cause

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principally turned. And the defendant's having failed to answer it, was, in my apprehension, a tacit acknowledgment that the charge was true.

Mr. *Brooke*, in his deposition, says, "with respect to the escape-warrants, the deponent is of opinion that the said *Winston* might have procured them, and that he still may, upon making proper application." What were the grounds of *Brooke's* opinion, respecting those warrants, or what he might think would be making "proper application," seems immaterial to be considered at this day. I am, upon the whole, clearly of opinion that the decree is correct, and ought to be affirmed.

The decree is affirmed by the unanimous opinion of the court.

Wilson *against* Crowdhill.

Wednesday, May, 29th.

An action of debt will not lie against the *acceptor* of a bill of exchange.

*** See the same point in *Smith* v. *Segar* 3 *H. & M.* 394.

THIS was an action of debt against the acceptor of a bill of exchange. Plea *nil debet*, and issue. After a verdict for the plaintiff, the defendant filed errors in arrest of judgment, the most material of which was, that the action of debt would not lie in this case. The county court gave judgment for the plaintiff, which the district court affirmed. The defendant obtained a *supersedeas* from a judge of this court.

Botts, for reversing the judgment, quoted 4 *Bac.* (*Gwill. edit.*) 732. and the cases there cited, as conclusive.

Monday, *June* 3d. The president pronounced the opinion of the court, that an action of debt will not lie against the acceptor of a bill of exchange.

Judgment reversed, and entered for the defendant.