REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:
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HENDERSON *v.* LIGHTFOOT.

1804. *October.*

A. sold a tract of land to B. for £600, and 4500 acres of land in Kentucky, estimated in the contract at £400. B. at the time of the decree, could not make a legal title to the 4500 acres of land; and therefore was decreed to pay the £400 with interest.

John Lightfoot filed his bill in the high court of chancery stating, That in the year 1785, he sold a tract of land in Culpeper to *Callender* and *Henderson* for £ 1050, and took their bond with security for payment of £ 600 thereof in the following manner, to wit: £ 400 in bonds, goods, &c. and the other £ 200 in about two years. The balance of the purchase money was to be paid in about 4500 acres of Kentucky lands, stated to be located for captain *Reid*. That the plaintiff has received the £ 400, and authorized *Slaughter* to receive the £ 200. That the plaintiff went to Kentucky to get the lands there conveyed to him. That the *Slaughters* assigned the bond aforesaid to *Gray* in order to enable him to receive the £ 200. That *Gray* is dead, and the bond lost. That *Callender* and *Henderson* have neglected *to clear out* the said 4500 acres of land. That *Callender* is dead without heirs in Virginia, and *Henderson* hath taken administration on his estate. Therefore the bill prays that *Henderson* may be decreed to pay the said £ 450 with interest, instead of the Kentucky lands.

The answer admits the purchase of the Culpeper lands, upon the terms in the bill mentioned, except that they were to give their *right* to the Kentucky lands. That *Callender* and *Henderson* having warrants for a large quantity of lands in the hands of ——— *Perkins* of Kentucky, the same were, after the death of *Perkins*, delivered by *Innes*, his administrator, to *Reid* to be located. That *Reid*, who was present at the contract between the plaintiff and defendant, did locate the warrants; and the defendant, not valuing Kentucky lands much, but willing to get clear of them on any terms, referred the plaintiff to *Reid* for information.

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That, after the plaintiff had had some conversation with *Reid*, the bargain between the plaintiff and *Callender* and *Henderson* was concluded, but upon the express condition that *Callender* and *Henderson* were not to warrant them against prior claims, unless made to appear within one year, as appears by the said bond. That no prior claims have been made. That *Callender* and *Henderson* gave the plaintiff an order on *Reid* for the lands as by his receipt will appear. That the defendant has paid the £ 600. That the Kentucky lands were scarcely worth the expense of surveying and obtaining titles; and therefore the sum, claimed for them by the plaintiff, is extravagant; especially as an exorbitant price was given for the Culpeper lands for the sake of getting clear of those in Kentucky. That *Reid* has been paid his fees for locating, as appears by his receipt and bond, stating that the locations have been made: Which bond the defendant directed to be delivered to the plaintiff. That it was agreed between the plaintiff and *Callender* and *Henderson* that the plaintiff should pay any other charges for *clearing out* the said lands, and that *Callender* and *Henderson* should repay them. That the defendant is neither the executor or administrator of *Callender*.

The amended answer, states that the plaintiff before he sold the Culpeper lands to *Callender* and *Henderson*, offered them at £ 500, but could not sell them at that price; and that the only addition to the value was 100 acres at the price of £ 100. That the defendant, several years afterwards and after the rise of lands, sold them for £ 950 upon credit: About £ 300 of which he cannot recover, because the title is disputed, and an injunction has been granted by the county court. It denies any notice that the land could not be obtained, until the suit was brought; which put it out of the defendant's power to obtain redress.

The exhibits are, 1. The receipt of *Reid* for his fees for surveying the land; which is written at the foot of an account stating the surveys. 2. A land warrant for 12,892¾ acres of land, with *Perkins's* receipt to *Callender* and *Hen-*

derson for the same, expressing that it was to be located. 3. The entries of the lands by *Thomas Perkins* as assignee of *Callender* and *Henderson;* and a survey thereof for the heirs of *Thomas Perkins*, assignee of *Callender* and *Henderson*. 4. The bond of *Callender* and *Henderson* to *Lightfoot*, with the payments endorsed; among which is a receipt by the plaintiff for an order on *Reid* for 6000 acres of land. 5. The obligation of *Reid* and *Strother* acknowledging receipt of fees for locating the lands, and containing an express declaration that they have been located and surveyed. 6. A letter from *Perkins* to the defendant enclosing a copy of the entries he had made for them, dated September 25th, 1785. 7. Three letters from *Innes*, the administrator of *Perkins:* The first dated March 23d, 1787, informs him of *Perkins's* death, and speaks of lands in which the defendant may be interested. The second, of lands located, by *Perkins*, for the defendant, himself and others: The third, of the defendant's lands, and wishes him to pay the surveyor's fees; after which he (*Innes*) will pass the plats through the office. 8. A letter from *Callender* and *Henderson* to *Reid*, desiring him to deliver the land papers to the plaintiff, who would pay the office fees: this letter appears to have been sent by the plaintiff.

The deposition of *Waddle*, states that, on the 14th of May, 1789, he, on behalf of *Callender* and *Henderson*, paid *Reid* his fees for surveying the lands.

The deposition of another witness, states that he was present when *Waddle* paid *Reid* for the surveys.

The defendant's counsel moved for a continuance of the cause in order that the defendant might take the depositions of *Innes* and *Reid;* but the motion was overruled by the court: which decreed payment of the money, without any condition.

Call, for the appellants. The title was unquestionable. 1. Because the receipt of *Perkins*, for the land warrant, created a clear trust for *Callender* and *Henderson;* and there-

fore the land belonged to them in whose name soever the warrant was located. 2. Because *Perkins's* letter says they were located for the benefit of *Callender* and *Henderson*; that he had got *Reid* to do the business, and that the two entries were enclosed; which is corroborated by *Reid's* calling on *Callender* and *Henderson* for his fees, stating, in his receipt, that they had been located on their account.

The appellant has not broken the contract. For the plaintiff knew the situation of *Callender* and *Henderson's* title to the lands at the time he purchased; because it is impossible that he should have bought without enquiring into the local situation, and rights; and the enquiry would naturally have led to a sight of the papers, and a full explanation of the title.

The plaintiff took upon himself the trouble of obtaining the patents. For his knowledge of the situation of the title shews it; especially as he was to go to Kentucky in pursuit of the lands: and he took the order on *Reid* in full satisfaction of the bond; which necessarily shews that he was to get the grant himself, or else the purchase would have been of no use to him. Besides, the amended answer (which not being replied to is evidence) states that he was to pay the fees for clearing out the lands and obtaining the patents. Which, *ex vi termini*, supposes, that he was to be at the trouble of carrying the rights into grant. For whoever buys an equitable title of this kind, agrees to encounter all the delays and difficulties incident to the procurement of the legal estate; because he knows it cannot be conveyed, until it is procured, and therefore he virtually stipulates to wait for it.

Consequently, the sole question is, Whether the defendant had an equitable title at the time of the purchase? For if he had, the court of chancery ought to have compelled the plaintiff to assert it, or given the defendant time to do it. 2 *Wms.* 630. 1 *Atk.* 12. 3 *Wms.* 190. *Syme* v. *Johnston*, 3 Call, 559. *Pollard* v. *Rogers*, in this court, 4 Call, 239. The principle of all which cases applies to this. For,

in that, in 2 *Wms.*, time was given, when the cause was ready for hearing, until the act of parliament could be procured to enable the party to convey, although it was, necessarily, uncertain, whether such an act would ever pass. In that in 3 *Wms.* the heir at law was as necessary a character to be brought into the cause, as the heir of *Perkins* here: And those in 1 *Atkyns*, and this court, are liable to similar remarks; for, in every instance of that kind, the person, having the legal estate, is a formal party only, without a *scintilla* of right. Besides, the practice is to send it to a master to enquire into the title; and if he reports, that a good one can be made, if such a person will join, time is afforded to get him to join. Which is exactly similar to the present case: and the argument is the stronger on this occasion, because the plaintiff might have made the heir of *Perkins*, defendants to this suit, and obtained a decree for a complete title. Therefore, as the plaintiff might, by additional parties, have enforced a conveyance of the legal estate, the court of chancery ought to have compelled him to make the parties, or given the defendant time to file a cross bill for that purpose.

It makes no difference that, although the location was in the name of *Perkins*, that circumstance is not mentioned in the written contract; because the bond does not say, that the lands were located in the name of *Callender* and *Henderson;* but is silent as to names; and therefore is not inconsistent with the truth of the case, which appeared in the entry and other papers.

The plaintiff ought to have pursued the claim; and, if disappointed in obtaining it, he should have given notice to the defendant. 1. Because he had undertaken to pursue it. 2. Because, by the contract, prior claims were to be made known, within a year; which supposes diligence of enquiry into the title; for otherwise, the information could not have been had, within the limited time.

The court of chancery ought to have granted the continuance. For the papers shewed, that the witnesses were

important; and commissions to take their depositions could not have been obtained without leave of the court.

Williams, contra. The contract was to convey the lands surveyed by *Reid*, and to warrant the title: which must have been understood as of lands surveyed in the names of *Callender* and *Henderson:* the answer so explains it, and the order upon *Reid* was accordingly. The appellants have not transferred the lands: and it is not sufficient for the seller to say he has not broken the contract, but he must prove that he has performed it. That *Lightfoot* bought the equitable title only, makes no difference, because he considered it as a transaction with the vendors only. The answer proves that the appellant did not disclose the papers and situation of the title to *Lightfoot* at the time of the contract: which ought to have been done, that the latter might have bargained with a full knowledge of the circumstances. The allegation of the answer that *Reid* was present at the contract, is disproved by the facts in the case; because it appears that the contract was on the 13th of August, and the survey was made on the 3d of the same month. The appellee did not undertake to clear out lands in the name of the heirs of *Perkins*, but those in the name of *Callender* and *Henderson*. The authorities cited on the other side, prove nothing for them; because those cases shew that there will be no specific performance unless compensation can be made. But here was greater delay, than was ever allowed. There was no obligation upon *Lightfoot* to make the heirs of *Perkins* parties; because it does not appear that he had any. The bill states a conveyance of the Culpeper lands, which was sufficient. It was not necessary to reply to the amended answer; because it was to be tried upon the evidence; and such a practice would produce the delay of a new commission, or drive the plaintiff to admit the new allegations. The survey is in the name of the heirs of *Perkins*, and therefore a patent could not be obtained. The sum decreed by the court of chancery was right: and the

continuance moved for ought not to have been granted, after so much delay.

Wickham, on the same side. The lands never have been conveyed, and *Callender* and *Henderson* have not got them. Although it be true that a mere legal title will not prevent a decree, yet that is not this case; for *Perkins's* heirs have not the legal title, but it is in the state of Kentucky. A patent cannot issue in the name of "*the heirs of Perkins*:" for the act of assembly requires the grantee to be named: and we know not who the heirs are. There may be other titles, in all this time, to these lands: And that is a danger which *Lightfoot* is not bound to encounter. If a suit is brought, it must be brought against the register of the land office in Kentucky; and could not have been brought here. Had all the circumstances been disclosed, *Lightfoot* would have made a difference in his contract. The defendant contracted to transfer; and therefore he must shew that he has done so.

CARRINGTON, Judge, delivered the unanimous opinion of the whole court* that the decree of the high court of chancery should be affirmed.

Decree affirmed.

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*The president was indisposed; but judge *Carrington* said, that he was directed by him to mention that he concurred with the rest of the court in affirming the decree.