DECISIONS OF CASES

IN

VIRGINIA.

BY THE

HIGH COURT OF CHANCERY,

WITH REMARKS UPON DECREES,

BY THE

COURT OF APPEALS,

REVERSING SOME OF THOSE DECISIONS.

BY GEORGE WYTHE,

CHANCELLOR OF SAID COURT.

SECOND AND ONLY COMPLETE EDITION, WITH A MEMOIR OF THE AUTHOR, ANALYSIS OF THE CASES, AND AN INDEX,

BY B. B. MINOR, L. B., OF THE RICHMOND BAR.

AND WITH AN APPENDIX, CONTAINING

REFERENCES TO CASES IN PARI MATERIA, AND AN ESSAY ON LAPSE; JOINT TENANTS AND TENANTS IN COMMON, &C.,

BY WILLIAM GREEN, ESQ.

RICHMOND:
J. W. RANDOLPH, 121 MAIN STREET.
1852.

BETWEEN
WILLIAM DAWSON, *plaintiff*,
AND
BEVERLEY WINSLOW, *defendent*.

1. Injunction to judgment founded on an award. D. owing only £100 was induced to give his bond for £150—the £50 being regarded as a penalty.—Equity will relieve against said penalty, not only upon the general principle of making compensation, but because in this case the plaintiff was prevented by defendant (who was also guilty of fraud) from performing one of the alternatives agreed upon.
2. An award will be set aside for improper and unfair conduct of the referees.
3. The Chancellor's remarks on the opinion of the Court of Appeals; and as to their power to correct awards. See *Ross v. Pleasants, Shore & Co.*, in this volume, p. 25; and 1 Wash., 158.

THE bill was to enjoin a judgment, founded on an award.

The plaintiff, in september, 1783, agreed to purchase 150 acres of land from the defendent for 200 pounds, and, some weeks afterwards, executed two bills penal for payment, one of 100 pounds, and the other of 150 pounds, to the defendent, on or before the 25 day of december, in the same year.

The defendents design in taking one bill, which the plaintiff reluctantly signed, for 150 pounds, instead of 100 pounds only according to the agreement, was by subjecting the plaintiff to the penalty of 50 pounds, to secure punctual payment or an equivalent. this if it were not confessed by the defendent, in his answer, would be manifest by a memorandum on the same paper, signed by him, purporting to be an agreement that the bill might be discharged by payment of 100 pounds, on or before the 25 day of december then next, or by delivering to the defendent a bond which he had given for 100 pounds payable to Henry Garrett the 10 day of february thereafter; and that the plaintiff had liberty til that day to procure the bond.

Henry Garrett had promised the defendent, at his request, the time of which request doth not appear, not to part with this bond, before the money should become payable.

The plaintiff, a few days before the day of payment, applied to Henry Garrett, and proposed to take up the bond, offering to give his own bond, with a surety, for payment of the money, to which Henry Garrett would have consented, if he had not made the promise; although he had agreed to assign the same bond, when the money should be payable, to David Garth, if a contract made with him should not be discharged otherwise. Henry Garrett referred the plaintiff to Garth that by a treaty be-

tween them the plaintiff might obtain the bond. a treaty was accordingly between them, but without effect at that time, Garth refusing to accept the plaintiffs, in exchange for the defendents, bond, from whom the money, or a negro in part payment, was expected.

On the 8 day of november, 1784, the defendent paid 14 l. 6s. 2d. to Garth, now the holder of the bond, by which, after 3 l. 14. 3d. deducted for interest, 89 l. 8s. 1d. of principal money, remained due.

David Garth, on the 19 day of february, 1785, assigned the bond, for the money then due by it, which was 90 l. 13s. 3d. to the plaintiff, and he ten days afterwards was preparing to deliver it, with 70 l. 6s. 0d. in money, to the defendent, who eluded a formal tender thereof, so soon as he discovered the plaintiffs intention, by withdrawing abruptly. yet the defendent on the bill penal for the 150 pounds endorsed a credit for Henry Garretts bond.

The defendent having commenced actions at common law on the bills penal, in the county court of Spotsylvania, and the plaintiff having confessed a judgement for 41 pounds, which was three pounds and some shillings less than was due to the defendent, if the plaintiff were chargeable by both the bills penal with no more than two hundred pounds of principal money; *by consent of parties, on the 3 day of november, 1785, all other matters in difference between them, respecting those suits, were refered to the final determination of Joseph Brock, William Smith, Edward Herndon, and James Lewis, or any three of them, whose award thereupon was to be made the judgement of the court; and all errors in the proceedings were released.*

Three of these referees reported, *that having heard the parties, and examined their accounts and papers, they found a balance due to the plaintiff* (who is defendent in this suit) *of 55 l. 16s. 6d. exclusive of the judgement confessed for 41 pounds, and awarded the present plaintiff to pay the 55 l. 16s. 6d. with interest from the date of that act, and costs to the present defendent.* according to which award the judgement sought to be enjoined was entered.

Two of the referees, examined as witnesses, deposed, that when they were appointed arbitrators, and undertook the office, which had frequently happened, they supposed themselves judges both of law and equity; and confessed that to them the defendent or his attorney read a state of his case, but do not remember whether the rehearsal had or had not influence on the referees; and by one of them this question, which the defendent propounded, *were not the parties and their attorneys*

heard with patience; and were not their accounts and other papers examined; and all other testimony that was offered by either party at the trial properly attended to? was reported by the commissioners, who took the examination, to have been *answered in the affirmative.*

Two witnesses, attending the referees, on behalf of the plaintiff, were not examined by them, who declared it was not worth while to examine any witnesses, nor do they appear to have examined any.

The plaintiff excepted to reading the statement of facts by the defendent, which nevertheless was read by him and his attorney, before the arbitrators, and seems to have been admitted, although the plaintiff alledged that he could disprove some of the facts by witnesses, if the arbitrators would examine them.

The memorandum on the bill penal for 150 pounds had been torn off by the defendent, although it was produced, with other papers, to the referees.

At the hearing, 20 day of may, 1791, the high court of chancery delivered this

OPINION,

That the defendent, in prosecution of a design to gain and secure to himself a profit illegal and unrighteous, was guilty of fraud, both in tearing the memorandum from one of the bills penal, and in obstructing the plaintiff in the procurement of Henry Garretts bond, mentioned in the memorandum; (*a*) and that the referees, in deciding the difference submitted to them, acted in such a manner that the award made by them ought to be set aside; and

Decreed a perpetual injunction to the whole judgement, awarding to the plaintiff the costs in the action wherein the judgement was given, with the costs of the suit in equity.

The court of appeals* before whom the cause was brought

(*a*) The court of chancery would not, for this reason only, have set aside the award, if the arbitrators had not appeared to have acted improperly; because the sentence of arbitrators, even if to a court it seem unjust, was theretofore thought to be definitive: but the arbitrators were believed to have misbehayed in refusing to examine witnesses produced by the plaintiff, whose testimony appeareth, by their written examinations, to have been pertinent and important, and might and probably would have contradicted or represented differently the facts stated by the defendent before the arbitrators, and supposed to have been admitted by them.

*[The report of this case in the Court of Appeals is in 1 Was. 119. See *Groves v. Graves*, 1 Wash. 1.—*Ed.*]

by the defendent, 17th day of october, 1792, pronounced the following

OPINION AND DECREE,

'That there is error in the said decree,in making the injunction therein stated perpetual, as to the whole judgment for fifty five pounds sixteen shillings and six pence, and the interest, whereas three pounds twelve shillings and eight pence, part thereof,appears by the record to have been due to the appellant, on the 3 day of november, 1785, for the balance of the bond for 100 pounds and the money paid by the appellant to Garth in part of his bond to Garret and interest to that time, over and above the 41 pounds, for which judgement was on that day confessed, and made no part of the 50 pounds and interest in dispute between the parties: that as to the said 50 pounds and interest there is no error in the said decree, the court being of opinion that the said 50 pounds, was to be considered as a penalty for further inforcing the payment of 100 pounds, or procuring an assignment of the appellants bond to Garret for that sum, against which penalty the appellee was intitled to relief in equity, not only by the general principles of that court, to relieve against penalties on making compensation, but, because in in this case, the appellee was prevented in performing one of the alternatives by the interposition of the appellant, and that the said decree is not erroneous as to the costs at law, more money appearing to have been tendered to the appellant before suits brought than was due to him at that time. Therefore it is decreed and ordered that the said decree be reversed and annulled as to 3l. 12s. 8d. part of the judgement for 55l. 16s. 6d. with interest from the 3 day of november, 1785, that the injunction obtained by the appellee in the said high court of chancery be dissolved as to so much; that the residue of the said decree be affirmed, and that the appellee pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here.

REMARKS.

The court of chancery is confessed to have erred in perpetuating the injunction to the whole judgment. an account was not stated, as it ought to have been, at the hearing, to shew that the money due from the plaintiff to the defendent was between three and four pounds more than the 41 pounds, for which the judgement had been confessed.

Upon the main question in the case, namely, whether the

plaintiff ought to be relieved by a court of equity against the judgment? the opinion of the court of appeals is stated in these terms, *that the said* 50 *pounds was to be considered as a penalty for further enforcing the payment of* 100 *pounds. or procuring an assignment of the defendents bond to Garret for that sum, against which penalty the plaintiff was intitled to relief in equity, not only by the general principles of that court, to relieve against penalties on making compensation, but, because in this case the appellee was prevented in performing one of the alternatives by the interposition of the appellant.* by which that court is supposed to have considered the case in the same manner as if no award had been made in it: and consequently to have established this position, that a court of equity hath power to relieve against a judgement founded upon an award, if the award appear to be contrary to the principles of equity, and if, as in the present case, the party, in whose favor the award is, had by his interposition prevented the other party from performing something whereby he would have saved a penalty, which he was condemned by the award to pay; and this notwithstanding the whole matter discussed before the court of equity had been discussed before the arbitrators.

That, in this case, the matters discussed before the court of chancery were discussed before the arbitrators is manifest by the exhibits and testimony, the question controverted between the parties, before both tribunals, being only, whether the defendent ought or not to have the fifty pounds penalty?

The act of the arbitrators may be understood therefore in the same sense as if their sentence had been declared in these term: *upon the two questions controverted between the parties we are of opinion,* 1, *that the defendent* (that is the plaintiff in the court of chancery) *ought not to be relieved against the penalty of fifty pounds, upon making reparation for all damage sustained by his failure to deliver to the plaintiff* (that is the defendent in the court of chancery) *his bond to Henry Garret, within the time limited.* (*b*) *and* 2, *that the plaintiff is intitled to the fifty pounds penalty, although it was incurred by his act and default, the one, in obtaining a promise from Henry Garret not to part with the bond before a certain time, and the other, in not having released Henry Garret from the promise before the defendent applied to him for the bond.. and therefore we do order and award, that the defendent pay to the plaintiff* 55*l.* 16*s.*

(*b*) In truth no damage was sustained; but the plaintiff derived no less benefit from the defendents procurement of the bond, at the time when it was procured, than he would have derived from a procurement before expiration of the time limited.

6*d. the principal money, including that penalty, found due to him from the defendent, exclusive of the* 41 *pounds for which judgement hath been confessed, with interest from this time, and costs.*

Let us admit the opinion of the arbitrators to have been erroneous in each question; hath any court, for that reason only, power to correct their sentence?

The object of these compromissary disceptations is to prevent the expense, delay, turbulence, and other inconveniences of forensic litigation. the parties intend the determination of the arbitrators to be final. it is so declared in the formula by which the controversy is submitted to their determination. it was so declared in the submission in this case.

When parties differ in opinion, or pretend to differ in opinion, each thinks, or pretends to think, the opinion of the other wrong. the question then between them is which is right? unable theirselves to decide this question they empower other men to decide it for them. the submission to those men imports an agreement by each party that he will allow to be right that opinion which the arbitrators determine to be right. the judgement of the arbitrators therefore is the judgement of the parties. he whose former opinion the arbitrators condemn is selfcondemned. this is believed to be the genuine ratio which breathes in the trite argument, against rescission of awards, unless for some misbehaviour in the arbitrators, namely, that they are judges chosen by the parties themselves. the choice of parties cannot make the arbitrators abler judges. and if the arbitrators may justly be suspected of inclination to favor the party who chose them, they ought not to be chosen, nor ought their sentence to bind the other party, if he knew not the cause of suspicion. from the sentence of arbitrators no direct appeal lieth to any court. accordingly courts of appeal are appointed to reverse and correct the decisions of courts which form part of the judiciary system, not to reverse and correct the decisions of judges whom the parties appoint to adjust their disputes.

This doctrine is not peculiar to us, nor to our times.

In Athens, the sentences of their diallacterioi, who were judges chosen by the parties, differing from our arbitrators only in being sworn, were not reversible, as we learn from the oration of Demosthenes against Midias.

By the roman civil law *arbitrorum genera sunt duo, unum ejusmodi, ut sive aequum sit, sive iniquum, parere debeamus: quod observatur, cum ex promisso ad arbitrium itum est.* Dig. lib. XVII. tit. LVI. I. 76. *qualem autem sententiam dicat arbiter, ad practorem non pertinere, Labeo ait, dummodo dicat quod ipsi videtur.* Dig. lib. IV. tit. VIII.

In many cases, however, a refusal to abide by an award is justifiable, and in such cases the magistrate, without whose authority execution of the sentence cannot be enforced, may, not only deny his aid but, abrogate the sentence. for example, 1., where an arbitrator giveth sentence for the party by whom he is bribed, or giveth sentence for one party, moved by good will toward him, or illwill toward his adversary; because the arbitrator is disqualified to perform the office undertaken by him, that is, the office of a judge, who ought to give the sentence which the praecepts of justice dictate, not the sentence which corruption in the one case, or affection or malice in the other cases, may prompt: the sentence of a judge, who thereby earneth sordid wages, or gratifieth a vicious passion, is no less a void act, than it would be, if he were to gain a part of the thing in controversy. 2, where the arbitrator giveth sentence for one party whom he doth hear, without hearing the other party, or giveth sentence without hearing either party, or, after hearing both, without bestowing convenient time in deliberating on the subject of controversy; because he doth not perform the office of a judge, which is to decide after hearing both parties, and to decide after duly deliberating on their allegations, the former being idle, if not rendered momentous by the other. 3, where the award itself is shewn to be such as could not not have been made without corruption, improper influence, (c) or precipitancy in the arbitrator, which hath frequently happened.

The writer of these remarks perhaps hath mistaken the decree of the court of appeals, if not, he asks whether it be not a decree *primae impressionis*, and whether it doth not constitute every court of equity a court of appeal from awards?

(c) See the next case, *Beverley v. Rennolds*.