

REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:

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1833.

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1805.
October.

RICHARDSON *v.* BAKER.

Quære, Whether if there be a bond given for the purchase money ; but no signing of the contract by the vendor, nor any other act of part execution ; the statute of frauds is a defence to a bill brought by the vendee for a specific performance of the contract.

Length of time is a bar to a bill brought for a specific execution of a contract, if there be no part performance.

Baker, in November 1794, filed a bill in chancery in the county court, against *Richardson*, stating that *Richardson* sold the equitable title to a tract of land to the plaintiff in July 1788, for £ 84, and was to procure a conveyance of the land to him from *Cary*. That a survey of the land was had, at the instance of both parties ; and, thereupon, the plaintiff gave his bond for the purchase money, on the 31st of July, 1788 ; and offered to pay down the price, if the defendant would give a receipt for it ; which he refused to do ; sent back the defendant's bond on the next day ; and afterwards obtained a deed to the defendant himself from *Cary*, for the land ; which the bill prayed he might be compelled to convey to the plaintiff.

The answer admits the bargain, but states that the plaintiff on the next day took back the bond under pretence of consulting counsel, and never returned it ; and therefore the defendant has considered the contract as vacated, as no application has been made to him concerning it *for so long a time*.

A witness states, that he heard the plaintiff say, about the year 1789, that the defendant had used him illy about the land, and he would have nothing more to do with it. And other witnesses mention, that the plaintiff frequently solicited a conveyance, offering, at the same time, to pay the money.

In June 1797, the defendant, by consent of the plaintiff, pleaded the statute of frauds : and the plaintiff replied to it.

The county court decreed a conveyance, and the defendant appealed to the high court of chancery, where the decree was affirmed ; and thereupon, *Richardson* appealed to the court of appeals.

Wickham, for the appellant. The plea is an absolute bar to the plaintiff's demand. For the statute of frauds in England, and our act of assembly, are exactly the same; and therefore, the English adjudications upon the subject will be strictly applicable to the case: And the amount of them is, that the plea is to be taken as a complete bar, and that the depositions are to avail nothing. If indeed there had been a part performance, the statute would not have applied; but there was none; for the bond is not for the title, but it is a bond for the purchase money only. The survey is unimportant, and does not alter the case; for both parties must sign the contract, or there must be an occupation and improvement of the land. 1 *Wms.* 770. But here nothing of that kind was done; for *Richardson* signed nothing, nor was there any occupation, or improvement of the land by *Baker*, without which the mere survey was of no effect. 2 *Suppl. Vin. Ab.* 270, 280. 2 *Bro. Ch. Cas.* 559. The admissions of the answer will not help the appellee. That point I admit is still unsettled in England, 1 *Fonbl. Eq.* 168. *Mitf. Plead.* 210. 2 *Bro. Ch. Cas.* 563; but, upon principle, it is clearly for us; because the contrary doctrine would repeal the statute, and let loose all the dangers which it was made to prevent. 1 *Bro. Ch. Cas.* 567. The acceptance of the bond was not material, as it does not satisfy the words of the statute; for it is not signed by the vendor, and the act of assembly requires that the agreement should be signed *by the party to be bound thereby*. The contract set forth in the bill differs from that stated in the answer and depositions; and therefore neither of them can be decreed: Not the first, because it is not proved: Not the second, because it is not sued upon.

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Randolph, contra. The statute was only made to prevent frauds and perjuries; and where that end is attained, the statute is satisfied. The decisions upon the statute are to be considered as fixed rules of property, 1 *Ves. jr.* 333; and, according to them, part performance is enough; which,

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from the nature of things, must be proved by parol testimony. If the contract be signed by one of the parties, it is sufficient. 2 *Ch. Cas.* 164. *Finch*, 39. 3 *Bro. Ch. Cas.* 318. The conduct of *Richardson* was fraudulent; and it has been frequently held, that fraud shall not be protected by the statute. 3 *Ves. jr.* 39, 724. It is admitted that part performance is enough; and here was such a performance, for *Baker* gave his bond for the money; which the vendor accepted; and therefore is bound in conscience to convey the land, which was to be the consideration for it. The admissions in the answer amount to a waiver of the statute; and take the case out of its operation, as the danger of perjury is removed. The contract never was rescinded; for as to what the witness says of the declarations of *Baker* at a subsequent period, they were not made in the presence of *Richardson*, and therefore could have no effect; and several other witnesses shew that *Baker* frequently offered payment of the purchase money, and demanded a fulfilment of the agreement by *Richardson*. So that in fact the contract never has been abandoned; but has always been insisted on; and it has been the perverseness of the vendor, which prevented the complete performance of it.

Wickham, in reply. The obligor sustained no injury from the bond; and therefore can derive no benefit from it; for the doctrine of part performance proceeds upon the ground of loss to him, who has performed. But, at any rate, *Baker* has given the strongest indications of abandonment, for several years before he attempted to set up the agreement.

Cur. adv. vult.

LYONS, President, delivered the resolution of the court, that it was unnecessary to decide the point upon the statute of frauds, as the judges were all clearly of opinion that the length of time was a sufficient defence, and precluded the appellee from all claim to relief. That both decrees were therefore to be reversed, and the bill dismissed with costs.