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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

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HACKETT *v.* ALCOCK.

Tuesday, April 16, 1799.

Relief afforded in Equity, against a bond given to secure a title to lands, although the consideration was not expressed in the bond.*

[A Court of Equity will always relieve against a penalty, where compensation can be made.]†

This was an appeal from a decree of the High Court of Chancery, affirming a decree of the County Court of Caroline. The bill states, that Hackett, the plaintiff, being entitled to a tract of land, after the death of his relation, Martin Hackett, and for which he had a deed, agreed with Alcock to give him a title thereto: provided he would clear him of the legion, in which he had enlisted. That, in pursuance of the agreement, he assigned Alcock his deed; who, pretending not to be satisfied with it, required the plaintiff to give his bond for a further title, in case it should be necessary. That Alcock drew a bill penal for 19,400 lbs. of tobacco and £5, 3s., without inserting any condition for a conveyance: which the plaintiff, who is ignorant of such things, executed; having first called upon witnesses to attend to the meaning of the parties. That Alcock afterwards brought suit on this penal bill, although the plaintiff had offered to make a further conveyance; but afterwards agreed to dismiss it, and said he would have a deed drawn. Notwithstanding which, that he fraudulently continued the suit, and obtained judgment against the plaintiff, for the full amount of the said bill penal. To which judgment, the bill prayed an injunction; which was granted.

The answer states, that the plaintiff often asked the defendant to clear him of the legion, for the land; but that he had refused to do so. At length, however, the defendant having a female slave for sale, the plaintiff offered him the land and thirty dollars for her: which the defendant agreed to. That afterwards, on the same day, the plaintiff informed him he had procured a man to take his place in the legion, for which he
[534] was to give him 3,000 lbs. of tobacco in hand; and requested the defendant to lend it to him. That the

*See the act of 1831, [Supp. to R. C. p. 157, §62, '3, '4,] and Code of 1849, [p. 654, §5, 6 and 7,] allowing *failure of consideration, fraud in procurement* of contract, or *breach of warranty of the title* or *soundness of personal property*, to be pleaded at law against action on contract.

†See instances of penalty from which Equity will relieve—*Winslow* v. *Dawson*, 1 Wash. 118; *Robertson* v. *Campbell, &c.* 2 Call, 431; *Mayo* v. *Judah*, 5 Mun. 495; *Mosby* v. *Taylor*, Gilm. 172.

defendant told him it was not in his power. That the plaintiff soon afterwards returned, and said that Johnston had two hogsheads, which he could get, if the defendant would pass his word to see it paid. That the defendant did so, and lent him a third. That the defendant procured a deed to be wrote, in September, 1782, for conveying the land, (reserving the said Martin Hackett's life therein;) which the plaintiff refused to sign. Whereupon, the defendant demanded security for the property he had given for the land; which the plaintiff agreed to, and gave the bill penal, estimating the slave at 16,000 lbs. of tobacco, and including the three hogsheads above mentioned, and £5, 3s. That the defendant then told him, if, by the time the bond fell due, he would pay him the tobacco lent, and make him a good title to the land, (the old man's life therein only excepted,) the bond should be void; but, otherwise, that it should be obligatory. That, some time after the bond became due, the plaintiff informed him he was willing to execute a deed for the land; when the defendant told him, if he would go to the office and get a sufficient evidence of his right to the same, he would settle it. That the defendant was, shortly afterwards, informed that the plaintiff had searched the records, and found that Martin Hackett the elder had a prior right: On which information the defendant brought suit on the bond. That, afterwards, the plaintiff produced a certificate, from the Clerk of Albemarle, that the deed to the plaintiff was recorded; which satisfied the defendant that the plaintiff's title was good, if there was no older one: and, therefore, he told the plaintiff to get copies of all the deeds, and, in the mean time, that he would endeavor to suspend the suit. That he, accordingly, directed the Sheriff not to return the writ till further orders, (meaning, thereby, to give the plaintiff a reasonable time to procure documents of his title;) but the Sheriff returned the writ, and the judgment was obtained. That the [535] plaintiff never produced any other evidences of his title; which is questioned and doubtful.

A witness deposed, that he saw Alcock refuse to sign a deed, which he believes is the one produced. A second witness deposed to the same effect; and, further, that in the year 1782, the defendant presented a deed to the plaintiff to sign, which he refused; and, thereupon, a bond was written; which the plaintiff was to pay off: he did not make the defendant a title. A third witness deposed, that in 1782, the defendant asked him to go and witness a bond, from the plaintiff, for a title to the land. That after it was executed, the defendant told the plaintiff he might have his choice, either to pay the amount of the

bond or make him a title. That the plaintiff said he would not sign the bond for any other purpose than to secure the title: which the plaintiff said was all he intended by the bond. Another witness deposed, that persons were called on to take notice that such was the object of the bond. Another witness says, he informed the defendant, that he the said deponent claimed the land: Which he still does.

Other witnesses proved that the bond was given for the title, and one related the circumstances relative to the original contract concerning the land and the woman slave, the tobacco, &c.

The deed spoken of by the first witness, reciting that the land had been conveyed to Martin Hackett the elder, for life, and afterwards to the plaintiff; and, that the plaintiff had agreed to sell and confirm the lands to the defendant, it then proceeds to convey them to the defendant, immediately; without postponing the possession until after the death of Martin Hackett the elder: Of whom the operative parts of the deed take no notice.

The County Court dissolved the injunction and dismissed the
[536] bill with costs; the High Court of Chancery affirmed that decree; and from the decree of affirmance Hackett appealed to this Court.

MARSHALL, for the appellant.

It is clearly proved, that the bond was only given as a security for conveying a title to the lands. The appellee was therefore bound to accept the conveyance and give up the bond. His insisting to compel payment of the penalty, because the consideration of the bond is not inserted in the condition, is a fraud; against which the Court of Equity ought to relieve. It is like the case of an absolute conveyance being taken by the creditor, when nothing more than a mortgage was intended. The case is the stronger, because the appellee actually promised to accept the deed after he had brought his suit; and, thereby, prevented the appellant from defending himself at law. The conveyance was only to have been of the remainder; whereas, the deed which was tendered by the appellee, was for an immediate conveyance; and was, therefore, properly rejected by the appellant.

WARDEN, for the appellee,

Insisted that the appellant not having performed the condition, the appellee became entitled to the money.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the Court to the following effect:

That the bond was given to secure a title to the land, and was to be void upon making a conveyance, is proved by three witnesses present, and not contradicted. They speak of the whole tobacco as on the same footing with the contract for the land; which probably proceeded from inattention of the parties at the time.

It is stated in the answer, and supported by Livingston, that the slave valued at 16,000 lbs. of tobacco was given for the land, and that 3,400 were lent and to be re-paid. The Court, therefore, are of opinion, that the 3,400 are an independent demand, unconnected with the land.

As to the deed tendered, there was a diversity of [537] opinion, whether it was a proper one; since, although it recited the estate for life of Martin the elder, it conveyed the land immediately, (and not in remainder at his death,) with a general warranty against all persons; not excepting the tenant for life.

But, this was thought unnecessary to be decided, as a majority of the Judges are of opinion that, without holding parties to strict time, a Court of Equity will always relieve against a penalty, where compensation can be made, placing the party in as good a condition, as if the land had been conveyed; as is proved by many cases in this Court, as well as in the Courts of that country, from whence we draw our principles of jurisprudence.* That this is a case which admits of compensation; and that the interest of the 16,000 lbs. of tobacco in lieu of rents or profits, will be a proper compensation.

Therefore, the decree is to be reversed with costs, and the injunction dissolved as to the 3,400 lbs. of tobacco with interest; and upon the appellant's executing a deed for the land, with warranty, and acknowledging or procuring to be recorded at the expense of the appellee,† and paying to him 800 lbs. of

[*See *Nelson* v. *Carrington et al.* 4 Munf. 332, 343; *Northcote* v. *Duke*, 2 Eden, 321, 322, and note (*a*); *Skinner* v. *Dayton et al.* 2 Johns, Ch. R. 526.]

[†Judge CARRINGTON said, in *Long* v. *Colston*, 1 H. & M. 115, that it is the custom of this country for the grantee to pay the expense of the deed.

In the recent case of *Fairfax* v. *Lewis*, 2 Rand. 20, it was held, that in case of a contract to convey, the purchaser is not bound to prepare the conveyance and tender it to the vendor for execution, unless such an obligation can be inferred from the terms of the contract. On the principles of the common law, any one undertaking to do an act or cause it to be done, is bound to do it or cause it to be done at his peril, and to find the means of doing it, unless it cannot possibly be done, without the active concurrence of the party with whom the contract is made. The exception to this general rule, in England, is founded on the practice of the profession in that country, which practice does not prevail here.

The rule as settled in *Fairfax* v. *Lewis*, was adjudged to be the rule in Penn. in the case of *Sweitzer* v. *Hummel, ex'r.* (May, 1817,) 3 Serg. & Raw. 228.]

tobacco *per annum*, from the death of Martin Hackett the elder, till payment, with the costs in law and equity within six months from the time of entering the final decree in the Court of Chancery, the injunction is to be made perpetual; but, if the appellant should fail to do so within that time, the whole injunction is to be dissolved.

SHELTON AND OTHERS *v.* WARD.

[538] *Friday, May* 3, 1799.

The High Sheriff may prove by *oral* testimony in a motion of his own against his deputy, that the recovery against himself was grounded on the misconduct of the deputy.

A motion in such a case, will lie for the Sheriff against the deputy Sheriff under the act of 1793.*

This was a motion made by Ward, in April, 1798, in the District Court of New London, "for a judgment, for the amount of a judgment obtained by John Wilson and George Adams, against the said William Ward, in September, 1797, for a trespass offered the said John Wilson and George Adams, by the said Daniel Tompkins, acting as deputy Sheriff under the plaintiff." The motion was continued until September Court, 1798, when it was determined. Upon the trial of the cause, the defendants filed a bill of exceptions to the Court's opinion, which stated, "that the plaintiff introduced a bond, executed by Daniel Tompkins, sen. deceased, and the present defendants, his securities, conditioned for the said Daniel Tompkins's performance of his duty as deputy Sheriff of the plaintiff; also a record of a judgment obtained against him by John Wilson and George Adams in the District Court of New London. Also a witness, who swore he had been examined on the trial betwixt the parties aforesaid, and that the judgment was obtained against the present plaintiff on account of the default of Daniel Tompkins, the then deputy of the plaintiff. That the defendants excepted to this evidence, alleging, that it ought to appear of record the judgment aforesaid against the plaintiff was obtained for his said deputy's default; and that the same did not appear by the declaration or any other process subscribed by the said deputy, and that proof

* 1 R. C. of 1819, p. 283, § 30, 32, 33 and 34. Code of 1849, p. 254, § 41-2.