REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

RICHMOND:
Printed by THOMAS NICOLSON,
M,DCC,XCVIII.

order was confirmed, and a writ of enquiry executed againſt the plaintiff in error, and the two Claibornes, and judgment was entered thereupon. The other defendants having pleaded *non eſt factum*, a verdict was found in their favor. The deputy ſheriff alone applied for, and obtained a ſuperſedeas.

The queſtions made were, 1ſt, whether the common order ought to have been confirmed againſt the *deputy ſheriff*, and 2dly, whether Armiſtead alone could obtain a *ſuperſedeas*.

WICKHAM for the plaintiff in error as to the firſt point, relied upon the caſe of White and Johnſon (ſee ante p. 159) as being expreſsly in point.

THE PRESIDENT. On the firſt point the court have no difficulty in reverſing the judgment, being of opinion that the law does not warrant a judgment againſt an *under ſheriff* for failing to take appearance bail upon meſne proceſs.

As to the other point (which was ſuggeſted by the court) we are of opinion, that as the deputy ſheriff was in no reſpect concerned in the merits of the cauſe, he alone, might obtain a ſuperſedeas.

The enquiry of damages muſt therefore, be ſet aſide, as to all the defendants, as muſt the proceedings ſubſequent to the declaration, and the cauſe is to be proceeded in anew upon the ſheriff's return, made upon the writs iſſued againſt the two Claibornes.

DANDRIDGE *againſt* HARRIS.

THIS was an appeal from a decree of the High Court of Chancery, diſmiſſing the plaintiff's bill, which was, to be let into a ſpecific performance of a contract between the parties, by which the defendant Harris was to repair a mill for the plaintiff, and to receive payment for it, either in money, or in property at a valuation to be made by two honeſt men, to be choſen, *one* by each party; and alſo to be relieved againſt a judgment at law obtained by the defendant, in conſequence of his fraud in not inſerting the alternative of payment in the written agreement, nor endorſing it on the back, as he agreed to do at the time of executing that agreement. The anſwer is a flat denial of every material allegation in the bill. The Chancellor conceiving the anſwer not to be diſproved, diſmiſſed the bill with coſts.

The

The PRESIDENT delivered the opinion of the court.

However it might appear to the Chancellor, this court have no doubt, but that the anſwer is fully diſproved by more than two witneſſes, who make it evident, that by the original agreement, before the work was begun, Mr. Dandridge was to have the alternative, and that at the time of ſigning the agreement, he refuſed his ſignature until Harris promiſed to make the endorſement allowing him that privilege. The alternative is an important part of the contract, ſince it might make a conſiderable difference to the appellant, whether he ſhould give up his property at a fair valuation, or be obliged to part from it under an execution at three fourths of its value, or, if he replevied, to have it finally ſold, perhaps at a much greater loſs.

It appears, that in the action at common law, brought by Harris upon the agreement, the jury found a ſpecial verdict, ſtating the above facts, as ſet forth in the bill. The appellant excepted to the opinion of the court, permitting the appellee to give parol evidence of thoſe facts, and the judgment which was in favor of the appellee was reverſed in the diſtrict court on account of the parol evidence having been admitted. Whatever might be the deciſion of a court of law upon the propriety of admitting ſuch proof to contradict a written agreement, there can be no doubt in equity, but that the appellee refuſing to make that endorſement, upon his promiſe to do which the agreement was ſigned, and availing himſelf of that agreement as an abſolute one, which in fact was only conditionally executed, he was guilty of a fraud, againſt which the court will relieve, by conſidering the endorſement *as made*, and incorporated into the agreement. The caſe of Walker *vs* Walker in 2d *Atk.* 98, which was read at the bar, does not apply; there was no written agreement in that caſe, and the queſtion was, whether the parol evidence of it could be admitted, under the ſtatute of frauds and perjuries. But there is a caſe there put by the Chancellor, which does apply. He ſuppoſes a perſon, advancing money, and taking an abſolute conveyance, to which, by agreement, there was to be a defeaſance, ſhould refuſe to execute the defeaſance. He puts the queſtion; will not this court relieve againſt ſuch a fraud? A ſtrong manner of declaring his opinion that it would, and it is very much like the caſe before the court. Conſidering the endorſements then as made, the court proceed to conſider what would have been the effect of it, at law. The defendant at law might have pleaded the ſpecial matter, that he was always ready to deliver property; that

that the plaintiff had neglected to name a perſon to value it, tho' he had promiſed to do ſo, and had refuſed to receive the property; which plea would have been ſupported by the proofs in the cauſe. But for want of this endorſement, the defendant was probably adviſed that he could not plead this matter, it being *dehors* the agreement, and therefore he pleaded conditions performed. It is true, the court permitted him at the trial, to give evidence of thoſe facts; and if the jury had upon that evidence decided againſt him, it would be reaſonable that he ſhould be bound thereby, ſince he would have had a fair trial upon the merits, as much ſo, as if the endorſement had been made. But that is not the caſe. The jury found matter ſufficient to excuſe him, and the County Court gave judgment in his favor, which the Diſtrict Court reverſed, the ground of which reverſal appears in the exceptions to have been, the admiſſion of the parol evidence: ſo that the appellee has committed a fraud in withholding the endorſement, and has then availed himſelf of it, by a legal objection, founded upon the want of that endorſement. If this be not a proper caſe for relief in equity, we are at a loſs to know how one can exiſt.

It was then objected, that ſuppoſe the endorſement made, it was the duty of Mr. Dandridge to tender property immediately, or elſe he loſt the benefit of the alternative. This caſe from its nature is very different from the common one of a debtor, owing money, who is obliged to ſeek his creditor in order to pay the debt. Here property was to be delivered, which could not ſo eaſily be conveyed from place to place as money, and it would be natural to ſuppoſe, that it was to be valued and received at the defendant's houſe; and the rather ſo, as being more convenient to him, in the ſelection of property which might have taken place. That an actual tender of property was made prior to that made at Johnſon's in November 1787, after the ſuit was brought, does not appear. And if it had ſtood upon that alone, the court would have conſidered Mr. Dandridge as having failed in performing his part of the agreement and conſequently that he had forfeited the alternative. But the fact appears to be, that on the 16th of December 1786 (the very day the work was finiſhed,) they ſettled their accounts, and fixed the balance at £48. Mr. Harris called upon Mr. Dandridge to ſign the account, which he refuſed to do, unleſs Harris would ſtate that property was to be paid; a circumſtance which he conſtantly adhered to as a part of the original agreement. He then deſired Harris to come to to him with the writing, and to join in naming perſons to value the property,

property, and to receive it, which Harris promiſed to do the next day, or the day after, but did not. Mr. Dandridge then wrote a letter to the father and ſon, requeſting them to come and have the property valued. They did not object, that the property ſhould be carried to them, but declared they would not receive property, and in February 1787, only 41 days from the time the work was finiſhed, and before Mr. Dandridge could probably have time to make a legal tender, Harris brought his ſuit.

Upon this view of the caſe, although Mr. Harris appears to have done his work honeſtly, and is entitled to his ſtipulated reward, yet ſince he has been delayed by what this court calls a fraud in him, and by his endeavours to uſe that fraud to the diſadvantage of the other party, he ſtands in a very different point of view in equity, from Mr. Dandridge, whoſe conduct through the whole tranſaction appears to have been fair and upright, at all times willing to perform his real agreement.

The court have to lament the expences which have been incurred on the occaſion, but are of opinion, that they ought to fall upon Mr. Harris, the party in fault, who is adjudged to pay the whole coſts at law and in equity.

It is objected that the court cannot decree a ſpecific execution in this caſe, becauſe the valuers were to be named by the parties, and as they did not name them, it is contended that the court cannot do it for them. In the caſes of Pleaſants Shore & company, and Anderſon *vs.* Roſs, (ante p. 156,) and Smallwood *vs* Hanſborough, (ante p. 290,) the parties named the valuers in their agreement, and it was decided that others could not be ſubſtituted in their ſtead, upon their refuſing in the one caſe to act, and in the other not having perfected what they were to do. In this caſe, no perſons were named, ſo as to ſhew a perſonal confidence, but a deſcription of their character only; they were to be honeſt men; and it is ſuppoſed, that if the parties ſhould refuſe to name, the Chancellor might eaſily find two men in the ſtate to anſwer the deſcription. The court are alſo of opinion, that the Chancellor might appoint a day, before which the parties ſhould name the valuers, or in caſe either refuſed, might direct it to be done by two honeſt men appointed by himſelf, to value the property, (negroes excepted) and upon delivering, or tendering the property ſo valued, to the amount of £ 48, the injunction to be perpetual.

But as there is difficulty in ſuch a decree, which may be delayed, if not defeated, by the valuers, whether choſen, or appointed, refuſing to act; and ſince the appellant com-

ing into equity, must do equity, and it appearing, that he has parted with the property in the mare, which in his bill he suggests to have been accepted by Harris, at £45, and to have been kept for him by the appellant; and the appellant having declared before bringing this suit, that he intended to pay the money, and only contended for the costs, the court is of opinion that the judgment at law ought to remain in force as to the £48, and be injoined as to the costs.

We therefore reverse the Chancellor's decree with costs. The injunction to be made perpetual as to all the costs at law: and to be dissolved as to the balance of the £48, if any shall remain after deducting therefrom the appellant's costs at law and in equity, as well as in this court: and if upon the adjustment of the account of the said £48 against the said costs, any balance shall remain due to the appellant, in that case the injunction to be perpetual as to the £48, and the appellee decreed to pay such balance.

DUVAL and MARSHALL for the plaintiff in error.

CAMBELL for the defendant.

N. B. The arguments at the bar are omitted being noticed much at large by the court.

NICOLAS *against* FLETCHER.

THIS was an appeal from a judgment of the District Court of Petersburg, affirming a judgment of the County Court of Amelia, rendered in favor of the appellee, upon a forthcoming bond, endorsed by the sheriff, "that the property therein "mentioned, had not been delivered on the day appointed for "the sale, to be dealt with according to law."

An exception was taken by the defendant below, that the plaintiff did not prove a non-performance of the condition, by good and sufficient testimony.

MARSHALL for the appellee. It was not necessary for the plaintiff below to prove a forfeiture, or breach of the condition, but it was incumbent on the defendant to prove performance. On the contrary, the sheriff has returned upon the bond, that the property was not delivered.

The court affirmed the judgment.

SCOTT