

Wallen v. Williams.

tion of the court below, but form no objections to the award. It does not appear from the record, that the defendant had refused or failed to do everything which the law required him to perform, to entitle him to the judgment of the court, and we must, therefore, presume, that no delinquency on his part was shown by the plaintiff; that if it was necessary for him to prepare and tender the deed, such as the law required, he did so to the satisfaction of the court. If he failed to do that which would warrant the court in entering judgment on the award, it was the duty of the plaintiff to have shown this, as cause against entering the judgment, and to have spread all the facts upon the record, which might enable this court to decide whether the court below acted correctly or not.

The award is said to be unreasonable, because it requires the plaintiff to get other persons to join in the conveyance to the defendant, which he may not be able to do. But surely, if the plaintiff was bound to pay the bonds in suit, or to convey a good title to certain property, which title would not be valid, in the opinion of the referees, unless other persons joined in the conveyance, he cannot surely complain, that he is ordered to pay the money, unless he executes such a deed as will pass a good title. It is his misfortune if he cannot make the title, but it is no reason why, in that event he should not pay the money.

There are other causes assigned why the award is unreasonable; but as the facts to prove it unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award.

Judgment affirmed, with costs.

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\*WALLEN v. WILLIAMS. (a)

*Equity practice.*

The circuit court of Tennessee, as a court of equity, cannot award a writ of *hab. facias possessionem* to enforce its decree.<sup>1</sup>

ERROR to the Circuit Court for the district of East Tennessee, in a suit in equity, in which Joseph Williams, on the 15th of November 1799, brought his bill of complaint against Elisha Wallen and John Williams, whereby he stated that the defendants and others, in the year 1779, entered into a copartnership in the entering of lands in the land-office for the sale of lands in that part of the state of North Carolina which now lies within the district of East Tennessee; and that each party was, on demand, to pay his proportion of the money due to the state upon the entries, to the party who should advance it: and that if any party so failed to pay his proportion, he should forfeit his share of the lands entered, and should cease to be a partner. That Joseph Williams, the complainant, paid the whole of the money due to the state for the lands entered, and that John Williams, one of the defendants, not having paid anything, sold his share of the lands to the other defendant, Wallen, who had notice that nothing had been paid by John Williams.

(a) March 17th, 1813. Absent, LIVINGSTON, TODD and STORY, Justices.

<sup>1</sup>The remedy is by injunction and writ of Grant (Pa.) 368; Kershaw v. Thompson, 4 assistance. Commonwealth v. Dieffenbach, 3 Johns. Ch. 609.

## Fairfax v. Hunter.

Wallen obtained patents, upon this assignment of John Williams, for two tracts of 640 acres each, and one for 440. The latter tract of 440 acres he sold to a purchaser without notice; but he still held the other two tracts. That the complainant had demanded from Wallen payment of John Williams's proportion of the money due to the state, which Wallen refused to pay. The defendant, in his answer, relied in part on the statute of limitations.

The facts being proved to the satisfaction of the judge, he decreed that "the said Elisha Wallen be divested of all the right, title, interest, property and claim which he had, or has, to the said two tracts of 640 acres, and each of them, and that all the right, title, interest, property and claim of, in and to said two tracts of land, and each of them, and every part and parcel thereof, be vested in the said complainant, Joseph Williams, his heirs and assigns for ever, to \*have, hold, occupy, possess and enjoy the same, [\*603 and each and every part thereof, with their hereditaments and appurtenances, against the said Elisha Wallen, his heirs and assigns for ever." And it was further decreed, that the defendant, Wallen, should pay to the complainant the sum of \$593.33 $\frac{1}{2}$ , the value of the tract of 440 acres as found by the jury which had been impanelled to ascertain its value; and that for the purpose of compelling payment thereof, the complainant should have execution, which was accordingly issued and satisfied.

The complainant afterwards obtained a writ of *hab. facias*, grounded upon the affidavit of the marshal, that the defendant refused to deliver possession to the complainant, according to the decree. By virtue of this writ, the complainant was put into possession of the two tracts of 640 acres each; and the defendant, Wallen, brought his writ of error.

*Jones*, for the plaintiff in error, moved the court to direct the court below to quash the writ of *hab. facias*, and to award a writ of restitution; upon the ground, as it is understood, that the court below, as a court of equity, could not award such a writ. He cited 5 Com. Dig. tit. Pleader, 3 B. 20; and 9 Vin. Abr. 478 (8vo. Ed.), tit. Error, F. pl. 3.

There was no appearance for the defendant in error.

THE COURT made the order, agreeable to the motion.

## FAIRFAX'S DEVISEE v. HUNTER'S LESSEE. (a)

*Lord Fairfax's estate.*

Lord Fairfax, at the time of his death, had the absolute property, seisin and possession of the waste and unappropriated lands in the Northern Neck of Virginia.

An alien enemy may take lands in Virginia, by devise, and hold the same until office found.

The commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck, until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax.

THIS was a writ of error to the Court of Appeals of Virginia, in an action of ejectment, involving the construction \*of the treaties between [\*604 Great Britain and the United States—the judgment of the court of

(a) February 27th, 1813. Absent, MARSHALL, C. J., and WASHINGTON, J.