McFerran v. Taylor.

February 13th, 1806. MARSHALL, Ch. J., after stating the case, delivered the opinion of the court.

This court has no jurisdiction under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is *against* their validity, &c., or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission *held under, the United States, and the decision is *against* the title, right, privilege or exception, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission. [*270

In the present case, such of the defendants as were aliens, filed a petition to remove the cause to the federal circuit court, under the 12th section of the same act. The state court granted the prayer of the petition, and ordered the cause to be removed; the decision, therefore, was not *against* the privilege claimed under the statute; and therefore, this court has no jurisdiction in the case. The writ of error must be dismissed.

MCFERRAN *v.* TAYLOR and MASSIE.

Implied warranty.— Verdict.

He who sells property on a description given by himself, is bound in equity to make good that description; and if it be untrue in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.[1]

Quære? If the mistake be of a matter deemed perfectly immaterial by both parties, at the time of the contract, and of a matter which would not have varied the bargain, if it had been known, and of which both parties were equally ignorant, whether a court of equity ought to interfere?

A finding by the jury, which contradicts a fact admitted by the pleadings, is to be disregarded.

ERROR to a decree of the District Court of the district of Kentucky, in chancery.

McFerran, in his bill, alleged, that on the 19th of March 1784, the defendant, Taylor, for a valuable consideration, executed his bond to the complainant, for the conveyance of 200 acres of land out of 1000 acres located by him on Hingston, or out of 5000 acres which Taylor then had for location. The condition of the bond was as follows: "that if the said Richard Taylor, his heirs, &c., shall well and truly make, or cause to be made, to the said Martin McFerran, his heirs or assigns, a good sufficient title in fee-simple to two hundred acres of land in the county of Kentucky, out of 1000 acre tract, located by the said Richard Taylor on Hingston's fork of Licking; or 200 acres out of 5000, which the said Taylor has now for location, provided he obtain the same, at such part or place thereof as the said McFerran shall choose, not to exceed more than twice the breadth in length thereof, so soon as the lands can, in any degree of safety, be surveyed; *then this obligation to be void, otherwise to remain in full force and virtue." [*271

[1] See Smith *v.* Richards, 13 Pet. 26.

The bill further alleged, that on the 25th of September, in the same year, the defendant, Taylor, executed another bond to the complainant for 300 acres of land adjoining the former tract of 200 acres. That the said 5000 acres of land alluded to by the bonds, was granted to Taylor, for his military services, by a warrant numbered 1734, which issued for 6000 acres; but that Taylor did not inform the complainant that it contained more than 5000 acres. That 1000 acres of the 6000 had been located on Paint Creek, and 2000 on Brush Creek, in the north-western territory, and 3000 on the Green River, in the district of Kentucky. That Taylor had not any lands on Hingston, so that the complainant could not make his choice there, where he averred the general quality of the land was equal to any in Kentucky, and was worth from $8 to $10 an acre. That Taylor has sold the 1000 acres on Paint Creek to the defendant, Massie, who, before he paid for the land, and obtained a title from Taylor, had notice of the complainant's claim to 500 acres from Taylor, as before stated.

That before the sale to Massie, Taylor had sold the 2000 acres on Brush Creek, to Abraham Buford, or to some one else, and in consequence thereof, assigned the certificate of survey to John Brown. That in 1796, the complainant applied to Taylor, to show him his lands, that he might make his choice, but Taylor neglected and refused to show them. That the complainant *chooses* to have the 500 acres laid off, and conveyed to him from the land on Paint Creek, and had given notice of his choice to Taylor, who refused to convey the same from out of that tract, and refused to accompany the complainant to have the same laid off; and that Massie also refused to convey.

The bill concluded with a prayer, that the complainant might be permitted to make choice of 500 acres of land out of the 1000 acres on Paint Creek; that the defendants might be compelled to convey the same; and that the court would grant general relief, &c.

*272] *The answer of the defendant, Taylor, admitted the bonds, and that the 500 acres were to be laid off in one tract. It alleged, that the consideration of the first bond was two horses, sold to him by the complainant, at the price of 40*l.* Virginia currency for both; and that the consideration of the other bond was another horse, valued at 48*l.* It referred to the entry for the 1000 acres upon the waters of Licking, dated June 15th, 1780, which was in these words: "Colonel Richard Taylor enters one thousand acres on treasury-warrants, adjoining an entry of Major Thompson's, on a buffalo road leading from Hingston's fork to the sweet licks, beginning at his south-east corner, thence, north, along said Thompson's line, 600 poles, thence, east, for quantity." The answer then averred, that the mentioning of Hingston's fork of Licking in the bond, was not a description of locality, but of tract; and that the mentioning Hingston was no greater recommendation of the land than if another fork of Licking had been named; because both parties were unacquainted with it, and Taylor had understood that his said entry was on Hingston. That the provision in the bond for a choice out of 5000 acres was an alternative; and it was not intended, that the complainant should have his choice out of the 6000 acre warrant; and it was intended and understood by both parties, that Taylor should hold 1000 acres thereof, unincumbered, and not liable to the complainant's choice. It averred further, that these 1000 acres were located on the shares

on Paint Creek ; that Taylor held part, and Kenton and Helm another part, as locators ; that he sold his part to Massie, but he did not recollect the quantity. Of the remaining 5000 acres, he exchanged 2000 with Colonel Abraham Buford, for two entries of 1000 acres each, because there was a greater probability of getting good land upon small entries than upon large. That these 2000 acres were located on the south side of Green river. That the other lot of 2000 acres, part of the 5000, was located on the north fork of Paint Creek ; but understanding the land was not good, he had 1500 acres withdrawn, and finally located on some of the waters of Paint Creek, as he was informed ; but he was so much unacquainted with that country, that he could not point it out particularly. The remaining 1000 acres were located and patented south of Green river. That he had offered the complainant a choice of any of those lands, except the 1000 acres held *by [*273 Massie, Kenton and Helm, which he had refused. That the 500 acres on the north fork of Paint Creek were inferior to the other lands, as he had been informed and believed ; and the complainant having positively refused them, Taylor had sold them. But the 1500 acres on the waters of Paint Creek, which were originally part of the 2000 acre lot, and the three tracts of 1000 acres each, south of Green River, were yet held by him ready for the choice of the complainant. That Taylor informed the complainant, before the commencement of this suit, fully, of the exchange with Buford, and had been always ready and willing to let him have his 500 acres as aforesaid. That Taylor informed the complainant of his said military warrant ; and that it was for 6000 acres ; and that he reserved 1000 acres thereof, which it was then possible he might want to live on, and that the complainant's right of choice was only to extend to the remaining 5000 acres. That since Taylor discovered that the first-mentioned 1000 acres laid on Slate Creek, a branch of Licking, and not on Hingston, a branch of Licking, he informed the complainant thereof, and also that he had no lands on Hingston.

The answer of Massie denied, that previous to his paying the consideration of the land to Taylor, and the issuing of the patent, he had any notice that the complainant had any claim to that land, and averred, that he was a *bonâ fide* purchaser, for a valuable consideration, without notice.

The jury (who, by the practice of Kentucky, are called to ascertain facts in chancery suits) found the following facts :

1. That the defendant executed the bonds.

2. That at that time, he had no lands on Hingston's fork of Licking.

3. That on the 29th of August 1795, he assigned to John Brown, the plot and certificate of survey, &c. (the 2000 acres before mentioned), which survey was made by virtue of a military warrant, No. 1734.

*4. That on the 31st of July 1797, he assigned to Massie, &c., [*274 the 1000 acres before mentioned, being a survey of part of the same warrant.

5. That the complainant demanded of Taylor 500 acres, in virtue of the said bonds, before the commencement of this suit ; but it did not appear that any lands had been conveyed in compliance with that demand ; neither did it appear that any particular piece of land was pointed out by the complainant, when the said demand was made, except that he had made his election to have 500 acres out of the survey assigned to Massie, and gave notice thereof to Taylor, who refused to convey it.

6. That 500 acres might be laid off in that survey, worth five dollars an acre, in the form called for in the bonds.

7. That the 5000 acres mentioned in the bonds were part of the warrant No. 1734, for 6000 acres, granted to Taylor for his own services.

8. That Taylor had the entry of 1000 acres, of June 15th, 1780.

9. That when the bonds were executed, Taylor had a military warrant for 6000 acres, 1000 whereof were entered on Paint Creek, in partnership with the locators, and since assigned to Massie ; 2000 were exchanged with Abraham Buford, for other 2000 acres of military warrants, in separate entries of 1000 each, because Taylor deemed it more probable that he should get good land on small entries than on large ones.

10. That 1000 acres of the said 5000 were entered on the south side of Green River.

11. That the remainder of the 5000 acres is located on Paint Creek, or its waters.

12. That Taylor was willing that the complainant should make his choice out of any of the three tracts of 1000 acres each, south of Green River, or out of the 1000 acres on the waters of Licking, or out of the 500 acres, or the 1500 acres, on the waters of Paint Creek.

*275] *13. That the average price of lands on Hingston, was three and a half dollars per acre, and on Slate, two dollars per acre.

14. The 1000 acres adjoining Thompson, were worth two dollars per acre.

15. The land transferred from Taylor to Buford, was worth one dollar and fifty cents per acre.

16. The land transferred by Buford to Taylor, was worth two dollars per acre.

The decree of the district court, upon the bill, answers, and facts found, was, in substance : That the complainant should, on or before the 1st of September then next, make choice of his 500 acres out of the following tracts of land, to wit, 1000 acres adjoining Major Thompson's entry, on a buffalo road leading from Hingston's Fork to the Sweet Licks ; the 2000 acres transferred by Buford to Taylor ; the 1000 acres entered in the name of Taylor on Lost Creek, a branch of the Ohio ; the 500 or the 1500 on Paint Creek ; and give notice to Taylor of such choice, within one month after it should be made.

Commissioners were appointed to lay off and survey the said 500 acres for the complainant ; and it was further decreed, that Taylor should, before the 1st of November then next, convey the said 500 acres to the complainant ; but if the complainant should not make his choice, and give notice as aforesaid, then Taylor should, on or before the 25th of the then next November, convey to the complainant 500 acres out of one of the said tracts, in a reasonable form, according to the condition of the bonds ; and that Taylor should pay the costs of the suit. Upon this decree, the complainant sued out his writ of error.

Breckenridge, Attorney-General, for plaintiff in error.—The records *276] show that Taylor had no land on Hingston, *and that, at the time of the decree, the plaintiff had not the liberty to choose out of the 5000 acres.

When a specific execution of a contract is decreed, it must be decreed to

be executed entirely, or not at all. Contracts receive the same construction in a court of equity as in a court of law. Neither can make an agreement for the parties. A court of law, in the construction of the present bond, on an action of debt, upon a breach of the condition in not conveying land on Hingston, could not consider the bond as discharged by the conveyance of land on Slate Creek. The defendant knew, or ought to have known, his property, so as not to deceive the plaintiff.

The difference in value between the lands on those two water-courses, is found by the jury to be a dollar and a half per acre. Suppose, the land on Slate Creek had been worth ten times as much as that on Hingston, the defendant could not, by this bond, have been compelled to convey land on Slate Creek, when he had contracted to convey land on Hingston. As the defendant, therefore, had no lands on Hingston, a specific performance of the contract was impracticable, and therefore, the plaintiff was, at least, entitled to damages to the value of those lands.

The decree is erroneous in another point. It directs the plaintiff to make choice out of 5000 acres of the defendant's land, when it is confessed. by the answer that the defendant had but 4500 acres; the 500 on the waters of Paint Creek having been sold by him. It is true, that the 12th fact found is, that the defendant is willing to let the plaintiff have his choice out of all his military lands, including these 500 acres, but a jury can find nothing contrary to that which is confessed or not denied in the pleadings.

*The court below has decreed that the defendant may specifically execute his contract, although it appears, 1. That he has no land on Hingston. 2. That he has sold 500 acres of the 5000, and, consequently, 3. That the 6000 acres out of which the plaintiff had a right to choose, is reduced to 4500. [*277

By the contract, the plaintiff had a right to choose out of 6000 acres, and as the defendant had no land on Hingston, is it not fair and equitable, that the plaintiff should have liberty to choose out of the defendant's 6000 acres? And as the defendant has reduced the plaintiff's choice to 4500 acres of land, inferior to the other 1500 acres, the plaintiff seems to be entitled to damages for the difference in quality. The plaintiff is certainly entitled either to a choice out of the whole of the defendant's military lands, or damages equal to the whole value of the lands on Hingston.

Hughes, for the defendant in error. Two questions arise in this case: 1. Had the plaintiff a right to choose lands not mentioned in the bond? 2. Has any conduct of the defendant enlarged the plaintiff's right of choice, under the contract?

The bill charges no fraud. Massie's 1000 acres were not within the plaintiff's choice. Taylor meant to reserve these 1000 acres unincumbered. The plaintiff was to choose only out of 5000 acres; and, although Taylor had a right to locate 6000 acres, yet that was no reason for the plaintiff's claim to choose out of the whole 6000. The answer of Taylor positively denies that the plaintiff's choice was intended, or understood by either party, to extend to the whole 6000 acres of military land; and this answer being responsive *to an allegation in the bill, and not contradicted by evidence, is conclusive upon that point. [*278

2. Has any conduct of the defendant enlarged the plaintiff's right of

choice? He relies on the mistake in the description of the land, but does not allege fraud. If it was a mistake, both parties were equally ignorant, as both lived in Botetourt county, in Virginia. It was not known to either, that the lands on one of the creeks was more valuable than those on the other, or that they would become so, in the course of the twenty years which have now elapsed since the date of the contract.

The words of the bond are, "out of one thousand acre tract located by the said Richard Taylor, on Hingston's fork of Licking." The real location was "on a buffalo road leading from Hingston's fork to the sweet licks." The description was intended to be of the tract located by the defendant several years before, and was not intended to fix its locality. Both the parties meant the same thing; they meant the 1000 acre tract located by the defendant in 1780, wherever it might lie. The fact turned out to be, that the tract did not lie exactly as it was supposed to lie, but still, it was the same tract which was contemplated by both parties. The description "on Hingston's fork of Licking," could not, at that time, influence the plaintiff; he has not even averred in his bill, that it did. The defendant has always been ready and willing to give the plaintiff his choice in the land actually intended by both parties, at the time of the contract.

The jury have found the present comparative value of the lands, not what it was twenty-two years ago. Its present value may depend on a variety of circumstances, which could not have been foreseen and contemplated, at the time of the contract.

*279] *The defendant is ready specifically to execute the contract as it was understood by the parties at the time; but as the plaintiff now construes it, it cannot be executed specifically, and therefore, there is no ground for an equitable jurisdiction. The party must be left to his remedy at law.

There is no contradiction between the admission in the defendant's answer, that he had sold the 500 acres which the plaintiff had refused, and the 12th fact found by the jury, that the defendant was willing that the complainant should make his choice out of those 500; for although the defendant may have sold them, yet, it does not appear that he has conveyed them away, and he may be willing to forfeit his contract for the sale of them, if the plaintiff should choose them; or if conveyed, he may be willing to take the chance of repurchasing them.

The *Attorney-General*, in reply.—Under no rational or legal construction of the bonds, can they be supposed to refer to lands located on Slate Creek, when they mention lands located on Hingston. This would be to make, and not to construe, the contract. The acquirement of land on Hingston was the plaintiff's object. It was unimportant to him, by whom, or when, the lands were located.

If the defendant had contracted to transfer, on a certain day, six per cent. stock, he could not discharge that contract by the transfer of three per cent. stock, although he should make up in quantity the difference of value arising from the different quality of the stock. But here the defendant offers only the same quantity of inferior land.

It is no excuse for the defendant, to say that no fraud was intended by him in describing the land as lying on Hingston, when it laid on Slate; and that it

was a mere mistake of a name. Whether it happened by mistake or fraud, is totally immaterial to the plaintiff. The defendant sold, and the plaintiff bought, the land on the defendant's own description. He was bound to describe it truly. But the jury have found his description to be false in a very important particular. The injury to the plaintiff is the *same, whatever may have been the motives of the defendant, and he is equally [*280 bound to repair the injury. The plaintiff, therefore, if not entitled to the land on Paint Creek, which he has elected, or to the value thereof, is entitled to the value of the lands on Hingston.

Marshall, Ch. J., delivered the opinion of the court.—The bill states the original contracts, and claims a specific performance, by permitting the plaintiff to elect the 500 acres to which he is entitled, out of the tract of 1000 acres, which had been located on Paint Creek; and also contains a prayer for general relief.

On the specific object of the bill, the right to make an election out of the lands on Paint Creek, there can be no difficulty. One thousand acres, part of the original warrant, having been clearly withdrawn, at the time of the contract, from the quantity out of which the 500 acres, sold by the defendant, were to be chosen, there can be no pretext for the claim set up in the bill. As little foundation is there for the claim to damages, instead of the land itself, on account of the 500 acres stated in the answer to have been sold; which sale, the counsel for the complainant considers as a wrong, which has put out of his client's reach a tract he had a right to elect, and has, consequently, disabled the defendant from complying with his contract. To this claim two answers may be given, either of which would completely defeat it.

1st. The fact found by the jury shows, that the defendant is still ready to convey this land. The attorney-general would exclude this finding from the case, because it contradicts the admission of the answer; and it is a rule of law, that a finding which contradicts a fact admitted in the pleadings, is to be disregarded. The principle of law is unquestionably laid down correctly; but the court can perceive no incompatibility between the admission of the answer, and the fact, as found by the jury. They may both be true; and, of consequence, *the court must consider both as true. After [*281 the answer was filed, the land may have been repurchased by Mr. Taylor, and such a repurchase would have been proper evidence, to justify the fact found by the jury, and would put him in a situation to perform his contract, so far as respected this particular tract. But were it even otherwise—

The 2d answer is, that the concession made by the defendant must be taken altogether. He states the complainant to have refused this particular tract of 500 acres, before it was sold. The complainant had, consequently, elected not to take it, and, of course, the defendant was at liberty to dispose of it.

The other point in the case is attended with more difficulty. It is, that the representation made by Taylor, at the time of the sale, was untrue in a material point. He represented the tract of 1000 acres which had been located, and out of which the plaintiff would have a right to take the lands he purchased, to lie on Hingston's fork of Licking, when, in truth, it lay on

Slate, another branch of the same river, where the lands prove to be less valuable than on Hingston. That this misrepresentation is material, cannot be denied; but it is contended by the defendant, that it originated in mistake, not in fraud; and as the country was, at that time, unknown to both the contracting parties, and the material object was to give the purchaser a right to take the land he had purchased out of the tract already located for the seller, an accidental error in the description of the place where the tract in contemplation of the parties lay; an error which could have had, at the time, no influence on the contract, ought not now to affect the person who has innocently committed it.

From the situation of the parties and of the country, and from the form of the entry, it is reasonable to presume, that this apology is true in point of fact; but the court does not conceive that the fact will amount to a legal justification of the person who has made the misrepresentation. He who sells property on a description given by himself, is bound to make good that description; and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still remain *liable for that variance. *282]
In this case, the defendant has sold land on Hingston, and offers land on Slate. He has sold that which he cannot convey, and as he cannot execute his contract, he must answer in damages. It is, therefore, the opinion of the court, that the plaintiff is entitled to an issue to ascertain the damages he has sustained by the inability of the defendant to perform his contract, and to the damages which shall be found.

Although, in the general principles laid down, the court was unanimous, I did not, in consequence of the particular circumstances of this case, concur in the opinion which has been delivered. I will briefly state those circumstances.

In his bill, the plaintiff does not allege that he was, in any degree, induced to make the contract, by supposing the land already located to lie on Hingston's fork. This representation, then, was an accidental circumstance, which has not, in the slightest degree, influenced his conduct. Nor does he now, in his bill, urge this variance in the description of the property as a reason for claiming damages, instead of the specific thing contracted to be sold. Nor does it appear, that this claim was set up in the district court. On the contrary, he alleges, that the land on Paint Creek is also in his power, and insists on making his election out of that tract. Under such a bill, in a case where the contract is a very advantageous one to the purchaser, I am not convinced, that a court of equity ought to award him damages, on account of an error in the description of the property, which was innocent in itself, which at the time appeared to be unimportant, and which most obviously did not conduce to, nor in any manner affect, the contract. The person claiming damages in such a case should, I think, be left to his remedy at law. I should, therefore, have been disposed to affirm the decree of the district court. I am, however, perfectly content with that which I have been directed to deliver.(a)

(a) The Judges present were, MARSHALL, Ch. J., PATERSON, WASHINGTON and JOHNSON, Justices.