

Skillern v. May.

But several other questions arise, which a court consisting of four judges finds itself unable to decide, and therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done, with the less reluctance, because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose *those who have been charged with treason to be proper objects for [*137 punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

SKILLERN'S EXECUTORS v. MAY'S EXECUTORS.

Fraud and failure of consideration.

If the obligee of a bond obtain title in his own name, for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the title to the residue of the lands to be lost, by non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond.

A court of equity will annul a contract, which the defendant has failed to perform, and cannot perform, on his part.

ERROR to the District Court of the United States for the district of Kentucky, in chancery.

The facts of the case, as they appeared upon the record, are as follows: Skillern put into the hands of Richard May several land-warrants, to locate in Kentucky, under an agreement that May should have half the land for locating the whole, who accordingly located the quantity of 2500 acres, in the name of Skillern, but not to his satisfaction, and the matter was not settled between them, at the time of Robert May's death, when his interest in the lands so located descended to his son, John May, the defendants' testator. Skillern afterwards came to an agreement with John May, on the 6th of March 1785, by which Skillern was to assign to John May one military warrant for 200 acres of land, and all the treasury-warrants located in the name of Skillern, with the entries and locations made thereon, which assignment was, on the same day, executed, but never lodged in the land-office, or the office of the surveyor of the county where the lands were situated. In consideration of this assignment, and in full of all demands by Skillern against the representatives of Robert May's estate, John May gave to Skillern a bond, dated March 6th, 1785, to convey to Skillern 1000 acres of the land to which Robert May was entitled at his death, and which remained unsurveyed, to be chosen by Skillern, before the 15th of June 1786. *It was also agreed, [*138 by another writing of the same date, that if Skillern would give up the bond for 1000 acres, John May should convey to him 1100 acres of other land described in the writing, and Skillern was to make his election of the one or the other, before the 1st of October 1786. This last agreement was afterwards cancelled, and a bond, in lieu thereof, given by John May to Skillern, dated October the 9th, 1787, to convey to the latter, on or before the 1st of December 1788, "eleven hundred acres of first rate elk-horn land, well watered, and lying within ten miles of Lexington."

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Skillern, notwithstanding the assignment of his military and treasury warrants to John May, afterwards obtained patents thereon for 1050 acres, of the value of \$4416.66. There was no evidence that Skillern ever offered to convey those lands to May, or his representatives.

The bond of 6th of March 1785, and that of the 9th of October 1787, were both fraudulently placed by Skillern in the hands of his agent, for the purpose of enforcing payment of both. The agent, supposing both bonds to be due, entered into an agreement with John May's executors, the present defendants, for the discharge of the bond of 6th of March 1785, and the same was given up by Skillern's agent, to the defendants, with a receipt thereon. But the agent finding afterwards that the bond of 6th of March 1785, was vacated by that of the 9th of October 1787, refused to carry that agreement into effect, but brought an action of covenant upon the condition of the *sat*-mentioned bond, and recovered damages to the amount of \$8433.33.

John May devised his lands to his executors for the payment of his debts, and this bill was brought by Skillern, in his lifetime, to subject the same to the payment of the judgment recovered at law. Pending this suit in chancery, Skillern died, leaving infant heirs, and the suit was revived in the name of his executors. Sixty acres, part of the 1050 acres, had been sold for *139] the payment of the state tax due from Skillern, *and the two tracts of 300 and 250 acres had been sold for the direct tax due to the United States, but were redeemed by the purchaser of the 60 acres.

After the filing of this bill, and after the death of Skillern, John May's executors filed a cross-bill against Skillern's executors, and it was agreed, that both suits should be tried at the same time.

The court below decreed a perpetual injunction as to \$4416.66, part of the judgment at law, the same being the value of the 1050 acres patented in the name of Skillern, and decreed payment of the residue out of the real estate of John May, unless it should be otherwise paid, by a day named in the decree. Both parties sued out their writ of error.

H. Clay, for Skillern's executors.

C. Lee, for May's executors.

It was contended, in behalf of May's executors, 1st. That inasmuch as both bonds, viz., that for 1000 acres, and that for 1100 acres, were given for one and the same consideration, a discharge of either was, in equity, a discharge of both; and that having discharged the first bond, by a new engagement, the executors of Skillern could not, in equity, claim satisfaction of either.

2d. That Skillern having taken to his own use part of the land which he had agreed to assign to May, as a consideration of the bonds, could not enforce them in equity.

3d. That as Skillern had suffered a part of the lands to be lost, by not paying the taxes, he had thereby made himself chargeable for the lands, and had in fact received a full equivalent for the consideration of the bonds; and therefore, there ought to have been a decree for a perpetual injunction as to *140] the whole amount of the *judgment at law; especially, as the fact of fraud on the part of Skillern is expressly found by the jury. The half of 2500 acres was all he was entitled to, if his conduct had been fair.

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But as it has been found otherwise by a jury, a court of chancery ought not to have given its aid to enforce any part of the judgment at law.

For Skillern's executors, it was said, that it was not in the power of Skillern alone to put an end to the contract. That by surveying and patenting the lands, he had saved them from forfeiture, for not surveying within the time limited by law. That although the lands had been sold for taxes, yet the redemption inured to the benefit of the right owner. The jury found the value of the 1050 acres of land, but not the value of the title. The land may be worth \$15 an acre, but the title may be worth nothing. The patents had issued by mistake in the name of Skillern, and that mistake was owing to May's not having filed the assignment in the proper office. Skillern's executors are ready and willing to transfer those titles to the defendants.

THIS COURT gave no other opinion in this case than is expressed in the following decree.

"It is the opinion of the court, that G. Skillern, by acquiring to himself the legal estate to 1050 acres of land, the equitable right to which he had transferred to John May, on the 6th of March 1785 (and having never conveyed or offered to convey the said lands to May, or to his legal representatives), and it appearing, that at the time of the decrees rendered in these causes, certain parts of the said entries to which Skillern had thus acquired the legal title, and which constituted a part of the consideration of the bond on which the judgment at law was entered, had been lost, in consequence of the neglect of Skillern to pay the taxes due thereon, the complainants below in the original suit were not entitled to the aid of a court of equity to enforce *the execution of the obligation of the 9th of October 1787, [*141 or to obtain satisfaction of the judgment at law founded thereon.

"It is, therefore, decreed and ordered, that the decree of the district court rendered in the original cause be reversed and annulled, with costs; and this court doth remand the same to the said district court for further proceedings to be had therein, in order that an equal and just partition of the 2500 acres of land mentioned in the said assignment of the 6th of March 1785, be made between the legal representatives of the said George Skillern and the said John May.

"And as to so much of the decree in the cross-suit as enjoins \$4416.66, part of the judgment at law, this court doth affirm the same; and as to the residue of the said decree, it is decreed and ordered, that the same be reversed and annulled, with costs; and this court, proceeding to give such decree in the said cross-suit as the said district court ought to have given, it is further decreed and ordered, that the judgment at common law mentioned in the said bill be perpetually enjoined."¹

¹ For a further decision in this case, see 6 Cr. 267.