*United States v. John Arthur and Robert Patterson.

Plea of performance.—Oyer.—Demurrer.

The want of *oyer* of the condition of a bond, in plea of performance, is fatal.[1]

Upon demurrer, the judgment of the court must be against the party who commits the first error.

Error to the Kentucky district court of the United States, in an action of debt, on a bond for $6000.

The *capias ad respondendum* issued on the 28th of June 1803, returnable to the first Monday of July, in the same year, and was served on the 30th of June. The declaration was in the usual form of an action of debt for the penalty of the bond, with a *profert*, but without setting forth its condition or any breach thereof. The defendants, without praying *oyer*, pleaded as follows:

"And the defendants, by their attorneys, come and defend the wrong and injury, when and where, &c., and for plea say, they have well and truly kept and performed, and have faithfully executed and discharged, all and singular the duties enjoined on them by the laws of the United States, and the conditions in the writing obligatory in the declaration mentioned, and this they are ready to verify," &c.

The plaintiffs replied, that they ought not to be barred, &c., because they say, "that the said defendants have not well and truly kept the several conditions in the said writing obligatory, as they in pleading have alleged, but have broken the same, in this, to wit, that the said John Arthur, although duly appointed to the office of collector of the revenue for the first division of the first survey of the district of Ohio, as stated in the said condition, had not, at the time of executing the said writing obligatory, executed and discharged, nor after the execution *thereof, did he continue to execute and discharge, faithfully, all the duties of [*258 said office; and also failed to settle his accounts with the proper officer, according to law, for more than six months previous to the institution of this suit, and also failed to pay over to the proper officer the duties which were collected, or the duties which, by law, and the accounts rendered by the said John, he was bound to collect and pay over; and is in arrear to the said United States in the sum of $16,181.15, due from and unpaid by him in his said office of collector as aforesaid; and this the said plaintiffs pray may be inquired of by the country."

To this replication, the defendants demurred specially, "because this suit is prosecuted under the 14th section of the act of congress passed in the month of July 1798, c. 88, entitled, 'an act to regulate and fix the compensation of the officers employed in collecting the internal revenues of the United States, and to insure more effectually the settlement of their accounts;' which section is in the following words, to wit: 'The bond of any supervisor or other officer of the revenue, who shall neglect or refuse, for more than six months, to make up and render to the proper officer, his accounts of all duties collected or secured, pursuant to such forms and regulations as have been, or shall be, prescribed according to law, or to

[1] *Oyer* of a bond does not include *oyer* of its condition; nor *è converso*. United States *v.* Sawyer, 1 Gallis. 88.

verify such accounts, on oath or affirmation, if thereto required, or to pay over the moneys which shall have been collected, shall be deemed forfeited, and judgment thereon shall and may be taken at the return-term, on motion, to be made in open court, by the attorney of the United States, unless sufficient cause to the contrary be shown to, and allowed by, the court; provided always, that the writ or process in such case shall have been executed at least fourteen days before the return day thereof;'

"And the plaintiffs, in assigning the breach in the following words, to wit: 'And also failed to pay *over to the proper officer the duties which were collected, or the duties which by law, and by the accounts rendered by the said John, he was bound to collect and pay over,' have assigned the said breach neither within the letter nor the meaning of the said section of the said act of congress; but the same is calculated to charge the said defendants with the amount of the duties due within the said first division of the first survey of the district of Ohio, whether the same is collected or secured, or not, or whether they could or might have been collected or not."

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This demurrer being joined, the judgment of the court below was in favor of the defendants; and the United States brought their writ of error.

Rodney, Attorney-General, for the United States.—Whether the replication be good or not, the defendants have committed the first error in pleading, and therefore, the judgment of the court below ought to have been against them. The plea is bad, for want of *oyer* of the bond, and of the condition, the performance of which is pleaded; as in the case of *Wallace* v. *Duchess of Cumberland*, 4 T. R. 370, where the defendant, after praying *oyer* of the bond and condition, omitted to set forth the recital which preceded the condition; and the court said that the plaintiff might have signed judgment as for want of a plea.

But the replication is good in substance; and if it contain more than is necessary, the surplusage will not vitiate it. 4 Dall. 440. A replication may be bad in part, but good upon the whole. This replication states matter sufficient to entitle the plaintiffs to maintain an action upon the bond; and even if it afterwards state something which is inaccurate, it will not vitiate the whole. *Duffield* v. *Scott*, 3 T. R. 376, BULLER's opinion. The breach need not be assigned in the words of the condition. It *is sufficient if a substantial breach be set forth. Doug. 367; Esp. N. P. 209.

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A demurrer admits all matters of fact although informally pleaded, if the right of the matter sufficiently appears. 1 Tidd's Prac. 649 (London edit.); Hob. 233.

The action is not necessarily brought under the 14th section of the act of July 1798. That section does not prevent the United States from bringing actions in any other manner.

Pope, contrâ.—The first error is in the declaration. No action can be maintained upon an official bond, until the condition be broken; and unless the declaration show the condition to be broken, it shows no cause of action in the United States. The act of congress only authorizes a suit to be brought upon such a bond, when the obligor has failed in his official duty, and such failure is a part of the plaintiff's title to sue. In the case of

Todd v. *Mc Clenahan*, in the court of appeals of Kentucky, Sneed 359, the court said, as the plaintiff could only sue in his own name, upon a bond given to the governor, by virtue of the act of assembly which gives a right of action upon such a bond to a person injured, the plaintiff ought in his declaration to have averred himself to be a person injured; otherwise, he does not show a title in himself to sue.

LIVINGSTON, J.—How does it appear, that this is an official bond, and not a bond for a debt simply?

Pope.—The bond of a public officer upon which a suit is brought is always a part of the record?

Rodney, in reply.—This case is not like that of *Todd* v. *Mc Clenahan*. *In that case, the name of the plaintiff did not appear in the bond, and the only fact which could give him a right to sue upon the bond [*261 was that he was a person injured. But in the present case, the plaintiffs are the obligees of the bond, and the defendants, under their hands and seals, have acknowledged themselves to stand indebted to the plaintiffs in the amount of the penalty of the bond. If they would take advantage of the condition of the bond, they must show it.

February 24th, 1809. MARSHALL, Ch. J., delivered the opinion of the court, to the following effect:—If this case depended upon the replication, the judgment of the court must be in favor of the defendants. It is certainly bad, inasmuch as it charges the defendants with moneys not collected. But upon a demurrer, the judgment is to be against the party who committed the first error in pleading.

The want of *oyer* is a fatal defect in the plea of the defendants; and the court cannot look at any subsequent proceeding. The plea was bad, when pleaded. The judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

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*HEPBURN & DUNDAS, Plaintiffs in error, *v.* COLIN AULD, Defendant in error. [*262

HEPBURN & DUNDAS, appellants, *v.* COLIN AULD, appellee.

Presumption of fact.—Specific performance.

After a long possession in severalty, a deed of partition may be presumed.[1]

In equity, time may be dispensed with, if it be not of the essence of the contract.[2]

A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title, at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed.[3]

But a court of equity will not compel a specific performance, unless the vendor can make a good title to all the land contracted to be sold.

THE first of these cases was a Writ of Error to the judgment of the Circuit Court of the district of Columbia, in an action of debt at com-

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[1] S. P. Williams *v.* Miller, 6 Wend. 228.

[2] Bank of Columbia *v.* Hagner, 1 Pet. 455; Taylor *v.* Longworth, 14 Id. 172.

[3] Hepburn *v.* Dunlop, 1 Wheat. 179, and note to that case.