222VA440

IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 791087

WOODY G. MARKS and
PHYLLIS H. MARKS,

.....Appellants

v.

CLARENCE WILLIAMS,

.....Appellee

JOINT APPENDIX

J. Edward Moyler, Jr.
James E. Rainey
506 North Main Street
Post Office Box 775
Franklin, Virginia 23851

Counsel for Appellants

Francis E. Clark
104 North Main Street
Box 216
Franklin, Virginia 23851

Counsel for Appellee

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

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TO THE HONORABLE JUDGES OF SAID COURT:

Your plaintiffs respectfully represent:

1. That on the 31st day of July, 1978, Clarence Williams, the defendant herein, being, or pretending to be, seized and possessed of an undivided one-fourth (1/4th) fee simple interest in and to the following described real property situate lying and being in the County of Southampton, State of Virginia, to-wit:

"All of that certain tract or parcel of land lying situate and being in Newsoms District, Southampton County, Virginia, known generally as the 'Mill Tract' and described as consisting of four hundred fifty (450) acres, more or less, but understood to contain only three hundred fifty (350) acres, more or less, and is sold in the gross as a parcel and not by the acre, more particularly bounded and described as follows: On the north by Ridley Mill Swamp, which divides this tract from the other lands of J. W. Ridley, on the east and southeast by a certain branch lying between this tract and the lands of Ed Story, the Jim Blow lands, and the Coggsdale land, known as the Jim Bishop tract; on the south and southwest by the Murfreesboro County road running by the residence of J. W. Ridley, and the aforesaid mill swamp, and on the west by the aforesaid county road and the farm known as the Sarah Stephenson place; a small portion of this tract or parcel of land lying on the west or northwest side of the said county road;

By survey made May 25, 1931 by Thos. D. Newsom, Surveyor, a plat of which, marked Exhibit 1, is filed in the Clerk's Office of the Circuit Court of said County, with the papers in the chancery suit of Calvin Williams vs. J. William Ridley, dismissed March 21, 1932, Chancery Order Book 9, at page 217, said tract is shown to contain 351.02 acres;

LESS, HOWEVER, those three lots, tracts or parcels conveyed to Raiford Parham, three acres, Ralph E. Williams, one acre, and Clarence Williams and Juanita Louise Williams, husband and wife, four acres by Mary Etta Williams and husband by deeds dated respectively May 3, 1955, November 21, 1958 and August 4, 1959, recorded in said Clerk's Office respectively in Deed Book 117, at page 281, Deed Book 133, at page 604 and Deed Book 137, at page 193;

It being in all respects the greater portion of the real estate conveyed to the said Mary Etta Williams by the Merchants and Farmers Bank of Franklin by deed dated December 14, 1937, recorded in said Clerk's Office in Deed Book 78, at page 590; and it being in all respects the same real estate of which the said Mary Etta Williams died seized and possessed, on February 27, 1966, and by her last will and testament dated May 9, 1962, admitted to probate in said Clerk's Office on March 16, 1966, recorded in Will Book 30, at page 262, devised to her husband, now deceased, for life and at his death to her four children, the said Clarence Williams and Joe Williams, Evelyn Granger and Anna Faulcon, in fee simple and in equal shares."

and being so seized, on that day, entered into a written agreement with your plaintiffs for the sale of his interest in the same, which said agreement was signed by the said Clarence Williams, the defendant herein, and your plaintiffs, and duly delivered to your plaintiffs, and by which the said Clarence Williams covenanted and agreed for himself, his heirs, executors and administrators, for and in consideration of the sum of FIFTY-SIX THOUSAND DOLLARS ($56,000.00), and other good and valuable considerations more specifically set forth in said contract, said monetary amount to be paid as hereinafter mentioned, well and truly, to convey by a good and sufficient warranty deed in fee simple to your plaintiffs, their heirs or assigns, his undivided one-fourth (1/4th) interest in the lot, tract or parcel of land above described.

2. In consideration of the covenants and agreements of the said Clarence Williams, your plaintiffs covenanted and agreed to pay unto the said Clarence Williams, his heirs, executors or administrators, the sum of FIFTY-SIX THOUSAND DOLLARS ($56,000.00) and other good and valuable consideration, the particular terms of said agreement being as follows:

(a) ONE HUNDRED DOLLARS ($100.00) paid upon the execution of the agreement, which said amount was paid by the plaintiffs.

(b) FIFTEEN THOUSAND DOLLARS ($15,000.00) paid upon the delivery of the deed (less the amount necessary to pay off in full the deeds of trust held against the said Clarence Williams' interest in said property by George Thomas Drake.)

(c) The balance of FORTY-ONE THOUSAND DOLLARS ($41,000.00) to be paid in four (4) equal annual installments of TEN THOUSAND TWO HUNDRED FIFTY DOLLARS ($10,250.00) each, payable on April 15th, 1979, April 15th, 1980, April 15th, 1981 and April 15th, 1982, with interests on the unpaid balance, said deferred payments being represented by a note payable to the said Clarence Williams and delivered to the said Clarence Williams upon delivery of the deed.

(d) Reasonable co-operation and assistance made by the plaintiffs to the said Clarence Williams to obtain a loan for the construction of a residence, said loan not to exceed THIRTY-FIVE THOUSAND DOLLARS ($35,000.00).

(e) Conveyance by the plaintiffs of a two (2) acre lot in fee simple and a life interest in a six and one-half (6-1/2) acre lot, subject to a specific agreement with reference to the plaintiffs obtaining the outstanding three-fourths (3/4ths) interests in said property.

3. A copy of the said agreement entered into by the plaintiffs and the defendant is attached hereto, marked Exhibit A and made a part of this bill.

Your plaintiffs further represent that they have always been willing and ready to comply with the terms of the agreement on their part to be performed; that they have on several occasions applied to the said Clarence Willaims and offered to pay him in accordance with the terms of said agreement the consideration agreed to upon his delivering to the plaintiffs a sufficient warranty deed for his said undivided one-fourth (1/4th) interest in and to the said premises, according to the said agreement, yet the said Clarence Willaims refused, and still refuses, to comply with the said agreement on his part; although your plaintiffs are and always have been, ready to pay the consideration set forth in said agreement, and to fully perform their part on said agreement whenever the said Clarence Williams will make and deliver to them a good and sufficient deed for his undivided one-fourth (1/4th) interest in and to the said premises as aforesaid.

Your plaintiffs further represent that as a direct result of the defendant's failure to comply with the terms of said agreement, and his willful breach thereof, your plaintiffs have sustained monetary loses and have been damaged to the extent of FIFTEEN THOUSAND DOLLARS ($15,000.00), your plaintiffs having been deprived of the rents and profits of said land and having been

deprived of the rights to manage, administer and deal with said property as only a fee simple owner of real estate can do, including, but not limited to, the right to farm, sale, rent, divide, partition, etc., etc.

Your plaintiffs therefore pray that the said defendant be required to answer the Bill of Complaint of your plaintiffs; that the said defendant maybe ordered specifically to perform the said agreement entered into with your plaintiffs as aforesaid, and to make a good and sufficient deed to your plaintiffs for his undivided one-fourth (1/4th) interest in and to the said described premises; your plaintiffs being ready and willing and are hereby offering specifically to perform the said agreement on their part and upon the defendant making out a good and sufficient title as to his one-fourth (1/4th) undivided interest in and to the said premises and executing a proper conveyance therefor to your plaintiffs, pursuant to the terms of said agreement, to pay to the defendant the residue of the consideration set forth in said agreement pursuant to the terms of said agreement; to pay unto your plaintiffs the sum of FIFTEEN THOUSAND DOLLARS ($15,000.00), said amount being the damages sustained by your plaintiffs as a result of defendant's refusing to comply with the terms of said agreement and his willful breach thereof; and that your plaintiffs may have such other and further relief as equity may require and as may seem meet, and your plaintiffs will ever pray, etc.

WOODY G. MARKS and PHYLLIS H. MARKS

By _____
Of Counsel

Moyler, Moyler, Rainey & Cobb
Attorneys at Law
P. O. Box 775
506 North Main Street
Franklin, Virginia 23851
Counsel for Plaintiffs

'Exhibit A'

500 Shands Drive
Courtland, Virginia 23837
February 10, 1978

Mr. Clarence Williams
RFD 1, Box 428
Newsoms, Virginia 23874

Dear Mr. Williams:

In accordance with our September 11, 1977 agreement as heretofore amended from time to time for the purchase by us of your one-fourth (1/4) undivided interest in and to the Mary Etta Williams real estate in Newsoms Magisterial District, Southampton County, Virginia, we have had prepared the attached deed for execution by you and your wife and delivery to us.

As consideration for conveyance of said real estate to us, we have agreed and hereby agree to pay you the sum of $56,000.00 in accordance with the terms set out below; and we have agreed and hereby agree to convey to you a ~~one~~ and ~~one-half~~ acre lot in fee simple suitable for the construction of a residence, and six and one-half acres for and during your natural life in accordance with thetterms and conditions set out below.

Upon the delivery of the attached deed properly executed, we will give you $15,000.00 less the amount necessary to pay off in full George Thomas Drake and havethe five deeds of trust against your interest in said real estate securing your obligations to George Thomas Drake released. Concurrently with said delivery of said deed, we will give you a note in the principal amount of $41,000.00 for the balance of the agreed $56,000.00, with interest at the rate of eight percent (8%) per annum; said note will be payable in four annual installments of $10,250.00 each on April 15, 1979, April 15, 1980, April 15, 1981, and April 15, 1982 with interest on the unpaid balances payable annually on the same dates. As agreed by us, we reserve the right to anticipate payments, and to pay the balance in full or in larger installments, without penalty, at any time or times after January 1, 1979. In addition and as part of this installment sale, we have agreed and hereby agree to offer reasonable cooperation and assistance to you in obtaining a loan from the Southampton County Bank for the construction of a residence including offering our endorsement or endorsements, if necessary, to the note evidencing said indebtedness subject to the conditions and terms as follows:

1. Said loan shall be secured by a first deed of trust on the residence and lot;
2. Said loan shall not exceed $35,000.00 in principal amount or 80% of the appraised value of said house and lot, which-

ever is less;

3. Said loan shall be payable in four annual installments on April 15, 1979, April 15, 1980, April 15, 1981, and April 15, 1982; and

4. The four annual installments of $10,250.00 with interest on the unpaid balances set out above to be paid by us to you on the $41,000.00 balance remaining on the $56,000.00 purchase price shall be paid in checks payable to the Southampton County Bank and Clarence Williams jointly so as to insure the payment of said annual loan installments set out in paragraph 3.

As you know, unless the three other owners, who each, as yourself, own an undivided one-fourth (1/4) interest in said real estate, agree to executing a deed partitioning and setting off the above-mentioned one and one-half acres fee simple lot and six and one-half acres life estate for you, neither you as the present owner of a one-fourth (1/4) undivided interest, nor we, as the owners of the interest now held by you can accomplish same. However, you have agreed and hereby agree to cooperate to see that such agreement between us and the other owners can be accomplished. If such can be done, we have agreed and hereby agree to convey to you in fee simple, a one and one-half acre lot, and to convey to you, for and during your natural life, an additional six and one-half acres; said eight acres to be set off from the land presently in a hog pasture across from your present residence. We have agreed and hereby agree to take all reasonable and necessary steps to accomplish this agreement and if such an agreement is possible to accomplish it as soon as possible.

In the event we do not acquire the other outstanding interests, or do not get in kind the eight acres now in a hog pasture, or the other owners do not agree to convey the hog pasture acres to you in accordance with the terms, conditions, and estates set out above, but nevertheless our undivided one-fourth (1/4) interest is set off and partitioned in kind, we have agreed and hereby agree to convey to you from our portion as set off in kind, a comparable lot containing one and one-half acres, in fee simple, and a life estate in six and one-half acres comparable to the land now used as hog pasture and desired by you; provided, however, that should some other party or parties purchase the entire farm to the exclusion of any interest by us, as a result of our efforts to acquire the entire farm, we will not and can not convey to you said eight acres now in hog pasture or any other eight acres on said farm in accordance with the terms, conditions, and estates set out above.

Mr. Richard E. Railey, Jr. represents us in this transaction and on several occasions we have advised you that he does not represent you in this transaction. Moreover, although on every occasion that we have discussed this transaction with you, we have suggested and advised that you seek the assistance of a lawyer of your own choosing in this matter, we understand that you are not represented by a lawyer and have elected not to be represented by a lawyer in this transaction.

Very sincerely,

Woody G. Marks 7/31/78
Woody G. Marks

Phyllis H. Marks
Phyllis H. Marks

Seen, approved and agreed to, and accepted:

Clarence Williams 7/31/78
Clarence Williams

DEMURRER

Comes now Clarence Williams, by counsel, and for demurrer to a certain Bill of Complaint for specific performance filed herein by Woody G. Marks and Phyllis H. Marks, sets forth the following:

(1) The contract, which is made a portion of the Bill of Complaint, and upon which the Marks' base their Bill of Complaint, shows on its face that the parties were not to be bound thereby except and unless the deed attached to the contract was executed by both Clarence Williams and his wife.

Respectfully,
CLARENCE WILLIAMS

BY: F. E. Clark
F. E. Clark, Of Counsel

Gilbert W. Francis
Boykins, Virginia

Francis E. Clark
Franklin, Virginia

I hereby certify that on the 13th day of April, 1979 a copy of the foregoing pleading was forwarded to James E. Rainey, Attorney, P. O. Box 775, Franklin, Virginia 23851, counsel of record for Woody G. Marks and Phyllis H. Marks.

F. E. Clark
F. E. Clark, Of Counsel for Clarence Williams

Received and filed, this the
day of APR 13 1979, 19
Clerk

SUPPLEMENTAL DEMURRER

Comes now Clarence Williams, by counsel, and for his supplemental demurrer herein sets forth the following:

(1) The Bill of Complaint seeks recovery of damages for breach of contract and specific performance which are inconsistent remedies.

Respectfully,
CLARENCE WILLIAMS

BY: F. E. Clark
F. E. Clark, Of Counsel

Gilbert W. Francis
Boykins, Virginia

Francis E. Clark
Franklin, Virginia

I hereby certify that on the 13th day of April, 1979 a copy of the foregoing pleading was forwarded to James E. Rainey, Attorney, P. O. Box 775, Franklin, Virginia 23851, counsel of record for Woody G. Marks and Phyllis H. Marks.

F. E. Clark
F. E. Clark, Of Counsel for Clarence Williams

Received and filed, this the 13th
day of April, 19 79

ORDER

This cause came on this day to be heard upon the complainant's bill of complaint and its exhibits and upon the demurrer and supplemental demurrer filed thereto by the respondent, Clarence Williams, and was argued by counsel.

Upon consideration whereof the Court doth sustain both the demurrer and supplemental demurrer and ORDERS, ADJUDGES and DECREES that the bill of complaint be, and it hereby is, dismissed.

To all of which the complainants, by counsel, duly objected and excepted.

Enter this 24th day of April, 1979.

JUDGE

ASKED FOR:

F. E. Clark

F. E. Clark, Attorney for Respondent

SEEN AND EXCEPTED TO:

James E. Rainey, Attorney for Complainants

The "contract" of February 10, 1978 is not a contract, but, rather, is an offer to purchase containing a condition precedent to its acceptance that the attached deed be executed by the seller and wife.

Williams' written acceptance at the foot of the offer was an acceptance only of what was offered. It does not state that he will obtain his wife's signature to the deed, or that he will convey without her signature, or that he will be bound if she refuses to execute the deed.

Obviously, the parties intended that as a condition precedent to any liability arising with respect to either of the parties the seller had to be able to give a perfect title.

Putting it a little differently, the purchasers foresaw, or at least wanted to protect themselves against, the possibility of the wife not signing the deed. They, therefore, conditioned their obligation to purchase upon delivery of a deed executed by both husband and wife. When the seller signed the acceptance at the foot of the offer he was in effect agreeing to this condition and saying, "I realize you don't want to be bound to buy this property if I can't give you title free of my wife's contingent right of dower. Therefore, if my wife won't sign the deed, nobody is bound by this offer and "acceptance"."

Had the purchasers intended that the seller was to be bound to sell and the purchasers bound to purchase, irrespective of the wife's execution of the deed, there would have been language in the offer to that effect rather than the language used by the offerors setting up the duly executed deed as a condition precedent to their obligation to purchase.

Had the offerors intended that they not be bound in event the wife refused to execute the deed but that the seller was to be so bound, why did they not spell it out in the offer? They prepared the offer. At the very

least, if that was their intention, they would have added to the language of the acceptance wording by which the seller would have guaranteed his wife's signature on the deed.

Further, the fact that no time limitation for execution and delivery of the deed is contained in the offer makes it obvious that the would be purchasers were aware that the seller needed time to persuade his wife. Why else would the deed not have been executed simultaneously with the sellers "acceptance" of the offer? Obviously, the purchasers were aware that the wife might refuse to sign the deed. Being aware that this might happen, it is inconceivable that the purchasers would have not included language in the offer which they prepared which would have bound the seller irrespective of his wife's signature on the deed if they wanted the contract to be enforceable without the wife's signature on the deed.

Did the minds of the parties meet? If not, of course, the offer and acceptance never ripened into an enforceable contract.

The offer is one to purchase conditioned upon execution and delivery of a deed executed by both the seller and wife. The language of the "acceptance" was, "Seen, approved and agreed to, and accepted."

What did the offeree accept? He accepted a proposal binding him to sell his land and the purchasers to purchase same if he complied with the conditions of that proposal. Nowhere in the offer or the acceptance is there language setting forth the obligations of the respective parties if the seller fails or is unable to comply with the conditions. It is obvious and is admitted that the purchaser is not bound unless the conditions imposed upon the seller are met. But where in the wording of the offer and acceptance is there language indicating a meeting of the minds as to the obligations of the parties if the seller fails or is unable to meet the conditions? Nowhere is there found language which binds the seller to obtain his wife's signature. The most that

can be said is that the seller impliedly agrees to encourage his wife to sign the deed, but there is nothing to indicate what the intent of the parties was with respect to the contractual duties of the parties if the seller is unable to procure his wife's signature. Thus, there was no meeting of the minds, or at least there is no language from which the court can ascertain the intent of the parties, on the very issue that has brought this matter to court.

The purchasers prepared the offer and the acceptance. This suit was instituted by the purchasers to compel performance. It is incumbent upon the purchasers to produce a contract which shows on its face that the seller contemplated and intended to convey his property with or without his wife's acceptance of the offer or signature on the deed. At best the offer and acceptance in this case leaves the court with no idea as to the intention of the parties on this point, and at worst, and in fact, the offer and acceptance indicate quite clearly that nobody was to be bound absent procurement of the wife's signature to either the acceptance or the deed.

Filed
4/24/79

PARKER, CLARK & PARKER
ATTORNEYS AND COUNSELLORS AT LAW
104 NORTH MAIN STREET
P.O. BOX 216
FRANKLIN, VIRGINIA 23851

GEORGE HINSON PARKER, JR.
FRANCIS E. CLARK
WESTBROOK J. PARKER

TELEPHONE 562-4151
AREA CODE 804

April 25, 1979

Honorable James C. Godwin, Judge
Fifth Judicial Circuit
Municipal Building
Suffolk, Virginia 23434

Re: Woody G. Marks and Phyllis H. Marks
v. Clarence Williams

Clarence Williams v. Anna W. Flythe, et als

Dear Judge Godwin:

Pursuant to your decisions in the above matters of April 24, 1979 I am enclosing herewith orders in each of the above matters for your entry and forwarding to the Clerk of the Circuit Court of Southampton County, Mr. Rainey having endorsed both orders.

Together with a copy of this letter I have today forwarded to Mr. Bryant copies of both of the orders and request that he attest the same upon receipt of the original from you and forward copies to Jim Rainey, Gilbert Francis and the undersigned.

I am also enclosing to Mr. Bryant my Memorandum which I prepared for the specific performance suit together with photocopies of the Dunsmore and Graybill decisions, as well as a photocopy of the unexecuted deed from Clarence Williams and wife to Woody G. Marks and Phyllis H. Marks. Mr. Bryant's attention is called to the fact that you have already "filed" the Memorandum and he is requested to also file in the specific performance suit of Marks and Marks v. Williams the two legal opinions and the photocopy of the deed, the photocopy of the deed to be marked "Respondent's Exhibit A".

With kindest personal wishes always, I remain

Very truly yours,

F. E. Clark

FEC/nw
Enclosures

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cc Mr. George O. Bryant, Clerk
Mr. James E. Rainey, Attorney
Mr. Gilbert Francis, Attorney

of negligence, statutory or otherwise, as to injuries to live-stock, seems to relate to stock when straying, and to recognize the important distinction to which I have adverted. It would be a strange anomaly in the law of negligence if, in a suit for the killing of a horse and its rider, the burden of proof should be in favor of the former and against the latter. The same rule, under the construction contended for, would apply to the case of a live pig which is being carried to market on the shoulder of its owner. In a single action for the recovery of damages for injuries to both, occasioned by the same accident, we would have two different rules as to the *onus probandi*, with the advantage most decidedly on the side of the pig; thus constituting, in the history of this species of the animal kingdom, the single exception to its exemption from all favorable consideration whatever, as indicated by its proverbial dependence upon its own peculiar exertions for a livelihood. Another objection is that under such a rule a person might purposely drive his horse on a railroad track, and have him killed, and then insist that the presumption of negligence arose, and that it devolved upon the railroad to rebut it. Again, it cannot, I think be reasonably insisted that animals in the actual use of the owner are generally spoken of as "cattle" or "live-stock." "Words are only designed to express the thoughts. Thus the true signification of an expression in common use is the true idea which custom has affixed to that expression." Potter's Dwar. St. 127. When one is driving his horse, or a lady is riding her pony, is it customary to say that the man is driving one of his "cattle," or that the lady is riding one of her live-stock, and is this the "expression" which "custom has affixed," which we commonly use in such instances? The mere statement of the question, it seems to me, furnishes its own answer.

These considerations induce me to believe that the words under examination do not apply to cases like the present; certainly, their meaning is not so "explicit" as to shut out all inquiry into the reason and spirit of the law. As I have said, "the most universal and effectual way of discovering the true meaning of a law, when the words, as used, are dubious, is by considering the reason and spirit of it, or the cause which moved the legislature to enact it." 1 Bl. Comm. 61. Acting upon this well-established principle, this court has unequivocally declared the true spirit of the statute, and the defects which it was intended to remedy. The late chief justice, in Doggett v. Railroad Co., 81 N. C. 462, in giving the history and reason of the statute, said: "Where injury to stock straying off is done by trains running at night as well as by day, and known only to defendant's employes, it was almost an impossible requirement" that the plaintiff should prove the negligence as a part of his case. "The owner would not know how, when, or by whom the injury was done, while the servants of the roads would possess full knowledge of the facts. Hence the general assembly enacted section 2326 of the Code, * * * thus shifting the burden of proof from the plaintiff to the defendant, and requiring the latter to show the circumstances and repel the legal presumption." In Durham v. Railroad Co., 82 N. C. 354, the court, further sustaining the same view, remarked: "The responsibility of railroad companies for injuries to stock straying upon their tracks, and the care and diligence required in the management of running trains, have frequently been before the court, and were fully discussed in Doggett v. Railroad Co., 81 N. C. 459." It seems to me that this clear and emphatic construction of the law, sustained, as it is, by reason and the current of authority, should not be disturbed. This construction gives full effect to all of the purposes which the legislature had in view; and I am opposed, by what I consider a strained interpretation of the statute, to go beyond these purposes, and introduce anomalies which were never even remotely contemplated by the law-makers. To "cavil about the words in subversion of the plain intent of the parties is a malice against justice, and the nurse of injustice." Throckmerton v. Tracy, 1 Plow. 161. "Construction must be made in suppression of the mischief, and in advancement of the remedy." Co. Litt. 381-386. Says DILLARD, J., in Burgwyn v. Whitfield, 81 N. C. 265: "In construing a statute, it is laid down as a rule by which courts ought to be guided to look at the words, and construe them in the ordinary sense, if such construction would not lead to absurdity or manifest injustice; but, if it would, then they ought to vary and modify the words so used, so as to avoid that which it certainly could not have been the intention of the legislature should be done." Broom, Leg. Max. 552.

The particular point under discussion in this case arises upon the instruction of the court (the defendant having asked a contrary instruction) that, "it being admitted that defendant's engine killed the cattle, and the suit having been brought within six months, the statute raised a presumption of negligence, and the burden was on the defendant to rebut the statutory presumption." It will be noted that the plaintiff's testimony showed that the animals injured were hitched to a wagon, and being driven by the plaintiff, and there was no dispute whatever as to these facts. In view of the well-established rules of construction most pointedly illustrated by the foregoing facts, I am well satisfied that we were in error in holding that the foregoing instruction was correct. It is because of what I conceive to be an erroneous statement and application of these most important general rules that I have thought proper to state my views at such length. I think the petition to rehear should be granted.

(87 Va. 391)

DUNSMORE v. LYLE *et ux.*

(*Supreme Court of Appeals of Virginia.* Jan. 29, 1891.)

SPECIFIC PERFORMANCE—EVIDENCE.

On a bill for specific performance of an alleged contract to convey land, it appeared that defendant's wife was unwilling to join in the conveyance, of which defendant informed plain-

tiff, and promised to do what he could to persuade his wife, but neither party proposed to conclude the sale without her consent. Afterwards defendant's wife refused to join in the deed. Plaintiff then proposed to make the cash payment, and take the deed, as a means of bringing the wife over, but he did not propose to accept the deed subject to her right of dower. Defendant would not agree to this, saying that he had never proposed to coerce his wife. Defendant testified that all their negotiations were subject to the question of his wife's consent, while plaintiff testified to a definite contract. *Held*, that there was not such distinct proof of the alleged contract as would sustain a decree for specific performance. RICHARDSON, J., dissenting.

White & Gordon, for appellant.

LACY, J. This an appeal from a decree of the circuit court of Augusta county, rendered on the 18th day of June, 1890. The bill was filed by the appellant against the appellees to enforce specific performance of an alleged contract for the sale of a tract of land, belonging to the said Lyle, to the appellant, Dunsmore. Upon the hearing, upon the demurrer, answer, and plea of the defendants, and the depositions taken on both sides, the circuit court dismissed the bill of the plaintiff, whereupon he applied for and obtained an appeal to this court.

The principles upon which courts of equity decree specific performance of contracts for the sale of real estate are well understood and familiar to the profession; yet it will be convenient, in the view we have taken of this case, to briefly recur to first principles. And we will remark that it is one of the principles of equity that it looks upon things agreed to be done as actually performed; and consequently, as soon as a valid contract is made for the sale of an estate, equity considers the buyer as the owner of the land, and the seller as a trustee for him; and, on the other hand, it considers the seller as the owner of the money, and the buyer as a trustee for him. And when a contract has been made, and either party refuses to perform the agreement, equity enforces the performance of the contract specifically, by compelling the refractory party to fulfill his engagement according to its terms. Thus, if the vendor refuses to convey, equity will decree a conveyance, and attach him until he makes it. All applications to the court to compel specific performance, however, are addressed to the discretion of the court,—a sound judicial discretion, regulated by the established principles of the court; and the contract must not only be distinctly proved, but it must be clearly and distinctly ascertained. It must be reasonable, certain, legal, mutual, upon valuable, or at least meritorious, consideration, and the party seeking specific performance must not have been backward, but ready, desirous, prompt, and eager; while a purchaser, however, cannot be compelled to take a defective title, but has a right to insist upon a clear legal title. On the other hand, though the vendor cannot make the title he contracts to make, yet he may be compelled to convey such title as he has, and to compensate for the defect; nor does it lie in him to object for the want of a complete title in him. The remedy of specific performance of contracts for the sale of real estate, to which it chiefly relates, falls within the inference of statutes of frauds which declares void all contracts for land which are not reduced to writing, and signed by the party sought to be charged. No proceedings in specific performance can, of course, be had, unless it be shown that a contract has actually been concluded. If the arrangement come to was in its nature merely honorary, or if the matter still rest in treaty, no specific performance can be granted. On the other hand, however, when the contract is embodied in a formal document, simultaneously entered into by both parties, little difficulty can occur as to whether the contract was concluded. But this question frequently arises, when a contract is alleged to have been constituted by the negotiations of the parties. If, however, it be only doubtful whether the contract was concluded or still remained open, the court will refuse specific performance, and leave the parties to their rights at law. Owen v. Davies, 1 Ves. Sr. 82.

In this case the appellant and the appellees had many negotiations, and a great deal of discussion about the sale and purchase of the land in question, running through a great space of time before there is any claim that any agreement had been come to, all of which is spread out *in extenso* in the record, but which will be passed over as irrelevant matter. It amounts only to the circumstance of a seller exceedingly anxious to sell, and indiscreet in constant agitation of the matter with a coy buyer, who, while equally anxious to buy, possibly, contented himself with an apparent good-natured indulgence of his impulsive acquaintance and friend in his importunities, and while looking at other lands, and appearing indifferent to the land ultimately in view, availed himself of such casual opportunity of inspection as presented itself, until the seller was brought while walking in the street to a proposal, which was accepted by the words, "I will take it." No written agreement was entered into, but the seller agreed to draw a deed, and get his wife's signature to it. Upon application to the wife to consent to and join in a conveyance of the land, she showed great unwillingness and much distress, and the seller thereupon notified the buyer of the impediment in his way, but promised to do what he could, by persuasion, to bring his wife over. There was no proposal on either side to conclude matters at this time without the consent of the wife of the seller. But the seller, by way of bringing his wife to agree to his wishes, prepared a deed, and asked his wife to sign and acknowledge it. But at this point the wife dried her tears, and flatly refused to do so, and declared her purpose to stand upon her legal rights in the premises, and not consent to any sale of her home. The purchaser, learning this, now proposed to pay the cash payment, and get the deed, etc., as a means to bring the wife over; but there was no proposition to accept a deed subject to the wife's contingent right of dower. The appellee, the

seller, here took a decided stand, and declined to do this, saying that he had never proposed to use coercion on his wife. He had persuaded, but would do nothing more. The rupture came speedily. Lyle declined further negotiations, and Dunsmore brought his suit.

The first question to be considered in this case is whether any binding contract was ever made between the parties; that is, whether such contract has been proved in this suit. The burden of the proof is, of course, upon the plaintiff. From his voluminous statement, answers to interrogatories, etc., may be fairly sifted out the assertion on his part of a definite and final contract, afterwards reduced to writing in the form of a deed signed by Lyle; and a letter is produced from Lyle declaring his inability to make the sale on account of his wife's opposition. But, on the other hand, Lyle declares distinctly that all their negotiations were subject to the question of his wife's consent, that he had never proposed to sell without it, and Dunsmore had never agreed to buy without it. The testimony of one may be offset against that of the other; and, as we have seen, the contract must be established by a preponderance of evidence on the part of the plaintiff. I do not think, from the evidence in this cause, that either party, during all their negotiations, ever contemplated any sale subject to the wife's contingent right of dower; and as we have seen, if it be only doubtful whether the contract was concluded or still remained open, the court will refuse specific performance, and leave the parties to their rights at law. When Lyle informed Dunsmore that his wife was distressed and tearful and unhappy, and could not be brought to his views, Dunsmore does not pretend that he offered to take the deed without his wife's concurrence. He says himself, to use his elegant language concerning this unhappy wife, that he said to Lyle's son: "Your step-mother is kicking. Is she?" He did not say, as he says now: "Oh, that is of no consequence. Let us go on and complete the sale, and, seeing that all is done, she may then consent." His device was to bring about this wife's consent in some way. This sustains, certainly does not contradict, Lyle's statement that his proposal was dependent upon his wife's consent, as it surely ought to have been; and, before a court of equity should compel a husband to sell in disregard of his wife's wishes, it is necessary, at the least, to prove that he has in some binding form agreed to do so, which is not proven in this case. But we must remember that we have already said that an application of this sort is addressed to the sound judicial discretion of the court, and that the ground of the jurisdiction here invoked is to remedy some mischief or grievance not relievable by a court of law. If this husband had obtained any money or other advantage of this purchaser, or in some way injured him in a manner not to be compensated in damages, or had in some wise defrauded him of any just rights, the court might entertain the proposal for its remedial hand to attain the ends of justice. But the appellant has paid no money; had his situation in no way changed. He is balked in his newborn fancy to have this woman's home. That appears to be the extent of his grievance, and I am of opinion that there is nothing contained in the application which commends itself to the favorable consideration of this court. In what way is his desire to have a home any more sacred than this wife's desire to retain her home? The appellee Lyle does say in the letter above mentioned that he feels very badly, and that he had never been so taken down in his life, and that he felt like he would not want to face the public again, etc., if his wife persisted. He had realized that now men would see that he could not manage matters at home, perhaps, as he desired, and there seems to have been some feeling of humiliation about it; but, so far from this being any discredit to him, it is far more to his credit as a husband and as a man that he yielded to his wife's feelings and wishes than if, to save this feeling of humiliation to himself, he had yielded to the proposal of Dunsmore, and provided him so far as he could with the means of breaking ties which bound his wife to their home. It is not only not proven that any binding contract was ever made between these parties, but the fair conclusion from the whole case is that these negotiations were merely *in fieri*, and that neither party ever contemplated any agreement subject to the wife's contingent right of dower being retained by her. And in this case there is no grievance to redress. No contract has been proved, and the circuit court was right in dismissing the plaintiff's bill, and the decree complained of and appealed from will be affirmed.

RICHARDSON, J., dissenting.

(87 Va. 319)

LUDLOW *et al.* v. CITY OF NORFOLK.

(*Supreme Court of Appeals of Virginia.* Jan. 16, 1891.)

APPEALABLE ORDERS.

An order appointing commissioners to fix a just compensation for land proposed to be taken in condemnation proceedings is not final, within Code Va. 1887, § 3454, and a writ of error will not lie thereto.

Harmanson & Heath, J. F. Crocker, and *Walke & Old*, for plaintiffs in error. *Tunstall & Thorn, White & Garnett*, and *J. F. Duncan*, for defendant in error.

LACY, J. This is a writ of error to a judgment of the corporation court of the city of Norfolk, rendered at its July term, 1890. On the 10th day of June, 1890, the defendant in error filed its petition in the corporation court of said city before the Honorable D. TUCKER BROOKE, judge of the said court, praying that, in accordance with the resolutions of the common and select councils in the said city, certain real estate situated in the said city, set forth in the said petition, should be acquired by the said city for condemnation for public grounds to be laid out and established therein; that it was impossible to acquire the said lands by purchase or agreement; and that five disinterested

tember 15, 1888, until paid, which must be paid to the said Ernest Mecklin; $275, part thereof, with interest from September 15, 1888, when paid to be credited on the deed of trust debt due from F. K. N. Gardner to the said Ernest Mecklin, and the residue, when paid, to be a credit on the first deed of trust debt due from Ann N. Walpole and her husband to said Ernest Mecklin. (2) The plaintiff's judgment for $417.73, with interest from March 1, 1878, until paid, and $7.75 cost. And (3) the deeds of trust in favor of said Ernest Mecklin; that given by F. K. N. Gardner (the interest on which, it appears, has been paid up to June 1, 1890) to be a lien on a half interest in the said John F. Gardner's moiety, and those given by Ann N. Walpole and her husband (no part of which have been paid, so far as appears) to be a lien on the other half interest in the said John F. Gardner's moiety." And the decree appointed commissioners to make sale of said land, unless said sums be paid in 60 days from the rising of the court, etc. And from these two decrees the case is here on appeal.

The bill and amended bill, taken as one, directly assail the proceedings had in the partition suit of Gardner vs. Walpole, and the deed of September 15, 1888, as had and done for the purpose of hindering, delaying, and defrauding creditors, and especially the appellee's intestate. In fact the bill is principally pregnant with oft-repeated charges of fraud, each and all of which are mere figments of the imagination. There is absolutely not a single fact or circumstance disclosed by the record which seriously tends to raise even a suspicion of fraud, but there is much to the contrary; nor is a single witness introduced to prove any fraud. It is simply far-fetched inference, and nothing more. The question of fraud being thus out of the way, the case lies within a very narrow compass, and may be briefly disposed of. In the partition suit of Gardner v. Walpole it was admitted in the pleadings that under the will of her father Mrs. Gardner took only a life estate. Assuming, without deciding, that this view is in accordance with the true construction of the will, the only question necessary to be considered is whether John F. Gardner has any interest in the land which can be subjected in this suit to the appellee's judgment. The appellee contends that by the will a life estate was devised to Mrs. Gardner, with remainder to her children, and consequently that the interest of her two children who died under age, without issue, passed to their father, the said John F. Gardner. But we are of opinion that, so far as the interest of the latter is concerned, no question as to the construction of the will can arise in this suit. That matter has been determined, and, for the purposes of the present case, finally determined, in the partition suit above mentioned. The object of the bill in that suit, as the appellants insist, and as the bill on its face shows, was twofold, to wit: (1) To obtain a construction of the will, and (2) to have the land divided among the two surviving children as "the parties entitled thereto." And in that suit the circuit court in effect decreed that the parties entitled as devisees under the will were the said surviving children, and ordered partition accordingly. To that suit John F. Gardner was a party, and is consequently bound by the decrees therein, from which no appeal has ever been taken.

It is contended, however, that the doctrine of res adjudicata has no application, because the decree of partition was not a final decree. But as to John F. Gardner the decree was final, though not as to the other parties. It settled the question that he had no interest in the land, and that was the only question in which he was concerned. This court has repeatedly decided that a decree may be final as to one party and not as to another, depending upon the circumstances of the case. Royall v. Johnson, 1 Rand. (Va.) 421; Noel's Adm'r v. Noel's Adm'r, 86 Va. 109, 9 S. E. Rep. 584. Whether the decree in said partition suit is right or wrong is a matter not now to be inquired into, or, even if it were conceded to be erroneous, the result would be the same. It is not only a final decree, but, having been rendered by a court of competent jurisdiction, with all the necessary parties before the court, it cannot, in the absence of fraud, be assailed, or its legal effect avoided. It follows, therefore, that the land in question is not liable for the appellee's judgment; that the decree appealed from is palpably erroneous; that the same must be reversed and annulled, and a decree entered here dismissing the bill and amended bill. Decree reversed, and bill dismissed.

(89 Va. 895)

GRAYBILL et al. v. BRAUGH.

(Supreme Court of Appeals of Virginia. April 20, 1893.)

SPECIFIC PERFORMANCE—MUTUALITY—DOWER.

1. A unilateral contract for the sale of land, reciting a nominal consideration of one dollar, but in fact entered into without any consideration, binding the vendor to convey the land within 10 months from date, at the vendee's option, but expressly exempting the vendee from all obligation to purchase, will not be specifically enforced in equity, since there is no consideration and no mutuality.

2. A contract for the sale of land entered into by a married man, will not be specifically enforced where the wife did not sign the contract, and refuses to join in the deed, and release her dower interest, unless the purchaser is willing to pay the full purchase price, and accept the deed without her joining.

Appeal from circuit court, Botetourt county.

Bill by E. J. Braugh against Mary W. T. Graybill and others for the specific performance of a contract for the sale of land. From a decree in complainant's favor, defendants appeal. Reversed.

E. & E. N. Pendleton, for appellants. Benj. Haden, for appellee.

FAUNTLEROY, J. This is an appeal from decrees of the circuit court of Botetourt county, rendered on the 20th day of May, 1890, and the 27th day of January,

1891, in a chancery suit in said court depending, in which E. J. Braugh is complainant and Mary W. T. Graybill and Lewis H. Graybill, her husband, and A. Nash Johnston, are defendants. It appears from the record in this case that on the 12th day of March, 1888, Lewis H. Graybill bought of J. H. H. Figgatt, special commissioner of the circuit court of Botetourt county, in the cause therein pending of J. P. Thrasher vs. Brierly and others, a tract of land in Botetourt county, Va., containing about 50 acres; that on the 3d day of February, 1890, before the purchase money had been paid, and before any deed had been made to Graybill for the land, the said Graybill gave to E. J. Braugh an option in writing and under seal for the purchase of this land by Braugh for the nominal consideration of one dollar, but, in fact, nothing, it is admitted, was ever paid to Graybill by Braugh, not even the one dollar for the said option. On the 20th of March, 1890, J. H. H. Figgatt, the commissioner aforesaid, upon the payment of the purchase money for the land by the judicial purchaser, Lewis H. Graybill, conveyed the land to Mary W. T. Graybill, the wife of Lewis H. Graybill, by the direction of said Graybill, as he was ordered by the decree of sale to do. On the 22d of March, 1890, Lewis H. Graybill and wife conveyed this land to A. Nash Johnston for $2,000. At the time of this purchase Johnston was informed that Lewis H. Graybill had given an option to E. J. Braugh on this land for the period of 10 months from February 3, 1890, but that nothing had been paid by Braugh on said option, and that it bound Braugh to pay or do nothing whatever, and it was therefore not binding on Lewis H. Graybill. At the April rules, 1890, of the circuit court of Botetourt county E. J. Braugh filed his bill in this suit, asserting the said option as a binding contract, which he prayed to have specifically performed, and that the deed from J. H. H. Figgatt, commissioner, to Mary W. T. Graybill, and the deed from Lewis H. Graybill and Mary W. T. Graybill, his wife, to A. Nash Johnston, be set aside, vacated, and annulled, and charging Mrs. Graybill, Lewis H. Graybill, A. Nash Johnston, and J. H. H. Figgatt, commissioner, with notice of his option, and with fraud in the execution of the deeds aforesaid.

The said parties filed their demurrers and answers, and denied the allegations and equities of the bill, and the circuit court of Botetourt county, by the decrees complained of, decided that both Mrs. Graybill and A. Nash Johnston had notice of the said option at the time of receiving their respective deeds, and that said option is an enforceable contract, and binding on all the parties, including A. Nash Johnston, and directing A. Nash Johnston to convey the land to E. J. Braugh, without retaining a lien on the land, upon the payment by E. J. Braugh of the cash payment and first deferred payment, and executing bonds for the second and third deferred payments of the purchase money, "with security approved by the clerk of this court," etc., "thereby substituting for the vendor's lien to secure the deferred payments of the purchase money mere personal security, and that, too, not such as might be satisfactory to the parties interested, nor such as should be approved by the court, but with security approved by the clerk," etc. Johnston did not buy the land from Lewis H. Graybill, but from Mrs. Mary W. T. Graybill. Lewis H. Graybill never had any title to the land, and the interest of Braugh, if any, by virtue of a mere naked option to buy, which did not bind him to buy in any event whatever, was not such an interest in the subject of which a purchaser for value is bound to notice, or which equity will regard. 2 Pom. Eq. Jur. § 692. Unilateral or option contracts are not favored in equity, and the want of mutuality of obligation and risk may generally be urged as bar to their specific enforcement. 2 Warv. Vend. p. 769. "Equity requires an actual consideration, and permits the want of it to be shown, notwithstanding the seal, and applies the doctrine to covenants, settlements, and executory agreements of every description." 1 Pom. Eq. Jur. § 383. In respect to voluntary contracts, or such as are not founded on a valuable consideration, courts of equity do not interfere to enforce them as against the party himself, or as against volunteers claiming under him. 2 Story, Eq. Jur. § 706a. In Duval v. Bibb, 4 Hen. & M. 116, it was held that in equity either party to a deed may aver and prove against the other the true and actual consideration on which the deed was founded, though a different consideration be expressed therein. Equity disregards the form and looks to the substance. The nominal consideration of one dollar in the option, it is admitted, was never paid, and the option says: "It is agreed by the parties hereto that there shall be no obligation upon the said E. J. Braugh by virtue of this agreement, unless within the period of the said ten months he pays one third of the purchase money." He did not sign the option, and it did not bind him to do anything. He attempted to make a large profit on an investment of nothing, and without the obligation to do anything, and he simply failed. The complainant's bill should have been dismissed in the circuit court for want of mutuality of obligation in the option sued upon. It professes to bind one of the parties absolutely, and stipulates only for the indefinite pleasure of the other; and it cannot, therefore, be specifically enforced. Ford v. Euker, 86 Va. 79, 9 S. E. Rep. 500. It, moreover, appears that neither party contemplated a sale subject to the wife's (Mrs. Graybill's) contingent right of dower, and in this respect this case is ruled by the case of Dunsmore v. Lyle, 87 Va. 391, 12 S. E. Rep. 610, where specific performance was refused, even though the bill offered to take a deed from Lyle subject to the wife's dower. In this case the complainant Braugh seeks to enforce a conveyance of the land free from the dower interest of Mrs. Graybill, who never signed the option, and who, on hearing of it, interposed her remonstrance immediately, and communicated her refusal to be bound by it to

Braugh. "Specific execution of an agreement to sell and convey will not ordinarily be decreed against the vendor, a married man, whose wife refuses to join in the deed, when there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money, and accept the deed without her joining." 2 Warv. Vend. p. 769. See Clarke v. Reins, 12 Grat. 98. Mrs. Grayhill held the legal title to the land, and she is in no manner bound by the option of her husband, to which she was not a party, and against which she protested, from the first moment that it came to her knowledge. Dunsmore v. Lyle, (Va.) 12 S. E. Rep. 611; McCann v. Janes, 1 Rob. (Va.) 256; Clarke v. Reins, 12 Grat. 98; Booten v. Scheffer, 21 Grat. 474; Iron Co. v. Gardiner, 79 Va. 305; Litterall v. Jackson, 80 Va. 604; Cheatham v. Cheatham's Ex'r, 81 Va. 395; Railroad Co. v. Dunlop, 86 Va. 346, 10 S. E. Rep. 239. The circuit court erred in overruling the demurrer of Grayhill and wife to the complainant's bill, and we are of opinion that the decrees appealed from are wholly erroneous, and our judgment is to reverse and annul them, and to enter a decree here dismissing the complainant's bill.

Reversed.

(39 S. C. 550)

GEDDES et al. v. HUTCHINSON et al.

(Supreme Court of South Carolina. April 29, 1893.)

APPEAL—FAILURE TO FILE RETURN—DISMISSAL—REINSTATEMENT.

1. The fact that amendments proposed by one party to a "case" are served on the opposite party after service of the proposed case, and after notice of an application to the court to settle the "case," indicates that the parties have not agreed upon a "case;" and a return is therefore necessary under Sup. Ct. Rules 1 and 2.

2. A party who is unintentionally misled by another to believe that time will not be insisted on in perfecting an appeal, and who thus neglects to file the required return so that a motion to dismiss is granted by the clerk, may have the appeal reinstated under Code, § 349, which declares that when any party shall omit, through mistake or inadvertence, to do any act necessary to the perfecting of an appeal, the supreme court may permit such act to be done at any time, on such terms as may be deemed just.

3. A party is also entitled to relief, under such circumstances, for failure to file a copy of the case within the time required by Cir. Ct. Rule 49.

Appeal from common pleas circuit court of Charleston county.

Motion to reinstate an appeal in the case of Toney Geddes and others against James Hutchinson and others. Granted.

W. St. J. Jervey, Mr. Priorleau, and Arthur Mazyck, for appellants.

A. M Lee and Mordecai & Gadsden, for respondents.

Relief should have been applied for under Code, § 349, before the motion to dismiss had been granted. Pregnall v. Miller, 26 S. C. 612, 7 S. E. Rep. 71; Gardner v. Mays, 26 S. C. 613, 7 S. E. Rep. 71; Dial v. Dial, 33 S. C. 607, 12 S. E. Rep. 474; Lombard v. Brown, 33 S. C. 598, 11 S. E. Rep. 634; Bomar v. Means, 35 S. C. 591, 14 S. E. Rep. 24, 309; Chisolm v. Insurance Co., 35 S. C. 599, 14 S. E. Rep. 349, 480.

McIVER, C. J. This is a motion to reinstate an appeal which has been dismissed by the clerk of this court for failure to file the return as required by rules 1 and 2 of this court. After a very careful consideration of the various and voluminous papers which were presented at the hearing of this motion, we have reached the conclusion to grant the motion, for the reasons which will be very briefly stated, as we do not think it would serve any useful purpose to enter upon any detailed consideration of the various facts appearing in the voluminous record presented, or to undertake to settle disputed questions of fact between counsel, about which honest differences of opinion might well have arisen.

We do not think the "case," as printed, incorporating the amendments proposed by respondents, can in any proper sense be regarded as an "agreed case," and is not, therefore, a substitute for the return, for the very fact that the amendments proposed were served on appellants' counsel in due time after the service of the proposed case, and afterwards a notice served of an application to the circuit judge to settle the case, shows that the parties had not then agreed upon the case; and the fact that afterwards the appellants accepted the proposed amendments, manifestly not for the reason that they agreed to such amendments, but for other reasons, which it is needless to state here, could not convert the proposed case into an agreed case, which would serve as a substitute for the return. Hence we do not think that there was any error on the part of the clerk in dismissing the appeal upon the showing made before him. But we are satisfied from a review of the whole proceedings that the appellants' counsel were misled (unintentionally, of course) by the correspondence between counsel into the belief that time would not be insisted on in taking any of the steps necessary to the perfection of the appeal. This, therefore, is a very proper case for this court, under the provisions of section 349 of the Code,[1] to extend relief to the appellants. It will be observed that this case differs from the authorities cited by respondents' counsel to show that relief under that section of the Code should be applied for before the motion to dismiss the appeal had been granted, for those cases apply to motions to dismiss appeals granted by this court, and cannot apply where the motion to dismiss the appeal has been granted by the clerk, who has no jurisdiction to grant relief under section 349 of the Code. In this case the motion for relief under that section was made to this court at the earliest time practicable.

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[1]This section provides that when any party shall omit, through mistake or inadvertence, to do any act necessary to the perfecting of an appeal, the supreme court may, in its discretion, permit such act to be done at any time, on such terms as may be deemed just.

RESPONDENT'S EXHIBIT A

THIS DEED, made this 12th day of September, 1977 by and between Clarence Williams and Anna Louise F. Williams, his wife, parties of the first part; and Woody G. Marks and Phyllis H. Marks, husband and wife, parties of the second part;

W I T N E S S E T H :

That for and in consideration of the sum of TEN DOLLARS ($10.00) and other good and valuable consideration cash to them in hand paid by the parties of the second part, at and before the signing, sealing and delivery of this deed of bargain and sale, the receipt of which is hereby acknowledged, the parties of the first part do hereby grant, bargain, sell and convey in fee simple and with GENERAL WARRANTY and ENGLISH COVENANTS of title unto the said Woody G. Marks and Phyllis H. Marks, husband and wife, as tenants by the entireties with the right of survivorship as at common law, parties of the second part, all their right, title and interest, the same being an undivided one-fourth (1/4), in and to the following described real estate, together with the buildings, privileges and appurtenances of every kind thereunto belonging, to-wit:

> "All of that certain tract or parcel of land lying situate and being in Newsoms District, Southampton County, Virginia, known generally as the 'Mill Tract' and described as consisting of four hundred fifty (450) acres, more or less, but understood to contain only three hundred fifty (350) acres, more or less, and is sold in the gross as a parcel and not by the acre, more particularly bounded and described as follows: on the north by Ridley Mill Swamp, which divides this tract from the other lands of J. W. Ridley, on the east and southeast by a certain branch lying between this tract and the lands of Ed Story, the Jim Blow lands, and the Coggsdale land, known as the Jim Bishop tract; on the south and southwest by the Murfreesboro County road

running by the residence of J. W. Ridley, and the aforesaid mill swamp, and on the west by the aforesaid county road and the farm known as the Sarah Stephenson place; a small portion of this tract or parcel of land lying on the west or northwest side of the said county road;"

By survey made May 25, 1931 by Thos. D. Newsom, Surveyor, a plat of which, marked Exhibit 1, is filed in the Clerk's Office of the Circuit Court of said County, with the papers in the chancery suit of Calvin Williams vs. J. William Ridley, dismissed March 21, 1932, Chancery Order Book 9, at page 217, said tract is shown to contain 351.02 acres;

LESS, HOWEVER, those three lots, tracts or parcels conveyed to Raiford Parham, three acres, Ralph E. Williams, one acre, and Clarence Williams and Juanita Louise Williams, husband and wife, four acres by Mary Etta Williams and husband by deeds dated respectively May 3, 1955, November 21, 1958 and August 4, 1959, recorded in said Clerk's Office respectively in Deed Book 117, at page 281, Deed Book 133, at page 604, and Deed Book 137, at page 193;

It being in all respects the greater portion of the real estate conveyed to the said Mary Etta Williams by the Merchants and Farmers Bank of Franklin by deed dated December 14, 1937, recorded in said Clerk's Office in Deed Book 78, at page 590; and it being in all respects the same real estate of which the said Mary Etta Williams died seized and possessed, on February 27, 1966, and by her last will and testament dated May 9, 1962, admitted to probate in said Clerk's Office on March 16, 1966, recorded in Will Book 30, at page 262, devised to her husband, now deceased, for life and at his death to her four children, the said Clarence Williams and Joe Williams, Evelyn Granger and Anna Faulcon, in fee simple and in equal shares.

Witness the following signatures and seals:

_____(SEAL)
Clarence Williams

_____(SEAL)
Anna Louise F. Williams

STATE OF VIRGINIA:

COUNTY OF SOUTHAMPTON, to-wit:

The foregoing instrument was acknowledged before me this _____day of September, 1977 by Clarence Williams and Anna Louise F. Williams. My commission expires _____.

_____
Notary Public

MOYLER, MOYLER AND RAINEY
ATTORNEYS AND COUNSELLORS AT LAW
506 NORTH MAIN STREET
P. O. BOX 775
FRANKLIN, VIRGINIA 23851

J. EDWARD MOYLER
J. EDWARD MOYLER, JR.
JAMES E. RAINEY

TELEPHONE 562-5103
AREA CODE 804

May 2, 1979

Honorable James C. Godwin
441 Market Street
Suffolk, Virginia 23434

File In re: Marks and Marks vs. Williams
Williams vs. Flythe

Dear Judge Godwin:

If you will recall, Francis Clark and I appeared before you on April 24th, 1979 in your office in Suffolk to argue the demurrers which Francis Clark had previously filed, specifically, a demurrer to the Bill of Complaint filed in the Marks and Marks vs. Williams matter, a supplemental demurrer filed in said matter, and a demurrer to a Petition filed in the Williams vs. Flythe matter. You sustained Mr. Clark on all three demurrers, to which we excepted. At this time, we would respectfully request you to reconsider your decision in this matter within the twenty-one day period in which this matter must lie in the breast of the Court, or in the alternative, hear further arguments on this matter. Our request goes only to the original demurrer filed in the Marks and Marks vs. Williams matter and the demurrer filed in the Williams vs. Flythe matter. We agree with Mr. Clark on his supplemental demurrer and would request with respect to said demurrer that we be given leave to amend our Bill of Complaint, deleting all references to breach of contract. With respect to the demurrer to the Bill of Complaint in the Marks and Marks vs. Williams matter and the demurrer to the Petition filed in the Williams vs. Flythe matter, both of which are based on the same factual situation and principles of law, we would respectfully submit the following.

In the Marks and Marks vs. Williams matter, our Bill of Complaint requested specific performance of Clarence Williams, the defendant, to convey to the plaintiffs his interest in certain real property in Southampton County, Virginia. We did not make the wife of Clarence Williams a defendant in this matter. We alleged in said Bill of Complaint that Clarence Williams "refused and still refuses to comply with the agreement" he had previously entered. Mr. Williams has not answered and given the reasons for his noncompliance and, therefore, the same is unknown. With reference to the Petition, the Marks were simply trying to stay further proceedings in that matter until the Court ruled with respect to their specific performance suit.

We submit to you that at no time does the Bill of Complaint nor the Petition attempt to allege why Mr. Williams will not comply with the agreement he previously executed. Mr. Clark sets forth that the wife of Clarence Williams will not sign the deed and therefore Mr. Williams does not have to convey if the

wife does not sign, since all parties contemplated the wife's signature. In fact, Mr. Clark's demurrers state as follows: "The parties were not to be bound thereby except and unless the deed attached to the contract was executed by both Clarence Williams and his wife." We submit to your Honor that whether or not the wife will or will not sign a deed conveying her dower interest is a factual situation which has been neither admitted nor denied. One cannot garner from the pleadings the alleged answer to this factual situation.

A demurrer, according to Michie's Jurisprudence, is

> . . . a pleading by which the pleader objects to proceeding further because no case in law has been stated on the other side, and of this he demands the judgment of the Court before he will proceed further. It lies only for a matter already apparent on the face of the pleadings, or which is made so to appear by oyer. It presents a question of law only, to be decided by the Court. It in effect says: Admit all you say to be true, the law affords you no relief in the form sought. (6A Michie's Jurisprudence 3)

And further, on page 6, it is stated

> A demurrer is addressed to matters appearing on the face of the pleadings and in aid of it. The Court cannot look to facts appearing in any other parts of the record.

And on page 7,

> A basic rule concerning demurrers is that a demurrer properly lies for only such defects as are apparent on the face of the pleading. It cannot allege matter foreign to the pleading. Thus, if a defect is not apparent in a declaration, the defendant should show the objection by plea or answer. A demurrer can never be founded on matter collateral to the pleading to which it is opposed, and must therefore, as a general rule, be decided without reference to extraneous matter.

And on page 16, it is specifically stated

> A question of fact cannot be settled on demurrer.

We submit to the Court that it is purely a question of facts as to whether or not the wife of Clarence Williams will sign the deed. We further submit that her signature is at issue in this case only collaterally, the collateral issue necessarily having to be determined by the evidence presented by the parties. For these reasons, we feel that the Court should overrule the defendant's demurrers, both to the Bill of Complaint and to the Petition.

With respect to Mr. Clark's argument as to the specific performance issue, we strongly disagree with his position, but, be that as it may, we definitely feel that his argument is premature. In reviewing his memorandum which he filed with you on the date of our arguments, we find no legal argument whatsoever, only an argument as to what the facts were. We submit to the Court that the parties involved are more competent to testify as to what the situation was at that particular time than is Mr. Williams' attorney, particularly when he is arguing a demurrer.

We reiterate our position that whether or not the exhibit filed with the Bill of Complaint was an offer, or whether or not it was a contract, or whether or not it was a memorandum of a previous agreement, can only be determined by construing the writing executed by the parties in light of the intention of the parties. It becomes a legal question only after the factual issues are determined. We are confident that we will have to face the argument presented by Mr. Clark at a later date; however at the same time, we submit that we should not be faced with the argument at this stage of the pleadings.

In light of the above, we respectfully request the Court to overrule the demurrers in this matter, other than the supplemental demurrer filed, and as to the supplemental demurrer, we request leave to amend the Bill of Complaint. In the alternative, we would request that the Court hear further argument in this matter.

Sincerely,

James E. Rainey

JER/lr

cc: Mr. Francis E. Clark
Attorney at Law
P. O. Box 216
Franklin, Virginia 23851

Mr. George O. Bryant, Clerk
Circuit Court, Southampton County
Courtland, Virginia 23837
(Copy to be filed in Marks and Marks vs. Williams)

Mr. George O. Bryant, Clerk
Circuit Court, Southampton County
Courtland, Virginia 23837
(Copy to be filed in Williams vs. Flythe)

Received and filed, this the 3rd
day of May, 1979

PARKER, CLARK & PARKER
ATTORNEYS AT LAW
104 N. MAIN STREET
P. O. BOX 216
FRANKLIN, VIRGINIA 23851

GEORGE HINSON PARKER, JR.
FRANCIS E. CLARK
WESTBROOK J. PARKER

TELEPHONE
804/562-4151

May 3, 1979

Honorable James C. Godwin, Judge
Fifth Judicial Circuit
Municipal Building
Suffolk, Virginia 23434

Re: Woody G. Marks and Phyllis H. Marks
v. Clarence Williams

Clarence Williams v. Anna W. Flythe, et als

Dear Judge Godwin:

In response to Mr. Rainey's request for a rehearing in the above matters I wish to set forth the following:

The Marks' offer states "We have had prepared the attached deed for execution by you and your wife and delivery to us." After setting forth the consideration, the offer states that "Upon the delivery of the attached deed properly executed we will give you $15,000.00" etc. At the end of the offer appears the language "Seen, approved and agreed to, and accepted:" and beneath this appears the signature of Clarence Williams.

The bill of complaint shows on its face that the deed was never executed by anyone and was never delivered to the Marks. It shows on its face that Clarence Williams instituted a partition suit a considerable length of time after having signed the offer, which, of course, constitutes an announcement by Mr. Williams that he never intended to sell the property to Mr. Marks.

Mr. Rainey desires an evidentiary hearing for the purpose of establishing the intention of the parties. If the language of the offer and so called acceptance were ambiguous, then parole evidence would be admissible to establish the intention. However, the language is not ambiguous and the intention of the parties is clearly stated on the face of the offer.

The sum and substance of this case is that Mr. and Mrs. Marks did not intend to be bound to purchase the property except and until Mr. Williams and his wife executed the deed mentioned in and attached to the offer. Mr. Rainey wants to introduce evidence to establish the reason that the deed was never executed. This is immaterial. The language of the offer requires that the deed be executed by both husband and wife and delivered else the Marks were not to be bound to purchase the property. Certainly, it was immaterial to the Marks why the wife might not execute the deed, the problem which they wanted to guard against was being obligated to purchase the property with a defective title. Further, the wife's signature was not the only condition, the conditions were the execution and delivery of a deed executed by both parties, and since no time is set forth within which Williams was required to deliver the deed properly executed, there is no possible construction which can be placed upon the language of the offer and acceptance except to construe the same as meaning "If and when the seller ever should decide to sell to the Marks, then the Marks would be bound to purchase paying the stated consideration and complying with the other terms of the offer." In other words, contrary to the Marks being able to compel Mr. Williams to convey, the situation is exactly the opposite. Indeed, the language requires the Marks to purchase if at any time Williams might care to deliver the properly executed deed, but there is no language which can be found which will require Williams to ever deliver a deed. There is further no language from which it can be implied that Williams must have some reason for not delivering the deed other than his own personal whims.

In summary, the language of the offer and the acceptance lends itself to only one construction and that is that if Williams should ever decide to sell to Marks, then Marks would be bound to purchase if Williams could deliver good title. The reasons for Williams' inability or refusal to execute the deed himself or to request his wife to execute the same are immaterial. The whole arrangement centered around delivery and execution of a deed by the seller and his wife, and in absence of the execution and delivery of such a deed nobody is to be bound.

I will be out of my office until June 4, 1979, but realizing that Mr. Rainey has to act within 21 days of the entry of your order, I have no objection to your deciding this matter on what is already before you.

With kindest personal wishes always, I remain

Very truly yours,

F. E. Clark

FEC/nw

cc Mr. James E. Rainey, Attorney
Moyler, Moyler, Rainey and Cobb
Post Office Box 775
Franklin, Virginia 23851

Mr. George O. Bryant, Clerk
Circuit Court of Southampton County
Courtland, Virginia 23837
(Copy to be filed in Marks and Marks v. Williams)

Mr. George O. Bryant, Clerk
Circuit Court of Southampton County
Courtland, Virginia 23837
(Copy to be filed in Williams v. Flythe)

Mr. Gilbert Francis, Attorney
Boykins, Virginia 23827

MOYLER, MOYLER AND RAINEY
ATTORNEYS AND COUNSELLORS AT LAW
506 NORTH MAIN STREET
P. O. BOX 775
FRANKLIN, VIRGINIA 23851

J. EDWARD MOYLER
J. EDWARD MOYLER, JR.
JAMES E. RAINEY

TELEPHONE 562-5133
AREA CODE 804

May 4, 1979

Honorable James C. Godwin
441 Market Street
Suffolk, Virginia 23434

In re: Marks and Marks vs. Williams
Williams vs. Flythe

Dear Judge Godwin:

Realizing that correspondence is not the most professional way to argue a case, we feel compelled, however, to make a few comments concerning the above matters.

1. Mr. Clark repeatedly refers to the exhibit attached to the Bill of Complaint as an offer and an acceptance. It is our contention that the writing, if not a contract itself, is a memorandum of a prior agreement. In fact, the very first sentence in the very first paragraph is as follows: "In accordance with our September 11th, 1977 agreement as heretofore amended . . ."

2. Mr. Clark indicates that "the" deed was never executed. I find nothing in the Bill of Complaint indicating whether or not "the" deed was executed.

3. Mr. Clark indicates that the Bill of Complaint shows on its face that Mr. Williams instituted a partition suit. I find nothing in the Bill of Complaint indicating that Mr. Williams instituted a partition suit.

We submit that the intentions of the parties are not ascertainable from the exhibit filed with the Bill of Complaint. In fact, the intentions of the parties, and for that matter, the draftsmen, were diametrically opposite from what Mr. Clark would lead the Court to believe the intentions were. However, be that as it may, our pleadings have matured only to the level of a demurrer, and therefore both Mr. Clark's argument and my argument, with reference to the intention of the parties cannot be considered. We repeat that Mr. Clark's demurrer states as follows: "The parties were not to be bound thereby except and unless the deed attached to the contract was executed by both Clarence Williams and his wife." We again submit to your Honor that whether or not the wife will or will not sign the deed conveying her dower interest is a factual situation which has been neither admitted nor denied.

Since Mr. Clark will be out of his office several weeks, and therefore, would not be available for further arguments in this matter, we will withdraw our request for further arguments, respectfully requesting that you reconsider your previous decision based on the prior arguments and letters submitted.

For your information, I am enclosing both a copy of the Bill of Complaint and a copy of the Petition.

Sincerely,

James E. Rainey

JER/lr

cc: Mr. Francis E. Clark
Mr. George O. Bryant, Clerk
(2 copies - one to be filed in Marks and Marks vs. Williams and one to be filed in Williams vs. Flythe)

Woody G. Marks and Phyllis H. Marks, plaintiffs, hereby give notice, pursuant to the provisions of Rule 5:6 of the Rules of the Supreme Court of Virginia, of their Appeal from that certain final order entered in the above styled matter on April 24th, 1979, to which action the said Woody G. Marks and Phyllis H. Marks excepted.

No transcript or statement of facts, testimony or other incidents of the case, other than those previously filed and made a part of the record hereof, or to be hereafter filed.

WOODY G. MARKS and PHYLLIS H. MARKS

BY _____
Of Counsel

Mr. James E. Rainey
Moyler, Moyler, Rainey & Cobb
Attorneys at Law
P. O. Box 775
Franklin, Virginia 23851
Counsel for Plaintiffs

C E R T I F I C A T E

I hereby certify that a copy of the foregoing Notice of Appeal was mailed to Mr. Francis E. Clark, Parker, Clark & Parker, Attorneys at Law, P. O. Box 216, Franklin, Virginia 23851 on this the 15th day of May, 1979.

_____

Received and filed, this the 15 day of May, 19 79

_____

ASSIGNMENT OF ERROR

1. The Court erred in sustaining the demurrer of the defendant in that the Court disregarded the plain meaning of the language of the agreement made by and between the plaintiffs and the defendant.

2. The Court erred in sustaining the demurrer of the defendant in that the Court exceeded the proper limitations of the office of a demurrer which said limitations have been established by statute and case law.

3. The Court erred in sustaining the demurrer of the defendant in that the same is not in accord with the law of specific performance of contracts for the sale of land in Virginia.

4. The Court erred in not allowing the plaintiffs leave to amend their Bill of Complaint upon the Court's sustaining the defendant's supplemental demurrer.