REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

DURING THE YEARS

1838-9.

BY RETURN J. MEIGS.

NASHVILLE:
S. NYE & CO. PRINTERS.
1839.

PEARL vs. NASHVILLE.

CHANCERY. *Practice—Effect of agreement to take testimony after* pro confesso *as if answer had been filed.* If after a bill for an account has been taken for confessed it be agreed that it may be referred to the Clerk and Master to take an account, and that the defendant may prove before him by competent testimony any matter of defence to the bill in the same manner, and to the same effect as if an answer had been filed, relying on such matter of defence,—the defendant is not confined to proof adapted merely to limit his responsibility; but may adduce proof to the equity of the bill, and to show that he is not accountable at all.

SAME. *Specific execution.* The specific execution of a contract for the construction of machinery for a certain purpose, will not be decreed at the suit of the undertaker or his assigns, if the machinery fail to answer the purpose of its construction, though the party, on whose premises and for whose use the work was done, take possession of the premises. To entitle the undertaker to a specific execution in such case, i. e. to a decree for the stipulated compensation for his labor, the party for whom the work was done, must take possession of, use and occupy the works as his own and for the end for which they were designed.

The Mayor and Aldermen of Nashville having entered into a contract with Samuel Stacker for supplying the town with water, which was only partially executed by him, on the 21st of January, 1826, made a contract with Daniel Avery and William L. Ward, to complete the construction of the works begun by Stacker. The terms of this contract were as follows:

Avery and Ward were to procure the necessary machinery for raising the water into the reservoir by steam; to keep the same constantly in operation and repair, so as to furnish an ample supply of water without intermission; to lay down pipes of sufficient calibre to conduct the water from the reservoir to the four corners of the square; to erect at each corner thereof hydrants to be used only in cases of fire, or for the purpose of exercising the fire engines, which hydrants were to be at all times, after the completion of the works, supplied with water; to erect at the intersections of the streets, hydrants to be used and supplied in the same manner, so far as said pipes were to extend under said contract; and to keep an accurate account of their expenditures on account of the works to the time of their completion, to be then filed with the Board of Mayor and Aldermen, verified on oath.

The Mayor and Aldermen, on their part, were, within the year, 1826, to furnish Avery and Ward with 5000 dollars,

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free of interest for ten years, to be expended in the construction of the works, or to liquidate and settle claims to that amount for and on account of the works, to be advanced as the work progressed, but not to exceed the amount expended thereon; to allow Avery and Ward the use, for said works, of all the ground lying between the road which might be constructed, leading to the middle or corporation landing, and a line 100 feet above the lower extremity of the corporation ground.

At the end of the period of ten years from the completion of the works the corporation might take them into their own possession, paying Avery and Ward, or their assigns, the amount expended in their construction over and above the sum of 5000 dollars.

Avery and Ward bound themselves, if the corporation advanced the 5000 dollars within the year, 1826, to have the works completed by the 1st of January, 1827, under the penalty of 100 dollars for every month thereafter that they might be incomplete: and if the works, at any time after their completion, should get out of repair and so remain for the space of ninety days, so that the town should not be supplied with water, then the Mayor and Aldermen might take possession of the works in behalf of the corporation, and use and occupy the same as their own; and be liable, in that case, to pay Avery and Ward only one half of the amount by them expended in the construction of the works, over and above the 5000 dollars.

The corporation advanced the 5000 dollars as stipulated in the above contract, but Avery and Ward failed to complete the works; and having, on the 5th of June, 1827, dissolved their partnership, the corporation, on the 22d of September, entered into a supplemental contract with Avery alone, wherein he bound himself to proceed forthwith to complete said water works, according to the first agreement by the 1st of January, 1828, or on failure therein, to pay the corporation five dollars for each day during which he should fail to have the works completed, and a good and sufficient supply of water in the reservoir for the use of the town: in consideration of which the Corporation was to loan Avery, to enable him to proceed

with the works, one thousand dollars, to be paid to his orders as the work progressed, and to be repaid at the end of one year with interest, and to secure the repayment of which, the corporation were declared to have a lien upon all the machinery and furniture attached to the works, and to the saw mill erected by Avery and Ward, and attached thereto.

On the 30th of June, 1827, Avery conveyed his interest in the water works, under the above recited contracts with the corporation, to Wilkins Tannehill, in trust to secure the payment of $1067, which he owed to Dyer Pearl & Co; and they, on the 15th of October, 1831, conveyed their interest in the premises to Robert Aldrich, in trust to secure the payment of certain debts, in that deed recited.

Things being in this situation, Dyer and Sylvester Pearl, and Richard Aldrich, on the 16th of April, 1833, filed their bill in the chancery court at Franklin, against the corporation of Nashville, Wilkins Tannehill and Daniel Avery, alleging that the works had been constructed and had supplied the town with water, for which the corporation was indebted to Avery, under the two contracts, in the sum of $1987 14 cents; that the works and the saw mill thereto attached, had been destroyed by fire about the 9th of March, 1830; that a large sum of money would have been required to repair the works; that Avery was too poor to raise it, and the corporation never offered to make him any further advances, in consequence of which the works had neither been rebuilt nor repaired by Avery, and the corporation had taken possession of the lot of land; and, at the filing of the bill, had and enjoyed it, having dispossessed the tenants by ejectment; And praying that the corporation might be decreed to pay to Aldrich such balance as might be found due from them to Avery; and that the necessary accounts to ascertain that balance might be taken, &c.

Answers were filed by Avery and Tannehill; but the corporation having failed to answer the bill, it was taken for confessed as to them at January Rules, 1834. At May Term, 1835, leave was granted to the Mayor and Aldermen to file the answer of the corporation within 90 days, so as not to delay the trial. On the 3d of November, they filed a demur-

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rer, which was sustained by Chancellor BRAMLITT at April Term, 1836, and the bill dismissed. From this decree the complainants appealed to the supreme court, where, at December Term, 1838, the chancellor's decree was reversed, and a decree pronounced that the corporation should answer, and remanding the cause to the chancery court. In that court, at April Term, 1837, the corporation was allowed till July to file their answer, but having failed to do it, the cause was taken for confessed at October Rules, and set for hearing *ex parte* as to them. At October Term, time was again given the corporation, by consent, till January Rules, 1838, to answer, so as not to delay the trial. Failing to answer, the bill was taken for confessed again at the rules in April; and at April Term, the counsel entered into the following agreement:

"In this cause it is agreed that an account may be ordered to be taken, the same as if an answer was filed. And it is also agreed that the defendants may prove, by competent testimony, before the Clerk and Master, any matter of defence to the said bill in the same manner, and to have the same effect as if an answer was filed relying on such matter of defence. The force of the *pro confesso*, is, however, not to be done away, except so far as it is done away by proof on the part of the said corporation."

And in pursuance of this agreement the court referred the cause to the Clerk and Master, to take and report an account of the expenditures of Avery and Ward, and of Avery alone, under the two contracts with the corporation; on taking which account the parties were to be allowed to make proof according to the above agreement.

At October Term, 1838, the Clerk and Master reported an account of expenditures and advances, which showed an excess of expenditures over advances, on the part of Avery alone, including interest from the 9th of March, 1830, the time when the works had been destroyed, to the 24th of October, 1838, the time when the account was taken, of $ 3015 41 cents.

On taking the account, the Clerk and Master examined two witnesses on interrogatories, from whose testimony it appear-

ed, that the works constructed by Avery and Ward, and by Avery alone, had proved to be a complete failure; that the "reservoir was a hoax," being incapable of receiving more than four feet of water, which quantity, moreover, was not kept in it; that the engine was not kept in operation more than half the time, and whilst it was stopped there was no supply of water; that the pipes were deficient, and had to be constantly repaired, &c. &c.

Upon this testimony, and the report, which was not excepted to, his Honor Chancellor BRAMLITT, at October Term, 1838, heard the cause, and being of opinion that the allegations in the bill whereon the complainants sought to ground the relief prayed for, had been disproved by the corporation, and the force and effect of the *pro confesso* done away with under the aforesaid agreement, dismissed the bill with costs.

From which decree the complainants appealed in error.

JAMES CAMPBELL and COOK, for the complainants, said the plain and obvious meaning of the agreement is, that the clerk was to take proof upon the matters referred to him, rebutting or disproving what the corporation had confessed, by failing to answer, and which they would not have been allowed to disprove but for the agreement.

January 6.

The bill alledges that an account of the expenditures was furnished the corporation, which they received and retained without objection, and this is not disproved—nor is it pretended that Avery and Ward, and Daniel Avery, did not, in fact, expend the sums they alledge and charge, they did expend.

Their defence, as now set up, does not rest upon any thing *referred to the Clerk and Master*—nor upon the facts that the work was not done and received by the corporation, the expenditures incurred, and an account thereof furnished. But the corporation now comes forward and tries to prove, that the work was not done according to contract; that the pipes were of inferior quality; that the location of the reservoir and water works was injudicious, that they could never answer the purpose of supplying the town with water, and that there was not a constant supply of water furnished.

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Complainants say that this evidence, which was introduced before the clerk, is wholly *dehors* the matters in issue.

2. Supposing it was all true, and defendants would now avail themselves of it, yet the location of the water works was fixed by the corporation, and complainants are not responsible therefor.

3. As to the pipes, &c. being of inferior quality, if that objection could have been made, it ought to have been done when the account of expenditures was furnished, or within a reasonable time afterwards.

4. They received the work, and cannot now object, unless for fraud, and no fraud is shown.

5. The covenant itself ascertains and fixes the damages. Avery and Ward are to pay in the event the work should not answer the intended purpose;—for it says, if the work get out of repair and water is not furnished as contracted for at any time, for the space of ninety days together, the corporation may take possession of them, paying Avery and Ward, one half their expenditures over $5000, &c. The chancellor after he had rendered the decree for an account and report, and after the report had been made and not excepted to, refused to confirm the report, but dismissed the bill—in which it is believed he erred. The proof shows the works in repair when burnt.

WASHINGTON, for the defendant, said—1. The plaintiff in asking equity, must do equity. The corporation has advanced $5000, under the first contract, and $680 under the second contract, and in return gets literally nothing.

2. The corporation never took possession of the water works, under the above mentioned provision in the contract; but the further prosecution of the enterprise was abandoned by Avery, leaving the corporation in such possession as, according to the nature of the thing, it had before.

3. As to the possession of the scite for the machinery; that possession, by the contract, was not the exclusive possession of Avery, but was the possession of the corporation by Avery, for the use of the water works. And it was not disturbed until Avery attempted to hold over, in defiance of the corporation, after the destruction of the water works.

4. Avery was, by the construction of the contract, a warrantor of the sufficiency of the water works, in all their parts, for the "constant and abundant" supply of water to the town, for ten years, from the 1st of January, 1828; or until the corporation took possession of them formally, under that provision in the contract already adverted to.

5. The proof shows that the whole enterprise was a complete failure, produced by the incompetency of the undertaker.

GREEN, J. delivered the opinion of the court. January 6.

In this case the defendant filed a demurrer to the bill of complaint, which was overruled by the court, and they were ordered to answer. No answer having been filed within the time allowed by the court, the bill was taken *pro confesso*. When the cause was about to be heard, the parties entered into the following agreement.—

"In this cause it is agreed that an account may be ordered to be taken the same as if an answer was filed; and it is also agreed that the defendants may prove by competent testimony before the clerk and master any matter of defence to the said bill in the same manner, and to have the same effect, as if an answer were filed relying on such matter of defence. The force of the *pro confesso* is not however to be done away, except so far as it is done away by proof on the part of said corporation."

The account was taken, and testimony, not relevant to the account, but affecting the right of the complainants to a decree for *any* amount, was taken before the master and reported to the court—whereupon the bill was dismissed.

The first question is, what construction must be given to this agreement of the parties?

The com plainants contend that the right of the defendants to produce testimony before the master, was confined to evidence in relation to the items of the account the master was ordered to take; while on the other hand the defendants insist they were permitted to take any testimony, which would have been competent evidence in the cause, if an answer had been filed.

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The true interpretation of this agreement is not without difficulty. The complainants contend with great plausibility, that as the matter referred to the master was the question of account, testimony to be taken before him, must be understood to refer exclusively to that subject. And the defendants urge with great force, that the comprehensive words of the agreement, permitting them to prove by competent testimony any matter of defence to the said bill in the same manner, and to have the same effect, as if an answer were filed, relying on such matter of defence," authorised the testimony in question to be taken.

We do not doubt, but that the gentleman who signed this agreement, on each side, understood it at the time, as they now contend it ought to be construed. We however think with the defendants, that the testimony is admissible under the agreement. If an answer had been filed, denying that Avery and Ward had ever completed the water works, and denying that the corporation had ever taken them into possession, *using* and *occupying* them, it is clear that the testimony of these witnesses would have been relevant to such issues and consequently it must be *competent*, under the agreement.

2. We next come to consider whether upon the bill and proof, the complainant is entitled to a decree.

The first covenant contains the following stipulation: "If at any time after the completion of said works, the same shall get out of repair, and so remain for the space of ninety days, so that the town is not supplied with water as is herein provided, then the mayor and alderman for the time being, may take possession of said works, in behalf of the corporation and use, and occupy the same, as their own, and shall only in such case, be liable to pay Avery and Ward; the one half of the amount by them expended in the construction thereof, over and above the five thousand dollars advanced as above stated."

The bill alledges "that after the completion of said works on the 1st January, 1828, the said Avery proceeded to supply, and did supply the said town of Nashville according to contract with water without intermission, except for the necessary repairs of machinery, until about the 9th day of

March 1830, when the building attached to said works, and the said saw mill, were destroyed accidently by fire, and the machinery of the establishment upon which the supply of water depended were thereby rendered useless. To repair said works would have required a large sum of money, and the said Avery was too poor to raise it, and the said mayor and aldermen never offered to make him any further advances, consequently said works have never been rebuilt or repaired by the said Avery. Your orator further states that the said mayor and aldermen have taken possession of said lot of land, and now have and enjoy the use and occupation thereof, having dispossessed the tenants heretofore in possession by action of ejectment."

The first witness, David M. Moore says, he always considered the water works a failure; that the reservoir was a complete *hoax;* that the pipes were very indifferent, insomuch that he was continually repairing them, and that before the buildings were burned, "the works did not go more than half the time."

Edwin Dibrell says, the water works were so complete a failure and disappointment, that the corporation never attempted to rebuild them, but constructed a different system altogether.

The condition of the covenant, which was to make the corporation liable for half the expense of erecting the water works, depended upon the taking possession of and *using* and *occupying* them as their own. And the question now is, did they do so?

We are of opinion they did not.

True, it is stated in the bill, that the "mayor and aldermen have taken possession of said lot of land, and now have, and enjoy the use and occupation thereof;" and this averment is not disproved, and is therefore to be taken as true. It was upon this averment in the bill that the court, 10 Yer. 179, overruled the demurrer. Nothing appearing to the contrary, the court was of opinion, that possession of the lot of land, upon which the machinery was erected, ought to be regarded as possession of the water works. But *now*, it appears from the proof that the water works were worthless,

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could not have been made to answer the ends of their erection, and were abandoned alike by the corporation and by Avery. The statement in the bill, corroborates this proof. The complainants say, "to repair said works would have required a large sum of money, and the said Avery was too poor to raise it: and the said mayor and aldermen never offered to make him any further advances, *consequently*, the said works have neither been rebuilt or repaired by said Avery."

This statement must be understood, in connexion with the evidence in relation to the worthlesss character of the works, as an admission that Avery had abandoned all idea of repairing them, before the corporation took possession of the lot of land. They were not repaired by Avery says the bill, in *consequence* of the want of money, which he was too poor to raise. They were not repaired by the corporation says the proof, because they were worthless, and they determined to construct works on a different system.

Upon the whole, it is clear that the corporation did not take possession, *use* and *occupy* the works as their own. This was the condition upon which their liabilities was to depend. The fact, that they may have had possession of them, as incidental to the possession of the land, where the machinery, pipes and reservoir, were situated, does not of itself create their liability.

It was their *use* and *occupation* of them, as *water works*, as *their own*, thus taking a benefit from them, that was to entitle Avery to half their cost. This, it cannot be pretended they have done, and therefore, we think the bill must be dismissed.

Affirm the decree.