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ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

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[280] CHAPMAN'S ADM'X *v.* TURNER.

Monday, May 14, 1798.

1. What shall be called a *conditional sale* and irredeemable, instead of a mortgage.
2. [C. gave an instrument of writing to T. stating that C. had received of T. £30, and had put into T.'s hands a slave, as security, and that if the £30 were not paid on or before a certain day, T. was to have the slave for the £30. Held, under the evidence in the cause, to be a *conditional sale,* which became *absolute* on the failure of C. to pay the £30 on the day specified in the instrument.]*
3. When the bill asks a discovery, the answer, if responsive to it, is entitled to credit as evidence. P. 286.

Elizabeth Chapman, administratrix of Richard Chapman, brought a bill in the High Court of Chancery against John Turner and Jedediah Turner, stating, that the said Richard Chapman being distressed, borrowed £30 of John Turner, and as a security pledged and mortgaged a valuable negro woman of about 18 years of age, and worth £50. That Turner took an instrument, by which it would appear, that the said slave *was pledged* as a security for the re-payment of money. That it was out of Chapman's power to repay the money on the day; whereupon Turner claimed the slave as his property, and sold her and her two children to Jedediah Turner for £60, which was less than their value. That Jedediah Turner at the time of buying, knew that the slave was *only pledged;* and *had read the mortgage or note.* That the plaintiff had tendered the principal and interest, but the defendants refused to restore the property, and, therefore, the bill prayed a redemption.

The answer of Jedediah Turner admits the purchase, and that prior thereto, he had seen the writing from Chapman to

* Whether a contract is a *mortgage,* or a *conditional sale,* depends on the whole circumstances of the transaction, and not on the mere written evidence of it. The great question is, whether the parties intended to treat of *a purchase,* and, contemplating the *commodity's value, fixed the price;* or whether the object was *a loan of money, and a security, or pledge, for re-payment.* If the former, it was *a conditional sale:* if the latter, *a mortgage. Robertson* v. *Campbell et al.,* 2 Call, 421; *King* v. *Newman,* 2 Mun. 40.

Cases of conveyances construed to be *mortgages*—*Robertson* v. *Campbell et al.,* 2 Call, 421; *Danby, &c.* v. *Green,* 4 H. & M. 101; *Ross* v. *Norvell,* 1 Wash. 14; *Pennington* v. *Hanby et als.,* 4 Mun. 140; *King* v. *Newman,* 2 Mun. 40; *Breckenridge* v. *Auld, &c.,* 1 Rob. 148.

Cases of conveyances construed to be *conditional sales*—The above case, of *Chapman's adm'x* v. *Turner; Leavell* v. *Robertson,* 2 Lei. 161; *Kroesen* v. *Seevers, &c.,* 5 Lei. 434; *Moss* v. *Green,* 10 Lei. 251; *Strider* v. *Reid's adm'r,* 2 Gratt. 33. *Conway's ex'or &c.* v. *Alexander,* 7 Cra. 218, or 2 Cond. R. 479; *Forkner* v. *Stuart,* 6 Gratt. 197.

Case in which the Judges were divided on the question of *mortgage* or *conditional* sale—*Roberts' adm'r* v. *Cocke, ex'or,* 1 Rand. 121.

the other defendant. But, as he had never heard that Chapman wished to redeem, he had concluded that the purchase was absolute; and that his own bargain was not advantageous.

The answer of John Turner states, that Richard Chapman applied to him for a loan of money, but the defendant, being a poor man, and wishing to vest the little money he had in personal property, refused. That Chapman at length offered to sell him the said slave, who was between 20 and 30 years of age, for £30, but with leave to repay it in a short time; in which case the slave was to be returned. That thereupon the defendant paid him the said £30; and it was stipulated, that if the money was not returned without interest, on or before the day for holding the Court in the county of Hanover, in the month of July following, that the said Chapman's right of redeeming the said slave should cease, and the slave become the absolute property of the defendant. That Chapman never re-paid the money or offered to redeem during his life-time; and that after Hanover Court aforesaid, he (Turner) considered the slave as his own property. That the bargain was not advantageous. That the slave had had four children prior to the purchase, three of which she had overlain, and that upon discovering these facts he had offered to annul the contract, but Chapman refused. [281]

The writing spoken of in the bill and answers, is in these words: "I this day received of Mr. John Turner, the sum of thirty pounds, and put a negro woman named Hannah, in his hands as security, and if *he* the £30 is not paid at or before next July Hanover Court, the said Turner is to have the said negro for the said £30. Witness my hand this 20th May, 1786. RICHARD CHAPMAN.

Teste, JAMES PARSONS."

There was an amended bill, which stated that Richard Chapman, in his life-time, on the day of , 1786, tendered to John Turner £30 13s. 0d. which he refused to accept. But the answer of John Turner denies the tender.

The deposition of a witness stated, that he had heard John Turner say, he had lent Mr. Chapman £30, and had got a bill of sale, or some writing, by which Chapman had conveyed a negro woman to him; which was to be obligatory if the money was not returned by a particular day. That he asked Turner if the money had been tendered? To which he answered, not within the time. That the deponent then asked when it was tendered? To which Turner answered, that it was after sunset, or some time in the evening, or towards dark on the day that it became due. That the deponent then [282]

advised him to return the negro and get his money back, or try to get another bill of sale; for, in his opinion, Turner was only raising negroes for other people.

There was no other evidence of the tender, and although the witnesses differed about the value of the slave, when bought of Chapman, yet none of them made her value to exceed the sum actually paid more than 10 or 15 pounds; and several represented her to have been under a bad character.

There was no other proof of any agreement for redemption. Neither was it proved that Turner offered to annul the sale; though one witness said he had frequently heard Turner, (who appeared to be uneasy at the slave's habit of over-laying her children,) say, that he wished he had his money back.

The Court of Chancery dismissed the bill with costs. From which decree the plaintiff appealed to this Court.

DUVAL, for the appellant.

Though the bargain be conditional, if the lender takes more than lawful interest, it is usury. Here was an application for a loan, and more than lawful interest was taken. It was, therefore, but a shift to evade the statute, and the security is void. [*Lawley* v. *Hooper*,] 3 Atk. 279, 154. [*Lowe* v. *Waller*,] Dougl. 736. At any rate, it was but a mortgage. The property was only to secure the re-payment of the money lent; and the form of the instrument will not alter the nature of the contract. 1 Eq. Ca. Abr. 310, pl. 1, (A,) 312, pl. 11, 13, 313, pl. 14. The person to whom a pledge is delivered, has no right to dispose of the pledge; and, if he does, he who delivered it may, on tendering the money, recover against the purchaser. [*Sir John Ratcliff* v. *Davies*,] Cro. Jac. 245; [*Coggs* v. *Barnard*,] 3 Salk. 268; 3 Atk. 49; Dougl. 636.

WASHINGTON, upon the same side.

It is proved that the money was tendered upon the day that it became due, though the witness is not positive whether it [283] was after sun-set or before. If, however, there was light enough to see the money counted, it was sufficient, according to the most rigid law; and much more in equity, where such strict terms are not required. Let it be, though, that there was no tender until about the time of commencing the suit; yet, the right of redemption, admitting that it is to be put on the common footing of a pledge of personal property, would still exist. 1 Bac. Abr. 128. But this is a case of the first impression with regard to slaves; which, in Virginia, form

great part of the wealth of the people. They were formerly deemed real estates; and could even be entailed, which shews the high value set upon that kind of property by the people and Legislature of this country: A circumstance, which should render them more easy of redemption than personal property in general, is, according to the opinion of the Chancellor, in *Tucker* v. *Wilson*, 1 P. Wms. 261. And although his decree was afterwards reversed by the Lords, yet, that was for the sake of trade and convenience. Therefore, notwithstanding the reversal, the case still shews that they do make a distinction in that country between the kinds of personal property pledged. It has been truly said, that if there be only a security for money, no form of words will bar the equity of redemption. The question must, therefore, always depend upon the nature of the case; and here the terms of the writing are for re-payment; which, from its nature, is consequently redeemable. Pow. on Mortg. 23, 26, 1st ed. The argument that purchasers might otherwise be deceived, does not hold in this case, where the purchase was made with notice of the equitable right. The length of time is no bar, for in the case of *Ross* v. *Norvell*, 1 Wash. [14,] the Court thought that slaves might be redeemed within twenty years; and the valuable nature of the property should preserve its redeemable quality.

WARDEN, contra.

It was a conditional sale, and not a mortgage, and this is proved by the instrument itself. 1 Ayleffe's Pandects of Civil Law, 144. Besides, it is clear, that the parties [284] so intended it; for Chapman was unwilling to lend his money at interest, because he wished to purchase property; and he only advanced it for the accommodation of the other, who was either to have given him his money, or insured him property, at the stipulated day. So, that he was clearly entitled to one or the other of them. The slave was not worth more than was agreed to be given for her; and the testimony does not shew any tender within the time. The answer denies it; and, in fact, the money was not offered until the pay day had passed. From the nature of the property, the contract cannot be considered as a mortgage, but must be taken as a pawn, and irredeemable. [*Anony.*] 3 Salk. 267; Cro. Jac. 244; [*Bonham* v. *Newcomb,*] 1 Vern. 214, 232. Chapman, at most, had only his own life-time to redeem it in; and, therefore, the right, if it ever existed, expired with him. There is no covenant for re-payment of the money after the day, but the contract merely

is, that if it be not paid at the day, the slave should belong to Turner, who had no action to recover the money afterwards; and might have been told, you have your bargain, for the slave is yours. 1 Pow. on Mortg. (new ed.) 148, 151. Which shews, that in cases of this kind, if the parties desire to make it irredeemable, their intention shall prevail; and that, where there is no covenant for re-payment, the sale shall be absolute.

WASHINGTON, in reply.

Wherever there is a forfeiture, for the non-performance of a condition or stipulation, equity will relieve, if compensation can be made. And why should there be a difference between a mortgage of real and personal property, as the principle applies to both? No reason can be assigned for it, and, therefore, an actual distinction should either be shewn or authorities produced. But, although the case in point of fact must have often happened, it is admitted that no adjudications are found, which precisely apply. *Tucker* v. *Wilson*, proceeded on the idea of the resemblance between the mortgaged subject [285] and *stock*. Which the Lords considered as money; and, therefore, decided against the redemption, on that special ground; and not upon any general principle that there could be no redemption after non-payment at the day. As, therefore, there is no decision against it, and the principle of compensation is applicable, it ought to govern, and the redemption be decreed. As to the nature of the transaction, it was clearly a redeemable interest. If it is a loan, and the conveyance is only by way of security, it is a mortgage. But, if the nature of their agreement was such as not to amount to a mortgage, it must be clearly proved, or the general principle will not be departed from, Pow. on Mortg. 50; but here is nothing upon the face of the instrument to distinguish it from ordinary cases of mortgage; and, therefore, the common rule will prevail. If it was only proved by parol evidence that it was a mortgage, it would be sufficient; but, here we have no necessity to resort to that, as the instrument itself expresses the redeemable quality of the contract. As to there being no covenant to re-pay, that, indeed, was formerly considered as important, but it is not so now. For it is settled, that a mortgagor is liable, as well without as with the covenant.* Indeed, if it be doubtful upon the instrument whether it be a mortgage or a sale, the want of a covenant is of some weight;† but, if on the face of a deed it be a mortgage, it is otherwise.

[**King* v. *King et al.*, 3 P. Wms. 358.]
†*Keller* v *Lees*, 2 Atk. 494.

ROANE, Judge. Upon an attentive review of the testimony in this cause, I must be of opinion, that the intention of the parties was, that there should be a conditional sale of the slave in question. This intention, indeed, must be clearly proved, or necessarily implied from the attendant circumstances, or the general rule authorising a redemption, will not be departed from. 1 Pow. on Mortg. 165.

As the line of discrimination, between mortgages and these defeasible sales, cannot well be marked out by any general rule, every case as to the true nature of the transaction, and the intention of the parties must, in some measure, be determined on its own circumstances. [286]

Here, it is to be premised, that the value of the slave in question, even as ascertained by the general current of testimony, though there are very different opinions on the subject, does not exceed in any excessive degree, the sum actually advanced by the appellee, John Turner; and, estimating that value at the highest sum stated by the witnesses, the purchase of the slave, for the sum advanced, could, at most, only be said to constitute a good bargain.

This case, then, may stand on very different grounds from a case where there may be an enormous inequality in value. For, although inequality of value is not, of itself, a sufficient cause to set aside a sale, yet it is a circumstance deservedly entitled to great weight in discovering the intention of the parties, in a doubtful case, as to the true nature of the contract.

A discovery of the contract being sought from the appellees by the bill of the appellants, their answer as to this subject is clearly entitled to credit; especially, when not contradicted by the written agreement, (which was probably the act of Chapman only;) and, when it is merely explanatory of the transaction, at and before the time that the contract was completed.

The answer of John Turner is express, that having refused repeated applications from Richard Chapman, to lend him money upon interest, Chapman then proposed to sell him the slave Hannah at £30, redeemable on payment of the money upon a certain day; that, accordingly, the £30 was paid, and the slave delivered; and that it was expressly stipulated, if the money was not re-paid, without interest, the right of redemption should cease, and the right of property become absolute.

If the written agreement referred to in this answer had even contradicted the statement of the bargain, it might well be doubted, whether being the sole act of Chapman, and such an act too, as an unlettered man might well sup- [287]

pose to correspond with the bargain, the acceptance of it should bind him as evidencing a variation in the contract. For, as on the one hand, no act of a scrivener can turn that which was intended as a mortgage, into an absolute sale, so as to preclude a redemption; so on the other, it must not be permitted to designing men to turn a real, though defeasible sale into a mortgage, without the free consent of the other contracting party.

But, I think the written agreement in itself may, on the contrary, justly be considered as corresponding with the real contract as stated by John Turner.

It is an universal rule of interpretation, that that construction shall be preferred, which will reconcile and give effect to the whole instrument, without rejecting any part.

That part of the agreement, which after stating a receipt of £30, goes on to say, "and put a negro in his hands as security," may well be verified and considered to have effect, by construing the sale defeasible till July Hanover Court, during which time the negro would only be a security, and afterwards absolute: Whereas, these words of the agreement, *and if the money is not paid at or before the next July Hanover Court, the said Turner is to have said negro for the said* £30, cannot have any effect, without decreeing the sale absolute after that period. In fact, the last words *for the said* £30, not only shew that there was a sale, but that the particular price was stipulated and adjusted between the parties.

If, indeed, such price had not been fixed expressly, or by strong and necessary implication, although upon failure of redemption at the day the property would have become absolute at law, and thus the terms of the agreement have had effect, yet equity, considering it as a forfeiture, would have relieved upon compensation.

[288] But, when the price is fixed, it not only inevitably evinces that a sale was the intention of the parties, but renounces that judiciary interposition which is now sought. Much more then shall this construction prevail, where the price agreed on is not unreasonable, if at all below the price for which the slave would probably have sold in ready money.

These are some of the most prominent principles and reasons, which induce me to conclude, that the contract was really a defeasible sale, which on the non-performance of the condition remained absolute.

I think, therefore, that the decree ought to be affirmed.

FLEMING, Judge. The principal point in this cause is, whether the paper was evidence of a conditional sale only? The cases cited by the plaintiff's counsel, were all upon mortgages where time is allowed; but, here the sale was absolute, though liable to be defeated by payment of the money. The first part of the agreement, looks at first sight, like an intention that it should be a mere security for the re-payment of the money; but, the latter part explains the meaning, and shews that the parties intended a conditional sale. There is no covenant for redemption or payment of the money; and, if the slave had died in the mean while, Turner must have borne the loss. This was clearly the understanding of the parties. Turner's answer states, that he was applied to for a loan of money, but that he refused to lend it, as his object was to buy property, and, therefore, that a conditional sale took place; which is not contradicted by any evidence. The original bill states, that the money was not paid, and does not allege any tender. The amended bill attempts to correct this, but it is only supported by the testimony of one witness, whilst the answer, which is responsive, expressly contradicts it, and the general circumstances of the case are in favor of the answer. The value of the slave is uncertain, but it does not affect the question at all, as there is no improper conduct shewn [289] on the part of Turner. To decree a redemption in such a case as this, would teem with mischief, and set aside an infinite number of sales, under which property is enjoyed. As to the argument with respect to usury, there is not the least foundation for it; as the seller had it in his power to re-pay the money, without any interest at all. And, even *that* he was not bound to do. I am, therefore, of opinion, that the decree ought to be affirmed.

CARRINGTON, Judge. The contract was plainly a conditional sale, and not a mortgage. For, no loan was contemplated by the parties, as Turner positively refused to lend, because he wished to invest his money in property. In consequence of which, a complete sale took place, and the money was advanced on account of the purchase; but, at the same time, a power was given the seller to re-purchase the property, by restoring the price (which was not very inadequate) at a given time, without interest, or any covenant that he should re-purchase, or pay back the money. This, therefore, was a right entirely collateral to the sale; and, as it tended to defeat a fair purchase, it ought to have been strictly pursued. But, there was a failure in the seller to do so; and, the money in fact, was not re-

paid upon the day. The sale was consequently discharged of the condition altogether, and the right of the purchaser was no longer liable to be disturbed.

In this view of the subject, the case bears no resemblance to a mortgage, which is always founded on a loan: and, as in that case, the sole object of the security, is merely to compel re-payment of the money, the creditor is compensated by decreeing him his principal and interest. But here, the object on both sides was a sale; and, only a collateral right to re-purchase by a given day, was reserved to the seller, who was under no obligation to do so, but might exercise the right or not, as he pleased. The cases are, therefore, essentially different; and, consequently, the plaintiff had no right to redeem, after [290] the time had elapsed. I am, therefore, of opinion, that the decree is right, and ought to be affirmed.

LYONS, Judge. I had some doubts at first, whether a mere security for re-payment was not intended, and, therefore, the contract subject to redemption. But, upon inspecting the instrument, and the other documents in the cause, those doubts are removed; and, I now think, it was a conditional sale and not a mortgage. That is to say, it was a complete sale, subject to a right in the seller to defeat it, and have the property back, on the re-payment of the money by a given day. Or, in other words, it was a perfect sale, with a right in the seller to re-purchase the property on restoring the money by a certain time.

It is extremely clear, that no loan was contemplated by the parties. For, Turner refused to lend the money, because he wished to invest it in property; and, therefore, purchased with a view of either having property at the day, or money to go to market with, in order to purchase it. For which reason, he did not demand interest, or insist on a covenant for re-payment; circumstances clearly shewing, that no loan was intended.

It was, therefore, a mere collateral right to re-purchase and defeat the sale by a given day. But, as this was not exerted in time, the sale is now altogether discharged of the power, and the seller can assert no right to the property.

But, the doctrine of pledges was insisted on by the appellant's counsel. It is, however, generally true, that if goods be pawned, without a day of redemption fixed, he, who pawned, has time during his life to redeem; but, his executors cannot. For, it is a condition personal, and being generally pawned extends only to the life of him who pawned it. *Ratcliff* v.

Davis, Yelv. 178.* So, that in the strictest case of a general pawn, the right of redemption would have expired with [291] Chapman himself; and, therefore, the inference drawn from that doctrine, if the doctrine itself has any application to the case, is altogether inadmissible.

But, there is no occasion to resort to any reasoning of that kind, as the cause is capable of being determined upon very different principles. For, the sale, as before observed, was every way complete; and only liable to be defeated by the exercise of a collateral right by a given day: which was not done; and, therefore, the seller could derive no benefit from it.

He might, indeed, have contracted to sell the slave for ready money, and out of the product, he might have re-paid the price which he had received for the purchase, taken back the slave, and delivered her to the second purchaser, keeping the overplus of the money, if any, to his own use; because, as the first purchaser would have got his money according to contract, it was of no consequence to him how it was raised.

But, nothing of all this was done. There was neither any actual re-payment or offer to re-pay on the day: so, that the power was never exercised, and, therefore, no advantage will result to it from the seller, who does not appear to have obtained a very inadequate price at that time, for the slave: which is a circumstance of some weight, and destroys the force of the argument, that imposition may be practised under pretense of sales of this kind: because, whenever such imposition appears, or, it is shewn that a borrowing and lending was really contemplated, and no sale intended, that alone will turn the transaction into a mortgage.

Upon the whole, I think the plaintiff had no title to redeem, and, that the Chancellor did right in dismissing the bill. The decree, therefore, ought to be affirmed.

PENDLETON, President. The principle respecting mortgages and pawns in England, borrowed from the hypothecations and pignorations of the civil law, are well settled as to the [292] right of redemption. Equity allows that redemption on this ground, that security for the debt being the object, no price for parting with it is contemplated; and as the subject pledged, is usually of more value than the debt, it would be unjust that the mortgagor should lose his property, from his misfortune of not being able to pay the money at the day; whilst on the other hand, the creditor receiving his debt and

[* But, see *Cortelyon* v. *Lansing*, 2 Caines' Cas. Err. 200, in which the subject of pledges is exhausted, by KENT, J. p. 201-13.]

interest, has what was his purpose to secure, and no injury is done him. A Court of Equity, therefore, allows redemption on a general principle adopted by that Court, of relieving against all forfeitures where compensation can be made.

And further, if it appear that a mortgage was really intended, the Chancellor will not suffer the usual relief to be evaded, by any restrictive clauses inserted by the act of scriveners. Against the redemption, the act of limitations does not run, (if it does in any case in equity,) but circumstances may bar it, manifesting a waiver of the right, or such a change in the state of things as would render the redemption iniquitous, instead of being equitable. But, as on the one hand, the Chancellor will not permit a real mortgage to be made irredeemable by the act of a scrivener, so neither on the other, will he suffer *real*, conditional or defeasible sales to be changed into mortgages by the like acts. The real intention of the parties governs him.

In a defeasible purchase, the condition must be strictly performed at the day, or no relief will be granted; because it does not admit of compensation for the risque. If the thing perish the next day, it must be the loss of the purchaser, he having no covenant, or even implied promise for return of the money in that event; and we are taught by a maxim in equity, that in these casual cases, eventual loss or gain must accrue to, or fall on him who runs the risque.

The reason for holding vendors to this strictness in conditional sales, applies with every degree of weight to the [293] case of slaves in this country. They are a perishable property and may die the next day: if they should not however, and are males, they may be very profitable, or, if females, they may by their children increase the stock. Now, can it be imagined, that any vendor could be so warped by interest, as to suppose he might lie by until in event the men had earned profits greatly exceeding the principal and interest, or the women borne several children, and then expect to perform the condition when the purchaser had all the meantime risqued their lives? If there be such a vendor, I am sure he will receive no countenance from a Court of Equity.

Upon these general principles, let us examine the present contract, and see whether they apply to it as a mortgage or defeasible purchase? Chapman's intention was to borrow, and for that purpose he applied in the beginning of May, to John Turner, who said he had no money to lend; and that he meant to lay out his money in a purchase. In this, he persisted during several treaties which they had, until Chapman yielded;

and agreed to sell him Hannah for 30*l.*, provided, that if the money was paid at July Hanover Court, without interest, she should be returned; and in the meantime he was to have her as security. On these terms the bargain was closed; and upon the 20th of May, Chapman sent Parsons for the money, with Hannah, and the writing ready signed: which Turner received and paid the money.

If the writing was really what the counsel have laboured to make it, instead of relieving Chapman, as a necessitous man, imposed on by Turner, I would grant relief to Turner as an illiterate man deceived by Chapman in writing the paper. But there is no deceit; for, the writing manifests the contract to have been as Turner states it. The word *security*, which gives the aspect of a mortgage, is explained by what follows, to be a pledge till July Hanover Court; when, if the money was not re-paid, he was to have the negro for 30*l.* *Have*, must mean property or possession. It could not mean the [294] latter; because, in that, there was no change; and, therefore, it must mean that he was to *have* the property.

This, then, was a defeasible purchase and not a mortgage; which puts an end to the dispute.

We are told, very truly, that usury and speculations are injurious to society, and that John Turner practised both. If it be usury, to lend money for six weeks without interest, then he is justly chargeable on that head. As to his speculations, they are explained by Castlin, to have been that of small articles of provisions from his neighbors; and carrying them in his cart to market at Richmond: a kind of dealing beneficial and not injurious to them.

As to imposition in bargain, there is no proof of any such thing; and the Court will scarcely presume it, from the described characters of the men. They will not readily conclude, that the miller and waggoner imposed upon the Magistrate.

Decree affirmed with costs.