

REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

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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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TOWLER *v.* BUCHANANS, HASTIE & CO., AND *E CONTRA.**Monday, October 15, 1798.*

If I. give a mortgage on land to B. & Co. and then their agent and I. agree to convey it to H. on his securing the mortgage money; after which, H. gives a deed of trust on sundry slaves, for that and other debts, to a succeeding agent of B. & Co.; the 1st mortgage is discharged, though B. & Co. never conveyed to H. as their agent had agreed to do.

This was an appeal from a decree of the High Court of Chancery, upon the following case: Towler filed a bill in Chancery against Buchanans, Hastie & Co. merchants in Glasgow; which stated that the lands in question were mortgaged to Buchanans, Hastie & Co. by Isbel. That Jameson, the defendant's factor, and Isbel afterwards agreed to convey them to Hammond, on securing the mortgage money to be paid to the defendants, in four instalments. That afterwards Jameson left the factorship, and Lindsey succeeded him. That Hammond mortgaged six slaves to Lindsey, for this and another debt, and then sold the lands to Lea, who sold to Towler; and the bill is brought to have Isbel's mortgage to the defendants delivered up.

The answer admits Isbel's mortgage, Jameson and Isbel's agreement with Hammond, and the mortgage to [188] Lindsey; but denies that the mortgage money has been paid, and, stating that Hammond is now insolvent, insists now upon the lien.

The cross bill states the debt due to Buchanans, Hastie & Co. and another of £95 due Read, for his undertaking to Burwell; for which, Isbel mortgaged the lands and four slaves. That Jameson and Isbel entered into the aforesaid agreement with Hammond, to convey him the lands, when he should secure the payment of £225, the amount of Isbel's mortgage; but denies payment thereof, or that Jameson ever conveyed to Hammond. That Hammond being indebted on his account to Buchanans, Hastie & Co. to secure that debt, as well perhaps as an additional security for Isbel's debt, gave the mortgage for six negroes, which he has since carried off.

A witness deposed that he heard Towler say, that he understood, previous to his purchase, that the lands were mortgaged to Buchanans, Hastie & Co. That Towler and he went to inquire of Jameson; to whom Towler showed the deed for the six slaves, and asked if they were not mortgaged to re-

lease the lands, who answered yes; and, that the land ought to be cleared.

The purport of the agreement of Jameson and Isbel with Hammond, is only that they would convey on the money being made or secured. There is in the record, the proceedings in an attachment by Burt for Buchanans, Hastie & Co. against Hammond; in which is an account stating Hammond to be debtor to Buchanans, Hastie & Co. in £156 19s. 9d. on his own account, and £225 *the agreed price for Isbel's land*, with a credit "by further security taken on slaves by deed of trust."

The Court of Chancery decreed that Towler's bill against Buchanans, Hastie & Co. should be dismissed; and, on the cross bill, that the lands should be sold to pay the mortgage money. From which decree Towler appealed to this Court.

[189] RONOLD, for the appellant,

Insisted, that the second deed for the six slaves was an execution of the agreement with Jameson, and, therefore, that the mortgage on the lands was discharged. That all the circumstances of the case proved this; and, consequently, that the decrees were erroneous.

CALL, for the appellees.

The second deed does not appear to be made with intention to discharge the first. The answer does not admit it; and the circumstances plainly prove, that no such exoneration was intended by the parties. At any rate, the last does not destroy the first, unless the money was paid: for, it was but a mere contract of sale. Buchanans, Hastie & Co. had a mortgage for market, which Hammond agreed to buy at a certain price, payable by instalments; but he has neglected to do so, and, consequently, by the known rule of equity, the sellers have a lien until the purchase money is paid, *Cole v. Scott*, [2 Wash. 141,] in this Court. This is stronger still, when the plaintiff, claiming with notice under Hammond, comes to call for a security, which, itself, is a lien on the estate, [*Hardwick v. Mynd*,] 1 Anstr. Rep. 111. If the contest were with Hammond himself, there could be no doubt; and his derivative purchaser, both with implied and express notice, can be in no better situation.

RONOLD, in reply.

The cases put are all of implied agreements, but here it was express.

PER CUR. The deed of trust from Hammond to Lindsey, of March the 28th, 1774, comprehending a security for the £225 mentioned in the agreement of October 27th, 1770, between Isbel, Jameson and Hammond, was a complete performance of the condition mentioned in the said agreement on the part of Hammond; and, as such, appears to have been accepted by Lindsey, as agent for Buchanans, Hastie & Co. Therefore, although Hammond, whilst the land remained in his possession, might hold it chargeable with any accidental deficiency in the new security, more especially if that deficiency was occasioned by his own fraudulent conduct: Nevertheless, as Lea was afterwards a fair purchaser of the [190] land, without other notice than what appeared from the several papers, which testified that the condition was performed, and the land exonerated; and this view of the papers confirmed by the proceedings of Buchanans, Hastie & Co. upon the attachment in Charlotte County Court: He, and the appellants under him, have superior equity to the appellees; and a right to have the agreement of Jameson specifically performed by a release of the legal title claimed under Isbel's deed of trust. Consequently, the decree of the High Court of Chancery is to be reversed with costs; and a decree entered for a release of all right to the land, under the deed from Isbel to Jameson.

COUNTZ v. GEIGER.

Monday, October 30, 1797.

If a *feme sole* devisee, having a right to lands in Lord Fairfax's boundaries, marry, and her husband, by force and menaces, gain her consent, that a patent should issue in his own name, her heir at law shall have a conveyance.

A *feme covert* must relinquish her equitable, as well as legal right, on a privy examination, separately and apart from her husband. Her answer, sworn to by her, is not sufficient to have that effect.

If an answer in Chancery be contradicted in several instances, it destroys its weight.

Lord Fairfax had a right to establish rules for issuing grants, and applicants were bound to conform to them.

This was an appeal from a decree of the High Court of Chancery, affirming a decree of the County Court upon the following case. The bill stated, that Geiger, the father of the plaintiff, being possessed of lands, for which he had obtained