REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA:

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME IV.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

NEW-YORK:

Printed and published by Isaac Riley.

1811.

ERRATA.

Page 152, line 5th, for "*Elizabeth*" read "*Anne.*"

Page 155, at the end of the case of *Braxton* v. *Gaines & others*, add,

"*Wednesday, October* 11th. BY THE COURT, consisting of Judges "FLEMING and TUCKER, the decree was reversed, and the bill dismissed, "as to the appellant *Anne Corbin Braxton*, who was ordered to be quieted "in the possession of *Thamar* and her increase."

Page 172, at the end of the case of *Eppes's Ex'rs* v. *Cole & Wife*, add,

"Judge FLEMING said it was the unanimous opinion of the Court that "the judgment be affirmed."

Page 282, *in the note*, the reporters were mistaken in supposing that Judge ROANE was *related* to the plaintiff. Other motives prevented his sitting in the cause.

Dabney and others, Executors and Legatees of Sadler, *against* Green.

Tuesday, May 16th.

THIS was a suit instituted in the late High Court of Chancery, (and afterwards transferred to the Court for the *Williamsburg* District) by *Robert Green*, of *Matthews* County, against the executors and legatees of *Robert Sadler*. The bill stated, that the complainant, being indebted to *Sadler*, did, on the 7th of *March*, 1788, execute a deed conveying to him six negro slaves, (mentioning their names,) with all their future increase, the consideration stated in the said deed being 126*l.* 11*s.* current money; that though the said conveyance was absolute, it was only meant and intended to operate by way of mortgage for the said sum of money, which was a debt due from the complainant to the said *Sadler*, payable on the 7th of *March*, 1791; that *Sadler*, at the time when the deed was delivered, executed and delivered to the complainant a *defeasance*, whereby he agreed, that on payment by the complainant of the said sum of money on or before the 7th of *March*, 1791, the right of *Sadler* to the slaves should cease; that it was understood and agreed that the complainant should keep possession thereof, paying interest on the money, for which, on the 10th of *March*, 1788, and the 10th of *March*, 1789, he executed a writing, promising to *pay* the said *Sadler* the sum of 6*l.* 6*s.* 6*d.* which, though it was expressed to be for the hire of the said slaves, was meant and agreed to be for interest on the said debt: that the complainant continued possessed of the said slaves till about the 8th of *December*, 1789, when he being some short time absent from home on ne-

1. Under circumstances, a bill of sale, though absolute on its face, will be deemed a mortgage; the true question always being whether a *purchase* of the property, or a *loan of money* or *forbearance of a debt* were intended.

☞ *In this case*, the circumstances proving the bill of sale to have been intended as a mortgage, were gathered from other *writings* and *acts* of the parties.

2. A mortgagee, by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution thereupon, does not, *in general*, deprive the mortgagor of the right of redemption. But, if such judgment and execution were upon an attachment against the mortgagor, as an absconding debtor, attempting to defraud the mortgagee of his security by removing the property out of the State, he shall not be permitted to redeem, under the influence of the maxim, "that he who hath "done iniquity shall not have equity."

APRIL, 1809.

Dabney and others v. Green.

cessary business, *Sadler* took out an attachment against him as an absconding debtor, which was levied on the said slaves and a child, the increase of one of them, and obtained a judgment for the sum of 139*l.* 4*s.* that thereupon the slaves attached were sold by the sheriff on the 13th of *May*, 1790, and the whole were purchased for 159*l.* by *Sadler* himself, who took them into possession, and held them (except one whom he sold) until his death, which happened about the year 1793. The prayer of the bill was, that the complainant be permitted to redeem the slaves by paying whatever balance should be found due from him on a settlement; that *Sadler's* estate be charged with the price of the slave sold by him, and with the hire of the other slaves since he took possession, and for general relief.

The joint and several answers of the defendants admitted the complainant to have been indebted to their testator when the deed of *March* 7th, 1788, was executed; but insisted, that the said deed, being absolute, amounted at law, and in equity, to a positive transfer of the slaves, and that the paper, called by the complainant a defeasance, did not convert the said bill of sale into a mortgage, but only secured to him the privilege of repurchasing them. The defendants believed it to be true that he remained in possession thereof, until about the time when he absconded; but neither knew, nor had any reason to believe, that any agreement was made between the said *Sadler* and him, that he should retain them, paying interest annually on any sum supposed to be due. They denied the attachment to have been unfairly obtained, averring the proceedings thereon were fair and just; that when it was issued, the complainant, being in embarrassed circumstances, was actually absconding, (leaving to his creditors no prospect of being ever paid,) and, with his family and property, and all the said slaves, (except a woman and three children,) was on board a vessel in *White's Creek*, about seven or eight miles below his former place of residence, privately removing from this Commonwealth; at which place a for-

tunate calm taking place, the Sheriff was enabled to levy the attachment; that, at the sale of the slaves, which was made by the Sheriff, after public notice duly given, *Sadler* purchased only a woman and three children, at 60*l.* the Sheriff himself bought another woman and child, and afterwards sold them to *Sadler;* that the negro, said in the bill to have been sold by *Sadler*, was bought by a certain *Mordecai Gregory*, and was never in *Sadler's* possession. The respondents were informed and believed, that the complainant instructed the Sheriff to pay the surplus money resulting from the sale, (which exceeded the amount of the judgment,) to a certain —— *Lowry*, to whom the complainant was indebted; and concluded with insisting on the title of *Sadler* to the slaves so purchased as aforesaid.

Two witnesses fully supported the allegations in the answers relative to the complainant's being actually absconding when the attachment was levied; and no depositions on his part appeared in the record. The exhibits were, 1. The absolute bill of sale from *Green* to *Sadler*, dated *March* 7th, 1788, signed, sealed, and acknowledged in the presence of three witnesses. 2. A receipt from *Green* to *Sadler* for 126*l.* 11*s.* "in full for six negroes sold and "delivered." "Witness his hand and *seal.*" Dated *March* 8th, 1788, and attested by the *same* three witnesses. 3. The writing called in the bill a *defeasance*, attested by *one of the same* witnesses, and being in these words:— "*March*, 1788, having purchased and received of *Ro-* "*bert Green*, six negroes, (inserting their names,) as men- "tioned in a bill of sale, I do hereby agree and oblige my- "self, my heirs, &c. should the said *Green* be desirous of "purchasing the above-mentioned negroes again, that "upon his the said *Green* paying me the sum of one hun- "dred and twenty-six pounds eleven shillings, on or be- "fore the seventh day of *March*, one thousand seven hun- "dred and ninety-one, he may have the above-mentioned

APRIL, 1809.

Dabney and others v. Green.

"negroes again, free from any claim whatsoever. In wit-"ness, I have this day set my hand and seal.

"ROBERT SADLER." (Seal.)

4. A copy of the record of the proceedings on the attachment. 5. *Green's* bond to *Sadler*, dated *March* 10th, 1788, for 6*l.* 6*s.* 6*d.* "for the *use* or *hire* of six negroes by "name," payable the seventh of *March* ensuing, and attested by the *same* three witnesses who attested the bill of sale. 6. *Green's* bond to *Sadler*, dated *March* 10th, 1789, but in other respects precisely in the same words with the former bond, attested by *one* of the *same* witnesses, and by another person.

The Chancellor, (on the 25th of *April*, 1804, (being of opinion, that the fair intention "of the parties was, that "the slaves conveyed by the plaintiff to *Robert Sadler* "should remain mortgaged for the payment of the princi-"pal debt and interest due to the said *Sadler*," ordered an account to be taken of the "hires and profits of the said "slaves since the thirteenth day of *May*, 1790, (being the "day of sale by the Sheriff,) making a just allowance for "the expense and improvement of the young negroes; "also an account of the number, names, and respective va-"lues of all the slaves sold by virtue of the execution, "founded on the attachment against the said *Robert* "*Green*, and of their offspring, and the name or names of "the person or persons in whose possession the said slaves "and their offspring now are; and also of the amount of "the debt due from the plaintiff to the estate of the said "*Robert Sadler*, with the interest thereon;" and, on the prayer of the defendants, granted them an appeal from the said order.

M'Rae, for the appellants. 1. The original contract was not a mortgage, but a conditional sale. No attempt has been made to shew any acknowledgment by *Sadler*, that it was intended as a mortgage. No agreement is proved but that in writing; in which there is no covenant for repayment of the money, but only that *Green* might

repurchase the slaves within three years. *Chapman* v. *Turner*(*a*) is not so strong as this case; for *there* the writing mentioned that the negro was put into *Turner's* hands "*as security*;" but no such words, nor any equivalent, were used *here*. If it was a conditional sale, *Thompson* v. *Davenport*(*b*) puts an end to the question: for, in such case, the person wishing to avail himself of the privilege of repurchasing, must pay punctually to the day, and cannot redeem after the time has elapsed. But,

(*a*) 1 *Call*, 280.
(*b*) 1 *Wash.* 125.

2. Whether it was a conditional sale or mortgage, the purchase by *Sadler* under the execution, vested in him a new and absolute right. The issuing of the attachment was produced by the conduct of the appellee himself; and he must answer for all the consequences in the same manner as if the sale had been by his own consent. The case of *Moore's Executor* v. *Aylett's Executor*(*c*) shews that the surplus only ought to be paid, where the sale by the *mortgagee* is with the consent of the *mortgagor*. Here *Sadler* (for any thing that appears) purchased only to the amount of his debt.

(*c*) 1 *Hen.* & *Munf.* 29.

3. *Sadler* and his representatives had *five* years peaceable possession before *Green's* bill to redeem; which, according to the case of *Newby's Administrator* v. *Blakey*,(*d*) vested in them an absolute title. I admit that *five* or even *ten* years' possession will not bar the title of the mortgagor, where the mortgagee holds *as mortgagee*: but *Sadler* held by virtue of his purchase of the Sheriff in *May*, 1790, and not as mortgagee. His possession was therefore *adverse*, and his title good by length of time.

(*d*) 3 *Hen.* & *Munf.* 57.

Wickham, for the appellee. If this was not a mortgage, I know not in what terms a mortgage can be defined. It is true there was a bill of sale, but there was also a cotemporaneous defeasance; and its being on a *different*, instead of the *same* piece of paper, makes no difference. If the defeasance had been incorporated with the bill of sale, no doubt could have been entertained. What is it that con-

APRIL, 1809.

Dabney and others v. Green.

stitutes a mortgage but the reservation of a right to redeem, or *repurchase*, the property by payment of the money? The person who sells the negroes in this case *remained in possession*, always having power to redeem. The interest of the money, and the nominal hire of the slaves, agree exactly. This is conclusive, to shew that a *loan* only was in contemplation. In *Ross* v. *Norvell*,(a) possession passed with the deed, and hire was paid; yet it was decided to be a mortgage. *Robertson* v. *Campbell* and *Wheeler*(b) is up to the same point. In that case, though the parties, "through fear of a Chancery suit," would not make it a mortgage, the Court decided it to be one. No attempt of the parties can defeat the justice of a Court of Equity, which will always give the mortgagor relief, wherever the real object of the contract was a *loan*. No argument can be drawn from the absence of a covenant to pay the money. In *Ross* v. *Norvell*, there was no such covenant. In *Chapman* v. *Turner*, the object was a *purchase*; and testimony of this contravened the natural effect of the writing. It is said, 2 *Call*, 429. that the *special circumstances* of that case determined it to be a conditional sale; and that the great *desideratum* in all such cases is to ascertain whether the object was a *purchase*, or a *loan*. Certainly, if there was any doubt here, the proceedings at law are conclusive in our favour on this point. *Sadler's* own attachment considered it as a *debt*, and demanded it as such.

(a) 1 *Wash.* 14.

(b) 2 *Call*, 424.

As our right is purely *equitable*, we cannot be barred by any proceedings *at law*. The sale under the execution was long before the period for redemption had passed. The sale, therefore, did not take away the right to redeem. It is true the money was raised by it before the time allowed; but justice has not been done. *Sadler* should be considered as a trustee for *Green* for so much as the value of the slaves exceeded the debt and inerest; and, according to *Whichcote* v. *Laurence*,(c) and *Campbell* v. *Walker*,(d) a trustee having a right to *sell*, yet *purchases*, clothed with

(c) 3 *Ves. jun.* 740.

(d) *Ibid.* 678.

the original trust. In *Newby's Administrator* v. *Blakey*,(a) there was *no trust, no equity*. The act of limitations is not *pleaded*, as it must be when relied upon in a Court of *Equity*; neither does it appear at what time this bill was filed.

(a) 3 *Hen.* & *Munf.* p. 57.

Hay, in reply. Whether this was a mortgage or conditional sale, must depend on the words of the written contract, and the circumstances in evidence. In the contract, it is expressly declared to be a *purchase;* and privilege is given to *repurchase*, without saying any thing about security for a *debt*. On the face of the papers, then, it is a conditional sale. I admit that, in many cases, contracts, *appearing* to be conditional sales, have been decided to be mortgages; the only question being what is the real intention of the parties. But where, *in terms*, a contract is a conditional sale, it is incumbent on the party, who contends it is a mortgage, to shew it by evidence. In this case, there is not one deposition shewing the contract to be different from what it appears on its face. There is no reciprocity on this subject. The parties stand on very unequal terms. If all the negroes had *died*, *Sadler* could not have come before a Court of Equity, contending that his bill of sale was a mortgage, and have claimed his debt out of other property. The evidence, therefore, which *Green* should be required to produce to prove it a mortgage, ought to be strong.

As to the circumstances, independent of the face of the written contract, (which, according to 2 *Call*, 429. we have a right to examine,) the inequality between the value of six negroes and 126*l.* 11*s.* for which they were sold, is relied on; but this inequality does not appear in the record. There is no proof of the ages or values of the slaves. Mr. *Wickham* relies on *Sadler's* having sued out an *attachment*, as conclusive evidence that the original contract was a *mortgage*. Perhaps *Sadler* was improperly advised. If a *purchaser*, and not a creditor by *mortgage*, his proper re-

April, 1809.

Dabney and others v. Green.

medy was by writ of *ne exeat:* but it was a desperate case, a case of necessity; and his counsel probably thought the shortest cut the best. However, as this act of *Sadler* was long subsequent to the contract, and induced by necessity, it ought not to be considered as evidence of the true construction of that contract. The time that elapsed between the dates of the bonds given for hire, and the date of the original contract, shews it was not understood *at that time*, that *Green* was to retain the possession. The bonds were given annually. The inference is, that a subsequent agreement for the hire of the slaves took place. The coincidence, between the amount of the hire, and the amount of the interest on the consideration money, is admitted. But where is the evidence that the hire was *inadequate?*

Green was a fraudulent character who attempted to carry away property, to which *Sadler was* entitled, whether it were by a mortgage, or by a conditional sale. Such a person is not entitled to presumptions in his favour.

But, admitting it was a mortgage, I contend that *Sadler's* right under the *execution* was good. Is the slave purchased by another man at the same sale *now* redeemable? If not, why should those purchased by *Sadler* be liable to redemption? Mr. *Wickham's* position, that relief in equity is never barred by proceedings at law, is not true in many cases. For example, would the Court decree the specific execution of a covenant for land, in favour of a man who had been sued at law, and suffered judgment for breach of the contract? The case here equally proves the position to be too general, and not universally true.

But it is said that *Sadler* was a trustee, and purchased subject to the trust. Every part of this proposition is erroneous. *Sadler* was not a *trustee.* Even if he was a *mortgagee*, the characters are very different. The purchase was not made under the mortgage or trust, but in a distinct right. The rule that a trustee purchases subject to the trust, (laid down in *Whichcote* v. *Laurence*, 3 *Ves.* jun. 740.)

applies only to trustees for the purpose of selling; and even such trustees may purchase, being accountable for profits made by them. *Ibid.* 750. But here the *Sheriff*, and not *Sadler*, was the trustee for selling.

The act of limitations does apply, though not specially pleaded. I draw this inference from *Newby's Administrator* v. *Blakey*. The rule is, that "*equitas sequitur legem*;" and, wherever the act cannot be availed of *at law*, without pleading, the course is the same *in equity*.(*a*) Since, then, *in detinue*, it is not necessary to plead the act, there is no reason for requiring it to be pleaded to *a bill in equity* brought for a similar purpose, viz. to recover slaves.

(*a*) 2 *Ves.* jun. 83. *Edsel* v. *Buchanan.*

Monday, May 22.

Judge TUCKER. The bill states, that *Green*, being indebted to *Sadler*, on the 7th of *March*, 1788, executed a deed to him for six negroes, to secure the payment of the debt, and that *Sadler* executed at the same time a defeasance, whereby he agreed that, on payment of 126*l.* 11*s.* (the debt before mentioned,) in three years, the right of *Sadler* to the slaves should cease. That *Green* was to keep possession of the slaves, paying interest on his debt, for which *Green* at different times gave his notes, under the name of hire, for the slaves. That *Green* being absent from his home for a short time on business, in *December*, 1789, *Sadler* took out an attachment against his estate, which was levied on these negroes; judgment in the attachment suit was obtained against *Green*, and the slaves sold under an execution issued upon that judgment; and that they were all purchased by *Sadler*, for 159*l.* The object of the bill is to set aside the sale, and redeem the negroes.

The defendants admit that *Green* was indebted to *Sadler* at the time he executed the bill of sale, which they insist was an absolute conveyance and transfer of the property both at law and in equity. They then proceed to state, by way of defensive allegation, that *Green*, before suing out the attachment, had absolutely absconded, and was on

APRIL, 1809.

Dabney and others v. Green.

board a vessel with the negroes, and other effects, six miles from his home, when he was overtaken by the Deputy Sheriff, in a calm, who levied the attachment on the slaves. This fact is proved by the testimony of two witnesses; one of whom (the Deputy Sheriff) says, that *Green*, after some conversation, observed that, if there had not been an unlucky calm, he should have been far enough out of reach, and thinks he said he should have been in *Carolina*. That the bill of sale given by *Green* for the negroes, was intended only as a security for his debt to *Sadler*, and not as an absolute conveyance, or even a conditional sale, is, I think, obvious, not only from the papers themselves, but from the admission in the answers, that there was a *previous debt* due from *Green* to *Sadler*, which distinguishes it from the case of *Chapman* v. *Turner*,(*a*) and brings it within those of *Ross* v. *Norvell*,(*b*) and *Robertson* v. *Campbell* and *Wheeler*.(*c*) I consider the original transaction between the parties, therefore, merely as a mortgage; and I hold that, if a creditor by bond, or other legal right which he is enabled to prosecute with effect at law, obtains from his debtor a mortgage by way of security for the same, and then prosecutes a suit at common law, and having obtained a judgment for his debt, levies the execution upon the mortgaged property, which is sold by the Sheriff, and purchased by the creditor, the *debtor's* right to redeem is not extinguished by this proceeding at law, but his equity of redemption continues as fully and completely as before the execution was levied, or the judgment obtained. And this upon principle; for the creditor having accepted of the security for his debt, is bound by every condition that a Court of Equity might impose upon him; nor can he by his own act absolve himself from any such equitable obligation. The case of Lord *Cranstown* v. *Johnson*,(*d*) is a much stronger case than the one I have put; and shews that a creditor purchasing property, sold under execution to pay his own debt, may, under circumstances, be considered as holding

(*a*) 1 *Call*, 280.
(*b*) 1 *Wash.* 14.
(*c*) 2 *Gall*, 421.
(*d*) 3 *Ves. jun.* 170.

the same only as a security for his debt, and the charges he has been put to. But there are several features in this transaction which give to this particular case a very different complexion. *Green* is proved to have absconded fraudulently, with his family and property, among which were all, or a considerable part of these slaves, and had actually embarked on board a vessel, and proceeded some distance on his way to another State, or some other quarter of this State, where he could conceal himself and his property from the very creditor to whom he had pledged it as a security. One of the soundest maxims of equity is, "that "he who hath committed iniquity, shall not have equi- "ty ;"(*a*) that is, as is explained by *Fonblanque*, b. 1. c. 2. s. 13. note (*p*), where such person is (as in the present case) plaintiff. *Willingham* v. *Joyce*(*b*) is not so strong a case as this ; for here the present plaintiff did all in his power to defraud his creditor. The latter was driven to seek his redress at law : whether the proceedings in the cause were regular or erroneous, cannot be inquired into in a collateral way. The judgment must be taken to be right, the sale lawful, and the purchase by the creditor the same as the purchase by any other person. The fraud of *Green* has utterly deprived him of the aid of a Court of Equity, which ought never to interpose to deprive a fair creditor, as *Sadler* was, of a legal advantage, gained in a due course of law, in consequence of a most flagrant attempt on the part of the debtor to defraud him. The staleness of the claim, postponed till after *Sadler's* death, and barred at law by the act of limitations, furnishes additional reasons in support of this opinion.

(*a*) *Francis's Max.* 2.

(*b*) 3 *Ves. jun.* 168.

I am, therefore, of opinion, that the decree be reversed, and the bill dismissed.

Judge ROANE. There is no doubt but that the agreement of *March* 7th, 1788, taken in connection with the defeasance, and all the circumstances of the case, imported a *mortgage*, and not an absolute sale of the slaves in

April, 1809.

Dabney and others v. Green.

question. The general right of a mortgagor to redeem may be waived, however, or the party may come into Court, asserting it under circumstances so unfavourable, that the door of the Court of Equity may be shut against him. The appellee's conduct, in the case before us, partakes of this latter character, and was clearly fraudulent and iniquitous; but I am not entirely prepared to say, that on this ground *alone* we ought to deny relief. There is one circumstance, however, which turns the scale with me, and that is, that it is neither alleged nor proved that the slaves in question were sold for LESS than their value, and it is also shewn that the surplus of the proceeds was applied to the benefit of the appellee by his consent and direction. I consider this, therefore, as a ratification of the sale; and as the appellee (taking the sale to have been for *full* value) is, perhaps, substantially in the same situation as if the negroes had been sold under the mortgage and the surplus paid over to him; I am of opinion, on these two grounds, (but principally the last,) to reverse the decree and dismiss the bill.

Judge FLEMING. I have not a doubt but the deed or bill of sale for the negroes, with the defeasance under the hand and seal of *Sadler*, (though on a separate paper,) was intended merely to secure the debt of 126*l.* 11*s.* with interest, and ought to be considered, in all respects, to have the operation of a mortgage; and had *Green* conducted himself with honesty and propriety, there can be no question but he would have been entitled to his equity of redemption of the mortgaged negroes, of which he would have been quieted in the possession, on his paying the original debt, with legal interest; but, when we see him fraudulently attempting to defeat not only *Sadler*, but his other creditors also, of their just claims against him, by endeavouring, clandestinely, to remove, as well the mortgaged negroes, as his other property, out of the reach of the law, and prevented only by the fortuitous circumstance

of a calm, he has, in my conception, forfeited all pretension to the aid or countenance of a Court of Equity; and I do not recollect a case where the rule more forcibly applies, than in the present, that he who comes into a Court of Equity to ask relief, ought to shew that his own conduct has been upright, equitable, and pure. I therefore concur in opinion with the other judges, that the decree is erroneous, and ought to be reversed, and the bill dismissed with costs.

Duval *against* Bibb.

Thursday, May 18th.

THE appellee preferred his bill in Chancery against *William Duval* and *Pleasant Younghusband*, and obtained an injunction to the judgment of this Court rendered in an action of ejectment between *William Duval* and himself, which case is reported in 3 *Call*, 362.

The bill suggested that, in *October*, 1788, the complainant agreed to sell to *Francis Graves*, deceased, *then in high credit*, the lands in question, for 200*l.* payable *September*, 1789, three negro girls, and one-half of two entries for lands in *Kentucky*, to which *E.* and *T. Waltons* had been entitled, and for the conveyance of which they

1. A *bona fide* mortgagee of a tract of land, without notice of any equitable *lien* in the original vendor, (of whom the mortgagor purchased,) is well authorized to purchase of the mortgagor a release of the equity of redemption, (even after notice from the vendor,) in consideration of any just claim of his upon the mortgagor, originating before such notice; but, after notice, the *lien* attaches, for so much as he may have actually paid, or agreed to pay, for such release, over and above the claims for which the mortgage was taken, and which originated before the notice.

2. A vendor, having conveyed a tract of land by an absolute deed of bargain and sale, in which, and by a receipt at the foot whereof, he acknowledged that the consideration expressed was fully paid, having, nevertheless, taken the vendee's bonds for the amount thereof, and continued to live on the land, by virtue of a parol agreement, that he should retain possession until the contract on the part of the vendee should be fully complied with, retained an equitable *lien* on the land against a purchaser from the vendee having *actual* notice of such agreement.

3. In *equity*, either party to a deed may aver and prove against the other, or against a purchaser with notice, the true consideration on which the deed was founded, though a different consideration be mentioned therein; but a *bona fide* purchaser, without notice of the existence of such consideration, is not to be affected thereby.

4. The vendee, or his legal representatives, ought to be parties to a suit in Chancery brought by the vendor against a subsequent purchaser, to recover a balance alleged to be due from the vendee.