REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF
VIRGINIA.

BY
BUSHROD WASHINGTON.

VOL. I.

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an execution, conditioned for the delivery of 1000 bushels of wheat, at the day, and at the time of sale appointed by the sheriff. The facts stated in a bill of exceptions are, that on the day of sale, the obligor delivered a parcel of wheat to the sheriff, the quantity at that time unknown, but which the defendant at the trial acknowledged to be about 500 bushels, which the sheriff received, *without excepting to the quantity*, and proceeded to sell the same, but could not for the want of buyers. The court over-ruled the motion, from which this appeal was prayed,

The PRESIDENT. The condition of the bond was not performed by the partial delivery stated in the record, and of course the penalty became forfeited.

The judgment must therefore be reversed, and the cause remitted to the District Court, to proceed to judgment on the the bond, allowing credit for any money, which may be proved to have been paid to the appellants, or to have been raised by the sale of any part of the wheat delivered.

Judgment reversed.

WARD *against* WEBBER & Wife.

THIS was an appeal from a decree of the High Court of Chancery, upon the following case. A suit was instituted by Webber and wife, in the former General Court, on the Chancery side, against the father of the appellant, and of Mrs. Webber, stating, that the father, had by a deed executed in 1754, conveyed to his said daughter, whilst single, several tracts of land, together with 16 slaves, and all the furniture and stocks on those plantations. That previous to this deed, and before her marriage, the father had frequently declared his intention to give his daughter the greatest part of his estate, if she should marry to please him. That in consequence of these promises, the complainant courted the daughter, and married her. That the father, after executing the deed, got possession of it surreptitiously, and cancelled it. The object of the bill was, to set up the deed. The answer of the father denied the material allegations in the bill; admitted the existence of the deed, but that it was made on a condition, that the daughter married to please him, which she did not.

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Upon the death of the father, the suit was revived against the appellant, the son, and against the executors, and a decree was made in that court, in favor of the complainant, as to the land, and part of the slaves, which were in the possession of the defendants. The same plaintiffs, afterwards, instituted a suit in the High Court of Chancery, for the balance of the negroes. The appellants filed a bill to review the former decree; and that being opened, the whole question came on again to be heard and considered. The ground now relied upon by the appellants to set aside the former decree, as well as to defend the last suit, is, that the father at the time of making the deed, labored under a prosecution which threatened his life, and that the deed was executed, in order to screen his estate from forfeiture, in case he was convicted, and under a trust, to re-convey the estate to the father, if he should get clear of the prosecution. Sundry depositions were taken, upon the weight of which, the present cause very much depended.

The Chancellor dismissed the bill of review, and decreed for the appellees upon their bill, from which decree this appeal was prayed.

MARSHALL for the appellants. It might perhaps be made a question in this cause, whether the deed of 1754, being made without consideration, can deserve the aid of a Court of equity to set it up? But as this is a point upon which I do not rely, I shall pass it over, and insist, that there are circumstances in this case, which would render it iniquitous in a Court of Equity to aid the plaintiffs, and that it will therefore leave him in the situation in which the law has placed him. That there was a secret trust and confidence between the father and daughter, is so strongly to be presumed from circumstances, that aided by the positive evidence of one of the witnesses, the fact can scarcely be doubted.

1st, the *time* when the deed was made,—the father then labouring under a perilous prosecution, which he appears to have been very apprehensive would affect his life.

2dly, The *person* to whom the deed was made—a child—in whom this secret confidence might with safety be reposed if with any person.

3dly, The various expressions of the father about that time, indicating his apprehensions, and the mode by which he expected to save his estate, (all of which are abundantly proved) at a time too when it is not to be supposed, he was preparing for future litigation.

4thly,

4thly, The father continuing in poſſeſſion of the property.

Theſe circumſtances ſtrong as they are by themſelves, are very much ſtrengthened by a fact proved and admitted, viz: that the daughter, declared, that the deed for one parcel of land (about which there is no diſpute) was to be recorded, but that the other (which is the deed in queſtion) was not to be recorded. The fact is, that one deed was recorded, and the other was not, which proves, that as to the deed which was not intended to be recorded, a mere truſt was underſtood. If then the court be ſatisfied that a truſt was intended, its aid will not be afforded in an attempt to violate that truſt.

WARDEN for the appellee. Before the deed was made, or a proſecution apprehended, it is in full proof, that the father had frequently made parol declarations of his intention to give the greateſt part of his eſtate to his daughter when ſhe married. If the deed in queſtion had not been made, this court would have decreed a ſpecific performance of thoſe promiſes; being made, it muſt be conſidered as done in execution of them. The title of the daughter therefore is paramount to, not dependent upon that deed.

CAMPBELL upon the ſame ſide. I lay down this as a principle of equity not to be controverted, viz: that where a father makes a deed to a child, it will be conſidered as an advancement and not a truſt. 2 *Vern.* 19—28—436. *Eq. Caſ. Ab.* 382. 1 *Vern.* 467, 2 *Ch. Caſ.* 26, 231. The principal circumſtances relied upon in this caſe to eſtabliſh a truſt, is the proof of a fraud intended by the father, for the purpoſe of defeating the crown of its eventual dues. It would be ſtrange, if a perſon who hath committed a fraud, could be permitted to defend himſelf by averring it. It is not pretended that this truſt was declared in the deed itſelf, and parol evidence is relied upon, not to explain a doubtful conſtruction, but to eſtabliſh one, totally different in its operation, from that which the real deed upon the face of it imported; and this, no court has ever yet gone ſo far as to ſuffer. Even in the caſe of laſt wills, evidence is received with great caution, and even then only, to rebut an equity. 2 *Vern.* 98, 337—648, 736.

The firſt point having been given up, it will be unneceſſary to take up time in proving, that a Court of Equity will aid a volunteer, againſt a volunteer. But if it ſhould be doubted, I will refer the court to the following caſes, 1 *Vern.* 219, 365—464. 2 *Vern.* 473. 1 *P. Wms.* 60.

MARSHALL

MARSHALL in reply. A Court of Equity, will never lend its aid to set up a deed, (tho' destroyed by fraud) if it would do iniquity. I may go farther, and say, that it will not even assist in setting up a hard and oppressive deed. It is contended, that independent of the deed, this court would enforce a specific performance of the parol promises of the father. But there is abundant proof, that those promises were conditional, and that the father, was always strongly opposed to the marriage of his daughter with Webber. Besides, the bill does not claim the property upon that ground; those promises are not put in issue, and of course the evidence as to them is irrelevant to the real merits of the cause.

The principle contended for by Mr. Campbell, that every thing is to be presumed against him who commits a fraud, applies not to this case, because there is no dispute between us, as to the contents of the deed. If there were, then I admit, that every thing should be presumed against the person who destroyed the deed. But I contend, that the deed, tho' absolute on the face of it, was intended to pass a beneficial interest, only in case the grantor should be convicted, and that a resulting trust was meant, in the event of his escaping the prosecution. Whether the fact be so or not depends upon the evidence, I admit therefore, that if this case were unconnected with those circumstances relied upon to prove a trust, that the deed would be considered as an advancement to the daughter, in which case the authorities cited would apply. But since a child, may as well as any other person be a trustee for a father, evidence to establish the trust may as properly be admitted in such a case, as if the conveyance were made to a stranger.

I do not contend, that if *Ward* had applied to the court to *set aside* the deed, that he would have been entitled to its aid: But on the other hand, that court will not assist the *daughter to set up* the deed. For if *he* were guilty of a fraud by intending to defeat the crown of its rights, *she* was *particeps criminis*, and can be in no better situation than he is. We ask no favors, nor do we require the aid of the court; we only desire that none may be granted to the other side, but that the parties may be left where the law has placed them.

As to the propriety of admitting parol evidence in this case, I do not contend, that it ought to be received to *explain*, or to *contradict the words* of a written contract; but it is every days practice to admit such evidence, to prove a *secret trust*. As for instance, to convert a deed absolute upon its face into a mortgage,

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which is a case parallel with this. So too the establishment of resulting trusts, depends almost always upon parol evidence varying the nature of the written deed. Upon the whole, I rely upon this principle, that tho' equity may aid a volunteer in setting up a deed against another volunteer, yet the plaintiff in such a case, must have compleat equity, and must come to ask relief with clean hands.

CAMPBELL—The case stated of an absolute deed being considered as a mortgage is not apposite to this, because in that, it is a fraud in the grantee not to insert the defeasance. Besides, the mortgagee is active, and is a real purchaser; whereas in this case the daughter is merely passive, and cannot be guilty of a fraud in accepting the deed.

MARSHALL.—If he who conveys, commits a fraud, the receiver, knowing of it, is equally guilty, because to all deeds there must be at least two parties, and if there were no fraudulent grantees, there could be no fraudulent grantors. A mere volunteer may as well be guilty of a fraud, as he who pays a valuable consideration, and all trustees are volunteers.

THE PRESIDENT delivered the opinion of the court.

The first point mentioned, tho' not relied upon was, that equity will not aid one volunteer against another, but will leave them to the law, their equity being equal. It is generally true, that this court will not aid a volunteer in *supplying legal defects* in a prior deed, against a subsequent volunteer. But there are exceptions to this general rule, one of which is, the cases of advancements for younger children otherwise unprovided for, in favor of whom the court will supply such legal defects; the counsel probably considering this as such a case, did not press the objection; but he insisted, that applicants to this court must come with clean hands and a fair case, as this court will not enforce iniquitous or even hard bargains.

As to the first, the whole proceeded from the father, and if there were any evil in his intentions, it is not to be imputed to the daughter, who was wholly passive, and used no means either fair or otherwise to procure the deed. Nor can it be thought immoral in her to accept the voluntary bounty of her father, securing to her a provision for life. Natural affection imposes upon parents a moral obligation to provide for their children, and it hath been esteemed both in law and in equity a good consideration for supporting such provisions.

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As to the second branch of the objection; it is true that the court will never decree iniquity, and there are instances, where they have refused to decree hard bargains though fair, but these are rare, and are generally cases of glaring hardships. For in general, the court will not undertake to estimate the speculations of parties, in a contract, but will deem them the best judges of their own views, and will compel a performance, though they may be eventually disappointed in their expectations.—As to *iniquity* the court discovers none in this case, at least on the part of the daughter, and upon the ground of hardship how does it appear? It is suggested, that the father left himself nothing to subsist upon; but the fact is not proved. On the contrary, it being charged in the original bill, that he had a considerable estate, he who best knew the truth or falsity of the assertion, does not deny it, nor does he complain of hardship, but rests his defence on quite another ground, viz that the promise was conditional, and was broken by the daughter. So that the principles of the objection do not apply to the present case.—If they did, it might be worthy of consideration, whether the present application *to restore a deed to its legal force, which it had lost by fraud or accident*, is not distinguishable from an application to *supply original defects* in a deed. The difference seems to be a strong one, and the court recollect the case of applications to supply defects in bonds against *securities*, which is constantly refused; yet if a bond in which they are *legally* bound be lost, the court will not on account of the securities, withhold the usual relief in giving it the same validity as if it were produced. The argument seems *a fortiori*, that a deed, deprived of its legal force by fraud in the donor, will be restored tho' in a hard case, the court considering that as undone, which should not have been done; but as I said before, it is unnecessary to decide this point, since the facts do not support the objection.

Two other objections remain to be considered. 1st, That the promise was conditional and broken. As to this, there is no proof.

2ly, That there was an implied trust for the father, in case he survived the impending prosecution for felony. Upon this head, the proof is generally derived from the vaunting declarations of the father, that he had secured his estate to his children, That he would face his enemies, and was a proper person to go to law. Mrs. Cotterel is a positive witness, that when he delivered the deed to his daughter, he said, it was not to have

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effect, if his life were saved, and the circumstances stated by the counsel might have weight to induce a presumption of the trust, if there were nothing to encounter them—but there is abundant proof to over-rule both.

1st, The deed was absolute—without trust or condition—if the former could not safely be inserted, the latter might and ought to have been, in order to prevent imposition upon her future husband.

2dly, There were three subscribing witnesses to the deed and a fourth present, who did not subscribe it, all of whom swear, that no mention was made at the time of either trust or condition.

3dly, Mrs. Woodson's deposition is material—she says that when Ward was speaking of the condition and trust, he was asked if there were any agreement at the time either verbal or in writing to that purpose, and he answered there was not.

4thly, As to the trust. Ward himself who certainly knew more of the matter than Mrs. Cottefel, does not mention it in his answer—whereas he ought to have relied upon it, if it were true, and ought to have brought a cross bill to discover and establish the trust—He did neither, and upon what ground can it now be set up?

The decree must be affirmed.

FIELD'S Executors,

against

SPOTSWOOD.

THIS was an action on the case brought by the appellants against the appellee in the County Court. The declaration contained two counts: the 1st, a special one, stating, that the plaintiff's testator was authorised by the defendant's father to lease out certain lands of which he was seized in tail. That he made a lease to one Dillon of a parcel of the said land for three lives; that Dillon assigned the same to Sisson, and that Field and Dillon gave their bonds to Sisson with condition to procure for him a lease from the defendant, (on whom the estate tail had by that time descended,) on the usual terms of his former leases, and that the defendant promised the said Sisson to