REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME III.

BY WILLIAM MUNFORD.

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OCTOBER, 1811.

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The county Court decreed, that, upon the plaintiffs paying the said sum of fifty pounds, with interest until payment, the said *Bartholomew* convey to him the land by deed with warranty against himself and those claiming under him; (*but appointed no time for such payment;*) and that the plaintiff recover *costs;* which decree being affirmed by the Superior Court of Chancery, the defendant appealed to this Court.

Friday, January 10th, the following opinion and decree were pronounced.

"It is the opinion of the court, that the decree of the Chancellor, affirming that of the County Court, is erroneous; the *latter* decree being erroneous in this, that *a time should have been limited within which,* if the apellee paid the money, he should have been entitled to a conveyance from the appellant; and in default of such payment, be *foreclosed* of all equity of redemption, and a *sale* directed of the mortgaged premises;—as also in this, that although the appellant was entitled to his *costs* in *that* Court, *costs* are decreed against him."—

"The said decrees are therefore reversed with costs, and the cause remanded to be proceeded in according to the principles of this decree."

Stockton *against* Cook.

Wednesday, Jan. 15, 1815.

THIS was an application, to the Superior Court of Chancery for the *Richmond* district, by *John Stockton,* purchaser of a tract of land from *William and John Roberts,* to be relieved against his bond for 52*l.* 10*s.* part

1. A purchaser of land, *warranted by the vendor to be free of all encumbrance,* is not precluded from relief, in equity, against his bond for the purchase money, by the circumstance that before he made the purchase, he was fully apprized of the encumbrance.

2. The *assignee* of the bond is not in a better situation than the *assignor.*

☞ See *Norton* v. *Rose,* 2 *Walsh,* 233.; and *Pickett* v. *Morris,* id. 255. *accordant.*

of the purchase money, on the ground that the land was encumbered by a previous mortgage for 64*l.* 11*s.* 8*d.* from the said *William Roberts* to *James Smith & Company;* from which encumbrance the complainant insisted that he ought to be exonerated, because the original written agreement concerning the purchase, bound the said *William and John Roberts* to make him a title "*clear of any fraud or deceit;*" and their deed to him contained a clause *warranting the land to be, at the time of granting the same, free and clear, of and from, all manner of encumbrances, and from the just claim of any person or persons whatsoever.*"

The complainant, *in his bill of injunction, did not mention whether he had notice of the encumbrance,* at the time of the purchase, or not. He alleged, however, that, having paid the residue of the purchase money, he advertised his said bond, forewarning all persons from taking an assignment thereof; notwithstanding which, the defendant, *Harman Cook*, bought it for little more than five pounds, and afterwards, as assignee, brought an action at law, and recovered a judgment upon it;—that *James Smith & Co.* had commenced a suit in *Pittsylvania* County Court to foreclose the equity of redemption; and that *William & John Roberts* were insolvent.

It was alleged in *Cook's* answer, and *proved* by testimony, that the complainant *knew of the mortgage before he bought the land.* It also appeared in evidence, that *Cook, before he bought the bond, was fully informed of Stockton's* determination not to pay it in consequence of that encumbrance.*

The late Chancellor, WYTHE, on the 21st of *September*, 1803, dismissed the bill with costs;—whereupon, in *October* following, the complainant filed a bill of review, alleging the said decree of dismission to be *erroneous on its face;*—in which last-mentioned bill a new averment was inserted, "*that the complainant was igno-*

* Note. The other material circumstances are noticed in the opinion of Judge FLEMING.

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rant of the encumbrance at the time of the purchase."—But this allegation was disproved by the deposition of *Samuel Calland*, who stated "that he was and is now the agent of *Smith & Company*; that among their papers, he discovered a deed of trust or mortgage for *Robert's* land; that he made *Stockton* acquainted therewith, who made light of it, and plainly intimated to the deponent, that he, *Stockton*, believed that the *British* debts would never be paid; and that the purchase by *Stockton* took place after this information was given him." This witness stated, further, that he brought a suit, as agent, to foreclose the mortgage, or deed of trust, and obtained a decree, amounting to ninety-one pounds, *which Stockton paid.*

Chancellor WYTHE, perceiving no cause for altering his decree, affirmed it, and adjudged and decreed, that the bill of review be dismissed with costs;—whereupon the complainant appealed.

Wednesday, January 15th, 1812, the following was pronounced as the opinion of this Court, (consisting of Judges FLEMING, BROOK, CABELL, and COALTER,) *Judge* FLEMING *dissenting.*

"This Court is of opinion, that the said decree is erroneous: therefore, it is decreed and ordered that the same be reversed and annulled, with costs: and this Court, proceeding to make such decree as the said Superior Court of Chancery ought to have pronounced, is of opinion, that the decree of the said Court, pronounced the twenty-first day of *September*, 1803, and sought by the bill of review in this cause to be reviewed and reversed, is also erroneous: therefore it is further decreed and ordered that the same be reversed and annulled; that the injunction awarded the said *John Stockton* to stay execution of a judgment recovered against him by the said *Harman Cook* in the District Court, held at *New-London* at *September* Term, 1797, be perpetual; and that the

appellees, out of the estate of the said *Harman Cook* in their hands to be administered, if so much thereof they have, pay to the appellants the costs expended by the said *John Stockton*, as well in prosecuting his suit on the bill of review, as in prosecuting the original suit in the said Court of Chancery."

Judge BROOKE assigned the following reasons for concurring in this decree.

I concur in the opinion that the decree of the Chancellor ought to be reversed. *Though Stockton was apprised* of the mortgage to *Smith & Co.* he *did not consent to take the land with that encumbrance.* The *covenant* of the vendors does not *except* it; and the *deed* to the vendee contains an *express warranty and covenant against all encumbrances.* The vendors evidently preferred to take the claim of *Smith & Co.* upon themselves to having its amount deducted from the purchase money; *they* believed, (no doubt,) that, as it was a *British* debt, it could never be recovered. The complainant (the *vendee*) having paid off the mortgage, has an equitable title to have the amount deducted from his bond to the *vendors;* and their assignment to the defendant does not place *him* in a better situation than that of the *assignors.*

Judge FLEMING.—Whenever I have the misfortune to differ in opinion from the majority of the Court, I feel great diffidence in my own judgment; though, in the case before us, I have the consolation to reflect that I concur with the venerable Judge, who pronounced the decree, and is now no more. Being of opinion that the decree, dismissing the bill of the appellant, is correct; and, consequently, differing from a majority of this Court, I shall briefly state *some* of the grounds on which my opinion is founded; and must *premise* a sound, and well-established *maxim*, that whoever comes into a Court of *equity*, to ask relief against the operation of the law, ought to appear with a pure conscience, and, first, *do equity* to all parties concerned.

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Let us examine whether the appellant in this case has so conducted himself? He states in his *original* bill, that the land, for the purchase money of which his bonds were executed, was, by *Roberts*, previous to his said purchase, mortgaged to *James Smith and Co.* to secure the payment of a considerable sum of money. But finding, afterwards, *where* "*the shoe pinched*," and that the simple fact (though literally true) was insufficient for his purpose, and did not avail him, he, in his bill of *review*, added a very important assertion, to wit, that "*of this circumstance he was ignorant at the time of the purchase;*" which assertion he knew to be false, and which is pointedly disproved by two respectable witnesses, whose credibility stands fair and unimpeached.

Samuel Calland deposes that, about the year 1786 or '87, while *Stockton* and *Roberts* were *on terms* for the land, the former applied to the deponent, who was the agent of *Smith & Co.* to whom the land was under a deed of trust or mortgage; that he delivered the papers respecting the land to *Stockton*, who kept them several weeks, and returned them, *previous to his contract with the Roberts's*, and made light of it; intimating to the deponent that he believed the British debts would never be paid; the mortgage having been made to secure the payment of a *British* debt. In answer to an interrogatory, put by *Stockton* by the witness, he said that he understood the bond had sold for an inconsiderable sum; but that *Stockton* had damn'd its credit by advertising it; and another reason why it sold so low was that it was not payable until more than three years and a half after the sale. And *Cook*, in his answer, says, he always intended that whatever money he might receive on the bond, more than sufficient to discharge *Roberts's* debt to him, (to secure the payment of which the *bond* was pledged,) should be restored to *Roberts*.

But to return to the *notice*. *Drury Cross* deposes that *he* had bargained with the *Roberts's* for the purchase of the land; when *Stockton* came to him at his own house, and

informed him that it was under a mortgage to *James Smith & Co.* And, wholly from what *Stockton* stated, in regard to the encumbrance that was fixed on the land, he declined his bargain; and, in a few days thereafter, *Stockton* himself became the purchaser. Thus did *he*, by a subtle artifice, defeat *Cross* of the purchase, in order to secure it to himself; for, although the fact was *true*, that the land was under a mortgage to *Smith & Co.* yet, as his motive was to secure the purchase to himself, (which he, no doubt, knew to be an advantageous one notwithstanding the encumbrance,) it was a palpable *fraud* practised upon *Cross*. And, with a full knowledge of all these circumstances, in which he had been an artful and a principal actor, he had the address to prevail on the *Roberts's* (either from their ignorance, or their necessities,) to covenant, in their deed of *October*, 1787, (which he, no doubt, had prepared himself,) that the said land, "*at that time*, was *free and clear of and from all manner of encumbrances, and from the just claim of any person or persons whatsoever;*" and, as such, warranted the same to the purchaser, who, had he intended upright and fair dealing with the parties, should have deducted the sum, for which the land was mortgaged, out of the price, and paid, or given his bond or bonds for the balance; and taken a special warranty for the land, adapted to what he well knew to be the circumstances of the case.

It appears, too, from the exhibits and evidence in the cause, that, notwithstanding the mortgage which *Stockton* afterwards discharged, it was to him an advantageous purchase; for it appears by the deed of trust, or mortgage, that, in addition to the 246 acres purchased by *Stockton*, there was a tract of 220 acres adjoining, (which had been sold by *Smith & Co.* to *Roberts*,) comprised in the deed; making, in the whole, 466 acres; which latter tract of 220 acres was subject to contribute in due proportion, to discharge the sum for which the whole was mortgaged, to wit, 64*l.* 11*s.* 4*d.* And it is, also, in evidence, that *Stockton* sold a part of the 246 acres, (but

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how much thereof does not appear,) to one *Hubbard*, for five hundred dollars.

But, however that may be, I am of opinion that, if *Stockton* would avail himself of the warranty in the deed from the *Roberts's*, his remedy (if any he hath,) is against *them*: though, according to the principles laid down by the Judges of this Court in the case of *Grantland* v. *Wight*, (*a*) *they ought, in equity, to be relieved against their warranty*. The case alluded to was this: *Wight* sold to *Grantland* a piece of ground, lying on a street in Richmond, by certain metes and bounds, marked out at the time of sale, which lot was supposed, and publicly advertised by *Wight*, to extend fifty feet on the street, but, on measurement, it fell short of the distance, between 5 and 6 feet. *Grantland*, after his purchase, and with full knowledge of the deficiency in the ground, obtained from *Wight* a written contract to make him a title, in which was a covenant that the ground extended fifty feet on the street; when, in fact, it fell short upward of five feet. *Grantland* brought his bill to have a deduction in price of the ground; not *pro rata*, according to the deficiency, but claimed an *extra* deduction, alleging that the remainder of the ground was rendered of much less value, on account of the said deficiency. *Wight* contended, *only*, that the deduction should be in due proportion to the deficiency; but the Judges of this Court were unanimously of opinion that *Wight* would have been relieved, altogether, against his covenant, had he sought such relief; although it was executed under his hand and seal; because *Grantland* was apprised of the *boundaries* of the ground, though not of the quantity, at the time of the *purchase*; and acquainted with the *deficiency*, at the time of the *contract*.

(*a*) 2 *Munf.* *p.* 179.

In the case before us, *Stockton*, at the time he obtained a covenant that the land was *then* free and clear of and from all manner of encumbrances, and, as such, warranted to him, had perfect knowledge, (though expressly denied in his bill,) that it was under a deed of trust, or mortgage to *Smith & Co.* and had deceitfully availed him-

self of that knowledge to wrest the bargain from *Cross*, and secure it to himself. The two cases are different in circumstances, but, *in principle*, appear to me the same.

There is abundant evidence in the record, that *Stockton* was a litigious, contentious man; and his conduct, throughout the transactions before us, appears to me replete with chicane, artifice, and want of candour. I therefore think him not entitled to countenance in a Court of *equity*; and am, upon the whole, of opinion, that the decree is just, and ought to be affirmed: but, a majority of the Court thinking otherwise, the decree is to be reversed with costs, and the injunction made perpetual.

Blakey *against* West.

Argued *Thursday*, *Jan.* 16th, 1812.

IN this case, (which was a bill of injunction, filed in the County Court of *Buckingham*,) on the defendant's motion for dissolution, it was ordered and decreed, that the motion be overruled; and ("*in order that an appeal might be taken*" to the Superior Court of Chancery,) the injunction was "*by consent of parties*," perpetuated. The chancellor reversed the decree, and directed the bill to be dismissed; whereupon the complainant appealed.

The opinion of this Court, pronounced *Wednesday*, *January* 22d, was as follows; "It not appearing, that the injunction was perpetuated, *by the act of the County Court*, or that any *final* judgment was rendered, by the said court, on the case, although (for the purpose of appealing) the *parties consented* that the bill should be perpetuated;—this Court is of opinion that the appeal did not lie to the Superior Court of Chancery; and that that

Upon a county court's overruling a motion for dissolution of an injunction, the parties cannot make the injunction perpetual, *by consent, in order that an appeal may be taken*; but to authorize an appeal, the cause must be regularly proceeded in to a final decree.

See in *Norris* v. *Tomlins and Gray*, 2 *Munford*, 386. another case in which an appeal could not be taken by consent of parties. See also *M'Call*, v. *Peachy*, 1 *Call*. 55. and *Clark* v. *Conway*, 1 *Munford*, 160.