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.

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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.

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.

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had given a bond which had been assigned to *Graves* without recourse; that, *relying on the punctuality of Graves, he accepted his bonds* for the money and negroes, and an assignment of the bond of the *Waltons* for the *Kentucky* lands; that, being pressed by *Graves* to make a deed for the lands sold him, he refused to do so, but upon the express condition that he should retain the possession until paid the money and negroes, and until he should receive a proper deed for the *Kentucky* lands, to which *Graves* assented, and thereupon he executed a deed to *Graves*, *Dec.* 13th, 1788, and has retained possession ever since, having received only a partial payment of money, and one negro, but no deed whatsoever for the *Kentucky* lands, which are absolutely lost; that some time after (but when he does not remember) he had a conversation with *Duval*, at *Thomas Johnson's* house, in *Louisa*, concerning the purchase and agreement with *Graves;* when he informed *Duval* of all the circumstances above stated, and *that he should retain the possession* of the land, until *Graves* should comply with the conditions before mentioned; that *Duval*, being asked by *Johnson* whether he had purchased the land from *Graves*, answered that *he had not;* that, notwithstanding this, *Duval* had brought an ejectment, and relied on a deed from *Graves*, dated in 1793, which was not executed until after the information given him as aforesaid, *Graves* being then sunk in credit, and, as the complainant believes, ruined in his affairs, and the deed obtained from him by *Duval* being as an indemnity against suretyships for him.

Duval's answer stated that, previously to the conversation at *Johnson's*, the respondent had a mortgage on the lands; that he then told the complainant of it, and that he intended to *purchase* the land of *Graves*, for himself and *Isaac Younghusband*, to *indemnify* themselves as his *securities;* upon which the complainant said, that *Graves* owed him money, but, if *Duval* would pay him, he could remove from the land the next fall; that the respondent was surprised, after *knowing Bibb had lived on the land from*

1789 *until that time*, that *Graves* should owe him any thing; that he told *Graves* what *Bibb* had said, whereupon he declared that he owed him nothing in his opinion, &c. *Pleasant Younghusband* (who was made a party as heir of *Isaac Younghusband*) never answered the bill.

Several depositions went to prove the *original* agreement between *Bibb* and *Graves* to have been nearly as stated in the bill; but there were none at all to shew that *Duval* had any *notice* thereof, until the conversation between him and *Bibb* at *Johnson's* house, which some of the witnesses supposed to have happened in 1795, but which, from the answer, it seems probable happened before the 28th of *November*, 1793, the date of *Graves's* deed to him and *Younghusband*.

Among the exhibits were, 1. An absolute deed of bargain and sale, for the land in question, from *Bibb* and his wife to *Graves*, and his heirs and assigns for ever, in consideration of 1,000*l.* in hand paid, the receipt whereof is acknowledged in the deed, and a *separate receipt* for the same, written and signed at the foot of the deed, with a covenant of warranty to *Graves* and his heirs, dated *December* 13th, 1788, and proved and admitted to record in the General Court on the 15th and 16th days of the same month. 2. A deed of bargain and sale from *Graves* to *Duval*, for the same lands, in fee-simple, with a proviso, "that whenever the said *Francis Graves*, his heirs or assigns, shall indemnify and keep harmless the said *William Duval*, respecting certain premises, (noticed in the former part of the deed,) or shall make or cause to be made to the said *William*, his heirs or assigns, a good, sure, and indefeasible estate in fee-simple, of, in, and to the premises, free from all incumbrances and necessary charges at law, then that *mortgage* shall be null and void, otherwise to be and remain in full force, power and virtue." Dated *February* 11th, 1790, and proved and admitted to record in the General Court the 14th of *June* following. 3. A deed of bargain and sale from

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Graves and wife to *Duval* and *Younghusband*, (in consideration of 600*l.* to them in hand paid, and for which there is also a separate receipt,) in fee-simple, with a clause of warranty, bearing date *November* 28th, 1793, and recorded in the General Court, *June* 17th, 1794. 4. The bond of *E.* & *T. Waltons*, for a conveyance of the *Kentucky* lands, assigned by *Swann* to *Graves* "*without recourse*;" and by *Graves* to *Bibb*, in general terms, *October* 13th, 1788, (which, it seems, was never complied with, nor put in suit.) 5. *Graves's* bond to *Bibb* for 200*l.* dated *December* 13th, 1788, payable *September* 1st, 1789; and, 6. *Graves's* bond to the same, (of the same date,) in the penalty of 250*l.* for the delivery of three negro girls, on or before the 1st day of *April*, 1789.

The Chancellor made a decree, (*in substance*,) giving the plaintiff his choice either to *pay* to the defendants so much of the consideration money as he had received of *Graves*, deducting therefrom his costs in this suit, (whereupon the defendants were to make him a deed for the land with a warranty against all their own acts in prejudice of the title,) or to *receive* from them the balance due of the said consideration money, (without allowing any credit for *Kentucky* lands,) such balance being ascertained by an account to be taken by one of the Commissioners of the Court; and, if the defendant should fail to pay what should be found due upon such account, within six months after it should be approved and confirmed, that the land in dispute should be sold for ready money by Commissioners, who should pay to the *plaintiff* what should appear to be so due, and to the *defendants*, the residue of the proceeds of the sale, after deducting the expenses thereof; reserving to *Pleasant Younghusband* liberty of shewing cause within months against the said decree.

From this decree the defendant *Duval* appealed.

Warden, for the appellant. The decree ought to be reversed. 1st. Because the deed from *Bibb* and wife to *Graves*, states a different consideration from that mention-

ed in the bill to have been given for the land, and admits the whole thereof (as well in itself as by the receipt thereto annexed) to have been fully paid. *Ars Clericalis*, 391. and 2 *Dyer*, 169. *a.* *Wilkes* v. *Leuson*, shew that neither the *bargainor*, nor his heir, can aver that his deed was made on a different consideration from that expressed therein. He has not a right to set up any thing in opposition to his own deed, because otherwise purchasers would be entrapped. The deed, with the receipt in full, having been recorded, *Duval*, when he purchased of *Graves*, had no reason to expect that the consideration money, or any part thereof, had not been paid. The parol agreement that *Bibb* should remain in possession notwithstanding the deed, was of no effect. The statute executes a deed of bargain and sale, where to the bargainee's use, and conveys the possession.(*a*) The word "*grant*," made the land pass by way of use, and there was no need of actual entry.(*b*) *Graves*, therefore, was in possession by virtue of the deed; and, as he never reconveyed the land, *Bibb* could not be considered, *legally*, as in possession.

(*a*) 2 *Mod.* 253. *Baker* v. *Kent.*

(*b*) *Shep. Touchs.* 221. 223. *Cro. Jac.* 604.

2. No notice that any part of the purchase-money was due, is proved to have been given to *Duval*, or to *Isaac*, or *Pleasant Younghusband*, until the year 1795, which was after the date and recording of the last deed from *Graves*.

3. There was no necessity of such an account as the decree directed; but, if it was to be taken, credit should have been allowed to *Graves* for the value of the *Kentucky* lands, for which the appellee had accepted the bond of *Edward* and *Thomas Waltons*. It is true the assignment of that bond by *Graves* was not "*without recourse*;" but the deposition of *John Poindexter*, who drew the writings, proves that he so understood the intention of the parties. Besides, if *Graves* were ultimately responsible for those lands, *Bibb* ought to have used due diligence in endeavouring to recover of the *Waltons*, before he could look to *Graves*; yet he has never brought suit on that bond, though so many years have elapsed since its date. But, at

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any rate, *Duval*, the *bona fide* purchaser of the *Louisa* land, ought, in no event, to be liable for the default of the *Waltons*, or of *Graves*.

4. The legal representatives of *Graves* ought to have been made parties; a balance being alleged to be due from *him*, and an account directed to be taken, which could not be rendered by *Duval*. *Graves's* representatives are interested on his warranty to *Duval*, and, at law, would have been called in as *vouchees*. It is a rule in equity, that all persons interested should be made parties. *Mitf.* 39. *Ibid.* 144.

Randolph, for the appellee. There can be no doubt, after the case of *Eppes*, &c. v. *Randolph*,(*a*) that a different consideration from that mentioned in the deed, may be averred and proved. Mr. *Warden* is mistaken in saying that *Duval* had no notice. It appears from his own answer, that he had notice before the last deed from *Graves* to him; and this notice binds him to the same extent, and in the same manner, as *Graves* was bound. *Sug. L. Vendors*, 484. The previous mortgage was of no consequence, for that was for indemnity only, and there is no proof that the indemnity was required. The evidence clearly proves, that *Bibb* was to retain possession of the land, until the contract on the part of *Graves* should be *fully complied with*, and that he actually did retain it, which in itself was sufficient. It is said that *Walton's* land was taken by *Bibb at all risks;* but the nature of the transaction precludes the idea. The bond was assigned by *Swann* to *Graves* "*without recourse;*" but from *Graves* to *Bibb in general terms*. It cannot be believed, then, that *Bibb* meant to take the land without the warranty of *Graves*. Let it be considered, too, that *Bibb* was selling himself out of house and home; and it would have been insanity in him to part with his own land, without any security for a good title to that which he took in its stead. The testimony of *John Poindexter* is only as to his "*apprehensions*,"

(*a*) 2 *Call*, 125.

in which he might have been mistaken; and even *he* admits that *Graves* was to see that the *Waltons* made a deed. He never did see to it, and the land is actually lost, as appears from the deposition of *Edward Walton* himself, who swears that other persons now hold it by prior titles.

As to the want of proper parties, the case of *Brace* v. *Harrington*(*a*) furnishes the general reasoning on the subject. *Collins* v. *Griffith*(*b*) is strongly in our favour, shewing, that where there are two joint and several obligors in a bond, and one dies, the executor of the deceased may be sued in equity, without making the surviving obligor a party; and that in such case it is incumbent on the *defendant* to compel the other obligor to contribute towards payment of the debt. So here, if any contribution is to be demanded of *Graves's* representatives, *Duval* must sue them for that purpose. But he has taken on himself the defence, and has not suggested the propriety of calling on them for contribution.

(*a*) 2 *Atk.* 235

(*b*) 2 *P. Wms.* 313.

Wyatt's Prac. Reg. 302. 314. and 3 *P. Wms.* 97. note [A], also, by analogy, support the doctrine I contend for. In note [I], to 3 *P. Wms.* 311. it is said to be a general rule, that no one need be made a party against whom the plaintiff can have no decree. Neither was it necessary to make *Graves's* representatives parties, in order to get evidence from them, because it might have been obtained in the ordinary way, by taking their depositions.

Thursday, June 1. The Judges pronounced their opinions.

Judge TUCKER, after stating the case, said, the first question which I shall consider is, whether a purchaser, for a valuable consideration of lands, for which the seller has an *absolute* conveyance in fee-simple duly proved and recorded, and the consideration for such a conveyance also acknowledged to have been fully received, can be affected by any latent equity which the first seller may have

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against the second, or by any *condition* touching the original sale, from the first seller to the second, which is not expressed in the deed itself?

This question seems to be fully answered by the President of this Court in the case of *Wilcox* v. *Calloway*,(*a*) where, in delivering the opinion of the Court, he says, "The rule *caveat emptor* applies only to purchasers of defective *legal* titles. A *purchaser* of the *legal* title is not "to be affected by any *latent* equity, whether founded on "trust, fraud, or *otherwise*, of which he has not *actual notice*, or which does not *appear in some deed* NECESSARY "*in the deduction of the title*, so as to amount to constructive notice."

(*a*) 1 *Wash.* 41.

Duval then could not be affected by any latent equity, or *secret condition*, between *Bibb* and *Graves*, which is not expressed in the deed itself. The mortgage of the 11th of *February*, 1790, therefore stands unimpeached, both at law and in equity, since he had neither *actual* notice of *Bibb's* private agreement, nor is there any thing in *Bibb's* deed to *Graves*, that could have led him to *further inquiry*. On the contrary, the information to be collected from it was conclusive, in *favour* of a purchaser; otherwise, the laws which direct the recording of all deeds of lands must prove a snare, instead of a security to purchasers.

The deed of *February* 11th, 1790, is to all intents and purposes an absolute conveyance in fee-simple, at law. The proviso is in the nature of a condition subsequent. The object of the deed is the perpetual security and indemnity of *Duval*, against a recovery which might be had against him by *Currie* or his heirs. Equity cannot deprive him of that security; and, so long as he may by possibility be exposed to the danger of a recovery, his estate at law remains absolute. Any future conveyance from *Graves* to him could only operate by way of a *release of his equity of redemption*; for *Graves* had nothing else left in himself. If, upon the faith of such a release, he advanced money to *Graves*, or became security for him in any of his pecuniary transactions, his *legal right* would at-

tach thereto an *equitable* priority against any other *equitable claim*, especially if his engagements, as security for *Graves*, were actually prior to *actual notice* of such *latent* claims. If a third mortgagee can, by purchasing the first mortgage, attach a priority to his own over the second, by thus acquiring the prior legal title, and the union of his own mortgage with it, will not the same reason apply more forcibly in *Duval's favour?* He therefore had a right to a *perfect indemnity*, not only from the events intended to be provided against in the mortgage of *February* 11, 1790, but from all other damages which he may have incurred, or still be exposed to, from his suretyships for *Graves;* nor could a Court of Equity deprive him of either. Why, then, might he not commute a contract for *future indemnity*, into one for *present indemnity*, by taking a release of *Graves's equity of redemption* of the lands, the *legal* title of which was already vested in himself?

According to the decision of this Court in *Eppes* v. *Randolph*,(a) *Duval*, as a *purchaser for a valuable consideration*, is at liberty to aver and prove the *real consideration paid or agreed on*, between himself and *Younghusband* on the one part, and *Graves* on the other, for the lands, as conveyed by the deed of *November* 28, 1793. He states that they had become bound as securities for *Graves* to *William Alexander & Co.* The amount of that suretyship, and the time when it was undertaken by them, are therefore, it may be presumed, susceptible of proof. Nor must the security intended by the mortgage in *February*, 1790, be lost sight of, if it can be proved that it entered into the view of the parties, when contracting for the absolute sale of the lands: *Duval's* equity must, therefore, prevail over *Bibb's*, as far as these matters extend. But, for any *actual payments* made by *Duval* to *Graves*, posterior to the information which the former received from *Bibb* at the house of *Johnson*, (if any such were made,) I think *Bibb* is fairly entitled to recover the amount thereof, with interest, towards the satisfaction of his claim against

(a) 2 *Call*, 185.

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Graves for any part of the purchase-money of the land which may still remain due to him from *Graves*, but nothing more.

I am, therefore, of opinion, that the Chancellor's decree be reversed, and the cause remanded for an account to be taken of any actual *payments* which may have been made by *Duval* to *Graves*, subsequent to the *notice received* at *Johnson's* house, &c. That an account of the balance due from *Graves* to *Bibb*, upon his bonds of the 13th of *December*, 1788, for 200*l.* and for the three negroes, if any, upon a full settlement of all accounts between those parties, (except as to the *Kentucky* lands, for which *Bibb* appears to have taken an assignment of the *Waltons'* bonds, without any agreement on the part of *Graves* to be responsible, in case the lands were lost,) ought to be taken; and for that purpose the personal representatives of *Graves* ought to be made parties to the suit; that *Duval* be considered liable for any *actual balance* due from him to *Graves*, as also for any *actual payments* made by him to *Graves* since the time of *Duval's* receiving *notice* of *Bibb's* equity, as before mentioned; and that the cause be sent back with directions accordingly.

Judges ROANE and FLEMING agreed that the decree be reversed; and the following was entered as the unanimous opinion of the Court: "The Court having maturely considered, &c. is of opinion that the said decree is erroneous in this; that the appellant, *William Duval*, having obtained from *Francis Graves*, before he had notice of any equitable claim which the appellee, *Robert Fleming Bibb*, might have on the lands sold by him to the said *Graves*, a conveyance in fee-simple, by way of mortgage, as a security against certain contingent damages to which the said appellant might be exposed from a claim of *James Currie* to the houses and lots, before that time sold and conveyed by the said *Graves* to the said appellant, and having, as he hath alleged in his answer, like-

"wise become bound, together with a certain *Isaac Young-husband* as a security to *William Alexander & Co.* "for a considerable sum of money, before notice as "before mentioned, was well authorized to purchase the "release of the equity of redemption of the said mortgage, "notwithstanding such notice afterwards received; and "to avail himself of the consideration in his favour arising "out of the preceding circumstances, being responsible "only for so much of the purchase-money as he may either "have actually paid to the said *Graves*, or have agreed to "pay to him, over and above the before-mentioned consi-"derations of indemnity; therefore, it is decreed and or-"dered, that the said decree be reversed and annulled, and "that the appellee pay to the appellant his costs by him ex-"pended in the prosecution of his appeal aforesaid here. "And this Court proceeding to make such decree as the "said Superior Court of Chancery ought to have render-"ed, it is further decreed and ordered, that an account be "taken before one of the Master Commissioners of the "said Court, of all sums of money, if any, actually paid "to the said *Graves* by the said appellant, since the notice "proved to have been given him at the house of *Thomas* "*Johnson*, in the county of *Louisa*, or which may be still "due from him to the said *Graves*, or to his representa-"tives, as a further consideration for the purchase of the "release of the equity of redemption, beyond the indem-"nities before mentioned, and also an account of the pur-"chase-money due from the said *Graves* to the appellee, ex-"clusive of the *Kentucky* lands, for which this Court is of "opinion the said *Duval* was not responsible; and, for the "purpose of taking such last-mentioned account, the re-"presentatives of the said *Graves* are to be made parties "to this suit, and that the account so to be taken be re-"ported to the said Superior Court of Chancery; and if, "upon such report, there shall appear any money due from "the said *Graves* to the appellee, on account of the pur-"chase aforesaid, the appellant, *Duval*, ought to be, and

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" is hereby made responsible for so much thereof as it may " appear that he hath paid, or agreed to pay to the said " *Graves*, since the notice before mentioned, with interest " on the same, and no more; and, on payment thereof by " the appellant to the said appellee, *Robert F. Bibb*, that " he, by a good and sufficient deed, at the costs and " charges of the said appellant, release unto him all his right " and title both in law and equity to the said land and pre- " mises, and deliver quiet and peaceable possession thereof " to the said appellant; and if the said appellant shall fail " to pay to the said appellee whatever sum of money may " appear to be due on such report of the Commissioner, " with interest as aforesaid, within a certain time to be li- " mited by the said Superior Court of Chancery, that then " the said *Louisa* land, or so much thereof as will be suf- " ficient, be sold by Commissioners to be appointed by the " said Court for that purpose, at public auction, for ready " money, after the time and place of sale shall have been " noticed for four weeks successively in two of the *Rich-* " *mond* newspapers; and, out of the money arising from " the sale, the said Commissioners pay to the said appellee, " or to his assigns, whatever sum of money shall, by the " report of the Commissioner of the said Court, appear to " be due, with interest as aforesaid, and the residue of the " product of the sale, if any, after deducting the consequent " expenses thereof, pay to the said appellant, and report " their proceedings in execution of the same to the said " Superior Court of Chancery, in order to a final decree."

Cause remanded to the Court of Chancery for further proceedings, according to the principles of this decree.