REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

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1814.

deduced from the patentee, who obtained a grant for the same from the crown, under the regal government, in the year 1751, down to *Patrick Ramsey*, in the year 1774. And none, I conceive, could be interested in, or affected by, the sale, except the purchaser, and those who claimed under *Patrick Ramsey*, and (except the possession) not a shadow of title appears in the appellant.

I have still, however, some doubts on the subject; and it being an invariable rule with me never to reverse a judgment, or a decree, unless thoroughly convinced that it is erroneous, I am of opinion that the judgment ought to be affirmed. But a majority of the court being of a different opinion, it is to be reversed, and the cause remanded to the superior county court of *Franklin*, for a new trial to be had therein.

Judgment reversed, and new trial granted; with a direction that, on such trial, the court do not permit the decree, mentioned in the bill of exceptions, to be given in evidence to prove that *Andrew Ramsey* was the heir of *Patrick Ramsey*.

Grantland *against* Wight.

Wednesday, April 3d.

THIS was a suit in the superior court of chancery for the *Richmond* district, on behalf of *Michael Grantland* against *Hezekiah L. Wight*, executor of *John Joy*, and of *John Prentis*, deceased, for a title to a tenement, being

1. A piece of ground being sold at public auction, expressly according to certain metes and bounds, (then and there shown to the purchaser before he became the highest bidder,) be the same more or less; he is not entitled to any compensation for a deficiency; although the previous advertisement described the tenement as containing more than the actual quantity: neither is the case varied by subsequent articles of agreement under seal, (written by the purchaser, and signed by the vendor, for the purpose of binding the vendor to make a title,) in which the terms of the sale are referred to, but the quantity of ground mentioned in the advertisement is specified, omitting the words "more or less." The vendor is not precluded by such articles from proving the terms of sale by parol testimony.

2. In such case, *it seems*, however, that if the chancellor decrees a compensation to the purchaser, and the vendor does not appeal, the court of appeals will not correct the error to his injury, upon an appeal by the other party.

3. An injunction, to a judgment for purchase-money, ought not to be dissolved until a good and sufficient deed for the land be tendered by the vendor.

MARCH, 1811.

Grantland v. Wight.

part of a lot, in the city of *Richmond*, sold at public auction by the said executor, and purchased by the complainant; and also for compensation for a deficiency in the quantity of ground. It appeared from the bill, answer, and depositions, that the tenement was advertised, before the sale, as containing fifty feet in front; but that on the day of sale, it being publicly suggested that it did not contain as much, the quantity within certain metes and bounds, (specially shown to *Grantland*,) be the same more or less, was sold and purchased for the sum of 442*l.* 10*s.* Some time after the sale, when *Grantland* gave his bond for the purchase-money, he proposed that *Wight* should sign a memorandum of the agreement, for the purpose of binding him to make a title; to which *Wight* assented, and accordingly signed articles of agreement written by *Grantland;* reciting that the said *Michael Grantland* having become the purchaser " of all that tenement on the main street, lately occupied by *William Hodgson*, containing fifty feet front, and running one hundred and sixty feet back, and the said *Michael Grantland* having, according to the terms of the sale of the said property, given bond with approved security for the payment of the purchase-money, to wit, the sum of 442*l.* 10*s.*" &c. " The said *Hezekiah L. Wight*, executor as aforesaid, in consideration of the premises, hath agreed," &c.

By a survey made in the cause, the tenement was ascertained to contain only forty-three feet ten inches in front.

The late chancellor having granted the plaintiff an injunction to stay proceedings on a judgment obtained against him on his bond, dissolved it, on the final hearing, as to 388*l.* 15*s.* 2*d.* and the interest thereupon, and made it perpetual as to the residue of the principal and interest; decreeing that the defendant *Hezekiah L. Wight* pay to the plaintiff the costs by him expended in

prosecuting this cause; but made no provision relative to the title to the tenement in question. From this decree the plaintiff appealed.

Hay, for the appellant. The decree is evidently wrong upon two grounds; 1st. The chancellor has erroneously adopted the standard, furnished by the price agreed on for the whole, to fix the compensation for the part lost.(1) If a purchase (for example) should be for a quantity of ground sufficient to build a house on, the loss of one half of the ground would be, obviously, more than equal to half of the price. The value of the damage sustained by the appellant ought to have been ascertained by a jury.

2. The court ought to have ended the subject of controversy by decreeing a conveyance on payment of the purchase-money.

Copland, for the appellee. The decree is erroneous in being more favourable to the appellant than it ought to have been. There should be no deduction from the purchase-money; the sale having been made according to certain boundaries marked out, though the number of feet and inches was not ascertained. The writing which he afterwards obtained ought not to put him in a better situation than he was entitled to according to the terms of sale. And, as to the want of a title, the payment of the money and delivery of the conveyance ought to be simultaneous acts.

Wickham, in reply. Mr. *Copland* admits the agreement, under hand and seal, is against him. This was after the sale. Parol testimony could not be admitted against it, unless fraud had been proved. The weight of such testimony may be in his favour; but we (having the deed)

(1) Note. See on this subject, 1 *Munf.* 330—338. *Hull* v. *Cuningham's Executor*; and *ibid.* 500. *Humphrey's Administrator* v. *M'Clenachan's Administrator*.

MARCH, 1811.

Grantland v. Wight.

were not compelled to take depositions to support it. Besides, a new bargain, made after the sale, might have been the inducement to the deed.

Wight (though an executor) had a right to warrant the title, if he chose it; and, in this case, he has agreed to make an indefeasible title. Suppose he is unable to make such title. In no case, of a suit in equity for a title, has it been deemed necessary for the plaintiff to tender the money. The decree should have been that the injunction be dissolved upon the defendant's depositing a conveyance as an *escrow*.

Saturday, *April* 20th. The judges pronounced their opinions.

Judge CABELL. The written agreement in this case ought to be considered as referring to the terms of the public sale, and therefore the decree of the chancellor, making a deduction from the price for which the property was sold, at the public sale, was erroneous. But, as the appellee has not complained of that deduction, it will not now be noticed. The decree appears also to be erroneous in dissolving the injunction before the appellee had made a title to the land. I am therefore of opinion that the decree be reversed, and that the cause be sent back to the court of chancery; that the injunction be reinstated and remain in full force until a deed, good and sufficient in the estimation of the chancellor, shall be executed, and then that it be dissolved as formerly directed by the decree now reversed.

Judge BROOKE. The claim of the appellant to a deduction from the amount of his bond appears to me entirely unfounded. The depositions concur in proving the terms of the sale. Though the advertisement described the lot of ground as containing fifty feet in front, yet the depositions of the auctioneer, and of two other

witnesses, prove expressly that it was publicly proclaimed by the auctioneer that the lot was sold as containing between forty-four and forty-six feet in front, more or less, by metes and bounds, which were specially shown to the appellant. He does not himself, either in his original or supplemental bill, insinuate that the articles of agreement were executed by the appellee in pursuance of any other contract or transaction than the sale; nor is there the slightest evidence to that effect in the record. I infer, therefore, that the words "more or less," in the terms of the sale, were omitted in that instrument by mistake. The appellant, coming into a court of equity to ask relief, insists with a bad grace on the legal effect of a deed so obtained. However, as the decree is not complained of by the appellee, it will not now be corrected as to the deduction from the amount of the bond; but the appellant was certainly entitled to a conveyance of the property before he paid the purchase-money; the want of it was the exclusive complaint in the original bill; yet the chancellor has been silent on that subject. I am therefore of opinion that the decree be reversed, the cause sent back, and the injunction reinstated, until the appellee shall tender a good and sufficient deed, in the opinion of the chancellor; and then to be dissolved, as before decreed.

Judge ROANE. Nothing can be clearer, upon the testimony in this case, than that the purchase was of the entire lot, by specified metes and bounds, and that the appellant was not only publicly and formally apprized of those terms, at the time of sale, but was also informed of the probable deficiency by a rough admeasurement of the premises. These circumstances are entirely competent to do away the effect of the advertisement, which represented the lot as containing fifty feet in front. If, therefore, we are authorized to test this case by the actual circumstances of the contract on the day of sale, the ap-

MARCH, 1811.

Grantland v Wight.

pellant is entitled to no abatement whatever, from the gross sum he contracted to give for the lot.

We are *so* authorized, unless prevented by the agreement of *November* 3d, 1801. The bill states the purchase of the lot at public sale; and that the appellant entered into the agreement, last mentioned, with the appellee; and prays that the said contract may be carried into effect. It does not allege a rescission of the contract by the sale at auction, and the making a new agreement by the writing of *November* 3d, 1801; but, on the contrary, it rather admits that the original sale was not rescinded, by stating the consummation, without also averring the rescission of it. The bill, at least, submits the construction upon this subject to the judgment of the court; and, if we were now to decree that the original bargain was rescinded and given up on the 3d of *November*, 1801, we should, I think, go beyond the allegations of the bill, and take a ground not taken by the complainant himself. Let us now examine the agreement itself. The agreement does not purport an abandonment of the former contract; on the contrary, it recognises its existence, by reciting that *Grantland* had become the purchaser of all that tenement, &c. and had given bond for the payment of the purchase-money, according to the terms of the sale; and by agreeing to make him a title to the tenement purchased as aforesaid, in consideration of the premises, which premises are, his having purchased the lot at public sale, and given bond for the purchase-money according to the terms of that sale. Thus far there is not an iota of the agreement which seems to look towards a rescission of the former contract, and setting up a new agreement; but what is now relied upon is, that, in reciting the fact of the purchase at auction, the lot is said to contain fifty feet; and this false recital is supposed both to demolish and surrender the contract on the original purchase, and to narrow down the effect of an agreement, which was then entered

into merely for the purpose of effectuating and finally settling the former contract. The answers to this idea are, 1st. That if the lot is, in this part of the recital, said to contain fifty feet in front, that recital also admits that he purchased *only* "all that tenement lately occupied by *W. Hodgson*," and that this part of the recital will narrow and control the effect of the former; 2dly. That this construction is abundantly supported by the agreement, taken in a general view as aforesaid; and, 3dly. That a false recital of a fact or contract does not in all cases amount to a grant or contract. In the case of wills it is clear that a false recital does not amount to a devise;(a) and the construction, I presume, will be the same in relation to a grant or deed, unless the circumstances are so clear as to amount to an admission to be bound by the fact or document recited, as in the case of *Annandale* v. *Harris*, 2 *P. Wms.* 433. where a man having, in a deed poll, recited that he had given a bond for 2,000*l.* to a woman whom he had seduced, and the bond could not be proved, it was held that the recital in the deed was sufficient evidence of there having been such a bond, as it was a confession by the obligor himself under hand and seal, and was stronger than a verbal confession. The case before us falls very far short of this standard; for so far from this recital amounting to an agreement to warrant the lot to contain fifty feet, it is not only a *felo de se* in itself as aforesaid, but the converse is evinced by all the foregoing considerations. I should be entirely of this opinion, did the parties in this case stand upon precisely equal ground: but that is not the case; for the appellee has got the law on his side, and is not to be deprived of the benefit thereof, unless his adversary will give up his claim to avail himself of a trick practised by him in relation to an immaterial omission in the recital of an agreement written by himself.

(a) *Bamfield* v. *Popham*, 1 *P. Wms.* 54. and *Wright* v. *Wyvill*, 2 *Vent.* 56.

As to the proposed variation in the decree, nothing can

MARCH, 1811.

Grantland v. Wight.

be more just than that a purchaser should not be compelled to part with the purchase-money until he has obtained a title for his land. I concur, therefore, in reversing the decree, and in modelling it in the manner proposed by Judge BROOKE.

Judgment reversed, and "cause remanded to the court of chancery, for the injunction to be reinstated until the appellee *Hezekiah L. Wight* shall tender a good and sufficient deed in the opinion of the chancellor, and then to be dissolved as before decreed by the chancellor."

Monday, *April* 22d. The judges (except Judge BROOKE) declared that, in this case, they did not mean to decide the question generally, whether, on reversing a decree to the injury of the appellant, the court can moreover correct an error operating to the injury of the appellee, but left it open for argument whenever the point should again occur.

October 2d, 1811. *The Court* established a *general rule* on this subject, for which see 1 *Munf.* p. 460. note.

Saturday, *November* 9th. *Copland* renewed a motion, formerly made by him, for a reconsideration of this case. His object was to obtain a correction of the error which operated to the injury of the appellee.

Cur. adv. vult.

Monday, *November* 11th. The president reported that, on reconsidering the case, the court saw no good ground for disturbing the decree entered the 20th of *April* last.