

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

BY
BUSHROD WASHINGTON.

V O L. I.

R I C H M O N D:
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M,DCC,XCVIII.

proceed to judgment upon so uncertain a verdict as to this fact.

The judgment of the District Court must be reversed for these reasons, and the cause remanded for a new trial.

ELIZABETH APPLEBURY & others,

against

ANTHONY'S Executors.

THIS was an appeal from a decree of the High Court of Chancery, reversing a decree of the County Court in favor of the appellants, the children of Thomas Applebury, in the suit, who were plaintiffs. The bill states a marriage agreement between Thomas Applebury, father of the plaintiffs, and James Anthony, their grandfather, by which the grandfather promised to give to the said Applebury, a slave named Lucy, in marriage with his daughter, the mother of the plaintiffs. That the marriage took effect, and the grandfather refusing to deliver the slave, the father brought a suit to recover her. That the suit was referred to arbitration, when the grandfather finding it would be decided against him, he proposed to convey the slave to all the children of his daughter, begotten, or to be begotten, with which proposition Applebury closed, and dismissed his suit.—That in May 1769 the grandfather executed a deed for the slave according to the terms of the compromise, which deed is lost or mislaid. That the grandfather died in 1784, and that the defendants are his executors, and refuse to deliver Lucy and her children; and to compel them to do so, is the prayer of the bill.

The answer admits the marriage contract; the suit and reference thereupon; that Lucy was determined to be the property of Applebury, and she was soon afterwards delivered into his possession. That upon an application made by the grandfather to Applebury, the latter agreed to exchange Lucy and her children, for a slave called Dinah, and two notes of hand for £60 which were delivered, and Lucy was retained by the grandfather; that a receipt, expressing this exchange, was signed by Applebury, in May 1769. They admit a deed from the grandfather

father to Applebury, for Lucy, which was put into the hands of a third person, and which was after the exchange delivered to the defendants by an order from Applebury.

The deed of the grandfather dated in May 1769 to the *children* of Applebury is proved by the deposition, and that it was delivered to a third person to be recorded. The answer is fully supported by the testimony.

The decree of the County Court which was in favor of the plaintiffs, was reversed in the Court of Chancery.

COPLAND for the appellants. The *children* of Applebury taking a legal estate under the deed, as purchasers, not under their father, but under James Anthony the grandfather, the father had no right to sell, exchange, or in any manner to defeat that right. They stand upon the same ground as all other persons who apply to a Court of Equity to set up deeds lost or destroyed by accident or fraud; and the deed in question having been destroyed by the testator of the defendants, this court will establish it without regarding the unauthorized interference of the father.

MARSHALL for the appellees.—The *equitable* right to these slaves was originally in the father himself; and the subsequent conveyance to the *children* being without consideration, they are merely volunteers against the representatives of James Anthony, whose testator was a purchaser, for valuable consideration, of the father's original equitable title.—So that this is not the case of a contest between volunteers, but that of a volunteer asking the aid of this court against a purchaser for valuable consideration; in which case, I conceive, a Court of Equity will not interfere. The only deposition in the cause is that of the father, who says, that he considered himself entitled to dispose of the negro mentioned in the deed, which leaves a strong presumption, that the deed was delivered as an escrow,

COPLAND in reply. I do not rely upon the deposition, because the answer admits the conveyance. As to the main point, there can be no good reason, why this court should not set up a deed destroyed by the party who gave it, because he had purchased the property from a person, who he knew had no right to dispose of it. Such a bargain could not bind the present plaintiffs.

THE PRESIDENT delivered the opinion of the court.

This being an application to a Court of Equity, to restore a lost deed to its legal validity, it becomes important to consider whether the deed, if restored, has any legal force. It is the
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the deed of the grandfather, for slaves, to which he had, at the time, no title. For upon the state of the case, the title appears to have been in Applebury the father.

But it is said, that this deed was made with the consent and privity of Applebury, and therefore ought to bind him; to this there are two answers. 1st, It is admitted, that if a man has an equitable title only, and stands by, and suffers another to purchase without disclosing his title, he is guilty of a fraud, which shall defeat him of his equitable claim. But it is supposed, that a legal claim could not be so lost, even in favor of a purchaser; and it is doubted, if even an equitable claim would be destroyed by that circumstance, in the case of a mere voluntary conveyance.

But 2^{dly}, Suppose the children had this equity against their father, it is but an equity, which may be opposed by circumstances of superior equity on the other side, especially on behalf of the grandfather, who was a fair purchaser, and had his deed delivered to him without the same having been recorded.

The whole transaction was fair. The grandfather who was bound to give Lucy to Applebury, conveyed her to his children with his consent and approbation. The next day an agreement was made between the same parties to substitute a valuable consideration for Lucy, and this, not with any fraudulent view, but upon the laudable motive of gratifying the wishes of the slave. The consideration was paid; Lucy re-delivered; and the deed restored to the grandfather. And now, the grandchildren are endeavoring to set up this voluntary deed, made upon a contract between their father and grandfather, who agreed without any fraudulent intention to change the contract, and to cancel the deed, whilst it was in their power to do so, (it not being recorded,) notwithstanding their father's estate was thereby augmented, in consequence of the consideration paid for Lucy. So that they have a chance at least, of receiving an equivalent, if they should get Dinah and the two other slaves purchased with the £ 60 which the father may give them in lieu of Lucy. The grandfather has already paid Applebury his wife's fortune, and if the plaintiffs were to succeed in this suit, they would compel the grandfather to pay it over again.

Upon the whole, the plaintiffs have neither law nor equity in their favor. The defendant Anthony has both, and the decree of the Chancellor is right. But it may be necessary, to distinguish this case from that of *Ward vs Webber and wife*,

(see ante p. 274) where a voluntary conveyance by a father to a child, being cancelled by the father, was restored to its legal validity:

1st, In that case the father was proprietor of the estate, and had a power to convey. In this the grandfather had no title and this original defect was to be supplied in equity by the consent of the father, and so liable to be opposed by superior equity.

2dly, In that case the deed was delivered into the daughter's keeping, who was of full age, and was privately cancelled by the father, without her consent; in this, the children, if they were in being, had no hand in the transaction, nor had they even the deed. The father who consented to accept it, relinquished it the next day, and gave it up to the donor.

3dly, The defendant in that case, was a mere volunteer, here, he is a fair purchaser, for a valuable consideration, so that the cases are wholly dissimilar, and the decree perfectly reconcilable.

Decree affirmed.

S M A L L W O O D,

against

MERCER & HANSBOROUGH.

THIS was an appeal from the High Court of Chancery, dismissing the bill of the appellant. The case was as follows.—Mercer being in possession of a tract of land, to a part of which Hansborough was entitled as heir to his mother, (and which had been sold to the father of Mercer, by the father of Hansborough, without the privy examination of the mother) proposed selling it to Smallwood, who hearing of the title of Hansborough, objected thereto. Mercer, to remove this obstacle, applied to Hansborough, and a bond dated March 26th 1783, was entered into, with a condition, the material parts of which are as follows, viz: “whereas certain matters of controversy now depend, and subsist between the above named Mercer, and the above bound Hansborough, that is to say, a claim which the said Hansborough pretends to have to 133 $\frac{1}{2}$ acres of land, now in the possession of the said Mercer, and which the said Hansborough claims as heir at law to his mother Lettice, whom the said Mercer admits to be one of the daughters and
“ co-heiresses