

REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:

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the five years were confined to the time of pleading, instead of the time when the action accrued ; and that the issue tried was immaterial. Therefore, it is considered that the said judgment be reversed and annulled, and that the appellants recover against the appellee the costs expended as well by them as by the said *Rebecca*, in the prosecution of the appeal aforesaid here, to be levied, &c. And it is ordered, that all the proceedings, subsequent to the office judgment, be set aside ; that the appellee be at liberty to appear and plead the general issue, and that a new trial be had in the cause ; or, in case of default, that the writ of enquiry be executed."

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Devise in 1760, to testator's son of a tract of land, without words of perpetuity, held a fee simple.

If the owner of a tract of land sees it sold to another person, without disclosing his title, it is a fraud which forfeits his right.

Milker Engle, by his will dated the 12th of January, 1760, devised as follows: "Touching such worldly estate, wherewith it hath pleased God to bless me in this life, I give, devise and dispose of the same in the following manner and form ; It is my will and I do order that, in the first place, all my just debts and funeral charges be paid and satisfied. I give, &c. &c. I give unto my well beloved son, *Michael Engle*, one hundred acres of land adjoining *Joseph Darke* and *John Humphries's* land. And the plantation I now live on, I give and bequeath the same to *Mary*, my beloved wife, during her natural life, and at my wife's decease, the said plantation to be equally divided between my beloved sons *John Engle*, *George Engle* and *William Engle*."

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On the 20th of December, 1787, *Michael Engle* sold the said tract of one hundred acres of land to *William Burns*, and gave him a title bond for the same, conditioned, "that if the above bounden *Michael Engle*, or his heirs, executors, administrators do and shall well and truly convey and assign, or cause to be conveyed and assigned unto the above named *William Burns*, his heirs or assigns, a good right in fee simple, unto a certain tract of land lying and being in the aforesaid county and state, joining the lands of *John Humphreys* and *William Burns*, containing one hundred acres more or less, it being the land of which the said *Michael* now dwells, on or before the third Tuesday in February next, free and clear of all incumbrances whatsoever, then the above obligation to be void, else to remain in full force and virtue."

Prior to this sale, *Michael Engle* had sold the land to *Philip Engle*, who knew of the treaty between *Burns* and *Michael Engle* for the purchase; but never disclosed his own contract to *Burns*, who paid the greater part of his own purchase money before he knew of that contract.

Upon discovering the deception, *William Burns* filed a bill in chancery in the county court, against *Michael Engle* and *Philip Engle*, stating, that, in 1787, he purchased of the defendant *Michael Engle* a tract of land, now claimed by *Philip Engle*, at the rate of forty shillings per acre, Pennsylvania currency. That he paid down £ 49. 5. part of the purchase money, and gave his bond for £ 113, payable in September 1788. That he has since paid the defendant *Michael Engle* £ 68. 19. 8. Pennsylvania currency; and is ready to pay the balance upon receiving a title to the land, agreeable to the defendant's title bond, dated the 20th of December, 1787. That the defendant *Michael Engle*, hath, nevertheless, conveyed to the defendant *Philip Engle*, who had notice of the plaintiff's right. The bill therefore prays for a conveyance from the defendants, and for general relief.

The answer of the defendant *Philip Engle* states, that on the 15th of October 1787, he, through *Darke*, purchased the *life* estate of *Michael Engle* in the land; paid part of the purchase money down; has since paid all the rest, except about £20; and took a deed for the land in 1788. That he does not certainly know of any bargain between the plaintiff and the defendant *Michael Engle*, although he has heard of one; but not until after his purchase, and considerable payments had been made by him.

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The answer of *Michael Engle*, sworn to in North Carolina, the 19th of April, 1790, states, that he sold the land to the plaintiff for the consideration in the bill mentioned. That afterwards, *Philip Engle* and *Darke*, (who was to have part of the land,) told the defendant that *Burns* meant to cheat him; and that he had better sell the land to them. That he did so; and *Darke* paid him twenty half joannes, and a mare, at the price of a hundred dollars. That he does not recollect the dates of the transactions.

There are some receipts and the depositions of sundry witnesses filed. The examinations of the witnesses extend to the transactions generally, as well as to the contracts. The county court decreed a conveyance of the land to the plaintiff; and the defendant appealed to the court of chancery; where the decree of the county court was reversed in part; and, from the latter decree, *Engle* appealed to the court of appeals.

Randolph, for the appellant. The appellee had, at best, only an equitable claim against *Michael Engle*; and the appellant had no notice of it, until he had advanced his money. But, in fact, the appellee had no title; for, if the contract was ever completed, it was afterwards revoked. 1 *Fonbl. Eq.* 158. *Cooke v. Oxley*, 3 Term Rep. 653. Besides, *Michael Engle* had only a life estate; and *Philip*, therefore, cannot be decreed to convey more, under any view of the case.

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Williams and Wickham, contra. The charge of a sum of money on the estate created a fee; and the word *estate* in the preamble, may be carried to the devise to *Michael Engle*, so as to enlarge the words into an absolute fee simple. *Davies v. Miller*, 1 Call, 127. *Watson v. Powell*, 3 Call, 306. *Kennon v. M'Roberts*, 1 Wash. 96. The defendant knew of our purchase, yet suffered it to proceed, without informing us of his own; and that will postpone him; who ought, consequently, to be decreed to convey a fee simple estate to the appellee.

Randolph, in reply. The word *estate* does not enlarge the interest in the present case; for it is not necessary to the construction, as the words are clear and need no aid. It is doubtful whether the lands are charged with the testator's debts; and therefore no inference of a fee can be drawn from any part of the preamble to the will.

Cur. adv. vult.

TUCKER, Judge. *Burns* brought a bill in chancery in Berkeley county court against *Michael Engle* and *Philip Engle*, setting forth, that in 1787, he purchased of *Michael* a tract of land now claimed by *Philip*, at the rate of forty shillings an acre, Pennsylvania money; for which he paid down £49. 5.; and, at the same time, gave his bond for £113, payable in September 1788: And that he hath paid *Michael*, on account of the purchase, £68. 19. 8. Pennsylvania currency, and is ready to pay the balance upon receiving a right to the land; which the defendant engaged to make him, as will appear by a bond dated the 20th of December, 1787, executed by *Michael* for the above purpose, to which he refers, and prays it may be made a part of his bill. That notwithstanding *Philip* was well acquainted with his purchasing the land from *Michael* in a fair and honest manner, and knew of his paying money on account of the purchase, the defendants combining together to deceive, injure and cheat him out of the land, by buying and

selling the same, the defendant *Michael* gave, to the other defendant, *Philip*, a deed for the same, which is of record. All which is contrary to equity, &c. The bill therefore requires, that the parties may answer the premises fully, and more particularly may set forth, whether the defendant *Michael* did not sell the land to the complainant for the sum stated, and with the knowledge of the defendant *Philip*? Whether the complainant did not pay the consideration mentioned in the bill with the knowledge of *Philip*? Whether a bargain between the defendants did not take place subsequent to his purchase? And whether *Michael* did not give *Philip* a deed for the land? And prays for a conveyance, and general relief.

The defendant *Philip* answers, that, on the 15th of October, 1787, colonel *Darke*, in the presence and at the request of *Philip*, purchased the land of *Michael*, then in *Michael's* possession, and to which, as he is advised, *Michael* had an estate for life, and that himself was entitled to the reversion in fee, under his father's will, to which he refers, as part of his answer, at the price of forty shillings, Pennsylvania currency, per acre, and did actually then and there pay, to *Michael*, part of the purchase money, but how much he does not precisely remember; and expressly charges that the whole purchase money, except about £20 Pennsylvania currency, is since paid to *Michael*: that *Michael*, on the — day of —, 1788, in compliance with his bargain, conveyed the land to the defendant *Philip*. That he does not certainly know of any bargain between *Burns* and *Michael* for the land; that he has, indeed, heard there was a bargain, but never heard the particulars; and expressly denies he ever heard one word about it, until some time after his own bargain with, and considerable payments made to *Michael*; and as expressly avers, that neither he, nor *Darke* for him, ever made but one bargain, which was on the 15th of October, 1787, and denies all combination, and concludes with a general traverse.

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It may save some trouble, in the future discussion of this cause, to remark, that the only charge of fraud contained in the bill against *Philip Engle*, or put in issue by it, is that he bought the land of *Michael Engle*; got from him a deed for it, after the complainant had agreed for the purchase; and paid a part of the consideration money with full knowledge of those circumstances. But the answer contains a full denial of both those facts, and alleges a bargain made by *Darke* on behalf of *Philip*, and payment of part of the purchase money more than two months before the date of *Burns's* bargain, or the payment of any money by him to *Michael*. The substantial point which is thus put in issue is the priority of the contracts; the dates of which are precisely fixed; the one by the bond, which is made part of the bill; the other by the answer. The date of *Burns's* contract is not denied or put in issue; nor is it alleged in the bill that any previous agreement, sanctioned by the payment of money, or by any other act, ever took place between the parties. The subject of enquiry then is, whether *Philip's* bargain was, in fact, prior to the 20th of December, 1787; and, if so, whether it was a *bona fide* transaction between the parties?

Upon this point I shall examine the evidence.

William Darke says, That, after an unsuccessful overture to *Michael* to purchase the land on a former occasion, the latter came to his house, and told him he would let him have it for less than he had before asked; that, either on the 14th or 15th of October, 1787, he bargained for the plantation, and thinks he then told *Michael*, that it was for his brother *Philip*, and that he must make him a deed for it; at which time he paid part of the purchase money, and was to pay the rest in April following; that *Michael* was to take a waggon with three horses, in part payment, and the balance in money: that some considerable time afterwards, he heard that *Michael* had sold the land to *Burns*: that on his return from Alexandria, after the last mentioned period, he paid *Michael* a further sum of money, and in a few days

or weeks after, he received the whole, except a small part left to pay a debt to col. *Morrow*: That the bond he took of *Michael* for a conveyance of the land was made to *Philip Engle*, and that if he remembers right, he was a witness to it; that the bond was given up to *Michael* when he made the deed; that he has not, nor ever had, any interest in the land; and that, although he did believe, from reports, that *Michael* had made some bargain with *Burns*, he always heard and believed it was after he had sold it to him the said *Darke*.

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A receipt, dated the 15th of October, 1787, from *Michael Engle* to *William Darke*, for part of the price of his land sold him, and an order from *Darke* in *Michael's* favour for four dollars, paid by *Henry Bedinger*, are among the exhibits; the date of this order is by *Bedinger* fixed on the said 15th of October, 1787, and that he paid the same, as appears from his day book. The receipt is substantiated by the depositions of *Michael Bigerly*, *Thomas Johnson* and *John Hendricks*, and corroborated by the testimony of *Michael M' Cabe*. *Thomas Johnson* also states, that, about the middle of October 1787, *Michael Engle* came to *Darke's* house, where he then was at work, and asked him if he could make him a suit of clothes, and said that he had sold his plantation to *Darke*, about two months after the witness heard he had sold it to *Burns*. And *John Darke* says that *Michael Engle* told him of the sale to his father, about the same time.

To rebut this testimony arising not only from the positive averment in *Philip Engle's* answer in a point responsive to the bill, and to the very git of the suit, but from collateral circumstances in evidence, as well as direct testimony, there is not in the record a single piece of testimony, or any circumstance whatsoever, that I have been able to discover, except the answer of *Michael Engle*, (which is not evidence against *Philip*, although it contains strong evidence for him, as to the payment of twenty half joannes) and the vague reference to the year 1787, in the deposition of *Robert Lowry*.

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I am, therefore, perfectly satisfied, that *Darke's* bargain with *Michael Engle*, was actually in October 1787; that he *bona fide* paid almost the whole of the purchase money; that *Burns's* bargain was subsequent to that period, it being concluded on the 20th of December, 1787, but not before. And consequently, that the complainant has no equity against *Philip Engle* upon this point.

The actual priority of *Darke's* purchase being thus, as I apprehend, fully established, I shall, before I proceed to the point insisted on by the counsel for *Burns*, viz. that *Philip Engle* had made himself liable by countenancing the fraud of *Michael*, make one enquiry, namely, Had *Burns*, at any time, notice of *Darke's* prior purchase?

John Engle states, that *William Burns* asked him something concerning the purchasing of some land of *Michael Engle*, and that he told *Burns* that *Michael* had no right to sell the land, which *Burns* was about to purchase; that he saw the parties together some time after, and heard *Burns* again propose purchasing land from *Michael*; that *Michael* gave the deponent an order on *Burns* for ten dollars; which he refused to pay, saying that when they concluded the bargain he would pay. Which conversation happened some months after *Darke's* purchase for *Philip*.

If this fact be true, *Burns*, and not *Philip Engle*, was guilty of fraud; by endeavouring, in an underhand manner, to purchase from *Michael* what he had notice was already sold to *Philip*; and, in that case, the maxim that he that doth iniquity shall not have equity, comes home to *Burns*.

I shall now consider the second point insisted on by the appellees, viz: That although *Philip Engle's* purchase should be prior in time to that of *Burns's*, his conduct in concealing his own purchase, and aiding *Michael* in drawing money from *Burns* in payment for the land, was fraudulent as to *Burns*, whose title, for that reason, is preferable in equity.

The rule laid down in the text of 1 *Fonbl.* 161, is, that where a man who has a title, and knows of it, stands by,

and either encourages, or does not forbid the purchase, he shall be bound, and all claiming under him by it; and this seems to be a just punishment for his concealing his right; by which an innocent man is drawn in to lay out his money.

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The rule thus laid down, supposes the party to be present at, or consulant of, the treaty in which the fraud is practised, and encouraging the purchaser, either in express terms, or by silence and concealment of his own title, to proceed in the purchase; and the cases of *Hobbs v. Norton*, 1 Vern. 136. *Hunsden v. Cheyney*, 2 Vern. 150, which is the strongest case there cited. *Draper v. Borlace*, 2 Vern. 370. *Arnot v. Briscoe*, 1 Ves. sen. 95. *Raw v. Pote*, 2 Vern. 239. And *Berrisford v. Milward*, 2 Atk. 49, cited in support of the rule, all proceed upon those grounds. In *Beckett v. Cordley*, 1 Bro. 357, lord *Thurlow* says, This court never binds a third person, but where there is notice of a treaty. And in *Ibottson v. Rhodes*, 2 Vern. 554, where a mortgagee being asked by the agent of a person about to lend money upon an estate, whether he had any incumbrance on it; answered he had not, the lord keeper ordered it to be tried at law, whether the agent told the mortgagee that his employer was about to lend money on the estate? In 9 *Mod.* 36, the party stood by and suffered a fraudulent treaty to go on. In *Clare* and the *Earl of Bedford*, an infant, nearly of full age, was bound, because he engrossed the deed. That, says lord *Thurlow*, was upon the principle that he knew of the transaction. In *Mocatta v. Murgatroyd*, 1 Wms. 393, the first mortgagee was witness to the second mortgage, and was therefore postponed. So in *Berrisford v. Milward*, 2 Atk. 49, with this additional circumstance, that he promised the mortgagor to rely on his personal security. There is no case in the books (says lord *Thurlow*), but where the party, to whom the fraud was imputed, was consulant of the treaty in which the fraud was practised. In *Stiles v. Cowper*, 3 Atk. 692, where a remainderman in tail had, for six or seven years, received rent upon a lease for sixty-one years, made by his father,

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who was only tenant for life ; during which time the tenant, at his own expense, had greatly improved the premises, the court declared, that when a remainderman lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it (as *Philip Engle* does in this case), all those circumstances together will bind him from controverting the lease afterwards.

The rule laid down in 1 *Fonbl.* 162, note n., as cited from *Fox v. Mackreth*, 2 Bro. Ch. Cas. 420, is thus : If a man by the suppression of a truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, his claim shall be postponed to that of the person whose confidence was induced by his representation.

Having already said, that I am fully satisfied that *Darke's* contract in behalf of *Philip Engle*, concluded with his knowledge, and at his request, was at least two months prior to the contract between *Michael Engle* and *Burns* ; if it shall appear from the evidence that *Philip Engle* either stood by and encouraged, or being present did not forbid *Burns's* purchase, or disclose his own claim ; or that being applied to by *Burns*, or any one on his behalf to know whether he had any claim or title, as *Burns* intended to make the purchase if no prior title or bargain existed, he did either deny that he had any prior claim, or conceal the bargain made in his behalf by *Darke*, from the knowledge of *Burns*, such conduct would bring him within one, or both, of these rules ; and if charged in the bill, and put in issue, and proved, will postpone his claim to that of *Burns*.

But I can find no such allegation in the bill, the charge in which is confined to his supposed fraud in obtaining the lands in pursuance of a bargain made subsequent to that of *Burns*. These charges are in their essence as materially different as a charge of horse stealing in an indictment, and a charge of concealing a horse thief. And to my apprehension, evidence of the one in support of the other of these

charges is equally inadmissible, as if the prosecutor of the supposed horse thief were to offer evidence to support the charge that he had received the principal felon in his house. And if the maxim be true, that fraud shall never be presumed, but must be proved, I presume it is equally necessary that it should be specially charged in the bill, that the defendant may deny it by averment; for otherwise the fact of notice, or of fraud, will not be in issue. *Mitf.* 216. And would it not be a breach both of law and equity to condemn a man, in a heavy penalty, for a fraud disclosed in evidence, but not charged or put in issue by the pleadings between the parties? Suppose, for example, the fraud that is disclosed in the evidence be proved only by one witness: if the defendant had been charged with this fraud in the most direct terms by the bill, and had answered and denied the charge with proper averments in his answer, the defendant could never have been condemned upon this evidence. But if we dispense with this strictness in the pleadings, a defendant can never be safe, because he may be condemned on collateral evidence of a fraud, with which not having been charged, he could not know it was necessary to defend himself against it.

But if it be supposed that this fraud is charged in the bill, then it is as clearly denied by the answer, which expressly denies all fraud and combination, and concludes with traversing all the matters alledged in the bill. Then how is it proved?

There is not one tittle of evidence to shew that there was ever any communication between *Philip Engle* and *Burns*, about the land, either before or at the time of the bargain; or any application from *Burns*, or any person on his behalf, to *Philip* for information, or any denial or concealment of his claim at any time whatsoever, unless such concealment (for there is not a shadow of proof of a denial) be inferred from the evidence of *George Burns*, who says, that some time before *Michael Engle* removed from this country, he and *Philip* came to the house of *Burns*, and wanted

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flour, or some other articles, (but whether he obtained them or not, he does not say.) That *Burns* observed to them, that he was frequently paying sums which he might forget : To which *Philip* replied, that he knew of some money (not saying how much) which *Burns* had paid *Michael* in Martinsburg, and the witness understood it was in payment of land which *Michael* had sold *Burns*. This witness could not remember the year in which this conversation happened : But *Frederick Blue* speaks of *Michael's* going to *Burns* for a barrel of flour about the first of May, 1788, which possibly was the same time ; and, if so, about four months after *Burns* had made his bargain for the land.

This is the only evidence in the record, direct or indirect, between *Philip Engle* and *Burns*. It is not in proof that *Burns* at that time paid a farthing, or supplied *Michael* with the flour, or any other article to that amount. Taking the evidence as it relates to the money paid at Martinsburg to *Michael*, it does not appear but that *Michael* might have told him of it ; or that he might have known it from a thousand other sources, without being present at the payment ; nor does the amount, whether a shilling or ten pounds, or any other sum, appear in any part of the evidence.

Is it possible, upon this evidence, to bring the conduct of *Philip* upon this occasion, within either of the rules which I have cited from *Fonblanque* ? I think it impossible to do so.

But let it be supposed that, instead of this vague and uncertain testimony, the evidence had been, that *Philip* went with *Michael* to the house of *Burns*, and that *Burns* had paid *Michael*, in the presence of *Philip*, ten pounds, *Philip* all the while concealing his claim to the land, what is the measure of punishment which equity would decree against *Philip* in such a case, he being before that time a *bonâ fide* purchaser without notice, and for a valuable consideration paid for the land ? Would equity, for this act of concealment, decree that he should lose his land, although worth a thousand or ten thousand pounds ?

If equity would, in such a case, decree such a punishment, I should think that she would hereafter abandon her claim to the title of mild. Her punishments, on the contrary, may be considered as far exceeding those of our present or former penal code. If *Philip Engle* had robbed him on the highway, or had broken open his house in the day time, and stolen his money, our criminal courts would now inflict a punishment comparatively light, to that of a forfeiture of perhaps all his lands. Such a punishment would not, according to the principles of our law, be according to the degree of the fault, and the estate of the defendant.

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Let it be remembered, that I am now considering the case of the concealment as it relates to this time four months after the bargain, and to the subject then in hand, the payment of a sum of money.

The most that equity could do, under those circumstances, would be to decree that money to be re-paid with interest; and to make *Philip* liable for it, in case *Michael* should not be able to do it.

Such, then, as it respects *Philip*, is the utmost that this court would decree against him, had the fraud been put in issue and proved. If he has any money of *Michael's* in his hands, that ought to be paid over to *Burns*, and the court might proceed to decree him further relief against *Michael*. Of this, however, it will probably be unnecessary to say more.

My opinion is, that the chancellor's decree should be reversed; that the bill be totally dismissed, as to *Philip*, with costs; and that the court might make such a decree against *Michael*, as to afford the complainant all the relief against him, that it may be in the power of the court to afford him.

In this opinion, I am the more confirmed by the deposition of *John Engle*, (which I have already noticed), who says, that he told *Burns* of *Darke's* bargain for the land, before *Burns* agreed with *Michael* for it. From that moment he was chargeable with the fraud which he now imputes to *Philip*.

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ROANE, Judge. In the view I have taken of this case, it is unnecessary to enquire minutely, Whether the purchase of *Philip Engle*, or that of *Burns*, was prior in point of time? I think, however, that throwing out of the case the answer of *Michael Engle*, and the testimony derived from him, the testimony preponderates in favour of the priority of *Philip Engle's* purchase. Nor do I deem it material to enquire at what time the purchase of *Burns* became known to *Philip Engle*, or whether, at such time, he, *Philip Engle*, had paid the whole of his purchase money, or not? This I go upon, that he, *Philip Engle*, claiming by purchase from *Michael Engle*, stood by, and concealed his purchase; suffered *Burns* to go on, without objection, and conclude his purchase: Nay more, was active in leading *Burns* on to pay up his purchase money. To make the case still stronger, he, *Philip Engle*, received as it were, a consideration for one of these payments by *Burns*, he being thereby released from a suretyship for *Michael Engle*. The testimony of *George Burns* shews, that *Philip Engle* encouraged *Burns* to pay money on account of the land, in an address to *Burns* himself. I say on account of the land; because it is neither shewn, nor pretended, that any money was due from him on any other account. The evidence of *George Burns* (page 14) is clear enough, that the money was paid on account of the land. The word "understood" must be taken to be an understanding at that conversation, and for the parties themselves. The testimony of *Slaughter* and *Lowry* shews, that *Philip Engle* was instrumental in procuring such payments from *Burns*; and, if *Burns* were not actually present at the time, it is immaterial, if he had a knowledge of such conduct on the part of *Philip Engle*, as implied his assent to his (*Burns's*) purchase, and a waiver of his own.

The ground on which a man is bound, who has a title, and stands by, and either encourages, or does not forbid a purchase, or the completion of the purchase, (for I make no distinction between the two,) is, that of an implied assent

to such purchase. 1 *Fonbl.* 151. This assent is as much to be inferred from the encouragement to pay a small sum, as the whole purchase money; for the purchaser inferring such assent from such payment, may reasonably go on thereafter to complete his purchase. To protect the first purchaser from the effect resulting from such partial payment, it is incumbent on him to shew an intermediate prohibition of payments on his part, or retraction of such assent. This is not done in the present case; and whatever conclusion may result from the other depositions, that of *George Burns* will sustain the appellee on this principle. If under this principle, a penalty or punishment results to the person encouraging, by his concealment, it is better that it should fall on him, than on an innocent man, thus drawn in, by him, to lay out his money; it is immaterial, in the eye of equity, whether injury has arisen from a suggestion of falsehood, or the concealment of truth from a party having a right to a communication thereof. In a case, like the one before us, the person induced or encouraged, has certainly a right to be informed of the claim or right of the adverse party, if it be intended to be relied on.

These principles are too self-evident to need the support of particular decisions. Such, however, I apprehend, may be readily found.

The conduct of *Philip Engle* thus tending in conjunction with *Michael Engle* to defraud a third person, being more than a mere concealment of facts which ought to be disclosed, and producing the actual benefit to *Philip Engle*, which is before mentioned, ought to be discountenanced in a court of equity. It actually ratified the purchase of *Burns*, though subsequent to his own purchase.

It now remains to enquire, whether *Burns*, by these acts, acquired a life estate, or an estate in fee, in the premises in question? If *Michael Engle* took a fee under his father's will, it is unnecessary to enquire, whether, or not, the reversion of *Philip Engle* would have passed to *Burns* by this conduct of *Philip Engle*, on a supposition that he, *Michael*

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Engle, took only a life estate. This latter enquiry is susceptible of various views, but perhaps need not be discussed. If decided, it ought, perhaps, clearly to appear, whether *Philip Engle* undoubtedly understood *Burns* as having purchased the fee from *Michael Engle*; for if not, if only a life estate was, or reasonably might have been understood by him to be purchased, it was not only unnecessary for him to have disclosed his claim to the reversion, but a forfeiture of such reversion by him for the concealment, would both seem too rigorous in a court of equity, and also perhaps be going beyond the principle pervading these cases, namely, that the purchase of the person encouraged or induced, is *ratified*. The case of *Watson v. Powell*, 3 Call, 306, seems, however, to render this enquiry unnecessary, and to settle the question that *Michael Engle* took under his father's will, and could consequently convey a fee. Whatever opinion I might have as to that case considered as a new one; however I might be disposed to doubt, whether any great stress should be laid in inferring the intention of a testator from mere words of course, from the formulary expressions of the scrivener, from words which exist in *all wills whatsoever*, and which would therefore prevent, in almost all cases whatever, any such thing being conveyed by will, as an estate for life, except such estate be expressly limited therein, (I speak now without reference to the act of 1786), I deem myself bound by that decision, and shall not attempt to disturb it. It is a very great evil that the rules of property should be perpetually fluctuating and uncertain.

As to the matters put in issue in this case, the bill calls on the defendant to say, whether he, *Burns*, did not pay his purchase money with the knowledge of *Philip Engle*? This is a point to which *Philip Engle* does not choose to answer; but it is certainly charged in the bill, and put in issue, and is the turning point in the cause.

As to an express charge of fraud, it is enough to charge fraud, by charging circumstances which involve fraud. There is some little obscurity in the bill upon this subject

with relation to the words "and that by the knowledge of *Philip Engle*," whether they are referable to the previous or subsequent question, (here a reference was had to those questions, from the record): I infer, however, that they refer to the former, because such words would be absurd, if applied to the succeeding question.

As to *John Engle's* deposition, it does not appear from it, that *Burns*, when he purchased, knew of *Philip Engle's* purchase.

My opinion therefore is, that the appellant do convey the land aforesaid to the appellee; and deliver up possession thereof, and account for the profits.

FLEMING, Judge. *Michael Engle*, without the least regard to principle, first sold the land to *Darke* on behalf of *Philip Engle*; and afterwards to *Burns*; who was imposed upon both by *Michael* and *Philip*. For *Philip* knew of the sale to *Burns*; was present when part of the purchase money was paid; and industriously concealed his own prior contract. The consequence is, that *Philip's* claim must be postponed to that of *Burns's*. For if a man stands by, and sees another purchasing land to which he has a prior claim, and does not disclose it, his concealment is a fraud, which forfeits his title. 1 *Fonbl. Eq.* 151. I am therefore of opinion, that there should be a conveyance of the land to *Burns*.

CARRINGTON, Judge. *Philip Engle* connived at the sale to *Burns*; and was present when several payments were made, without disclosing his own claim, which must therefore be postponed to that of *Burns's*. For the concealment was a fraud, which forfeited his title. I think, therefore, that there should be a decree for a conveyance of the land to *Burns*.

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LYONS, President. *Burns* is entitled to a decree for a conveyance of the land; and the following is to be the entry:

“The court is of opinion, that so much of the decree of the high court of chancery, as reverses that part of the decree of the county court, which ordered the appellant to convey the land in controversy in fee simple to the appellee, and directed that he should only convey all the right in the land and premises which he derived from the defendant *Michael Engle*, to the appellee, is erroneous; that the said decree of the high court of chancery is also erroneous in this, in not directing an account to be taken of the monies stipulated to be paid by the appellee for the purchase of the said land, and actually paid by him, that a decree may be made thereupon according to equity, for the benefit of the appellant so far as he shall appear entitled thereto; but that there is no error in the residue of the said decree. Therefore it is decreed and ordered, that so much of the said decree of the high court of chancery, as is hereby declared erroneous, be reversed and annulled; that the appellant forthwith convey the said land to the appellee in fee simple, with warranty against himself, and all persons claiming under him; that he also forthwith deliver possession thereof to the appellee; that an account be directed to be taken of the purchase money aforesaid, for the benefit of the appellant, so far as he shall appear entitled thereto, according to equity; that the land aforesaid be held subject to any balance which may be found due to the appellant; that the rest of the said decree of the high court of chancery be affirmed; and that the appellant pay to the appellee, as the party more substantially prevailing in this court, his costs by him about his defence in this behalf expended.”