REPORTS

OF

C A S E S

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 II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)
PRINTED AND PUBLISHED BY I. RILEY.
1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"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 II. By William W. Hening and Wil- "liam Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "An act for "the encouragement of learning, by securing the copies of maps, charts, and books, to the "authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie- "tors of such copies, during the times therein mentioned, and extending the benefits thereof "to the arts of designing, engraving and etching historical, and other prints."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

MARCH, 1808. offered by the appellant, at the trial; and that the judgment ought to be affirmed.

Goodall v. Stuart.

By the whole Court, (absent Judge LYONS,) the judgment of the District Court was AFFIRMED.

Wednesday, March 15.

Pollard *against* Cartwright, Brand, and others.

The vendor of a tract of land having previously incumbered it with a mortgage, of which the vendee had no notice; the innocent security in the bond for the purchase money is not liable to make good the loss of a subsequent purchaser evicted by a decree to foreclose the mortgage.

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced in *October*, 1802.

The only parties before the Supreme Court of Appeals, were *Pollard* and *Brand;* as between whom the sole question was, whether *Brand*, who was the innocent security of *Richard Burnley*, for the purchase of a tract of land made by him of *Cartwright*, which he (*Cartwright*) had previously mortgaged to one *Doncastle*, but of which mortgage *Burnley* had no notice, could be made liable to *Pollard*, a subsequent and remote purchaser from *Burnley*, of the same land; it having been sold under a decree to foreclose the mortgage, while *Pollard* was in possession of it.

In the Court of Chancery, there were several other parties defendants, against whom, according to their respective interests and liability, the Chancellor decreed in favour of *Pollard;* but dismissed the bill as to *Brand*, upon the coming in of his answer: from which decree *Pollard* appealed to this Court.

Warden, for the appellant, took several exceptions to the proceedings in Chancery, which are particularly noticed in the opinion of Judge *Tucker;* and endeavoured to shew that *Burnley* had no right to complain, because, although the land was subject to a prior incumbrance, yet he

received more for it than he had agreed to give to *Cartwright*.

Call and *Randolph*, for the appellee, *Brand*, contended, that the bond in which he was surety, was not binding, either upon him or *Burnley*, because it was given for the purchase of a tract of land to which *Cartwright*, the vendor, had no right, until a mortgage to *Doncastle*, the former proprietor, should be satisfied.

Suppose *Cartwright* himself were before the Court, claiming the benefit of the bond: would this Court decree against *Brand*? Surely not. It would be said that *Cartwright* had been guilty of a deliberate fraud in selling the land to *Burnley*, without giving him notice of the existence of a mortgage which absorbed the whole land. If, then, *Cartwright* could not recover against *Brand*, *Pollard*, who claims of *Brand* as the debtor of *Cartwright*, can stand in no better situation.

Monday, *March* 21. The Judges delivered their opinions.

Judge TUCKER. The original parties to this suit, in Chancery, were *Richard Byrd* and *Robert Pollard*, complainants, against *Thomas Cartwright*, an absent defendant, and *William Gooseley*, executor of *Allen Jones*, *James Davis*, —— *Burnish* and *Elizabeth Swann Burnish*, his wife, administratrix of *Richard Burnley*, deceased, (two other absent defendants,) *Joseph Brand*, and *Mary Bell Burnley*, daughter and heir of *Richard Burnley*, deceased, an infant, since married to *Edmund Brown*, as debtors of *Thomas Cartwright*, and garnishees under the act of assembly concerning absent debtors. The bill states a variety of matter, which I deem it unnecessary to particularize. A decree was obtained against *Cartwright*, under the act of assembly, and against *James Davis*, as a garnishee for him; *Gooseley* having answered and denied having any effects in his hands, and the accounts rendered by

MARCH, 1808.

Pollard v. Cartwright and others.

him having been referred to a commissioner, whose report was favourable to him, the bill was dismissed as to him. It abated as to *Burnish*, the husband of the administratrix, by his death; a decree was made against *Elizabeth S. Burnish*, the administratrix of *Richard Burnley*, under the act of assembly concerning absent defendants; but no person appears to have been summoned as a *garnishee for her;* nor is there any suggestion that she had any effects in the hands of any person in this state, nor are the securities for her administration made parties to the suit. *Edmund Brown* answered in *behalf* of his wife, the daughter and heir of *Burnley*, "denying every allegation in the "bill, asserting that *Richard Burnley* had complied with "all his engagements, respecting the lands in question, "and denying that he had any real assets in his possession "of the late *Richard Burnley*, deceased, either by descent "or devise." To this answer there was a general replication, without any exception taken thereto, nor was there any further process to compel his wife *Mary* to put in her separate answer. The cause was set for hearing on the *motion of the plaintiffs*, and coming on to be heard on the 6th day of *June*, 1800, was *no further prosecuted* by the plaintiff, *Richard Byrd*, and was taken for confessed, against the absent defendants, and JOSEPH BRAND, who was in contempt for not answering, and was heard on the bill, answers of the other defendants, and "*exhibits, among* "*which were the proceedings in two other causes;*" in one of which there was a decree, *September* 22, 1792, and in the other, a decree passed 29th of *May*, 1800. In neither of which cases does it appear that an appeal was prayed, or granted. The Chancellor in the case now before us, made a decree to the effect before stated, as to all the defendants, except *Brown* and wife, as to whom the bill was dismissed; and except *Joseph Brand*, who was allowed till the next term after service of a copy of the decree, to shew cause against it. He appeared accordingly at the next term, and for reasons appearing to the Court, the decree as to him was set aside, and thereupon he put in

his answer. In this, he admits, that he was security to a bond given by *Richard Burnley* to *Thomas Cartwright*, on account of the purchase of a tract of land called *Doncastle's*. That it hath since been discovered that *Cartwright* had *previously mortgaged* the lands to *Thomas Doncastle*, so that the consideration for which the bond was given had altogether failed; and therefore that neither *Burnley* nor himself ought to be compelled to pay the bond; insists he is an innocent security to the bond, and knows of no way of reimbursing himself; and denies that he is indebted to *Cartwright* on any other account. It appears from the exhibits that the mortgage had actually been foreclosed, and the land sold.

On the 30th of *September*, 1802, the Chancellor setting aside so much of his former decree as related to *Joseph Brand*, dismissed the bill as to him; and also made some alteration in the decree as to *James Davis*, allowing him his costs. The next day he set aside that decree, and finally dismissed the bill as to *Brand*: "From which decree the plaintiff prayed an appeal." The only parties who have appeared in this Court, are the appellant, *Robert Pollard*, and the appellee, *Joseph Brand*.

From this view of the case, which I found no small difficulty in comprehending at first, it will appear that the records in the two former suits are no otherwise before this Court, than as EXHIBITS in the present suit. With the correctness and propriety of the several decrees therein pronounced, we have no more to do, than if they had been pronounced in another state, or a century ago. Consequently the arguments of the appellant's counsel predicated upon the pendency of those suits, are wholly irrelevant to the present cause.

Of the decree against *Cartwright*, in this cause, there is no ground of complaint on the part of the appellant: he has obtained all he asked for against that defendant. So has he against *James Davis*, and against *Elizabeth S. Burnish*, administratrix of *Richard Burnley*, deceased. But we are told by the counsel the decree is erroneous in

MARCH, 1808.

Pollard v. Cartwright and others.

not providing *any expedient* for the settlement of the account of that defendant as administratrix of her first husband *R. Burnley*. Was it the duty of the Court, or of the party, or his counsel, to point out the means by which an *absent defendant* might be compelled to do what the interest of the plaintiff required? Is the Court bound to inquire for proper parties, who might have money or effects, or the accounts of an absent defendant in their hands, without the aid or request of the complainant or his counsel? If such be the duty of a Court, what need is there of counsel? Another error which the appellant's counsel suggests, is, the dismission of the bill as to *Gooseley*. The decree as to that defendant, if not perfectly correct, is more favourable to the appellant than perhaps it ought to have been. A third error suggested is the dismission of the bill as to *Mary Brown*, the daughter of *R. Burnley*, on the answer of her husband, which it is said is in no respect a proper answer. Why then was it not excepted to? Why was there not process of contempt against the wife, to compel her to put in a separate answer? Why was the cause set for trial as to these defendants as well as the others, on the motion of the plaintiff? The answer of the husband *in behalf of his wife* not being excepted to, was admitted as *her* answer. The general replication *put in issue* the facts therein alleged, but did not controvert the *propriety* of the *answer*, as the answer of the *wife*. No evidence was adduced to disprove a tittle of it. It stood then upon the footing of any other answer, being put in and sworn to by a real defendant in the cause, and as such was entitled to credit, not being disproved, or even contradicted. A further ground of complaint with the appellant's counsel was, that the decree hath exonerated *Joseph Brand*, who was an innocent security for a purchaser, without notice, of lands, *previously* mortgaged by the *seller*; which mortgage hath since been actually foreclosed, and the vendee of the purchaser evicted. Neither the security nor the purchaser himself, can in such a case be made liable to the seller, because his

concealment of the mortgage, to which he was not only privy, but was actually the maker of it, was such a fraud in him, as would have subjected him to make restitution, if the money had been paid; and consequently afforded a sufficient ground to protect the security against the payment.(*a*) And although it has been urged that *Burnley*, the purchaser, sold the lands again, and received the purchase money, so that *he* sustained no loss by the mortgage, yet this does not alter the case, for he is still liable to recompence his vendee who has been evicted, and therefore shall not be compelled to pay his vendor, who sold under such fraudulent circumstances. Nor shall his security be liable to pay the money at the suit of one who may have an equity against such a fraudulent seller, because, where there is equal equity on both sides, *melior est conditio defendentis*. Nor ought the security to be liable to *Pollard* for any equity which he might have against *Burnley*, (as I understood the counsel for *Pollard to contend*,) for *Brand* was not the debtor of *Burnley*, but the debtor of *Cartwright*, the fraudulent vendor to *Burnley*. Upon these grounds I am of opinion, that the decree ought to be affirmed. Leaving it, however, to the appellant to pursue his remedy against *Cartwright*, and against the absent administratrix of *Burnley*, by adding other parties in whose hands he may find money or effects, belonging to either of them, as garnishees.

(*a*) 1 *Fonb.* b. 1. c. 2. sect. 8. *Ib.* c. 3. sect. 4. *note* n.

Judge ROANE, considered this a very plain case, and that the decree ought to be AFFIRMED. If the plaintiff thought proper to amend his bill and pursue other parties, he could see no objection to such a course.

Judge FLEMING. When this voluminous record, and seemingly complicated case, comes to be inspected, it is reduced into a very narrow compass, and the present contest seems to be between *Robert Pollard* and *Joseph*

MARCH, 1808. Pollard v. Cartwright and others.

Brand, only; the latter is not now, nor never was, otherwise interested, or concerned in the business, than as a security for *Richard Burnley* to *Thomas Cartwright*, in a bond executed thirty-two years ago, and given for the purchase money of a tract of land called *Doncastle's Tavern*, to which he could convey to the purchaser no title, having previously mortgaged the land to *Thomas Doncastle*, to secure the payment of 500*l.* which circumstance was concealed from *Burnley*, and did not come to his knowledge for several years after the transaction; which rendered the bond, I conceive, void in equity; and, at least, exonerated the security, who was no ways concerned in interest, from his responsibility.

And let us see what are the appellant's pretensions to charge the appellee *Brand*. *Burnley*, the first purchaser from *Cartwright*, sold his right to *Adam Byrd*, who agreed to give him, in part payment, a tract of land called *Cochran Town*, purchased of one *Hill;* but for which he had no deed of conveyance: *Burnley* sold to *Butler* and *Butler* to *Pollard*, after *Hill* had conveyed to *Byrd;* but no other deed had ever passed between the parties, of which *Pollard* had full notice, and took advice of counsel on the subject, before he made his improvident purchase of *Butler*, as he confesses in his answer to the bill of *Richard Byrd*. *Thomas Doncastle* (to whom *Cartwright* had mortgaged the land called *Doncastle's*, to secure the payment of 500*l.* as before noticed) being dead, the executors of his surviving executor brought a bill in the High Court of Chancery to foreclose the equity of redemption of the mortgaged premises, which was sold under a decree of the said Court, in *April*, 1793, to satisfy the debt due to *Doncastle*. Upon which *Richard Byrd*, who is heir of *Adam Byrd*, deceased, and who was a party complainant with *Robert Pollard* in the suit now before us, brought his bill against *Pollard*, to be indemnified out of *Cochran Town*, for the loss of *Doncastles*, and in *May*, 1800, it was decreed that he should convey *Cochran Town* to *Pol-*

lard, on his paying him the sum of 500*l.* with interest from the 17th day of *April*, 1793, and the costs of the suit; and in default of payment, *Cochran Town* to be sold for that purpose.

The appellant, in his bill charges, "that *Richard Burn-* "*ley* in his life-time, and *Joseph Brand*, as his security, "were indebted to the said *Thomas Cartwright* in a very "considerable sum;" but carefully avoids stating on what consideration that debt arose.

It was urged in the argument, by the appellant's counsel that he had paid the valuable consideration of eight hundred pounds, for *Cochran Town*, and therefore he ought to be reimbursed somewhere; and that *Burnley*, who was the first purchaser under *Cartwright*, and sold to *Byrd*, had received full satisfaction from the latter.

This argument might be correct if it applied to *Burnley* and *Cartwright* only; and the appellant, I conceive, has still an equitable right to pursue the estate and effects of either, or both, of them, wherever to be found; until he shall receive full indemnification; but it is not a good reason why *Brand*, the innocent security of *Burnley* to *Cartwright*, with whom the fraud, that has occasioned all the mischief, originated, should be answerable for all after transactions of *Burnley* through life; and be harassed for twenty-five or thirty years, and be made responsible for what he never undertook, nor never had in contemplation.

The decree is to be AFFIRMED, without prejudice to the appellant, who is at liberty by all lawful means to pursue the estates of *Burnley* and *Cartwright*, wherever to be found, until he shall receive full indemnification for his loss.

Decree of the Superior Court of Chancery, unanimously AFFIRMED, "without prejudice to the appellant, to

MARCH, 1808. Pollard v. Cartwright and others.

" whom liberty is reserved to pursue by all legal means, " the estates of *Burnley* and *Cartwright*, wherever to be " found, until he receives full indemnification for his " loss."

Thursday, March 17. Chandler's executrix, *against* Hill and Lipscombe, executors of Charles Neale.

Under what circumstances a promise *in writing* will be considered merely *nudum pactum*, and will not be enforced, even in equity.

A trust created by will for the payment of debts by a general direction that all the testator's debts shall be paid, extends only to such as he was bound *in conscience* to pay: therefore an undertaking which is merely *nudum pactum* is not comprehended, and may be barred by the act of limitations.

ON an appeal, taken by the complainant, from a decree of the Superior Court of Chancery, for the *Richmond* District, pronounced on the 17th of *March*, 1803.

William Neale, father of *Charles Neale*, the testator of the appellees, became indebted to Doctor *Chandler*, the appellant's testator, in the sum of 25*l.* 14*s.* 7*d.* the balance of an account for services rendered as a physician, between *Dec.* 1761, and *Feb.* 1768. On the 13th of *July*, 1768, *William Neale* made his will in due form of law, and desired, " that his executors should sell such part of his es- " tate, either *real* or *personal*, as they should think fit, ex- " cept the land whereon he lived, *for the payment of his* " *debts*," &c. That will was exhibited for probate by one of the executors in *November*, 1768: *but Charles Neale was not named an executor therein, nor does it appear that he received a larger portion of his father's estate than any other of the legatees*, of whom there were several; the

The surviving obligor in a *joint* note, (made before the act of 1786, see *Rev. Code*, vol. 1. ch. 24. sect. 3. p. 31.) is alone liable to an action *at law*; nor can the note be set up *in equity* against the representatives of the deceased obligor, but on the ground of a moral obligation antecedently existing on his part to pay the money.

It seems, that to authorise the proving of an exhibit at the hearing, by *viva voce* testimony, a previous order for that purpose must have been obtained from the Chancellor, and notice given to the adverse party of an intention to introduce such evidence.