REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,
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which the judgment for sterling money might be discharged. The first error assigned was abandoned.*

On the second, it was contended for the defendant in error that the rule, stating the sum in current money by which a judgment in sterling should be discharged, formed no part of the judgment itself. It was usually entered at the close of a term, and was applied to each particular judgment by the Clerk. The judgment, therefore, was not erroneous, and ought not to be reversed. An instruction to the Sheriff how to serve the execution was alone necessary, and that might be obtained at the succeeding term before the Clerk could issue the execution should the judgment be affirmed.

But the Court reversed the judgment for this defect.

[*See LYONS, J. in *Payne* v. *Ellzey*, 2 Wash. 145.]

SYME *v.* JOHNSTON.

Wednesday, December 15*th*, 1790.

Equity will not relieve against a purchase, if the vendor, at the time of the decree is able to make a title.*

[When an executor (vendor) declares at the sale that he sells only as his testator held, 'tis the duty of a purchaser to enquire into the state of the property.†

A confession of judgment precludes a party from availing himself of an equity with which he was, or must be presumed to have been acquainted at the time.]

Richard Johnston and Harry Gaines purchased in partnership several lots of land, for which leases had been given by the College of William & Mary. On dividing their purchase it became necessary to divide one lot called the lot C. E. Application was made to the President and Masters of the College for a lease to each, for his part, which they refused giving, as it was a rule with them that no lot should be divided; but they agreed to give a lease to either of them, and that they

* Vendee, in possession, under a conveyance with general warranty, when the title is not questioned by any suit begun or threatened, has no claim to relief in equity against the purchase money; unless he shews a defective title as to which the vendor practised falsehood or concealment, and which the vendee had not means to discover. *Beale* v. *Seiveley, &c.*, 8 Leigh, 658.

See *Mills* v. *Bell*, ante. 320, and 328; *Mayo* v. *Purcell*, 3 Mun. 243; *Grantland* v. *Wight*, 5 Mun. 295; *Keytons* v. *Brawfords*, 5 Leigh, 39.

† One who buys land from an executor, must look for and understand his powers to sell; as the rule *caveat emptor* strictly applies —*Brock, &c.* v. *Phillips*, 2 Wash. 70.

might divide the possession as they pleased. A lease was given to Richard Johnston, and they divided the lot between them by the courses of Gravelly run, leaving to Johnston 38½, and to Gaines 68½ acres. It was a condition of the College leases that the lessee should not give, grant, alienate, sell, assign, or set over his interest or title without having first obtained, in writing, the assent of the President [559] and Masters for the time being, except only by last will and testament, whereby only the whole premises together, and not any part of the same, shall be demised and bequeathed.

Richard Johnston, by his will dated in September, 1771, devised that his College leases should be sold on twelve months' credit.

In 1781 his executors proceeded to sell the said lands at public sale; and John Syme, Jun., who was the proprietor of some adjoining fee simple lands, being the highest bidder, became the purchaser, at the price of 115,000 weight of tobacco. No bond having been given, an action on the case was instituted by the executors in the General Court.

When this suit was for trial John Syme and William Johnston met at the house of Richard Chapman, and after much altercation and a comparison of several College leases, Syme declared himself perfectly satisfied, admitted that he had the quantity of land he had purchased, and agreed to confess a judgment for such a sum of money as the tobacco, by a person fixed on between them, should be estimated at. The tobacco was estimated at twenty-eight shillings per hundred, and for that sum judgment was given. After an execution had issued, Syme applied to and obtained an injunction from the Court of Chancery in October, 1786, having stated in a bill his equity, which, he alleged, was unknown to him at the time the judgment was confessed.

It appeared that the division of the lot C. E. between Johnston and Gaines, was known in the neighborhood; that at the sale of the lots the executors declared that they [560] sold them as their father held them, and that there were 432½ acres. During the sale notice was given by an agent for Walker Tomlin, that he claimed a part of the land held under one of the leases, as belonging to an adjoining tract, which was his property. Mordecai Abraham, who was one of the bidders, asked the acting executor, William Johnston, particularly the terms of sale, and he said that he sold the lots as his father held them, except the part north of the Gravelly run, which was the part of C. E. assigned to Gaines; and, on being further asked by Abraham, whether he would make good to

the purchaser the land which Tomlin might recover, he said he would not. There was no public information given by the executors, or by the crier, that any part of the ground sold was a divided lot, or that Tomlin had a claim to any part of it. John Syme, the purchaser, had resided in distant parts of Virginia, so as to exclude a presumption that he knew one of the lots had been divided. Though not entirely deaf, his sense of hearing was very obtuse; and those who saw him when Tomlin's agent gave notice of his title, declared their belief that he did not hear the notification. His father, John Syme, appeared to be a partner in the purchase; but he did not interfere in any manner, and was not present when Tomlin's title was announced. There was some proof that the property would not command half the price given for it.

The President and Professors gave the following certificate:

We, the President and Masters of William & Mary College, do hereby consent to and approve of the sale made by the executors of Richard Johnston, of certain leases, to John Syme the younger, which leases bear date the first day of [561] February, 1765; retaining, however, the said Johnston's representatives still bound for the rents, and responsible for all breaches of the covenants contained in the said leases until the said Syme shall take new leases from us, or otherwise bind himself, by accepting an assignment of the said leases in due form.

On the 27th day of February, 1789, Thomas Fox, collector for the College, certified on the back of the lease C. E., that he would hold the lessee Johnston, or his assignee only, responsible for half the rent reserved on the lease. And on the 27th of March, 1789, the President and two of the Professors ratified this agreement. On the 11th of May, 1789, the executors of Richard Johnston assigned that part of the lease C. E. which lay south of the Gravelly run to John Syme, Jun.

In October, 1789, the cause came on to be heard before the Chancellor, who gave the following decree:

"This cause came on to be heard, &c., on consideration whereof, &c. The Court is of opinion, not only that in the sale of the College lots mentioned in the proceedings, the defendants do not appear to have been guilty of any concealment or other malversation, for which the contract ought to be avoided; but that the plaintiff, after notice, as seemeth to the Court, of what he allegeth to have been concealed from him, and after his title to the said lots might be and were offered to be confirmed to him, had the less just pretence to apply for

relief; more especially, as by his intromission at the sale he hindered a sale to some other at a price nearly as advantageous as that offered by himself. The Court doth, therefore, order, adjudge and decree, that the injunction obtained by the plaintiff be dissolved, and his bill dismissed, and that he pay unto the defendants their costs; but this dimission is to [562] be without prejudice to any relief which the plaintiff may seek in case of eviction, without collusion, of any part of the 432½ acres of land sold by the defendants to the plaintiff. And the Court doth further order, that the assigned leases, and two papers subscribed by the President and Professors of William & Mary College, which are among the exhibits, be delivered the plaintiff if he will accept them."

From this decree the plaintiff prayed an appeal to the Court of Appeals.

The cause was argued by TAYLOR and MARSHALL, for the appellant, and by CAMPBELL and DUVAL, for the appellees.

For the appellant, it was insisted that the decree was founded on the idea of notice to Syme of the incumbrances on his title, and depended on that fact.

That there was no proof of notice except from the answer, which does not assert it, since the declaration of satisfaction, which the answer states the appellant to have made, and which Chapman proves him to have made, relates merely to the quantity of land, and does not prove that any other ground of objection to the transaction was then known to him.

The answer itself will show that the appellant had no notice of Tomlin's claim.

Nor is any notice, not expressly proved, to be inferred from the circumstances of the case and of the parties. The circumstances from which notice is to be inferred, are, that the division of the lot C. E. was known in the neighborhood, and that Tomlin's agent did, on the day of sale, declare his title to a part of the property sold.

The information of the neighborhood cannot affect [563] Mr. Syme, who was a stranger; nor can it be presumed that he heard the declaration concerning Tomlin's title, as he was very deaf; and the declaration was not addressed to him. The conversation between Abraham and Johnston was a private conversation, not heard by Syme; and, so far from affording a presumption of notice to Syme, it serves to shew that the public declarations of Johnston did not reach those points concerning which Abraham enquired. The confession of judg-

ment ought not to affect the case; as he does not appear, at that time, to have had any other objection than to the quantity of land purchased; and, consequently, that confession can amount in equity only to a waiver of that objection.

Syme's equity, then, whatever it may be, remains unaffected by notice, either expressly proved or to be implied from circumstances.

Enquire into that equity. It consists of two points:

1. The division of the lease.
2. Tomlin's claim.

1. As to the division of the lease.

When a particular tract of land is exposed to sale, and no incumbrances are stated, the purchaser has a right to believe that no incumbrances exist. If the seller knows of these incumbrances, and yet conceals them, it is a suppression of truth, which a Court of Conscience considers and treats as a fraud. On purchasing these lands, Mr. Syme had a right to expect a clear and complete title to the particular lands purchased, unmingled with the title or possession of any other person. Can he ever now obtain such a title? More than [564] half of one of the lots is the property of another person. It may be true, that notwithstanding this, Mr. Syme has his quantity; but the mere quantity is not the only important consideration in such a purchase. The College leases are subject to a certain rent, and are subject to forfeiture, unless certain improvements be made. To the whole of the rent, Mr. Syme, as the legal proprietor of the lease, was liable until so late as March, 1789; and is yet liable for the half of it, although he holds but little more than a third of the lot; and for the whole improvements, he appears, from the expression of the paper given by Fox and assented to by the College, to be still liable. The lease is forfeitable by alienation otherwise than by devise. It is true that the President and two of the Professors, who are not a majority, for there are six Professors, have sanctioned the sale to Syme; but the lease may be forfeited by a sale of the holders of the other moiety. As the legal proprietor of the land, Syme is liable for all the taxes which may be imposed on it. It is true, he has recourse to the proprietor of the other part of the lot; but he did not consider himself as purchasing property which subjected him to the payment of money which he might afterwards recover from another.

These are serious inconveniences, a knowledge of which might have had considerable influence with Mr. Syme in making the purchase. They are inconveniences to which he has

not consented to subject himself, and to which Mr. Johnston has no right to subject him; but they are inseparable from a complete and full establishment of the contract. Nor can these objections be got over by establishing the contract, except as to the lot C. E., and annulling it as to that lot; because the Court can never split a contract.

2. His title is threatened by Tomlin's claim.

Whatever this may be, Johnston had knowledge of it, [565] and ought to have proclaimed it. The necessity for this was the stronger, as he did not mean to warrant the title of the land sold.

That no suit has been brought does not protect Mr. Syme, because the possession being social, no length of time will guard him from the claim.

This is in the nature of a bill of *quia timet*, and the Court will direct Syme to be secured.

From the price given for the lands, and the price at which they could now be sold, being less than half what was given, one of two things must be obvious. Either the contract was at first a very hard one, or the lands, before Syme could get even the title which the certificates of the College now give him, had fallen very much in their price. This will induce the Court to lay hold of circumstances which might not otherwise be deemed material, to set aside the contract. That Johnston might have sold the land to another for nearly the same money, if Syme had not overbid him, and that it is not now in his power to make a similar sale, ought not to affect the case, because the loss ought to fall where the fault has been; and in this case the fault is in Johnston, who did not openly and publicly proclaim the state of his title to the property sold. [*Heath* v. *Heath*,] Bro. C. C. 148; [*Marlow* v. *Smith*,] 2 P. Wms. 201; [*Colton* v. *Wilson et al.*] 3 P. Wms. 190.

For the appellees, it was urged:

That there were circumstances in the case which raised against Mr. Syme a strong presumption of notice at the time of the sale. Having come to a public sale determined to purchase the land, which was contiguous to his own estate, he must be considered as having made enquiries concerning the property he designed to acquire. The whole neighborhood knew that the lease was divided, and a part of it was in the actual possession of the person entitled to it. In addition to this, his father was a joint purchaser with him, [566] who might be supposed to be informed of the state of the pro-

perty. If he did not hear Tomlin's claim announced, he was in a circle of his friends bidding for the land, and it was not likely that no one of them should inform him of it. Declarations of that sort at a sale are always the subject of general conversation, and are certain to be mentioned to a bidder, especially one known to be deaf. Johnston could not have supposed it necessary for him to proclaim Tomlin's title, since Tomlin had proclaimed it himself, and Syme might as well be supposed not to have heard Johnston, as not to have heard Tomlin's agent. The nature of the sale should have put every purchaser on his guard. The sale was made by an executor, who only professed to sell the right of his testator. Syme, then, ought to have made particular enquiries into the nature of the property, and there is no reason to suppose that Johnston considered him as not hearing what others heard, because Johnston did not know him, and could not know that he was deaf. But certainly, in October, 1785, when Syme confessed a judgment, he ought to have been acquainted with the property he had purchased. Every defence which is made in this Court could have been made at law; and, therefore, the confession of judgment will bind Mr. Syme, unless he shews that at that time he was unacquainted with circumstances, which, from the time that had elapsed, he must be supposed to have known.

But if he had not notice, still, under the circumstances of the case, there is no ground of application to this Court. Johnston does not appear to have intentionally concealed any thing. No fraud, therefore, is ascribable to him. There is in the case no fact, which, with that degree of usual enquiry which common prudence dictates to purchasers, Mr. Syme might not have been possessed of. In this case, as the sale was made by an executor, who sold, as he said, only the right of his testator, the principle of *caveat emptor* applies with peculiar force.

[567] Under this impression, the incumbrances on the land ought to be examined. The clause in the leases would probably authorize a sale made in pursuance of a will. If it will not, still the President and Professors have sanctioned it by their after-act. The division of the lease is also sanctioned. The certificate in March, 1789, amounts in substance to a complete separation of the lease, and would certainly disable the College from resorting to the possessor of the ground on one side of Gravelly run, for any thing whatever, on account of the ground on the other side. The proportion of taxes may be made payable in the first instance by the holder of the other part of the lot by entries on the books of the Commissioners,

and should the proprietor refuse so to do, Mr. Syme, having the legal title, may eject him, and hold him out until he shall comply with such conditions as a Court of Chancery shall deem equitable. There is now, then, a complete title, and if a complete title can be made at the time of the decree, it is sufficient. 2 Pow. on Cont. 630.*

Gravelly run must be considered as dividing the lot equally in point of value, though unequally in point of quantity, as it is a division made by consent, and there is no proof or allegation of inequality of value.

LYONS, Judge, delivered the opinion of the Court.

After stating the case, he said that the Court considered the declaration of the executor, that he sold only as his testator held, as imposing on the purchaser the necessity of enquiring into the state of the property. That there having been no refusal to inform on the part of the executor, or any evasion whatever, the Court did not consider him, after his general declaration, as having been guilty of any fraudulent concealment which could affect the contract. That Gravelly run ought, as there was no testimony to the contrary, to be considered as dividing the lot equally. And that the agreement to confess judgment, in a suit in which the fraud [568] of the contract, had there been any, was examinable, and the declaration of the defendant at law, on that occasion, that he was satisfied, made after, he must be presumed to have been acquainted with his equity, amount to a confirmation of the contract, which ought to bind him.

The decree was affirmed.

[*See Sudg. on Vend. ch. 8, sec. 2, p. 282, 2 Am. ed; *Wynn* v. *Morgan*, 7 Ves. jun. 202; *Hepburn et al.* v. *Dunlop & Co.* 1 Wheat. 179; *Brasier* v. *Gratz*, 6 Wheat. 528.]