

REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

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1812.

DISTRICT OF NEW-YORK, 25.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh year of the Independence of the United States of America, LEWIS MOREL, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following, to wit :

“Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. L. By WILLIAM MUNFORD.”

IN CONFORMITY to the act of Congress of the United States, entitled, “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, entitled, “An act, supplementary to an act, entitled 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 extending the benefits thereof to the arts of designing, engraving and etching historical and other prints.”

CHARLES CLINTON,
Clerk of the District of New-York.

properly credited. I have therefore had recourse to the circumstances above stated as the basis of my own opinion. If *Todd*, by his unfair conduct, in tearing off his own and *Bowyer's* signatures from the agreement made between them on the 16th of *May*, 1799, (which was endorsed on the order of reference in the cause, and was evidently meant for the information and guide of the first set of commissioners appointed by that order,) had not brought himself within that rule of equity, 'He that doth iniquity shall not have have equity,' I should have thought it highly improper to disturb that settlement. But, he having, by that act, imposed upon *Bowyer* the necessity of proving his accounts over again, I think the latter was fairly entitled to the benefit of any error which might thereafter be discovered therein. Approving, therefore, of the last commissioner's report, my opinion is, that the injunction be dissolved as to 55*l.* 6*s.* 5*d.* 1-2. including the costs of the judgment of *Botetourt* County Court; that the Chancellor's decree be reformed in that manner, as has been done on some other occasions;(a) and that the appellant, as the party prevailing here, recover the costs of his appeal here.

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v.
Bowyer.

(a) See 1
Wash. 389.
Penlleton v.
Vandevier.



Green against Price.

Thursday,
October 25.

FORTUNATUS GREEN filed his bill in the Superior Court of Chancery, for the *Richmond* District, on the 1st of *March*, 1802, against *Thomas Price*, and the children of *Richard Littlepage*, deceased; for the purpose of obtaining a title to a tract of land, containing 261 1-2 acres, in the county of *Hanover*.

From the bill, answer of the defendant *Price*, exhibits and depositions, the following statement of the most material facts in the case may be extracted.

Robert Bumpass sold the land in question to *John Ferguson*, but did not make him a deed; neither does it appear in evidence how much money was paid by *Ferguson*; though the bill alleges (without proof) that he paid only 50*l.*, and the surveyor's fees. On the 7th of *May*, 1786, *Ferguson* gave a bond to *Benjamin Kimbrough* to make him a title to the said land, when he should himself obtain a deed from *Bumpass*; reciting in the condition of that bond that *Kimbrough* was to pay for the land, on or be-

1. A mortgagee without notice, shall be protected against a prior equitable title; if the person having such title, either encouraged him to take the mortgage, or, knowing of his intention to take it, stood by, and made no objection.

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fore the 1st of *January* ensuing, 150*l.*, and on or before the 1st of *January*, 1788, the farther sum of 175*l.*; provided the said *Ferguson* could then make a title; and, if he could not, it was agreed that the last-mentioned sum was not to be paid until such title should be made. The plaintiff alleges in the bill that, in *September*, 1788, he took *Kimbrough's bargain*, and, in *January*, 1789, received possession of the land, "*which he had retained ever since.*" It seems that, while a suit in the High Court of Chancery, by *Ferguson* against *Bumpass*, to obtain a conveyance for the land, was pending, *Richard Littlepage* bought the title of *Bumpass*, for 100*l.* cash paid by *Fortunatus Green*, the plaintiff, and for his benefit, as he alleged; but the deed, which was dated the 14th of *February*, 1794, was made to *Littlepage* himself, conveying absolutely "*to him, his heirs and assigns, all the right and title of the said Bumpass, for the consideration of 100*l.* paid by him the said Littlepage,*" and warranting the right and title of the said land "*against the claim of any person or persons whatsoever, except the claim of John Ferguson, or his representatives, which now is in dispute.*" To this deed the plaintiff was one of the witnesses, and, partly on his testimony, it was recorded the 4th of *April*, 1794. The next day after its date, a writing under seal was executed from *Littlepage* to the plaintiff; setting forth that *John Ferguson* had contracted with *Robert Bumpass* for the said 261 1-2 acres of land which the said *Ferguson* took possession of and sold to *Benjamin Kimbrough*, who then disposed of it in the following manner; "*viz. 61 1-2 acres said to be sold to a certain Samuel Nuckolls, and the remainder to Fortunatus Green, who is now in possession of the said land, though the right still remains in Robert Bumpass, who had conveyed to Littlepage by virtue of a power of attorney. Now be it understood that Fortunatus Green hath this day advanced to me, (the said Littlepage,) as attorney for the said Bumpass the sum of 100*l.*, which sum I do oblige myself to return the said Green with interest thereon from the date hereof, or make him a lawful right to the said two hundred acres of land. And I do further oblige myself as attorney for Robert Bumpass, and in behalf of the said Fortunatus Green, that no other person shall have a right to the 200 acres of land but himself, until he is returned the 100*l.*, with interest, as is before mentioned; for the faithful performance of which I do hereby, as attorney for Robert Bumpass, bind myself, heirs, &c. in the penalty of 500*l.**"

The 2d of March following the plaintiff paid *Littlepage* a farther sum of 26*l.* 9*s.* for which he gave a receipt "promising to account for it in the same manner as for the 100*l.* received of him the last month on account of *Robert Bumpass*;" and signed "*Richard Littlepage* for *Robert Bumpass* and self." A farther payment of 8*l.* was made the 11th of July, and a similar receipt taken: and on the 20th of May, 1799, the said *Littlepage*, by a writing under seal, obliged himself, his heirs, &c. "that the balance of the moneey due him from *Fortunatus Green*, for the land whereon he lived, should remain in the hands of the said *Green* until he the said *Littlepage* should satisfy the amount of three executions which had been paid for him by the said *Green*."

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It was fully proved, that, at the time the deed was executed from *Bumpass* to *Littlepage*, a witness advised the plaintiff, (who it seems was present,) "that it would be best for him to take the deed from the said *Bumpass* in his own name;" whereupon the said *Littlepage* observed "that, if the right should be made to him, it would put it out of the power of *Ferguson* ever to make the plaintiff a right; and that it would enable the plaintiff to recover three or four hundred pounds as damages of the said *Ferguson*; and that he would get his land clear;" to which arrangement the plaintiff assented.

It was further proved that, by the contrivance of *Littlepage*, and with the assent of the plaintiff, a declaration in ejectment was served upon the latter; the lawyer's fee for which appears to have been paid by the plaintiff to *Littlepage*; to whom he surrendered the possession of the land, and immediately resumed it as his tenant; agreeing to pay ten dollars a year rent, as long as he should remain on the land; that *Littlepage* afterwards declared that, after recovering the land by law of the plaintiff, he had sold it to him for a certain sum of money, and for the benefit of his claim against *Ferguson*; which sum of money and claim were understood, by a witness who stated what *Littlepage* said, to be in full discharge of the contract between them for the said land.

What became of the claim upon *Ferguson* does not appear in the record; but after all these transactions, (of which it does not appear that *Thomas Price* had any notice,) upon a settlement of accounts between the said *Price* and *Littlepage*, on the 17th of February, 1801, a balance of 156*l.* 2*s.* 3*d.* 1-2. being due from

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the former to the latter; and it being proposed that that balance should be taken by *Price* upon the plaintiff, the plaintiff readily agreed to it, (acknowledging himself to be still indebted to *Littlepage*, for and on account of the same land,) and expressed great satisfaction (at that time, and repeatedly afterwards) at this arrangement. A contract was then made between *Price* and the plaintiff, that *Price* should take in payment, his produce, at the highest *Richmond* cash price; that the plaintiff should do a job of brick-work towards payment of the debt, and that *Price* should let him have certain articles of the grocery kind for the use of his family at the *Richmond* cash price.*

By a writing, dated the same day, (to which the plaintiff appears to have been privy, without making any objection,) *Littlepage* "obliged himself, whenever called upon by the said *Price*, to give him an instrument of writing vesting him the said *Price* with all the rights and immunities that he the said *Littlepage* holds in the 200 acres of land on which the aforementioned *Fortunatus Green* now lives; which right the said *Price* is to hold until the above-mentioned sum (of 156*l.* 2*s.* 3*d.* 1-2.) with the interest accruing, is fully paid."† The first of *March*, 1801, a mortgage on the said 200 acres of land was given by *Littlepage* and wife to *Price*, to secure the payment of the same sum of money, with interest, and proved in Court by one witness, the 21st of *May* following; but does not appear to have been fully recorded. A bill to foreclose that mortgage was filed in *Hanover* County Court against the children of *Richard Littlepage*, without making *Fortunatus Green* a party, and a decree for the sale of the mortga-

* Note. It is alleged in the answer, that, "after the death of *Littlepage*, (which happened in a few weeks from the time of this transaction,) and not until then, the plaintiff began to *prevaricate*; and, after making several promises, and appointing several days to commence the brick-work according to his contract, at length declared he would do no work unless he received *cash* for the same; that he considered *Littlepage* as fully paid for the land, and that, notwithstanding his frequent promises, he would pay the defendant nothing." This allegation in the answer, is supported by several depositions, and not contradicted by any evidence.

† Note. This instrument of writing recited, in its commencement, that *Littlepage*, to secure the payment of the said balance, with interest from the date, had given an order on *Green*, which he had that day accepted, in favour of *Price*. But, probably, this was only a verbal order and verbal acceptance; for no written order is mentioned in any part of the record. In the answer it is said, (by a plain mistake,) not that *Littlepage* had given, but that, by the said instrument of writing, he obliged himself to give such an order.

ged premises obtained December 22, 1802; to which decree the present plaintiff obtained, on the 3d of June, 1803, from the Superior Court of Chancery, a writ of injunction to stay proceedings upon it until the further order of that Court.

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The prayer of the bill in this suit was, that the mortgage be cancelled, that all the defendants be compelled to join in a deed conveying to the plaintiff in fee the land aforesaid; or that he might receive any further or other relief more agreeable to equity. No answer was filed on behalf of *Littlepage's* children, and no proceedings against them appear in the record; according to which, on the 28th of September, 1804, "the papers in this cause were put into the hands of the Court, upon motion, by counsel for the defendant *Thomas Price*, to dissolve the injunction which had been awarded the plaintiff; but the cause being regularly set for a final hearing as to that defendant, the *plaintiff's* counsel moved the court to proceed to hear the same in chief as to him;" whereupon, the cause was heard as to the defendant *Thomas Price*, and the bill, as to him, dismissed with costs; from which decree the plaintiff appealed.

Randolph, for the appellant.

Wickham, for the appellee.

Saturday, November 3. The Judges pronounced their opinions.

Judge TUCKER. The only question in this case appears to me to be, whether a man, who, having an *equitable* title to lands, and, knowing of it, stands by, and either encourages, or does not forbid the *purchase*, (or, what is the same thing, the *mortgage* thereof to another,) shall be bound by the purchase or encumbrance thus made? In the present case, the complainant *Green* appears from the testimony to have encouraged Mr. *Price* to take the mortgage from *Littlepage*; and, by so doing, I conceive he has bound himself, and all claiming under him. I am of opinion, therefore, that the decree dismissing the complainant's bill be affirmed. (a)

Judge ROANE said it was a plain case for affirming the decree.

(a) See 1
Fonb. b. 1. c.
3. s. 4. l.
Wash. 217.
Hooe & Harri-
son v. Pierce's
Adm'r. Ibid.

289. *Appiebury and others v. Anthony's Ex'rs.* 1 Vern. 136. *Hobbs v. Norton.* 2 Vern. 370.
Draper v. Borlase. 2 H. & M. 116. *Pollard v. Cartwright.*

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Judge FLEMING. This appears to be one of the clearest cases in favour of the appellee that ever came before a Court of Justice. There seems to have been a combination between *Littlepage* and *Green* (the latter of whom affects great ignorance) to swindle *John Ferguson* out of three or four hundred pounds; but in that nefarious business *Price* was no party: nor is he to be affected by it. The case is too plain to need further animadversion; and I shall only add that it is the unanimous opinion of the Court that the decree, dismissing the bill against *Price*, be **AFFIRMED.**



Wednesday,
October 31.

Clay against Ransome.

1. A defendant in ejectment is protected by 20 years' possession before the action bro't; but the 5 years and 17½ days, excluded by the act of Assembly, are not to be counted in his favour.

2. If, therefore, upon a special verdict in ejectment, it be uncertain whether the defendant, or those under whom he claims, had 20 years' possession, exclusive of the said 5 years and 17½ days, a *venire de novo* ought to be awarded.

UPON an appeal from a judgment of the District Court of *Prince Edward*, rendered for the defendant, the 4th *April*, 1805, in an action of ejectment on behalf of *Charles Clay* against *Elizabeth Ransome*.

The case was submitted, without argument, by *Samuel Taylor*, for the appellant, and *Munford*, for the appellee, and is sufficiently stated in the following opinion of Judge TUCKER; except that it may be proper to mention, that the claim of the lessor of the plaintiff, as set forth in the special verdict, was founded on a deed of mortgage dated the 20th of *April*, 1772, from a certain *Anthony Winston* (who was found to have been in possession at that time) to *James and Robert Donalds & Co.*; a decree of foreclosure, dated the 3d of *October*, 1797, against the heir at law and executor of *Anthony Winston*; and a deed, dated the 24th of *January*, 1798, to the lessor of the plaintiff, from the Commissioners appointed by that decree to sell the land. No possession by *James and Robert Donalds & Co.*, by *Anthony Winston*, or any person holding under him, either before or after the 20th of *April*, 1772, or by the lessor of the plaintiff, after the 3d of *October*, 1797, was found by the Jury.

Friday, November 2. The Judges pronounced their opinions.

Judge TUCKER. *Clay* brought an ejectment on the 17th of *August*, 1799, against *Ransome*. The Jury found a special ver-