REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME IV.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

NOTE BY THE EDITOR.

There is no printed report of the decisions of the first court of appeals, and of those which have been omitted by reporters from that period to the death of Mr. *Pendleton*, although such a work is obviously wanted; and it is to supply that defect, that the present volume is published: which consists of two parts: the first includes all the important cases determined from the commencement of the first court, to its final dissolution in the year 1789; the second contains the unreported cases in the new court of appeals, from that period to the death of judge *Pendleton* in 1803, besides two cases in the general court, and court of admiralty.

1798.
October.

HOOE *v.* MARQUESS.

The questions whether, after answer without a plea in abatement, to the jurisdiction of the court; and whether the court of appeals has jurisdiction to reverse in such cases, debated, but not decided.

If the bill charges fraud, and the testimony be conflicting and unsatisfactory, an issue ought to be directed.

Where a son had obtained a deed from his father for 90 acres of land and five slaves, in consideration of £1. 16., and maintenance for life: after which he sold the land to a third person: who filed a bill alledging that deed to have been recorded, but to have been afterwards destroyed; another substituted in its room, and the land sold again by the first donor to a purchaser with notice of the plaintiff's title, whose deed had not been recorded; the court of appeals directed an issue to try whether there was such substitution? and, if so, what were the terms of the first deed?

For those points ought to be decided before any further proceedings are had in the cause.

Marquess filed a bill in the high court of chancery against *Grigsby*, *Hooe* and *Bruce*, stating that, in 1782, the plaintiff purchased of the defendant, *Mott Grigsby*, a tract of ninety acres of land, and took a deed; which was proved in court by two witnesses, and lodged for further proof. That *Mott Grigsby* had, previously, purchased the land of *Charles Grigsby;* whose deed to him was admitted to record; but was afterwards destroyed; and, one of a different import, substituted in its room, by the deputy clerk; who had instigated *Charles* to sell the land to *Hooe;* was to have half the purchase money; and joined in the deed. That *Hooe* had turned the plaintiff out of possession by force; and that *Charles Grigsby* is since dead. That *Hooe* sold to *Bruce;* and that both of them were purchasers with notice. The bill prayed for a conveyance of the land, and an account of the profits.

The answer of *Mott Grigsby*, admits he purchased the land and five slaves from *Charles Grigsby*, for £1. 16., and sufficient victuals and clothes, during his life: which the defendant has punctually complied with; but does not believe that the deed, then given him, is the one now of re-

1798. *October.*

Hooe v. Marquess.

cord, as the terms are different, and the witnesses not the same. Admits he sold the land to the plaintiff for 4000 libs of tobacco.

The answer of *Hooe* states, that *Charles Grigsby* having frequently applied to him to purchase the land, representing that he was likely to be distressed for the necessaries of life, the defendant, at length, enquired into the title; and, upon finding that *Charles* had conveyed to *Mott Grigsby*, upon conditions which had been broken, and that *Charles*, in consequence of the breach, had entered into the land again, he purchased it for £30; and paid the money to *Charles*, although the deputy clerk joined in the deed, because the defendant had heard, but untruly, that he held a prior deed of trust. That the defendant had never heard of any other conveyance to *Mott Grigsby;* but admits he had been informed of the deed to the plaintiff. Denies force.

The answer of *Bruce*, states that, previous to his purchase, he had been told by the plaintiff, that, although he was resolved to sue for the land, he was certain he should never obtain it. Denies fraud; and says that the defendant has a bond from *Hooe*, in the penalty of £100, for a good title.

Sundry depositions were taken relative to the matters set forth in the pleadings; and one to shew that *Charles Grigsby* was an ignorant, helpless man in distress; and that *Mott Grigsby* was indolent, careless and poor.

The only exhibit is a copy of the supposed substituted deed; which a succeeding deputy clerk says he made from one he found in the office in a bundle endorsed "deeds for further proof;" which, reciting as a consideration the sum of £1. 16. and the maintenance of *Charles Grigsby* during life, and that *Mott Grigsby* was not to sell the property, under pain of its reverting to *Charles*, conveys the land and slaves to *Mott Grigsby*, his heirs and assigns, with a covenant for further assurance.

The court of chancery being of opinion that the defendants were not entitled to the benefit of the condition, inserted in the indenture "among the exhibits, because a right

1798. *October.*

Hooe v. Marquess.

of entry for a condition broken was not assignable;" and that *Bruce* ought not to retain possession of the land, because *Hooe* gained it by combination with the tenant of the plaintiff, of which *Bruce* had notice, decreed the latter to resign possession to the plaintiff, and account for the profits: which the court was of opinion might be awarded, "although the plaintiff might perhaps have recovered the possession in an action at common law, the defendants not having pleaded to the jurisdiction of the court."

Hooe and *Bruce* appealed to the court of appeals.

Warden and *Randolph*, for the appellee. The deed to *Mott Grigsby* was conditional, as well by the terms, as the intention of the parties; and therefore the breach, in selling one of the slaves, revested the property in *Charles Grigsby*, who never waived his right, but was upon the land when he executed the deed to *Hooe;* which was a sufficient entry to avoid that to *Mott Grigsby:* for no set form was necessary, and the executing of the deed was enough, because it shewed an intent to assert the right. Besides, a *chose in action*, or possibility, may be assigned; and consequently a right of entry. When *Charles* joined in the bill of sale for one of the slaves, he was not conscious of the effect of it. The substitution of one deed for the other is not proved.

Washington, contra. The stipulation that *Mott Grigsby* should maintain his father, was part of the consideration for the deed, but not a condition: which was only that *Mott* should not sell the property; and non-payment of the consideration does not avoid a deed. Therefore, as there was no forfeiture incurred by selling the slave, because *Charles* joined in the bill of sale, 1 *Bac. Abr.* 419; the deed would still have been good, even had the father not been maintained. That, however, was not the case; for he neither wanted the necessaries of life, nor was worse supported than he was before the deed, and all at the expense of *Mott*, whose conduct, therefore, cannot be impeached. *Shep. Touch.* 150. The deed to *Hooe* was void; for a right

of entry cannot be assigned either at law, or in equity. *Charles's* being on the land at the time of his making that deed, is not material, unless it had been shewn that he went there, for the purpose of making an entry. 6 *Mod.* 44. *Hooe* and *Bruce* are purchasers with notice; for the circumstances, within their knowledge, made it necessary to enquire. The point relative to the substitution of the deed is submittted upon the evidence.

Cur. adv. vult.

At a subsequent day, the court directed the point, whether the court of chancery had jurisdiction of the cause, to be argued.

Marshall, for the appellee. The jurisdiction is sustainable upon four grounds: 1. The defendants, having answered without pleading to the jurisdiction, are precluded from excepting to it now, by the express words of the act of assembly. 2. The deed under which the appellee claims was not recorded; and, although the defendant is a purchaser with notice, yet, as it is a case which originated before the act of 1785, his title is good at law, and can only be impeached in a court of equity. 3. The defendant has a pretensed title, and the plaintiff might properly ask the aid of a court of equity to compel *Hooe* and *Bruce* to deliver up their deeds, in order to prevent any future use of them to his prejudice. 4. The bill states a fraudulent substitution of one deed for another, and that the plaintiff has thereby lost the evidence of the actual contract: and, if so, application to a court of equity to establish the first deed, was proper.

Randolph, contra. It is a rule in construing statutes, that where the intention of the makers is clear, it is not to be frustrated by any generality of expression; and it cannot be imagined that the legislature intended to bring all kinds of causes into the court of chancery. It will hardly be pretended that suits upon bonds, actions of assault and

1798. *October.*

Hooe v. Marquess.

battery, slander, &c., were within the view of the law makers, who only meant equivocal cases; or those where the defendant had some personal privilege of being sued in a particular court: They could not intend to overthrow distinctions which have been established for ages; and the court will reject that interpretation, as unconstitutional.

Marshall, in reply. If it were true that the legislature could not give such jurisdiction under the constitution, I should admit that the law was void; but the appellant's counsel ought to prove the position: for it is not sufficient, to state it. The constitution contains nothing which warrants the idea: it only states, that there shall be courts of certain descriptions, but does not prescribe the extent and limits of their respective jurisdictions. That was left, and properly left, to the wisdom of the law makers. The question is, What the legislature intended by the act? The words are so general, and their meaning so clear, that they cannot be explained. The terms are precise, that, after answer without a plea in abatement, no exception for want of jurisdiction shall be made; that the court shall not delay or refuse justice for want of it; and that no other court shall reverse its proceedings for that cause: So that not only is the jurisdiction of the court of chancery affirmed, but the reversing jurisdiction of this court, in that instance, is taken away. It is not necessary to push the argument to that extent however; and therefore I admit that the court may give a reasonable interpretation to the act; but I deny that they can destroy its effect altogether: which would be the consequence of the construction contended for by the other side. The objection, that suits upon bonds, or actions of assault and battery, and slander, may be brought in the court of chancery, has no weight, 1. Because no such case is likely to go unnoticed by the defendant; and, if he does not choose to waive the exception, he will be sure to put in a plea to the jurisdiction. 2. Because, if the licentious practice, alluded to, should follow, it will be a consequence growing out of the law, which the legislature, if they think

1798. *October.*

Hooe v. Marquess.

proper, may alter, but the court cannot control. If the meaning of the law makers was less precisely expressed, it would be found in the next member of the sentence; for it is a principle in construction, that an exception proves the rule; and there is an express exception, in the statute, with respect to infants, *femes covert*, and lands lying out of the jurisdiction of the court: which proves, that all other cases were to be included. There is no ground for the distinction between plain and doubtful cases. Such a construction would be elusory; for it would be impossible to distinguish the shades, or decide where the line should be drawn. The notion of confining the law to cases of personal privilege has as little foundation; for such cases too seldom occur to have been the cause of anxious legislation: the manifest object was to correct the evils of the former practice; delay, expense, and the loss of common law remedy by efflux of time, while the suit was protracted in the court of equity. Upon the whole, our construction supports the law, the other overthrows it.

Cur. adv. vult.

PENDLETON, President, delivered the resolution of the court as follows:

The frauds charged in the bill would, if proved, be a foundation for application to a court of equity: and this dispenses with the necessity of considering the general question of jurisdiction under the act of assembly. An important one indeed, and reserved until its decision shall be necessary.

Proceeding to the merits, we observe that the chancellor has omitted to decide the first question of contest between the parties, namely, that relative to the suggestions in the bill of the substitution of the deed; which we think ought to have been determined: and, as the testimony is conflicting and unsatisfactory, that an issue ought to have been directed to ascertain, whether there was such a substitution? And, if so, what were the terms of the original deed? before any further proceedings were had in the cause.

1798. *October.*

Hooe r. Marquess.

The decree therefore is reversed; and the following is to be the entry:

"The court is of opinion, that the suggestions of the bill being that the deed from *Charles Grigsby* to *Mott Grigsby*, now remaining in the clerk's office of King George county court, is not the true deed executed between the parties, but was fraudulently substituted for the true one, which contained no clause of forfeiture upon the sale of the property; and this not being confessed by the answers, was the first subject of contest between the parties, to which the testimony of several witnesses relates, and yet is not decided upon either way, by the decree of the said high court of chancery, unless by implication, passing to the decision of consequent points in the cause; and, in this, there is error in the said decree, therefore it is decreed and ordered, that the same be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here: And this court, proceeding to give such decree as the said high court of chancery should have pronounced, is of opinion, that, since the testimony as to the fraud charged, is conflicting and not satisfactory to the court to decide the question for either party, the fact ought to be determined by a jury, therefore it is further decreed and ordered, that an issue be made up in the said high court of chancery, and tried as usual by a jury, whether the writing now being in the clerk's office of King George county court, as mentioned in the deposition of *Caleb Smith*, purporting to be a conveyance from *Charles Grigsby* to *Mott Grigsby*, be the deed of the said *Charles*, or not? And, if found in the negative, to try whether the said *Charles* made and executed any other deed to the said *Mott* for conveying the lands in question, and whether the conveyance was absolute, or subject to any, and what, condition? Which being tried and certified to the satisfaction of the said court, such consequent proceedings be had thereupon to a final decree, as to the said court shall seem proper, this court not having decided on any of the points in the former decree."