

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.

Entered according to act of congress, on the eighth day of August, in the year eighteen hundred and thirty-three, by ROBERT I. SMITH, in the clerk's office of the district court of the eastern district of Virginia.

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.

After all, it seems a discretionary power in that court, to be exercised as circumstances shall require for the attainment of justice; and when a plaintiff in the cross bill has practised delay in preparing his suit for a hearing, that would be a just cause for proceeding to hear the original bill.

1798.
October.

M'Connico
v.
Moseley.

In the present case, that court possessed the means of information upon the subject, as it had all the papers in both causes before it, which we have not. We therefore presume that the chancellor exercised his discretion properly, and affirm the decree.

FOWLER and wife v. SAUNDERS.

1798.
October.

Bill, stating the case too imperfectly to bring the merits of the cause before the court, dismissed with costs.

Bill, in nature of *quia timet*, must shew grounds for sustaining it.

Especially if it be against an infant, and relate to transactions before her birth, and of which a discovery, from her, was not to be expected.

William Fowler, and *Susanna* his wife, filed their bill in the high court of chancery, stating, That *Alexander Saunders* was the former husband of the plaintiff *Susanna*; and that *Thomas Sale*, her father, made his will on the 4th of December, 1789, and devised as follows: "I lend unto my daughter *Susanna Saunders* and her husband *Alexander Saunders* all the negroes that they have in possession at this time, with their future increase from the date of this my will during their natural lives, then after their deaths to be equally divided among her children if she should have any lawful issue; but if she should die without lawful issue my desire is, that the above negroes with their increase shall return into my estate, and to be equally divided between my son *Humphrey Sale* and my daughter *Mary Sale*." That *Alexander Saunders*, at the death of *Thomas Sale*, had been in possession of the slaves nearly three years.

1798.
October.

Fowler
v.
Saunders.

That *Saunders* had, by the plaintiff *Susanna*, one daughter, who is an infant; and her guardian demands the slaves as her property, upon the ground that the testator had permitted them to remain in the service of her father, although the latter had never given them to him or his wife, except by his will aforesaid. That the plaintiffs have been in possession of the slaves about two years; and that, in order to save expense, it was agreed that the right to them should be submitted to the court of chancery. The bill therefore prayed that the infant might answer by her guardian, and be decreed to release her right to the slaves during the lifetime of the plaintiff *Susanna*.

The answer of the guardian as such (none being filed in the name of the infant) states that *Alexander Saunders* had been possessed of the slaves for three years only; and that they are now in the possession of the plaintiffs; but contends that they belonged to *Saunders* under the act of 1787, and submits the cause to the court.

There is a copy of the will of *Thomas Sale*, but no other evidence in the cause: which was heard by consent in the court of chancery, without any writ or order appointing a guardian *ad litem*; and that court, presuming a complete gift from *Thomas Sale* to *Saunders* and his wife at the time they took possession, declared that it would have dismissed the bill, "but the parties, in case of a decision in affirmance of the defendant's title, having proposed that an account of the slaves and their profits should be taken," one was accordingly directed; and the plaintiffs appealed to the court of appeals.

PENDLETON, President, delivered the resolution of the court, that the decree was to be reversed for the reasons contained in the following entry to be made in the cause:

"The court is of opinion, that the facts stated in the proceedings are too imperfect to enable the court to decide upon the supposed merits of the cause, arising under the several acts of assembly therein mentioned; but if it were

otherwise, it would be improper to discuss the subject upon this unusual bill, lest injury should be produced to the appellee. The bill is brought by a mother (or perhaps, without her knowledge, by a step father) in possession of slaves, claiming them under the will of her father, against an infant daughter, stating the adverse claim of the daughter to the same slaves, and drawing her into a discovery and contest, and finally into a release of that claim: It is, in its nature, a bill *quia timet*, without even a suggestion of the usual and proper grounds for sustaining such a proceeding; since a discovery, from an infant, of a transaction prior to her birth, could not have been expected; and no testimony having been taken, it is supposed there existed none to be preserved; and that the said decree is erroneous. 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 make such decree as the said high court of chancery should have pronounced, it is further decreed and ordered, that the appellants' bill be dismissed, and that they pay to the appellee her costs by her about her defence in the said high court of chancery expended."

1798.
October.

Fowler
v.
Saunders.