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.

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SPOTSWOOD *v.* PENDLETON, *&c.*

An act of assembly for sale of an infant's lands, not proved to have been obtained by fraud, is valid.

No averment, against the facts stated in the act, can be made.

The sales in such cases may be public or private.

The sales, to the tenants who, before the lands were put up, agreed to give the prices contained in a previous estimate made by the trustees, were good, as nobody bid against them.

The trustees might sell by agents.

A small excess raised, beyond the sum required by the act, did not avoid the sales.

Alexander Spotswood, grandson and heir of major general *Spotswood*, filed his bill, in the high court of chancery, against *Edmund Pendleton* and others, stating that general *Spotswood*, by his will, entailed his lands in Orange, Culpeper and Spotsylvania, upon his son *John;* but charged them with four legacies, which *John* was empowered to raise by sale, or mortgage, of any part of the lands. That *John Spotswood* died in 1758, leaving the plaintiff his heir in tail; and appointed *John Robinson*, *Edmund Pendleton*, *John Champe*, *Bernard Moore*, *Nicholas Seward* and *Roger Dixon*, executors of his will; but that *Moore* only qualified, and afterwards got himself appointed guardian to the plaintiff. That general *Spotswood's* debts and incumbrances might have been paid, without a sale of the lands; especially, as *John Spotswood* had drawn bills of exchange for the debts, which, although they were not paid, had exonerated the estate; but that *Moore*, on pretence of its being necessary to pay debts, and that it would be beneficial to the plaintiff, which was not true, obtained, by means of the powerful interest of himself and friends, two acts of assembly, the first enabling him to apply the profits of the lands towards payment of the claims, and the second empowering him to sell them for the same object. That, to prevent those laws from taking effect, a friend of the plaintiff's had caused a *caveat* to be entered against them, before the king and council: to support which, proofs had been

procured; but they were kept back by unfair practices between *Moore* and *Campbell*, who had married the plaintiff's mother, until the royal assent was obtained to the acts. That the act provided that *Moore*, the executor, with the consent and approbation of *John Robinson*, *Edmund Pendleton*, *Roger Dixon* and *John Campbell*, or any two of them, should make the sales: which ought to have been at public auction, by the executor and trustees; but, in fact, the greatest part of them were private sales, to the tenants of the lands, and made by two agents. That *Moore* converted the proceeds of the sales to his own use; and left the debts and incumbrances unpaid; but that the purchasers were bound for the application of the money; especially as they knew the nature of the transaction, and some of their bonds had been assigned to persons, not creditors of the estate. That more money than £6000, the sum called for by the act, had been raised by the sales: which the bill prayed might be declared void.

The answer of *Edmund Pendleton* states, that general *Spotswood's* estate was greatly involved. That, when *John Spotswood* came of age, the executors, upon a settlement of their administration account, obtained a decree against the estate for £2000, although the incumbrances were not much diminished; and he believes that *John* left the estate, at his death, more encumbered than he found it. That *John Spotswood* was obliged, because he could not effect a sale, or mortgage, of the lands, to change the form of some of the debts, by drawing bills of exchange, which he knew would be protested; and the defendant submits whether that exonerated the estate. That the conduct of *Moore* was fair; and that the defendant, who was one of the assembly, neither felt himself, nor observed in the other members, any motive, except that of providing for payment of the debts in the manner most beneficial to the family. That a public sale was advertized; which *Moore*, *Campbell*, *Dixon* and himself attended: and *Moore* and *Campbell*, having previously made an estimate of the respective lots, the same was noti-

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fied to the tenants; and when any of them agreed to give the estimate, the lot was cried at that price, but nobody bidding against the tenants, it was, after some time, determined that the others might take at the estimated prices, without the formality of crying the bids. That, those sales, not producing the sum required, agents were appointed to sell other parcels of the lands, upon the plan of the estimate, as it would have been unreasonable to expect that the trustees, who had control over the agents, should go through all the details. That the excess arose from the lots being sold by the acre, and measuring more, upon a survey, than was expressed in the leases. That neither the trustees, nor the purchasers, were liable for the application of the purchase monies; but that they were accounted for, by *Moore*, in the last settlement of his administration account.

That defendant was afterwards examined as a witness, and gave a deposition of the same purport with his answer.

The answers of the other defendants, state, that some of them were purchasers, without notice, under those who purchased from the executor and the trustees. That they know nothing of the supposed frauds, if any were committed. That the sales were fair; and that the best mode of making them was pursued. That the act of limitations bars the plaintiff.

The deposition of a witness charged *Moore* with mismanagement of the estate; and Mrs. *Campbell* says, that she was always averse to selling the lands; but that *Moore* agreed, in writing, with her husband, not to sell the Newport estate, if the act passed; and that *Pendleton* was one of the witnesses to the writing.

The other depositions proved the lands were cried at the estimated prices; that they were sold by the acre, and measured more, upon the survey, than was expressed in the leases; and that nobody bid against the tenants.

Montague, the public agent of Virginia in England, says that the committee of correspondence never requested his attention to either of the acts; but refers to the letters of *Robinson*, requesting him to do so: In one of which, he

mentions that he is surprized at the obstruction they had met with from *Campbell*, as he supposes; but apprehends that it has proceeded from his wife, who dislikes *Moore:* that he has sent *Pendleton's* deposition to remove difficulties; and that he must endeavour to obtain the royal assent to the acts. That the witness does not know upon what ground the *caveat* was dismissed; that he never received any proofs in support of it; and does not believe that any averments, contrary to those in the acts, would have been allowed.

The act of assembly for selling the lands, after reciting that for applying the profits, (which sets forth the incumbrances, debts and bills of exchange drawn by *John Spotswood*, and that it was deemed beneficial for the heir and the creditors to apply the profits to discharge the claims,) states, that £ 9000 are still due; and that "it has been represented" that it will be for the benefit of the heir and the creditors to sell part of the lands, to satisfy some of the most pressing demands, and thereby reduce the debts to a sum which could be paid by *Moore*, in a reasonable time, in the method directed by the recited act, enables *Moore*, or the acting executor or executors, "with the consent and approbation" of *John Robinson*, *Edmund Pendleton*, *Roger Dixon* and *John Campbell*, or any two of them, to sell *such and so much* of the entailed lands, as he or they shall judge most convenient and necessary; so as that the whole sum to be raised does not amount to more than six thousand pounds; and that *Moore* should apply the money towards payment of the debts; the residue whereof to be paid out of the profits of the rest of the lands, under the former act.

The high court of chancery "being of opinion, that the persons appointed by the act of the general assembly, passed in the year one thousand seven hundred and sixty-four, intituled '*an act to direct the sale of certain intailed lands, whereof* John Spotswood *esquire, died seized, for payment of the debts due from him, and from major general* Spotswood,' did not perform the duties with which they were entrusted, in such a manner, that the sales, by them, ought to

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be set aside; and being also of opinion that the title of the plaintiff, if he hath a title, to the lands claimed by him, was a legal title, which ought to be pursued in a court of common law," dismissed the bill at the costs of the plaintiff; who appealed, from that decree, to the court of appeals.

Wickham for the appellant. The act of assembly, being contrary to the principles of justice, and *magna charta*, was void by the English law. But, if it were otherwise, still the sales were void; because they exceeded the sum which the trustees were authorized to raise; for they were confined to £ 6000, and the sales amounted to more money. This objection applies even to the sales made by the trustees themselves; but, as to those made by the agents, they are more exceptionable still; for the trustees had but a naked power; and the rule, in such cases, is, that *delegatus non potest delegari*. If, however, the sales to the amount of the £ 6000 would have been good, yet all above that sum was beyond the power of the trustees, and therefore void. It is true, that it may not be an easy matter to ascertain which were first, and which last; but it is the business of the purchasers to make the distinction, as they are endeavouring to defeat the appellant in his attempt to recover property, which once clearly belonged to him, and which nothing but an arbitrary law could have deprived him of. But, as that law gave power to the trustees to raise a certain sum only, the purchasers were bound to attend to the amount, as well as to the application of the purchase money. They did neither, however, and the consequences have been fatal to the appellant.

Call and *Randolph*, *contra*. The act of assembly was reasonable, and enacted no more than a court of equity would have decreed. It was perfectly consistent with the principles of the government that then existed; which admitted that the authority of the legislature was conclusive in all cases whatever. 1 *Black. Com.* 91, 161. But such

a law is obligatory since the revolution, *Taliaferro* v. *Minor*, in this court, 1 *Call*, 524: which was stronger than the present case; because, there, the parties interested procured the law to be passed; and then took advantage of it to obtain the lands for themselves. The act was properly executed; for the testimony shews that the most proper mode of making the sales was adopted: and the trustees had control over those that were made by the agents. The excess did not prejudice the sales; because it never does, in any case, except as to the excess itself; but here it was very small, and arose from fractions of land not foreseen at the time. But be that as it may, the sales, as far as £ 6000, were good; and as the priority of the purchasers is not known, each has a right to say, that he was first; and those who contest it must shew the dates. It is not true, that the purchasers were bound to enquire, whether there was an excess, or not; or to see to the application of the purchase money, 2 *Fonbl.* 154. 2 *Ch. Cas.* 115. 1 *Vern.* 301: Added to which, the defendants are generally purchasers without notice; and therefore not affected by the prior transactions.

Cur. adv. vult.

ROANE, Judge. The errors assigned, by the appellant's counsel, are that the act of assembly was void and obtained by fraud; and that the trust was improperly executed under it. But a previous question arises from that part of the decree relating to the jurisdiction of the court of chancery; which it is unnecessary to decide, as well as whether it could be gone into, when the answer contains no exception of that kind; for, as the decree dismisses the bill, it would be right, according to my view of the case, whichever way the question of jurisdiction might be decided. At the same time, however, I cannot help thinking, as at present advised, that the chancellor erred upon that point; because the bill charged fraud in the creation of the trust; and improper conduct in the execution of it; which, if sustained, would probably have entitled the plaintiff to relief. Passing that

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point over, however, I am of opinion, that the decree ought to be affirmed upon the merits. For there is no evidence of fraud in obtaining the act of assembly. The testimony of *Pendleton* refutes the charge while the bill was before the legislature; and the allegations, with respect to the *caveat*, are not proved, and amount to nothing. The principle of the act is unexceptionable; for there is nothing contrary to natural justice in it. The object was to sell the lands, to greater advantage, in order to pay debts, to which they were liable before. It therefore neither conferred new rights upon the creditors, nor took away any from the heir; whom it was intended to benefit, by relieving the estate, not only from the increasing charges upon it, but from the dangers to which it was exposed from the creditors, who might have sacrificed it by pursuing the remedies which were in their power. As to the execution of the trust, there is no ground for complaint. For the sales were open and fair: And, although an excess took place, it was very small, and arose from balances of land not foreseen at the time of the sales, but discovered afterwards upon the surveys of the leases. Besides, in a variety of small tracts, it was impossible to arrive at absolute precision, without doing injury to the residue of some of them. A single tract might admit of greater exactitude; but, even in that case, circumstances may require slight departures. In regard to the objection, that the trustees could not delegate the trust confided to them, there is nothing in it; for it was not an absolute delegation of the power, but the sales were subject to the control of the trustees.

FLEMING, Judge. The objection to the principle of the act, and the manner of procuring it, is not sustainable; and, probably, was not much relied upon by the appellant's counsel; for the fraud is not proved, and the statute conferred no new obligation, nor took away any antecedent rights from the heir; whom it was intended to benefit, by selling the lands upon credit, and consequently more to his advantage. The sales were properly conducted; and those made by the

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agents are unexceptionable; for it was not an absolute delegation of the trust, but they were subject to the control of the trustees, who could not conveniently go through the business themselves. The excess complained of was small; and arose from unexpected amounts of land discovered, upon the surveys, to be in the lots, over the quantities called for in the leases: which ought not to avoid sales otherwise unexceptionable, especially against purchasers, who bought under the general power, without any knowledge of the excess. 1 *Vern.* 301. The purchasers were not bound to see to the application of the purchase money; for the power was to pay debts generally, and not according to a schedule. 1 *Bro. C. C.* 186. The point of jurisdiction is not necessary to be decided; because the decree dismissing the bill is right, whether there was jurisdiction or not; and therefore it should be affirmed.

CARRINGTON, Judge. The charge of fraud in obtaining the act, is not proved; and I cannot doubt of the facts contained in it; for the finding of the legislature is conclusive. The principle of the statute is not obnoxious to exception; for it neither conferred new rights upon the creditors, nor took away any from the heir: On the contrary, it was beneficial to him, as it was calculated to lessen his burden, by making the lands, which were liable for his father's debts, sell to more advantage on account of the credit. The suggestions relative to the *caveat* are unimportant; for the averments in the act were all that would have been attended to by the king and council, and nothing more was ever sent. The powers confided to the trustees were exercised with propriety, and the sales were conducted as well as circumstances would permit. The excess was small; was produced from causes not foreseen, and perhaps could not well be avoided; for it would be extremely difficult, in any case, to sell to the exact amount of the sum required. The court, I think, had jurisdiction; and the decree ought to be affirmed upon the merits.