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,

COUNSELLOR AT LAW.

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could have been made to them; and, also, in continuing the interest to the time of payment instead of to the time of the decree, and making the recovery to be of the aggregate of principal and interest."*

[* See notes to *M'Call* v. *Turner*, and *Deanes* v. *Scriba*.]

Chisholm *v.* Starke and others.

Tuesday, April 28th, 1801.

A. devises slaves to his wife for life, remainder to his children. The wife marries B. who empowers C. to sell the slaves. C. does sell them to D. who was ignorant of the right of those in remainder; and D. sells them to E. If the remaindermen bring a bill of *quia timet* against B., D. and E., the Court will decree B. to give security for the forthcoming of the slaves, [and their increase,] at the death of his wife; but, as D. was a purchaser without notice, he will not be compelled to give such security.*

This was an appeal from the High Court of Chancery. The bill states, that James Underwood, the father of the plaintiffs Ann Starke and Martha Underwood, who live in the city of Richmond, died in 1773, having first made his will, and thereby devised, as follows: "I lend to my loving wife Ann, the use, labor, and profits of one-third of my slaves, during her natural life; my will and desire is that the dower slaves of my loving wife Ann (meaning the third lent to her as aforesaid) may be equally divided at her decease amongst all my children." That the said Ann took possession of a third part of the slaves, which have greatly increased; but, through the severity of her, and her second husband, William Richardson, (of Hanover county,) they are reduced to three: That the said

* Injunction granted to restrain tenant for life of slaves from selling them out of the State. *Didlake* v. *Hooper*, Gilm. 194.

But the Chancery Court will not rule the tenant for life to give security to have the property forthcoming at his death, unless there appear danger of its being wasted, or made way with. *Mortimer* v. *Moffatt and wife*, 4 H. & M. 503. *Coleman* v. *Holladay*, 2 Mun. 162.

Acc. 2 Kent's Comm. 287.

So, a fraud in A. does not affect B., purchasing from A. *bona fide*, and without notice. *Coleman* v. *Cocke*, 6 Rand. 618.

And a d rivative purchaser *with* notice is protected by the want of notice in him he claims under. *Curtis* v. *Lunn*, ex'r. &c., 6 Mun. 42.

So, if grantor make a deed with intent to defraud creditors, &c.; yet if grantee do not partake or know of the fraud, and pay valuable consideration,—he is clear of charge. *Astor* v. *Wells, &c.* 4 Wheat. 466; 4 Cond. Rep. 513.

Ann is consumptive, and Richardson in danger of insolvency; and that, conscious thereof, he has frequently endeavored to sell the slaves as his absolute property. In pursuance of which, he empowered Burnett to sell one, by the name of Judy. That Burnett sold her to Chisholm, who lives at a great distance up the country, for £50, the estimated value of the full property of such a slave. That Richardson has attempted to sell others; and pretends, that the increase of the slaves is his. The bill, therefore, prays, that Richardson and Chisholm may give security for the forthcoming of the slaves, at the death of the said Ann; and for general relief. [26]

The answer of Richardson and wife, admits the will, but denies the severity; states, that the defendants thought, until now, that the increase was their's, as part of the profits of the slaves; but submits the construction of the will to the Court. Admits the sale of Judy; but it was only meant to sell the right of the defendants; and, if more was done through mistake, the plaintiffs cannot complain, as after this discovery they may recover of Chisholm: Insists, that no security ought to be decreed.

The answer of Chisholm states, That, in April, 1796, Burnett came into the defendant's neighborhood, (about 40 miles from Richardson's,) and sold the slave Judy for £50, (which is her full value) to the defendant, under a power from Richardson; whom, the defendant then supposed to be the true owner. That afterwards, and before the defendant had the least intimation of the suit, (if it were then commenced,) he sold the said slave to Peebles, for £60.

There are in the record, Richardson's power of attorney; Burnett's bill of sale; and a copy of Underwood's will, which contains the above recited clause exactly, but in a latter part thereof, the testator devises the slaves to be equally divided, at his wife's death, among all his children, and Anna Underwood. The cause was heard, by consent, on the bill, answers, and exhibits; but the replication does not appear to have been withdrawn.*

The Chancellor decreed, that Richardson should give bond in the penalty of £500; conditioned for delivering to the plaintiffs, the slaves in his possession, and their increase, living at the death of the defendant, Ann his wife. And that Richardson and Chisholm should give bond, in the penalty of £500 for delivering Judy and her increase. [27]

[* See *Leeds* v. *Mari.* Ins. Co. 2 Wheat. 380; *Wiser* v. *Blackley*, 1 Johns. Ch. R. 607.]

From this decree, Chisholm appealed to this Court.

CALL, for the appellant.

Peebles ought to have been a party; because his title was drawn into question, and it was in his power to have produced the slave, but Chisholm could not. Chisholm acted innocently, and committed no fault; for he did not know of the plaintiff's claim at the time of his own purchase, or of the sale, which he afterwards made to Peebles; and, therefore, he ought not to be put to unreasonable inconvenience. Under the circumstances, he is liable for nothing; but, at most, it can only be for the value at the time of the sale.

RANDOLPH, contra.

There was danger that the property might be eloigned; and, therefore, the bill was proper. The notice is not positively denied; and the will was recorded, which was constructive notice. If a man once had possession of another's property, he is liable to detinue. *Burnley* v. *Lambert*, 1 Wash. 308: and, therefore, equity, where detinue cannot be immediately brought, will oblige him to give security for the forthcoming of the property. The argument on the other side, would lead to an infinity of suits.

PER CUR. The Court is of opinion, that there is error in so much of the said decree as orders the said William Richardson, and the appellant, to seal and deliver an obligation for the delivery to the appellees of the slave Judy named in the answers, and the increase of the said Judy, or such of them as shall survive the said Ann Richardson, the appellant having stated in his answer, which is not disproved, that he was a fair purchaser for a valuable consideration, without notice of the title of the appellees, and had sold the said slave Judy before suit brought, or any notice of the appellees' claim to, or interest in, the said slave. Therefore, it is decreed and ordered, that so much of the decree aforesaid as is herein stated to be erroneous, be reversed and annulled; that the said William Richardson do with surety seal and deliver an obligation in the penalty of five hundred pounds, payable to the appellees, their executors, administrators, or assigns, with condition that the said slave Judy and her increase,* or such of them as shall survive the said Ann Richardson, shall be delivered to the appellees, or their executors, administrators, or

[28]

[* *Ellison* et al. v. *Woody* et al. 6 Munf. 368, and *Maria* et al. v. *Surbaugh*, 2 Rand. 230, J. GREEN's op.]

assigns; that the appellees' bill be dismissed as to the appellant; that the residue of the decree aforesaid be affirmed; and that the appellees pay to the appellant his costs.

CURRIE *v.* MARTIN.

Monday, May 11th, 1801—Friday, Oct. 29th, 1802.

The party who caveats must shew a title to the warrant under which his own survey is made.*

Quære. What certainty is required in an entry for lands?

Martin, on the 28th May, 1798, filed a *caveat* against a patent to Currie, as assignee of Henry Banks, on a survey of 2,225 acres of land in Harrison county, dated 30th November, 1797; part of a warrant for 58,400 acres entered the 11th of May, 1784: 1. Because the entry does not express the date and number of the warrant. 2. Because the warrant did not exist at the time of the entry. 3. Because the entry was not special enough. 4. Because the land surveyed is not included in the entry. 5. Because Banks had made a survey, on the 27th of June, 1785, on the same entry, and had obtained a patent thereon, and, at different times, had made other surveys, and obtained other patents on the same entry, before the making of the survey caveated against. 6. Because the said survey is entirely unconnected with the beginning of the said entry, and with the said other surveys made upon the same entry, being separated by many prior claims, by settlement, &c. The caveator states his own claim to be founded upon an entry for 50 acres, made the 7th of February, 1797, by virtue of part of two warrants, viz: 25 acres, [29] part of a Land Office treasury-warrant of 2,000 acres, issued to Col. William M'Williams, 8th May, 1783, and 25 acres, part of a pre-emption warrant of 1,000 acres issued to John Goodwin, Jr., 28th March, 1782.

Upon the trial of the cause, in the District Court, the parties agreed a case, which stated: That on the 7th of August, 1783, a treasury-warrant issued to Henry Banks for 58,400 acres, which is set forth in *hæc verba.* That on the 11th of May, 1784, an entry was made with the surveyor of Monon-

*Accordant, *Field* v. *Bulbreath*, 2 Call, 547.