REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA :

WITH SELECT CASES,

RELATING CHIEFLY TO POINTS OF PRACTICE,

DECIDED BY

THE SUPERIOR COURT OF CHANCERY

FOR

THE RICHMOND DISTRICT.

VOLUME II.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

FLATBUSH, (*N. Y.*)
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1809.

DISTRICT OF VIRGINIA, TO WIT:

BE IT REMEMBERED, That on the twenty-first day of March, in the thirty-third year of the Independence of the United States of America, WILLIAM W. HENING and WILLIAM MUNFORD, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia: "with Select Cases, relating chiefly to Points of Practice, decided by the Superior Court of "Chancery for the Richmond District. Volume II. By William W. Hening and Wil- "liam Munford."

IN CONFORMITY to the act of the Congress of the United States, entituled, "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, entituled, "An act, supplementary to an act, entituled, an act for the encouragement "of learning, by securing the copies of maps, charts and books, to the authors and proprie- "tors 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."

WILLIAM MARSHALL,
(L. S.) Clerk of the District of Virginia.

fective in point of form, and the first is also defective in point of substance, in not averring that the release signed by *Elisha Boyd*, the attorney, was for the purpose of obtaining an injunction, I think the repleader ought to go up to the writ of *supersedeas* itself.

Judge FLEMING concurring, the judgment was REVERSED; all the proceedings back to the *supersedeas* set aside; and a repleader awarded.

Dennis and William Fitzhugh, Infants, &c. *against* Anderson, Taliaferro, Meredith, and others.

ON an appeal from a decree of the Superior Court of Chancery for the *Richmond* District, pronounced in *May*, 1803, in a cause in which the appellants were complainants, and the appellees defendants.

A father, anterior to our statute of frauds, having delivered certain slaves to his son, which were proved by *verbal evidence*, (without any *deed* or *writing*,) to have been *lent*, for an indefinite period, and the son having retained the uninterrupted possession for many years, used the property as his own, and acquired credit on the strength of his possession; in a controversy between the *father*, or volunteer claimants under him, and creditors of, or fair purchasers from the son, the father shall be deemed to have *given* him the slaves; and on *general principles* of law and equity, independently of any statutory provision, the title of the creditors and purchasers will be protected. The circumstance that the father, afterwards, by his last will and testament, bequeathed the slaves to the son for life, remainder to his children, makes no difference in the case.

When the act of limitations once begins to run, its operation does not cease by the intervention of *infancy*, *coverture*, or any other legal disability.

William Fitzhugh, of *Marmion*, in the County of *King George*, grandfather of the appellants, about the year 1772, and at different periods afterwards, between that date and the year 1778, put into the possession of his eldest son *John*, a number of slaves, amounting in the whole to about eighteen or twenty. These slaves were sent by *William Fitzhugh* to the County of *Caroline*, (separated from that of *King George* only by the river *Rappahannock*,) where his son *John* then resided. *John Fitzhugh* remained in the County of *Caroline*, until sometime between the years

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1784 and 1788, when he removed to the County of *Amherst*, (distant upwards of one hundred miles from the County of *King George*,) and carried those slaves with him. About the year 1784, while he resided in the County of *Caroline*, he sold a negro girl (one of these slaves) to a certain *Benjamin Johnson;* in 1786, he sold a woman and her child to *Thomas Anderson;* and, after his removal to *Amherst*, (at what precise time does not appear,) he sold a negro man to *Zacharias Taliaferro*. In 1788, about eighteen months after he came into *Amherst*, an execution, founded on a judgment of the Court of *Amherst* County, at the suit of *William Meredith*, was levied on a number of these slaves; and at the moment when the sheriff offered them for sale, *John Fitzhugh* forbade the sale, alleging that the negroes were not his property, but were only lent to him by his father during his life, and after his death they would go to his children. *Meredith* having indemnified the sheriff, and the sale being about to proceed, *John Fitzhugh* took out one of the company, (who had attended for the purpose of purchasing,) and assured him that his title to the slaves was good and indisputable, and that his prior declaration to the contrary was merely intended to prevent the sale of the property, if possible; but, as he found the plaintiff was determined to sell, he wished the witness to bid, and become a purchaser; which he declined, fearing that there might be some defect in the title. This was the first intimation given in the County of *Amherst*, that the slaves were not the absolute property of *John Fitzhugh*. The sale, notwithstanding, took place, and the slaves were purchased by different persons who, or whose representatives, were parties defendants to the present suit. *William Fitzhugh* never brought suit in his life-time for any of them; but by his will, dated in *March*, 1789, and proved in *June*, 1791, he bequeathed to his son *John*, "all the negroes which he had hitherto lent him "during his life, and, at his decease, the whole of them "and their increase to be equally divided between his two

"oldest sons now living, by his present wife." The appellants are those sons, who, in 1796, being *infants*, brought a suit by *Lucy Fitzhugh*, their mother and next friend, against the persons in possession of these slaves, claiming also their increase and profits, and praying a *discovery* of their increase, &c.

All the defendants, except the representatives of *Anderson* and *Taliaferro*, formally pleaded the act of limitations; and they all answered, insisting that they, or those under whom they claimed were fair purchasers, without notice of the pretended loan of *William Fitzhugh* to his son *John*.

There is no proof in the cause, that the slaves were ever *given* to *John Fitzhugh* by his father: on the contrary, the evidence of the delivery *to him*, and the declarations of the father *to others*, (for it does not appear that any conversation or contract ever passed between the father and son on the subject,) seem to shew that it was intended as a *loan* only, without specifying for any particular period. This *fact*, too, of a *loan*, was communicated by *William Fitzhugh himself*, only to members of his own family, and persons in his employment; some of whom were requested to let the circumstance be known to the public. Mrs. *Hannah Fitzhugh*, widow of *William Fitzhugh*, *Robert Allison* his nephew and a member of his family, *William Watkins*, his overseer at *Marmion* in 1772, *William Redd*, who lived with him from 1766 to 1769, at *Marmion*, and then removed to a plantation of his in the County of *Caroline*, where he was living in the year 1772, all prove that the negroes were *lent* to *John Fitzhugh* by his father. Mrs. *Fitzhugh* further states, that *it was never intended by her husband that the negroes should be at the disposal of his son John, but should descend to his children;* that *John* applied to his father for permission to sell a negro woman and child, which *with difficulty was obtained*, he declaring at the same time, that *he never would give him permission to dispose of another*, which, to the best of her knowledge,

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he never did. *Robert Allison* proves, that *William Fitzhugh always* declared that he *intended* the negroes delivered to his son *John* as a *loan* only; that, in the year 1783 or 1784, he requested the witness to write a new will for him, and directed that the negroes should be lent to *John* during his life, and at his death to his children in fee-simple; that, after the year 1784, he frequently heard solicitations, both verbal and written, from *John Fitzhugh* to his father, requesting permission to sell some of the negroes he had in his possession, which was as constantly refused; that *he had understood, from the family, leave had, with difficulty, been obtained to sell one or two of them;* that, during the four or five latter years of his uncle's life, he was so harassed with solicitations of this sort, that he desired the witness to take occasion to mention the subject in *Caroline* County, and inform the people there, that he never would give his son *John* a negro, and, if they purchased them, they would do it in their own wrong; *and the witness obeyed this injunction by frequently declaring the old gentleman's intentions. William Watkins* proves, that in 1772, the negroes were *sent* by *William Fitzhugh* to his son *John*, then living in the County of *Caroline;* that he informed the witness, *he had only lent them to his son John, and expressed a desire that the people should know it; for that he had no right to sell them;* but that *John*, after being several years in possession, did sell one of them. *William Redd*, on the 28th of *December*, 1772, received a letter from *William Fitzhugh*, directing him "to "send to *Port Royal* on a particular day to meet *John's* "things and negroes, to be conveyed, &c. *all which he lent* "*him*;" that before *John Fitzhugh* had sold any of the negroes, the witness frequently spoke of the letter to sundry people, and informed them that he did not believe *John Fitzhugh* had any *right* to the negroes his father had lent him. There is proof by one person only, (*John Sutton*,) that this letter was mentioned to him by *Redd*, while the witness was in treaty for a negro girl, whom

John Fitzhugh had offered to sell *and to make a good title for;* but they not agreeing in the price, he sold her shortly afterwards, (in the year 1784,) to *B. Johnson.* Before this time, the witness had never heard but that the title of *John Fitzhugh* to those negroes was good, although he had settled in the neighbourhood in 1781. Another witness, (*William Hughlett,*) who lived in the employment of *W. Fitzhugh* from 1784 to 1787, declares, that he was charged with a letter from *B. Johnson*, of *Caroline*, to the said *W. Fitzhugh*, requesting his consent to the sale of a negro then in the possession of his son *John;* that *W. F.* throwing the letter in the fire, declared that he never had nor ever would consent to the sale of any of the negroes he had lent to his son *John;* that, during the time the witness lived with *W. F.* he was frequently importuned by different persons to solicit his consent to his son *John's* selling some of the negroes in his possession; but, from the agitation of mind always discovered by *W. F.* when the subject was mentioned, the witness was deterred therefrom.

On the part of the defendants there was abundant proof that *John Fitzhugh*, both in the Counties of *Caroline* and *Amherst*, enjoyed the uninterrupted possession of these slaves, listing them with the commissioners of the revenue as his own, paying their taxes, and never paying any hire for them that was known to any person; that, while he resided in *Caroline*, a person (*Wm. Clasby*) who was his overseer, and another, (*Thompson Mills,*) a near neighbour, always understood that he was the *bona fide* owner of all the slaves in his possession; that an agent of *Meredith's*, (*Charles Watts,*) while in *Caroline*, made a conditional contract with *John Fitzhugh*, for *Meredith's* land, lying in the County of *Amherst*, upon the faith and credit of the negroes then in his possession; that *John Fitzhugh* afterwards came up to the County of *Amherst*, and confirmed the bargain with *Meredith* himself, who declared that he never should have credited him for the land, but in consequence of his being the owner of a number of slaves; that

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he brought the same slaves with him, on the strength of which, *Watts*, the agent of *Meredith*, had been induced to enter into a contract with him, and that he had exercised every act of ownership over them, pledging some for the loan of money, obtaining credit for goods, &c. on the faith of his being the real owner, *selling* some, *offering* others at *private sale*, and never intimating that his title was incomplete till they were about to be sold to satisfy *Meredith's* execution; at which time he acknowledged to *W. S. Crawford*, and afterwards to *Samuel Meredith* and *Stephen Watts*, that he had made those declarations merely to prevent the negroes from being sold at all; that more than five years after the sale of the negroes by execution, *John Fitzhugh* took credit for the amount in a final settlement with *W. Meredith*, and thereby induced him to give up a mortgage on some land, which he had taken in order to secure himself, should any claim be set up to the slaves; that, before the day of sale, *John Fitzhugh* went down the country, as he informed one of his sureties for the delivery of the property, (*Stephen Watts*,) to obtain some aid from his father in the first payment of the land; and, on his return, told the witness that his father had refused him any assistance, declaring that he had already done enough for him.

The cause coming on to be heard, the Chancellor (the late Mr. WYTHE) pronounced the following opinion and decree:

"That a father putting his son in possession of slaves, "and suffering him so long to retain it, and so to convert "to his own use their labour and services that the son "thereby had gained a delusive credit, ought to be deem-"ed to have *given* the slaves to his son, in a controversy "between the father or volunteer claimants under him, "and purchasers from, or creditors of the son, unless his "possession had been, by some written act, registered in a "reasonable time and in a proper office shewn to have "been fiduciary, or no more than usufructuary by some "written publication in solemn form premonishing people

" with whom the son should deal that he was, although " the visible, not the real owner. *John Fitzhugh's* pos- " session of the slaves demanded by the plaintiffs may be " predicated, from the testimony, to have been such, that " all men, except those of their grandfather's family, or in " his employment, had every reason to believe the pro- " perty to be concomitant with that possession. The cau- " tion to the creditor, to satisfy whose execution the slaves " were sold, is unimportant, because in the same predica- " ment with them was every slave of *John Fitzhugh*. The " Court doth therefore adjudge and decree, that the bill of " the plaintiffs, who are legatees, and therefore volunteers, " be DISMISSED," &c.

From this decree the complainants appealed to this Court.

This cause was argued on *Saturday, the 19th of March*, 1808, by *Wickham*, for the appellants, and by *Randolph*, for the appellees. On account of the importance of the subject, the Judges took till this term, to consider of their opinions.

Wickham, for the appellants, argued, that the decree of the Chancellor was erroneous, as the proofs in the cause clearly shewed, that the slaves in question were *lent* and not *given* to *John Fitzhugh;* and that, as there was no evidence of fraud in *William Fitzhugh*, there was no rule of law or equity which gave the defendants a preferable right to that of the plaintiffs. This case, having arisen prior to our *statute of frauds*,(1) is to be considered as affected by the statutes of 13 *Eliz.* c. 5. and 27 *Eliz.* c. 4. which have no clause respecting *loans*. On the main point

(1) This act passed, as it was reported by the committee of revisors, on the 30th of *November*, 1785, and took effect the 1st of *January*, 1787. See *Rev. Code*, vol. 1. c. 10. p. 15. and *Revised Bills of* 1784, c. 25. p. 22.

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Mr. *Wickham* referred to the case of *Cadogan et al.* v. *Kennet et al.*(a)

As to the act of limitations, he contended, that it would not run, because *William Fitzhugh*, although he had a *right* to resume the slaves at any time during his life, yet was not *bound* to do it; like the case of a remainder-man, stated by Ld. *Hardwicke*, in *Kemp* v. *Westbrook*,(b) who has an estate expectant on an estate for life or years, and has a *right* to enter for a forfeiture of the particular tenant, yet he is not *bound* to enter on the accruing of such forfeiture, and, if he comes in time after the remainder attached, that is, after the death of tenant for life, the statute of limitations will not bar him.

(a) *Cowp.* 432.

(b) 1 *Ves.* 278, 279.

Randolph, for the appellees, contended, that on general principles of law and equity, independently of any statutory provision, the purchasers and creditors of *John Fitzhugh* ought to be protected. As between the father and son, there can be no question but *John's* long and uninterrupted possession, *upon a mere delivery*, gave him a complete title; and his creditors and purchasers may insist upon any thing which he might have done, and may equally avail themselves of the act of limitations.

The *loan*, which is so much relied on, is only proved by the dependents and connections of *Wm. Fitzhugh*. No publicity was given to the transaction. They only prove the *declarations* of *Wm. Fitzhugh* as to his *intentions* that *John* was to have the slaves for life, remainder to his children; but there was no *contract*, either verbal or written, no delivery to *John Fitzhugh* for any particular purpose, or for any definite period of time. It is true, they prove that *John* consulted his father as to the sale of some of the negroes, and *with difficulty* obtained his permission to sell one or two; but this sale was permitted by *Wm. Fitzhugh*, without connecting his own claim with it, so as to let the transaction get to the ears of the public. It was made by *John Fitzhugh*, apparently of his own property;

and is a strong proof of that *crassa negligentia*, which will never be tolerated in a Court of Equity.

There is *positive* proof that *John Fitzhugh* exercised every act of ownership over this property; that he sold some of the negroes; paid the taxes of the whole; enjoyed their services without compensation; and acquired credit on the strength of his possession which he would not otherwise have done. If *William Fitzhugh* did not think proper to put an end to these deceptious practices, he is justly liable to all the consequences which have resulted. He who produces a false credit shall alone suffer; according to the maxim "*qui non prohibet quod prohibere potest, assentire vide-tur.*"(*a*) On this principle it is, that a stander-by, who sees his property pass into the hands of another without objection, is precluded from afterwards asserting his right. *William Fitzhugh* ought to have given publicity to this transaction; which might easily have been effected by conveying the negroes in trust for the benefit of *John's* children; and then the general law, which directs that all deeds of trust shall be recorded would have embraced the case. At this period too, the act of 1758 was in force, which provides that all gifts of slaves should be in writing and recorded within a limited time.

(*a*) See 2 *Inst.* 305.

The rule *caveat emptor* has no application to this case. The appellees were buying property of a person who had been in possession more than twice the term necessary to give a complete title in personal estate; and *slaves*, under the act of 1727, passed as chattels, in which case *possession* is sufficient evidence of a title.

The statutes of 13 and 27 *Elizabeth*, of which our statute of frauds is partly composed, and which were in force in this country at the time of this transaction, and Mr. *Wickham's* own case of *Cadogan* v. *Kennett* confirm the title of the purchasers. It is not contended that the *whole* of the statute of frauds as it now stands in our act of Assembly was then in force; that part which relates to loans was suggested by the committee of revisors, and was not in force till the

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first of *January*, 1787. Those revisors took a latitude which has never been taken since. They condensed the substance of various laws, instead of *compiling* a code. But our statute of frauds is nothing more than an affirmance of the general principles of equity, that he who contributes, by his neglect, to a deception, shall himself bear the loss.

It may be objected that all the defendants have not *formally* pleaded the act of limitations. This was unnecessary. *John Fitzhugh's* title was protected by the act, and consequently the title of those claiming under him was equally so. Where a party derives a title by several mesne conveyances, he has a right to avail himself of any ground of law or equity which any of those through whom the title was derived might have taken. The *delivery* of the negroes to *John Fitzhugh* was in 1772; and the act of limitations, once beginning to run, never ceases to operate by the occurrence of infancy, coverture, &c. If there be a *moment* when the right may be asserted against the possessor, and it is not done, no intervention of infancy, or any other legal disability will prevent the operation of the statute.(*a*)

(*a*) See *Plowd.* 355. *Stowel* v. Ld. *Zouch.* 4 *Term Rep.* 300. *Doe ex dem. Durome* v. *Jones.* 1 *Salk.* 241. *note* (*a*) *to the sixth edition, by Evans.*

Wickham, in reply. The whole of the testimony proves this to have been *a loan to John Fitzhugh for life*, with remainder to his children. No fraud appears to have been meditated by *William Fitzhugh*; and the only effect of his not executing a deed was, that he ran the risk of not identifying the property. It is the usual mode of providing for children and their issue in family settlements; and the circumstance that the remainder was not limited until *William Fitzhugh* made his will has no weight; because *John Fitzhugh's* title not having been consummated during his life, his father might limit the remainder at any time. Nothing is more common than for persons, *by will*, to confirm estates before *given*, or to limit remainders on such estates. Once prove that the negroes were *lent*, and it is a continuing loan till the contrary appears.

There is no such maxim as that he who gives a false credit shall suffer. If this were so, a person having a carriage and horses with a driver from another, or borrowing from a friend a horse or other property upon occasions of the most urgent necessity, might deprive the owner of them; because the person *hiring* or *lending* gives a *credit* by giving *possession*. It must often happen in the intercourse of society that a person *ostensibly* the owner of property has no *right*. Though a person *in possession* is *prima facie* the owner, yet it is *prima facie* and nothing more.

What law did *William Fitzhugh* violate, in lending these negroes to his son? What negligence can be ascribed to him? Suppose he had made a deed for them and kept it in his *scrutoire;* would this have been notice? But it is said the deed ought to have been recorded. Was there any law in force at that time which required it? None. How then can *William Fitzhugh* justly be charged with neglect for not doing a thing which the law did not require him to do?

Examine the situation of the parties, and see which were the most to blame. *William Fitzhugh* did what was common in such cases. He made no deed, because no law required it. The purchasers on the other hand were apprised of the state of the property by *John Fitzhugh*, and might have obtained complete information by inquiry of his father. It was their duty to have done so. *They* were chargeable with neglect, and not *William Fitzhugh*. *He* was not a stander-by; for he knew nothing of the sale. But he might, it is said, have given notice in writing. How? Was he to have published in the news-papers? And, if he had, was every body bound to read them? The act of 1758 has been mentioned; but it has no relation to the subject; because that act applies to *gifts* of slaves, and this is the case of a *loan*. But *John Fitzhugh* paid the taxes on those negroes! Is there any thing more common than for persons in possession of negroes to pay the taxes, who, notwithstanding, have no right to them? *A complete answer to all these ar-*

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guments is, that the sale was forbidden; and the creditors and others purchased at their peril.

As to those defendants who have not *pleaded* or *relied* on the act of limitations, it is clear that they cannot take the benefit of it. The act cannot be given *in evidence* in a suit in Chancery; because the complainant would be deprived of an opportunity of replying such matter as would take the case out of the statute. And, as to *John Fitzhugh* himself, he could not plead it, because he held the slaves notoriously on *loan*.

Friday, April 22. The Judges delivered their opinions.

Judge TUCKER. *William Fitzhugh* of *Marmion* in *K. George* county, about the year 1772, put his eldest son *John* in possession of sundry slaves, which he carried first to *Caroline* county, and afterwards to *Amherst*. He some years after sold one of them to *Thomas Anderson*, and another to *Taliaferro*. About eighteen months after his removal to *Amherst* several of them were taken and sold under an execution. *John* forbade the sale, which took place in 1788. *William* never brought suit in his life-time for any of them; but by his will dated in *March*, 1789, and proved in *June*, 1791, he bequeathed to his son *John*, "all the negroes "which he had hitherto *lent him* during his life, and at his "decease the whole of them, and their increase to be equal-"ly divided between his two eldest sons now living by his "present wife." The appellants are those sons, who have brought a suit by their guardian against the purchasers, and their descendants, for those slaves and their increase. There is no evidence in the record that the slaves were GIVEN to *John Fitzhugh* by his father: on the contrary the evidence of the delivery to him, seems to shew that it was intended by the father as a *loan*, only. Some of the defendants have pleaded the act of limitations: they all insist that they are fair purchasers. The Chancellor was of opi-

nion, " that the father having suffered his son to remain so " long in possession of the slaves to his own use, ought to " be deemed in a controversy between himself, or volun- " teers under him, and creditors of the son, or purchasers " from him, to have GIVEN him the slaves, unless his pos- " session had been under some written act, registered " within a reasonable time, and in a proper Court shewn " to have been fiduciary, or no more than usufructuary, " by some written publication in solemn form premonishing " people with whom the son should deal, that he was al- " though the visible, not the real owner." And dismissed the bill with costs, &c. from which decree the complainants have appealed.

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The lapse of time between the loan (if in fact it were a loan) of the slaves by the father to the son, being nearly or quite twenty years, the period between the sale of those sold by *John Fitzhugh* and the father's death, being equal to that which the act of limitations makes a perpetual bar to the action for the recovery of them by the father; and that which elapsed between the taking them and selling them under execution, and the death of the father, being little short of that which constitutes a bar to such recovery, I strongly incline to approve of the Chancellor's opinion and decree, throughout. I have no hesitation in thinking it ought to be affirmed as to those defendants who have pleaded the act of limitations. And upon the principles of public policy and utility, I think it ought to be affirmed as to the others. Five years peaceable possession of a slave will operate as a bar to the recovery by the former owner, unless some express bargain or agreement be proved, shewing that the possession of the *holder*, is in fact the possession of *him* who claims the *absolute* property. If no such proof be adduced the law construes the property to be in him who hath the unqualified possession, for such a length of time. And as to the creditors of the holder who may have acquired a title under an execution, and as to purchasers either at a public sale under execution, or from

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the holder himself, an acquiesence in their titles and possession thus acquired, seems to me to be a *legal* bar, and equally one in equity. The gift to the grandsons can have no reference to any period antecedent to the death of *William Fitzhugh*; for no remainder in a slave could have been created by any *verbal* gift, made at the time of the delivery to *John Fitzhugh*, and none is pretended to have been made by deed; and the devise in the will, I consider, as merely void and ineffectual, after such a long period as intervened in this case. I am therefore in favour of an affirmance of the decree.

Judge ROANE. The *first* part of the second section of the act of 1785 to prevent frauds and perjuries,(*a*) in relation to conveyances, &c. to defraud creditors and purchasers, was taken from and intended to be co-extensive with, the *English* statutes of 13 *Eliz.* c. 5. and 27 *Eliz.* c. 4. This is not only evident from comparing it with them, but has also been so decided by the Supreme Court of the *United States*, in the case of *Hamilton* v. *Russell.*(*b*) In that case the Court, moreover, said, that those acts of Parliament are to be considered as only declaratory of the principles of the common law. The Court of King's Bench had, previously, in the case of *Cadogan* v. *Kennett*,(*c*) declared that the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end attained by the said statutes; and that these statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud. It is added, in the same case, that many things are considered as circumstances of fraud; that the *statute says not a word about possession;* (which is also the case with the clause of our act of Assembly now in question;) but that THE LAW says that, if after a sale of goods the vendor continues in possession, and appears as the visible owner, it is evidence of fraud; *because goods pass by delivery.*

(*a*) *Rev. Code*, 1 vol. p. 15, 16.

(*b*) 1 *Cranch*, 309.

(*c*) *Cowp.* 434.

It has since been decided in *Edwards* v. *Harben*,(*a*) as well as in the beforementioned case of *Hamilton* v. *Russell*, (in which our act of 1785 was directly brought into question,) that, unless possession *follows and accompanies* the deed, such deed is adjudged to be fraudulent; that, in the case of an absolute and unconditional deed, that cannot be said to be the case where possession is retained by the vendor; and the decision in *Cadogan* and *Kennett* is justified in the case of *Edwards* v. *Harben*, by considering that the possession was consistent with and accompanied the deed made in that case in favour of the wife.

(*a*) 2 *Term Rep.* 594.

Both these authorities also shew that, where the deed is absolute, the retaining the possession is *per se fraudulent* in point of law, and not merely an *evidence of fraud.*

These cases go to shew that the statutes in question are merely supererogatory in relation to the common law; that the decision respecting the separation of the possession from the title, thus adjudged to be *in itself* fraudulent, does not result from the *terms* of the statute, but from the general principles of law; that the only cases, in which such separation can stand justified, are those in which the possession is consistent with, and called for by, some deed under which the property in question is limited and claimed; and that the reasons upon which the said statutes are founded cannot be too much extended for the purpose of suppressing fraud. Upon the point of POSSESSION also, it will be seen not only, that *possession* is every where considered as the *indicium* of property in relation to personal goods, but also that the third point resolved in *Twine's* case(*b*) is, "for that the donor continueth in possession "and *useth them*" (the goods in question) "as his own," (as in this case,) "and by reason thereof, he tradeth and "trafficketh with others and *defrauds and deceives* them."

(*b*) 3 *Co. Rep.* 80.

The general principle arising out of the above decisions, when simplified, is, that an unqualified contract, whereby the *possession* of goods remains in one man and the *right* in another, is fraudulent; not only for the reason so *em-*

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phatically expressed, *ut supra*, from *Twine's* case, but also, because, as is above said, in the case of *Cadogan* v. *Kennett*, "goods pass by delivery:" and, in the case of *Hamilton* and *Russell* it will be seen, that no difference in this respect exists between *slaves* and other goods.

Is not the above precisely the definition of the case before us? While the possession exists in the son, does not the right exist in the father? It existed in him *always*, because the testimony does not shew that he lent the negroes to his son *for any given time*, and therefore might at any time have resumed the property.

While it is agreed that so much of our act as I have just referred to was taken from the two *English* statutes of *Elizabeth*, I cannot see that the *latter* part of the section in question finds any correspondent provision in any *English* statute. I mean the part respecting the recording of agreements made on consideration not deemed valuable in law, and that respecting goods loaned.

The clause respecting goods loaned is as follows:

"And in like manner, where any loan of goods or chat-
"tels shall be pretended to have been made *to* any person,
"with whom, or those claiming under him, *possession*
"shall have remained by the space of *five* years, without
"demand made and pursued by due process of law on the
"part of the pretended lender, or where any reservation
"or limitation shall be pretended to have been made of a
"use, or property, by way of condition, reversion, re-
"mainder, or otherwise, in goods and chattels, the pos-
"session whereof shall have remained in another as afore-
"said, the same shall be taken as to the creditors and
"purchasers of the persons aforesaid so remaining in pos-
"session, to be fraudulent within this act, and that *the*
"*absolute property is with the possession*, unless such loan,
"reservation or limitation of use or property were declared
"by will or by deed in *writing* proved and recorded as
"aforesaid."

On this clause, which, being posterior to, does not embrace, our case, I will remark, that this provision, or one

similar in *principle*, (however indefinite as to detail or modification,) may, as justly and naturally, be deemed to have resulted from the general principles of law, as that just noticed in relation to the first branch of this section, and was intended to put an end to all future litigation depending upon the point of possession only. Considering that the wide field carved out for perjury and litigation by the indefiniteness of the principle in relation to *possession* would be productive of much public inconvenience, our act of frauds has improved upon that of *England* by extending itself into this subject also, and establishing one certain standard in relation to possession in respect of loans. In utility, and in principle, this provision is analogous to that beneficial one in the same act which relates to the sale of lands, marriage-agreements, &c. But I take the law *always* to have been in this country, and in *England*, (and which *probably* is not *changed* or *affected* by the before cited passage from the act of 1785,) that whilst loans of personal goods were permitted, the borrower keeping himself strictly within the pale of his authority in relation thereto, yet, whensoever he should overstep the limits of his character of *borrower*, act as *owner* over them, or *sell* them, (especially with the knowledge and consent of the lender,) he should be taken *to be the owner*, in reference to all those who may have been drawn in by these acts to give him credit; and that, in such case, the lender is not to be permitted, by his neutrality and connivance, to aid in the perpetration of a fraud.

In considering this case, therefore, as *anterior* to the operation of our act; while I do not feel myself at liberty to take, in relation to *loans*, as *bold* a ground as is above taken, under the statute of *Elizabeth*, in relation to *conveyances*, namely, that a separation simply, of the *possession* from the *right*, for any portion of time, shall be held to be fraudulent, I have no hesitation to say that, if the borrower, with the knowledge and consent of the lender, departs from his true character, and, in the strong and just language in *Twine's* case, "*useth the goods as his own*,

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"*and, by reason thereof, tradeth and trafficketh with others,* "*and defrauds and deceives them,*" the lender and all volunteers under him shall be bound thereby.

As to the facts in the case before us, although Mrs. *Fitzhugh* and *Allison* prove *William Fitzhugh's intention* to *lend* the negroes to *John Fitzhugh for his life*, there is no testimony to shew that, in fact, any *contract was made* to lend them for *any determined period. William Fitzhugh* had therefore always the right of property in him; and his right of action accrued, if not from the very time of the loan, at least from the time of the sales in question. *William Fitzhugh* had not postponed his right to demand these negroes until after his son *John's* death; and this, *perhaps*, (for I have not looked into it,) is an answer to the case stated on this point from *Vezey*. If *William Fitzhugh's* right of action accrued, even on the latter event, the plea of the act of limitations is a bar in favour of those who have resorted to it. The case of *Grey* v. *Mendez*(a) shews that, when the five years have once commenced, they run over all *mesne* acts, such as coverture, infancy, &c. but I return to the merits of the case.

(a) 1 *Str.* 556.

It is indeed proved, by *some* of *William Fitzhugh's* overseers and members of his family, that these negroes were only *lent;* and this was, also, probably known to a few others to whom it was mentioned, and, in some instances, by *William Fitzhugh's* desire. On the contrary, several persons residing even in the County of *Caroline*, where the transaction first originated, (one of them, too, an overseer of *John Fitzhugh*,) prove that these negroes were considered as *John Fitzhugh's* property, that he used them as his own, gained credit upon them, and even sold one of them. This sale being known, it was naturally to be presumed, from his near residence, that his father knew and approved of it, and it may not have been equally notorious, that this sale was by his special leave, and assented to by him with difficulty. The father, therefore, ought to be bound by the presumption and consequences arising out of this circumstance. Besides, he suffered his son,

without objection, to remove them into a *distant* County, in which County, as well as in *Caroline*, he used every act of ownership over them, and gained credit upon them. *John Fitzhugh* always, both before and after the sale in 1788, spoke of them as his own; and the purchasers at the sale were authorised to consider his conduct at the sale, (which also was *withdrawn* in a conversation with *Crawford*, who most probably communicated that withdrawal to others,) as a fraudulent attempt to evade the execution. I must not here omit to remark, that *John Fitzhugh* was the eldest son of an opulent father; that this provision, *admitting* the property to have been *absolutely* given, was, probably, but a reasonable advancement to him; and that, therefore, (and under the general usage in this respect,) the property might naturally and reasonably be taken to have been his own. On the whole, this is a strong case for the purchasers. I cannot differ this claim from one made for the negroes by the *father* himself; and, if the father himself were before us, no man could hesitate to decree him to abide by the fruits of his own fraudulent conduct, concealment, or connivance.

On these grounds, I approve of the Chancellor's decree. But I have formed no opinion (as he seems to have done) as to what act, on the part of a lender, might be proper and *sufficient*, under circumstances similar to the present, to repel the consequences arising from similar transactions. This is not called for in the present case, and is the less necessary to be settled by the Court as a general regulation, in consequence of the provision before mentioned, as introduced into the act of 1785, in relation to loans.

Judge FLEMING. This appears to be a very plain case. The reasons given by the Chancellor for dismissing the bill are too cogent to be gotten over. *John Fitzhugh's* long uninterrupted possession of the slaves afforded a strong presumption that they were his own property, upon the strength of which he obtained extensive credits. The

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knowledge that he had received them from his father on *loan*, was confined solely to the family of *Fitzhugh;* and the great distance to which he removed from his father's dwelling, rendered it next to a miracle that the circumstance could have been known to others. The dangerous and pernicious consequence of giving countenance to such claims as this, is too obvious to need a comment. I therefore concur in opinion, that the decree dismissing the plaintiff's bill be affirmed.

By the whole Court, (absent Judge LYONS,) the decree of the Superior Court of Chancery, dismissing the complainant's bill, was AFFIRMED.

Saturday, April 16.

Mantz *against* Hendley.

An original attachment, prior to the act of *Jan.* 25, 1806,(1) ought not to have been granted to a creditor, whose claim exceeded 20 dollars, or 1000 pounds of tobacco, on the ground that his debtor *intended* to remove his effects, or would elude the ordinary legal process, but only on the ground that he was actually removing out of the County or Corporation privately, or absconded or concealed himself so that the ordinary process of law could not be served upon him.

ASA BACON, as attorney for *Francis Mantz*, on the 12th day of *August*, 1796, obtained an attachment from a

(1) See *Rev. Code*, 2 vol. c. 70. p. 98. *where* the law is altered.

The complaint on which an attachment is issued, and the bond and security for its due prosecution, ought to be made and given by the creditor himself, and not by his *attorney at law.*

An attachment irregularly issued ought to be quashed *ex officio* by the Court to which it is returned, though bail be not given, nor any plea filed by the defendant; and, in like manner, the Court ought to quash it, on errors in arrest of judgment, after pleadings and a verdict for the plaintiff.

A plea in abatement to an attachment ought not to conclude with praying judgment if the plaintiff ought to have and maintain his attachment and *action*, but only that the attachment be *quashed.*

A *general* demurrer to a plea in *abatement* ought to be sustained, though the plea be defective in point of *form* only.

The plea, that the defendant *never absconded*, is a plea in *abatement.*

A District Court ought not, in any case, merely to reverse the judgment of a County Court, *in general terms;* but should proceed to render such judgment as the County Court ought to have rendered.