REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME III.

BY WILLIAM MUNFORD.

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1816.

Argued *May* 30th, 1811, and reargued *Jan.* 20th, 1812.

Baird *against* Bland and others.

1. If, by a deed of marriage settlement, duly recorded, slaves be conveyed to certain trustees and their heirs, to the use of the wife, for life; and after her death, to the use of the husband, for life; and after the death of the survivor, to the use of the children of the marriage, equally to be divided between them, and their heirs for ever; upon the deaths of the husband and wife, the children of the marriage are entitled, not only to the *equitable*, but the absolute *legal* estate.

2. In such case, if the parents, in their lifetime, be deprived of the slaves, and depart this life, leaving children under age, the act of limitations does not run against the children until they attain the age of twenty-one years.

THEODORICK BLAND and others, children of *Theodorick Bland*, deceased, and of *Sarah*, his wife, also deceased, brought suit in the late high Court of chancery against *Thomas L. Lee*, *Peter S. Randolph*, *Anthony Thornton*, and *John Thornton*, *heirs* of *Thomas Ludwell Lee* and others, who were trustees in a deed of marriage settlement between the said husband and wife, before their marriage; by which deed, bearing date the 4th of *December*, 1772, sundry slaves, and other property, were conveyed to the said trustees, to the use of the said *Sarah* during her life; and, after her death, to the use of the said *Theodorick*, during his life, for the maintenance of himself and of the children of the marriage, "in lieu and satisfaction of any claim of dower or distribution which the said *Sarah* might claim in any of the slaves and other personal estate of which her said intended husband might die possessed; and, immediately after the death of the survivor, the said slaves and other personal estate to be to the use and behoof of such child, or children, of the body of the said *Sarah*, begotten by the said *Theodorick*, for such estate and interest therein, and for such parts and proportions thereof, as he, by deed, or will, might appoint; and in case no such deed, or will, should be executed, then to the use and behoof of all the children of the body of the said *Sarah*, begotten by the said *Theodorick*, equally to be divided between them and their heirs for ever; and, in default of such child or children, to the use and behoof of such person or persons as the said *Sarah*, by will, or deed, might appoint."

3. A person entitled to a *legal* estate in slaves, may sue *in equity* to recover them, *if thereby a multiplicity of suits may be prevented*: calling on the defendant to *discover how long* he has had them in possession, and to discover and state an *account* of their profits.

☞ See *Alderson* v. *Biggars and others*, 4 *H.* & *M.* 470., and *Bass* v. *Bass*, *Ibid.* 478.

The bill charged, in general terms, the trustees, and their heirs with misconduct and negligence, by which the plaintiffs, in their minority, (both parents having died intestate, and without making any appointment by any other deed,) had sustained great losses; and further alleged, that the plaintiff, *Theodorick*, attained his full age on the 6th of *December*, 1797, after which he discovered that a certain *John Baird*, jun., by some unlawful or covinous means, had obtained the possession of a negro-man slave, named *Will*, one of the slaves in the said deed mentioned; and that *Lydia Richardson* had, in like manner, obtained the possession of another, by the name of *Bill*; that the plaintiffs had demanded the said slaves, which the said *John Baird*, jun., and *Lydia Richardson*, (who were made defendants,) had refused to deliver, *although they well knew* the same to belong to the plaintiffs, who, therefore, prayed a decree for the said slaves; that each of the said defendants be compelled to *discover how long* he, or she, had had possession thereof, respectively, and also to discover and state an *account* of profits. The bill, moreover, contained a prayer, that the *heirs* of *the* trustees be compelled to carry the trust into effect.*

Anthony Thornton, eldest son of one of the trustees, by his answer, denied any knowledge of the transactions in question, or any responsibility arising from his father's having been a trustee in the deed; averring, that he was in no manner interested in his father's estate; from which he was to receive no advantage; nor did he, by any means, think himself bound to carry into effect the trust in the deed executed by his father; but he had no objection to the plaintiffs' using his name (*if necessary*) in carrying on a suit, or suits, for obtaining justice for them.†

* Note. There was no demand, in the bill, of an *account in what manner the trust had been executed*; or by *what title* the defendants held the slaves.

† Note. According to the case of *Robinson's administrator* v. *Brock*, 1 *H. & M.* 213., the plaintiffs, in this case, might have brought an action of detinue in their own names, without using the names of the *heirs* of the trustees.

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No answer was filed by any other defendant, except *John Baird*, jun., who relied on his being a fair purchaser of the slave, *Will*, at a sheriff's sale, without notice of any dispute as to the title, and alleging that, for more than five years past, to wit, from *the 28th day of July*, 1791, he had been in possession of the said slave) claimed the protection of the act for the limitation of actions. "This defendant never heard of the marriage settlement in the bill mentioned, nor of the trustees therein, until the commencement of a suit against him in the district Court of *Petersburg*, in the names of the said trustees, or some of them, or their heirs, or the heirs of some of them, for the said slave, *Will*, which suit this defendant avers *was prosecuted by the said Theodorick, the plaintiff, and by his own neglect dismissed.* This defendant, therefore, denies the suggestion of the complainant to be true that he has no remedy *at law:* if a title can be made out under the said deed, it can be supported in an action of *detinue*, and ought not, therefore, merely at the discretion of the plaintiffs, to be brought in question in this Court." The time when the bill was filed, or subpœna issued, does not appear in the transcript of the record; but it probably was in, or before, the year 1798; the answer of *John Baird*, jun. being sworn to *in August*, 1798.

The plaintiffs proved, by the deposition of *John B. Fitzhugh*, that the slaves in question were two of those comprehended in the deed of trust; that *Theodorick Bland*, and *Sarah*, his wife, were married in *December*, 1772, and both died *in April*, 1793, leaving issue, the plaintiffs, *Theodorick*, *Sophia*, and *Henry*, *Bland;* that, on the 5th day of *March*, 1798, the deponent saw the slave, *Will*, in the possession of *John Baird*, jun., when the plaintiff, *Theodorick*, demanded, and *Baird* refused to deliver him, "*alleging, that he had bought him at a sheriff's sale about seven years ago.*"

The suit abated as to *Thomas Ludwell Lee* and *Peter S. Randolph*, by their deaths; and the bill being taken for

confessed against the defendant, *Lydia Richardson*, for failing to appear and answer, after an attachment for that contempt had been returned executed upon her, the cause came on to be heard the 14th of *May*, 1805, when the late Chancellor WYTHE pronounced his opinion, "that the bill is properly maintainable in the Court of equity, not only because here the plaintiffs may, as they now do, claim the benefit of a *trust estate in slaves, to which species of property the statute transferring uses into possession extendeth not*;* but because the plaintiffs demand (what they could but partly demand in the Court of common law) both a *discovery of sundry material facts*, and an *account of profits*, which can be settled in this Court, by one of its officers, more conveniently than by a jury; so that the plaintiffs, although relievable by an action of detinue in the names of their trustees, are *more completely* relievable by this mode of proceeding; and that of this relief the plaintiffs are not deprived by equity of the statute for limitation of actions and avoiding of suits," (the agreement in consideration of marriage, in the bill mentioned, having been legally *recorded* in due time,) "if the defendant's, *John Baird*, jun., possession, by him *alleged, but not proved*, had been as long as he affirmed." It was, therefore, adjudged and decreed, that the defendant, *John Baird*, jun., deliver to the plaintiffs the slave, *Will*, first named in the bill, and account for his profits, &c. A decree *nisi* was entered against the defendant, *Lydia Richardson*; and as to the defendants, *Anthony Thornton* and *John Thornton*, the bill was dismissed, with costs.

During the same term, on motion of *John Baird*, jun., by his counsel, the decree was set aside, and he was permitted to file several exhibits; from which it appeared that the negro man, *Will*, was taken in *June*, 1791, by the sheriff of *Chesterfield* county, upon an attachment against *Theodorick Bland*, for a debt alleged to be due to *John Pride*; and, by virtue of an order of the Court of

* Note. See *Rev. Code*, vol. 1. ch. 90. sect. 14. p. 159.

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said county, was sold by the sheriff, and bought by *John Baird*, jun., *July* 28th, 1791, for the sum of 67*l.*; that the suit against him in the *Petersburg* district Court, in the name of the heirs at law of the trustees aforesaid, was instituted *September* 4th, 1793, and dismissed, for want of prosecution, *September* 19th, 1796.

May 19th, 1806, the cause being reheard, the chancellor retained his former opinion, and renewed his decree; whereupon the defendant, *John Baird*, jun., appealed to this Court.

George K. Taylor, for the appellant. The Court of chancery had no jurisdiction; there being a plain and adequate remedy at law, by action of detinue in the name of the trustees. The legal title was, to all intents and purposes, vested in the trustees, who were living at the time when *Baird* obtained possession of the negro.* They took upon themselves a sacred duty, to assert the right whenever it was impugned. Suit should, therefore, have been brought by them. It appears, indeed, that the *heirs* of the trustees did bring a suit, which they might have prosecuted.

There was no necessity for a *discovery*. The plaintiffs themselves have exhibited testimony. The chancellor has taken another strange ground of jurisdiction; that an *account of hire of negroes* was demanded. But the plaintiffs were not compelled to come into equity for *this*. A jury could have settled it better than a commissioner. *Bland and wife*, when living, could not have sued the appellant, *Baird*, in a Court of equity; and their posterity can have no better title than they.

2. The act of limitations was a bar to the claim of the plaintiffs; (*a*) for the rule of equity, that the statute does not bar a trust estate, holds only as between *cestuy que*

(*a*) 4 *Bac.* 473.

* Note. It does not *appear*, from the transcript of the record, whether any of the trustees were *then* living, or not. The bill *stated* that they severally died in the years 1780, 1782, and 1783; but there was no *proof* on the subject.

trust and *trustees*, not between *cestuy que trust* and *trustees* on one side, and *strangers* on the other; therefore, where a *cestuy que trust*, and his trustees, are both out of possession for the time limited, the party in possession has a good bar against them both.(*a*)

(*a*) Per Lord *Hardwicke*, in the case of *Llewellin* v. *Mackworth*, 2 *Eq. Ca. Abr.* 579. pl. 8. See also *Townshend* v. *Townshend*, 1 *Bro. Ch. Rep.* 554. *Harrison* v. *Harrison*, *Call*, 428.

Hay, on the same side, referred also to Judge TUCKER's opinion, in *Fitzhugh* v. *Anderson and others*, 2 *H. & M.* 301.

Wirt, for the appellees. The deed of marriage settlement was *recorded*, which was notice to all the world; so that *Baird* had constructive notice, if not actual. By the deed, the children are original *purchasers*, taking as remainder-men, not as heirs.* The slave, named *Will*, was sold for *Bland's* debt, and purchased by *Baird*, while the plaintiffs were *infants*. The suit was brought by one of them, as soon as he came of age, for himself, and the other two, who were yet under age, to bring the trustees, and the holder of the property, into a Court of equity, demanding an *account of the trust*,† and a *discovery* by what title the defendant, *Baird*, held. The witness does not show *when Baird's* title commenced, or *how* it accrued. It was a proper case, therefore, for *discovery*. The plaintiffs could not know but that *Baird* held under the trustees themselves. The account of hire was to be founded on facts to be disclosed by the *answer*. At law, the plaintiffs could not have obtained a verdict for hire, because they knew not *when* it commenced.

If *Bland* and wife had sued in equity, a demurrer to their bill would not have been sustained; because they had no remedy at law, their title being *equitable* only. Their neglect, or omission, cannot prejudice the present plaintiffs, who claim under the deed. The act of limitations, therefore, does not apply. The whole time, on

* Note. See *Tabb and others* v. *Archer and others*, 3 *H.* & *M.* 399. pl. 2.

† This appears to be a mistake. See *ante*.

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which *Baird* relies, ran during the minority of the plaintiffs. The two years in *Bland's* lifetime did not run against them, for they do not claim as *heirs*, but as *purchasers*. I admit the law to be as Mr. *Taylor* has said, in relation to the *legal* title; but the rule is, that the act must run against the *equitable* title, *as well as the legal*, before the holder of the *equitable* can be barred. But it could not run against the *infants*. They are expressly excepted in the act. *Their* right of action accrued in 1793, when their father and mother died. The *cestuy que trust* must be equally negligent with the *trustee* to make the statute a bar against *both*. In *Llewellin* v. *Mackworth*,(a) the time was counted against the *cestuy que trust*, *who was of full age*. In *Townshend* v. *Townshend*,(b) it was counted not upon the trustee, but upon the man who had the substantial claim to the property. No case, or *dictum*, can be shown, that the act shall run against the *cestuy que trust* merely on the ground that it ran against the *trustee*, or that the former cannot sue *in equity*, because the latter cannot sue *at law*.

(a) 2 *Eq. Cas. Abr* 579.

(b) 1 *Bro. Ch. Rep.* 554.

Hay, in reply. The chancellor's benevolent feelings influenced his judgment. The decree is fraught with error from beginning to end. Suppose a landed estate conveyed to trustees to receive rents and profits, and they and *cestuy que trust* are both *disseised;* could they come into *equity* to try the title? *Ejectment* should be brought in the names of the trustees.

A plaintiff should not come into equity, merely for a discovery of facts which can be proved by testimony at law. A bill for discovery lies in cases only where the discovery cannot be obtained without the defendant's answer. *In what manner Baird* got possession of the slave was unimportant, since the plaintiffs claimed under their deed. *When* he got possession might easily have been proved by the neighbours. The mere allegation, that the plaintiff knows not when the defendant obtained possession, is not sufficient to give the Court of equity

jurisdiction. Such a doctrine would destroy the common law jurisdiction altogether.

As to the act of limitations, the trustees discontinued the suit, brought by them, before the time had elapsed. Let the consequences be upon *them*. If they were barred by the act, the legal title was gone ; neither they, nor the *cestuys que trust*, could have recovered at law in 1797, the five years having then elapsed. *Equitas sequitur legem*. If the trustees were barred *at law*, the *cestuys que trust* must be barred *in equity*. It is monstrous that the plaintiffs should give the Court of equity jurisdiction, merely by coupling the *trustees*, as defendants, with *Baird*, whose right was complete at law by his five years' possession.

In 1 *Call*, 428., it is said that the statute runs, both in equity and at law, in favour of *disseisors* and *tortfeasors*. Surely, then, in favour of a *bona fide purchaser*. *Infants* are not the only objects of the favour of a Court of equity: *fair purchasers* are equally favoured. *Baird* bought at a sheriff's sale, and paid his money, without any suspicion of a defect of title.

The trustees executed the deed, and bound themselves to fulfil the trust. *They* have neglected their duty: but *Baird* is not to pay the penalty. *They* ought to be responsible to the *cestuys que trust*. Between *them* and the plaintiffs, I admit the Court had jurisdiction. Yet the chancellor dismissed the bill as to *them*,* and gave relief against the wrong person!

The great question is, can the present plaintiffs stand in a *better* case than their own trustees? Can the *cestuys que trust* be entitled to recover, when the trustees cannot either in law or equity? The moment *Baird* got the property, there was an existing right of action in the trustees: (it was totally unimportant whether *Bland and wife* were alive or not:) the act therefore began to run immediately.

* Note. The bill was not dismissed as to the *trustees*, but their *heirs at law*.

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Wirt referred to *Sugden*, 242., citing *Lytton* v. *Lytton*, 4 *Bro. Ch. Rep.* 441.

Curia advisari vult.

The cause was reargued, before a full Court, *January* 20th, 1812; (in the absence of the reporter;) and, afterwards, on *Monday*, the 11th of *February*, 1813, the president pronounced the following opinion of the Court:

"This Court is of opinion, that the appellees, upon the deaths of their father and mother, took a *legal* estate, under the deed of marriage settlement, in the slaves in the bill mentioned;* and that, being *infants* at the time that estate vested, they were within the provisions of the act of limitations, in relation to infants; and that, therefore, they are not barred by that act. And the Court is further of opinion, that, although the appellees have a *legal* title to the slaves in question, yet, *for some of the reasons stated in the decree, and to prevent a multiplicity of suits*, the Court of chancery had jurisdiction of the cause; and, for the reasons aforesaid, affirms the decree of the chancellor."

* Note. See *Robinson's administrator* v. *Brock*, 1 *H. & M.* 213—235.