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 IV.

BY WILLIAM W. HENING AND WILLIAM MUNFORD.

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1811.

ERRATA.

Page 152, line 5th, for "*Elizabeth*" read "*Anne.*"

Page 155, at the end of the case of *Braxton* v. *Gaines & others*, add,

"*Wednesday, October* 11th. BY THE COURT, consisting of Judges "FLEMING and TUCKER, the decree was reversed, and the bill dismissed, "as to the appellant *Anne Corbin Braxton*, who was ordered to be quieted "in the possession of *Thamar* and her increase."

Page 172, at the end of the case of *Eppes's Ex'rs* v. *Cole & Wife*, add,

"Judge FLEMING said it was the unanimous opinion of the Court that "the judgment be affirmed."

Page 282, *in the note*, the reporters were mistaken in supposing that Judge ROANE was *related* to the plaintiff. Other motives prevented his sitting in the cause.

Braxton *against* Gaines and others.

Thursday, October 6, 1809.

Where a *child*, who is an infant, is deemed a *purchaser* for valuable consideration, of a slave, the circumstance that such child resides in the family of its father, and there keeps the slave, over whom it exercises every act of ownership, will not entitle the creditors of the *father* to disturb the possession of the child, although the father had included the slave in a mortgage, to indemnify the mortgagees against certain securityships.

GAINES, executor of *Robert Page* and *Pollard*, administrator of *John White*, brought a bill in Chancery against the widow and children of *Carter Braxton*, deceased, who left no executor, and on whose estate no person had administered for the discovery of certain slaves and other property mortgaged to *Page* and *White* by *Braxton*, *June* 10, 1792, by deed acknowledged and recorded in the General Court, for the purpose of indemnifying them against certain securityships for him; but which were to remain in his possession, until default made by him, to which was added a covenant in behalf of *Braxton*, his heirs, &c. to save them harmless from all actions, &c. on account of the said securityships, and that he and his heirs, &c. should and would pay off and discharge, *out of the above conveyed or meant to be conveyed premises*, out of his proper estate, all such sums of money as should thereafter be due for principal, interest, costs, &c. And that it should be lawful for the mortgagees, and each of them, &c. who should be brought in jeopardy by breach of the proviso in the mortgage, or of that covenant, in any respect, by action or otherwise, instantly to take possession of the premises, and sell and dispose thereof at public auction, for the purpose of indemnifying themselves, &c.

The bill suggests, that after *Braxton's* death all the mortgaged property which *remained* alive and *unsold*, came to the hands of his widow and children, of whom the appellant was one, and at that time of full age, or to some or more of them, but to the hands of which, and in what proportion, the plaintiffs cannot say; but call upon the defendants to discover what has come to their, or either of their knowledge, concerning deaths, births, and sales out of the said property, as well before *Braxton's* death as

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after, *and by what right or title they, or either of them, hold the same or any part thereof.* And that they may be severally foreclosed, unless they indemnify the plaintiffs by a certain day; and for general relief.

Elizabeth Corbin Braxton, the only appellant from the Chancellor's decree, according to the prayer of the bill, by her answer states, that she is possessed of *Thamar* and four others descended from her, and that, since the date of the mortgage referred to, *Thamar* has had two children; but contends, that those slaves could not be considered as the property of her deceased father, at the date of the mortgage, (*June* 10, 1792,) for that twenty years ago, (that is, in *March*, 1780, the answer being sworn to, *March* 15, 1800,) before the said *Thamar* had any increase, she was declared by her father to be her own and peculiar property; was considered generally as belonging to her, and particularly by the mortgagees, *Robert Page* and *John White*, intimate in her father's family by their intermarriage. That the defendant, when of very tender years, received a present from her grandfather, *Richard Corbin*, which was deposited in the hands of her father, who having failed to invest her with it, it being in money, declared to her that the said slave, *Thamar* and her children, were her property, and that as she had so long had possession of her, and it was so notorious that the property was hers, she considered it entirely unnecessary to require a bill of sale, or any other instrument of writing, to insure to her property which she had for such a series of years held and enjoyed as absolutely and indisputably hers. That not only the *right* of the slave was *not* in her father at the date of the mortgage, but he was not invested with the possession of them, she having lent the slave *Thamar* to her brother, with whom she then lived as a cook, and her children with her, by the defendant's permission.

The affidavit of *Francis Corbin* states, that he well remembers that when this defendant was a little girl, the

partiality of her grandfather, *Richard Corbin*, brought her to *Laneville*, where she lived for several years. That a negro woman then attended her as a nurse, by the name of *Thamar*, and that it was always understood in the family that his father, *R. C.* had given the said negro woman to the defendant, *Ann C. Braxton*. That since his return from *England*, where Mr. *Braxton's* affairs had been the subject of his father's unceasing reflections, he has been frequently advised by him to take care that his niece, the defendant, did not lose her maid *Thamar* and her children in the scuffle, for that HE had paid Mr. *Braxton* 100*l.* sterling for her, and *given her* to the defendant. He adds, the particulars, as collected from him, are these: Mr. *Braxton*, being pressed in *Williamsburg* for that sum, applied to his father for it. He advanced it for him by a bill of exchange, and *gave it to the defendant*. It was to lie in her father's hands, and interest to accumulate on it till she should marry or come of age. But by agreement a short time afterwards, and *long before* Mr. *Braxton* became embarrassed in his affairs, the said negro woman and her increase were given to the defendant *in lieu of the said* 100*l. sterling and interest*. She has remained the property of the defendant ever since; and until called on to state what he knew of the matter, he did not imagine her right had ever been contested.

This affidavit was admitted to be read as evidence in like manner as if the examination of the witness had been taken by a commissioner. There is no other evidence in the cause as between these parties upon this particular point.

The Chancellor (the late Mr. *Wythe*) decided, that the defendant had no title to the slaves, and that they be delivered up to commissioners to be sold, &c. The defendant, *A. C. Braxton*, alone, appealed to this Court.

Call, for the appellant, (Miss *Braxton*,) contended, that the decree of the Chancellor could not be supported on

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any ground whatever. An attempt had been made to charge her as a mere *volunteer*, when she was a *purchaser* for valuable consideration. The property was *paid* to her by her father, long before the date of the mortgage, in lieu of a sum of money given her by her grandfather; she had been upwards of twenty years in peaceable possession, and had exercised every act of ownership over it. Though she lived in her father's family, yet no possession adverse to hers was attempted to be proved.

But even if her title could be disturbed, the plaintiffs must shew that her father was the proprietor of the property at the time of the transfer to his daughter, and indebted in a sum vastly beyond his ability to pay. It is not enough to shew that a DONOR *is indebted*, but it must be further shewn that he was *so much indebted at the time of the gift*, as not to be able to make it, without injury to his creditors.(*a*)

(*a*) *Cowp.* 432. *Cadogan et al.* v. *Kennet et al.* 1 *Fonb.* b. 1. c. 4. s. 12. note (*a*), cites *Townsend* v. *Windham*, 2 *Ves.* 11. *Stileman* v. *Ashdown*, 2 *Atk.* 481. *Doe* v. *Routledge*, *Cowp.* 711. *Russel* v. *Hammond*, 1 *Atk.* 13.

Warden, for the appellees, observed, that it was stated in the bill, and not denied in the answer, that the persons whom the complainants represented had paid upwards of 2,000*l.* as sureties of *Carter Braxton*. It was also a matter of record, as well as of public notoriety.

With respect to the slaves in question, the possession was always in *Carter Braxton*. His daughter, Miss *Braxton*, was an inmate in her father's house at the time of the mortgage, and so continued ever since. There being no public conveyance of the property to Miss *Braxton*, the possession of her father was sufficient to induce a purchaser to take a conveyance. Miss *Braxton* does not pretend to claim the slaves by any deed or record. She only says, that her father gave her the negro *Thamar*, in consequence of a sum of money appropriated by him, which had been given to her by her grandfather. The testimony of *Francis Corbin*, as to this fact, is mere *hearsay*, and differs, in some respects, from the account given by Miss *Braxton* in her answer. *He* states that his father,

who was the grandfather of Miss *Braxton*, lent 100*l.* sterling to *Carter Braxton*, which was to lie in his hands, and the interest to accumulate, till his daughter, the appellant, came of age. There is no evidence that this sum of money was paid for the negro, but hearsay. It is, in fact, only a *gift* from *Carter Braxton* to his daughter, and subject to all the legal consequences of such. She cannot, therefore, be considered as a *purchaser*, nor can the decree of the Chancellor, on any principle, be reversed.

[*Wirt* and *Randolph* also argued the cause at large; but the Court being clearly of opinion that Miss *Braxton* was to be regarded as a fair *purchaser*, for a valuable consideration paid by her grandfather, the only point of any importance left to be considered was, whether she had held an *exclusive* possession of the slaves, and exercised acts of ownership over them. This being a matter of *evidence*, more than of *legal inference*, it is deemed unnecessary to insert the arguments at the bar, further than has already been done.]