REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

THIRD EDITION.

TO WHICH, 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.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

C. H. WYNNE, PRINTER.

Taliaferro *v.* Minor.

Friday, October 18, 1799.

Private act of Assembly for sale of lands, part of which belonged to infants, and the sale being for ready money, the payment was postponed with consent of the trustees appointed by the act to make sale of the lands, during which the paper money depreciated, but payment was afterwards actually made in paper money, and a conveyance made by the trustees to the purchasers, who were the adult co-parceners: Held, the sale and conveyance are good; and the purchasers shall not be affected by the depreciation.*

This was an appeal from a decree of the High Court of Chancery. The bill stated, that John Thornton died seised of lands which descended on his daughters Mary, (the wife of Woodford,) Betty (the wife of Taliaferro,) his grandson Thornton Washington, and his grand-daughter Mildred the wife of Minor. That, in May, 1778, an act of Assembly passed, [9 Stat. Larg. 573,] vesting the lands in trustees, and authorizing them to sell the same and invest the money in other lands for the benefit of the parties entitled; those designed for Thornton and Mildred, who were both then minors, and the latter unmarried, were to be purchased with the approbation of their parents or guardians. That, in January, 1779, the whole of the said lands were sold for 41,583*l.* 5*s.* 4*d.* (then equal in value to 5,197*l.* 18*s.* 2*d.* specie,) and Taliaferro and Woodford became the purchasers, but paid no money on the day of sale. That, had the lands been sold on credit, they would have produced more, and, therefore, no indulgence in the payment should have been given the purchasers. That the money, however, was not received until greatly depreciated, to wit: 10,639*l.* 6*s.* 1*d.* in June, 1780, and 5,441*l.* 3*s.* in December,

* In *Hughes* v. *Caldwell, &c.*, 11 Leigh 353, Tucker, P., considers this case of *Taliaferro* v. *Minor* as shewing, that "Though a trust sale was not in strict pursuance of a power, and though the complaining parties were infants when it was made; yet Equity will not set it aside if all was fair, though a loss has resulted to them."

See that case (11 Lei. 342–353) where a sale by a trustee's executors (who were held not lawfully authorized to make it) was yet held good under the circumstances, of acquiescence of the parties for sixteen years, though one was a *feme covert* all the time.

In *Pierce's adm'r* v. *Trigg's Heirs*, 10 Lei. 406, Land had been sold under a decree, as subject to certain incumbrances, which did not exist. This had injured the sale. Infant defendants, under the liberty reserved to them, shewed cause against the decree when they came of age, and sought to set aside the sale. The Court refused this: but directed a proceeding to ascertain the true value, and the difference to be paid.

1781; which ruined the shares of Thornton and Mildred; whilst Woodford and Taliaferro received the whole [525] benefit of the estate. That the trust remained unexecuted, and the trustees (when called on for settlement and payment of the money, no land being purchased,) offered to pay certificates for paper money funded; and that Taliaferro and Woodford refused to pay according to the real value. The bill, therefore, prayed an account of the trust; that Taliaferro and Woodford might pay the actual value, or the sale be annulled; and that the plaintiffs might have general relief.

The answer of James Taylor, one of the trustees, stated, that the trustees sold the land; but, as there had been no survey, the amount could not be ascertained until that was made; and, therefore, the payment was postponed. That the father of Mildred was solicited to purchase one of the tracts of land for her, but refused, as lands of double the value beyond the mountains could be purchased. That Thornton Washington also desired that none might be bought for him; which they suppose was done on the advice of his father and guardian. That on the day appointed for making deeds and paying the money, Taliaferro and Woodford brought a great many slaves which they had previously advertised for sale, for the purpose of raising the money; when it was discovered that most of the people who came to buy had brought emissions of money which had lately been called in by Congress, and, therefore, the trustees objected to receive such; but, doubting whether they were justifiable in doing so, a consultation was held among all the parties (the fathers of the plaintiffs Thornton and Mildred being present,) and it was agreed to postpone the payment, which was to be forthcoming, when demanded, and to carry interest. That the fathers of the infants never pointed out any purchase (except one by Mildred's father, which, as the quality was not known to that trustee, who lived at a great distance from the land, he proposed to abide by the opinion of her grandfather, who lived near it; but no further [526] steps were taken in it;) though they had promised to do so. That the father of Mildred was absent in Kentucky for twelve months, (during which no purchase could have been made for her.) That the trustees could not procure purchases, although they endeavored to do it, as people were averse to sell for paper money. That Taliaferro and Woodford threatening to tender the money, it was received; which being insufficient to make purchases, part was deposited in the loan office, under the act for funding paper money, and the other part paid to Mildred's grandfather, one of the trustees, in

order to be invested in land warrants, but the investiture was not made. That the trustees received no benefit from the loss, which was owing to the situation of the times, and not to any fault in the trustees. That in making the deeds, land equal to one-fourth of the purchase money was conveyed to both Mrs. Woodford and Mrs. Taliaferro; and the residue was conveyed to Taliaferro and Woodford in their own rights respectively.

The other trustees refer to this answer, and say the lands were considered at the time of sale as having been sold at a very great price.

Taliaferro's answer states, that he bought at a high price; that Mildred's father was urged to buy, and refused, saying that better lands could be procured beyond the Blue Ridge. That the purchasers met at Fredericksburg, on the day appointed by the trustees for making payment, each carrying 4000*l.* cash, and slaves, to sell for ready money to make up the balance. That the sale was disappointed, by the trustees telling them they might retain the money, which would be as well in their hands as those of the trustees, until purchases could be procured; that besides this, the purchasers had some apprehensions about the emissions of money. That their propositions were disliked by the purchasers, who objected at first; but, on Mildred's father, as well as the plaintiff Thornton's father saying it was their desire that it should be retained, the purchasers paying interest, it was agreed to on those terms. That the purchasers afterwards [527] sold their slaves and paid the money. And in other respects it agrees with Taylor's answer.

The heirs of Woodford answer as far as they know, and to the same effect with Taliaferro.

There are some depositions as to the value of the lands, and whether they sold for sufficient prices; the current of which prove that they sold for about their value, though one or two persons declined bidding, because they understood that it was a sale for cash. The crier and another witness, said it was proclaimed at the sale that there would be a survey, to ascertain the amount of the money to be paid for the lands, which were sold by the acre.

The father of the plaintiff Mildred says, that the tract of land spoken of in the answer of James Taylor was offered, if the money could be raised in ten days; but as he knew the purchasers had it not by them, and must sell slaves to raise it, and that Woodford was from home, he declined all thoughts thereof. That he afterwards mentioned the land warrants as the only probable means of preventing further loss. That he

once offered to take his daughter's proportion, if paid immediately, but the same was not done. Another witness proves, that Taliaferro offered to sell one of the tracts he had purchased to Mildred's father, saying it would suit his daughter; but that the father refused.

In other respects, the testimony agrees pretty much with the answers.

The High Court of Chancery decreed, "that Taliaferro and the heirs of Woodford should convey to the complainants their *purparties* of the said lands, to be held in the same manner as if the act of Assembly had not been made;" and should account for the profits. From which decree, the defendants appealed to this Court.

[528] The petition to the House of Delegates for the private act of Assembly, was preferred by Woodford, Taliaferro, Lewis, (the father of Mildred,) and Washington, the father of the plaintiff Thornton.

WICKHAM, for the appellant.

There was no necessity for a survey previous to the sale; and it was almost impracticable to have it made before, consistent with the idea of a sale at a reasonable period: which, in practice, is always at the beginning of a year; and that time is most convenient to sellers and purchasers; because, the first loses nothing on a growing crop, and the latter has an opportunity of preparing for a crop. The purchasers had no advantage from the manner of the sale, which, in fact, was a ready money sale; because the trustees might have demanded the money at any time, on completing the survey and tendering a conveyance. So that it was as much a ready money sale as any sale of lands is; because it rarely, perhaps never happens, that the conveyance is made and the money received on the day of sale; but a few days always elapse before the business is completed. It was impossible to foresee the subsequent depreciation; for, because it had depreciated, it did not follow in the opinion of men, that it would continue to depreciate. If that idea had prevailed, it would have sunk altogether, and gone entirely out of circulation. If the money had been paid, it would have depreciated in the hands of the trustees as much as it did in the hands of the purchasers, with this difference, that in the latter case there was interest accruing on it, whereas in the former there would have been none. There was no obligation to postpone the sale, until there were probable grounds that other lands might be bought for the infants; because every body knows, that in this country, lands may always be

bought for money. Besides, it was impossible for them to know what purchases to look out for, until the amount of the sales should be known. It is a strange position to say, that the purchasers were bound to look out for purchases; for, they were not the proper persons, and, indeed, had nothing to do with it. The purchasers have complied substantially with the terms of the sale; and, therefore, should have [529] the benefit of their contract. It is not true, that the trustees were bound to refuse a conveyance. For, the question is not what a Court of Equity would do now, but what a Court of Equity would have done then. Now, there can be no question but a Court of Equity at that time would have compelled a conveyance on payment of the money; and it would have been strange if they had refused; because the law made it penal to refuse the money, and had declared it a legal tender. Besides, the contract being for paper money, it was impossible to refuse a specific performance, when paper money was tendered according to the contract. The trustees, therefore, were not only justifiable in receiving the money and making a conveyance, but absolutely compellable thereto; and, if they had refused and any accident had happened to the debt, they must have borne the loss themselves. If this transaction be unravelled, none of that day can stand; for, it was not a transaction with infants, but with the trustees, who were of full age. There was no breach of trust in the trustees, and, therefore, they are not liable in any shape. If it be said, that the whole purchase money was not paid, it will make no difference; because the purchasers were entitled to the other half themselves; and, consequently, were not bound to pay it, in order that they might receive it back again. So, that the whole transaction was complete, notwithstanding only half the money was actually paid.

MARSHALL, contra.

The trustees were bound to pursue the power; and, if they departed from it, it was a breach of trust which cannot be justified. The Legislature must have meant that they should sell for ready money, as the then currency had already depreciated greatly, and was daily depreciating still more. [530] Of course, the trustees, by allowing the credit, departed from the power; and, therefore, their act was not obligatory. At least, it will not avail purchasers with notice, especially where the interests of infant children are to be destroyed by it. The trustees ought to have surveyed before they sold, which would have avoided the difficulty; because they might

then have received the money on the day of sale. It is singular, too, that to some bidders it should have appeared a sale for ready money, and to others that it should have been known to be otherwise. This was not putting bidders on an equal footing, and must, consequently, have injured the sales.

This being a power created by the Legislature, and not by the decedent, ought to have been the more rigidly observed, as it was not a confidence reposed by the owners in the trustees. Although the trustees had an indefinite latitude as to the sale itself, they had not as to the manner; but were bound to a providential regard for the interest of the infants. Now, it is evident that a purchase, for the infants, could not be made upon as good terms, when the money was standing out, as if it had been in hand; and, accordingly, Lewis could not make a contract, because he was uncertain whether the money could be received in time. There was no probability of the trustees sustaining an injury, by not receiving the money; and they ought not to have gone on to complete the sale and make conveyances to the purchasers. The latter, therefore, cannot derive any benefit from it; because, having purchased with notice, they became trustees themselves. But, one argument against the purchasers is particularly strong; that is to say, that the whole purchase money was not actually paid, nor any express appropriation of that which was retained by the purchasers; for, the deeds appear to have been made to the purchasers, and not to their wives. Of course, the matter remains *in fieri*, and the contract has not been completed, but is still
[531] open as to that part. Therefore, with regard to this part of the cause, there can be no doubt but that the complainants were entitled to relief.

RANDOLPH, in reply.

If this transaction is unravelled, all paper money cases must be broken up and opened again. The appellants had the legal title, and therefore did not come into Court to ask a favor, so as to put it in the power of the Chancellor to impose terms. It was, in fact, a sale for ready money; but, if it had not been, that would have made no difference: for, the act of Assembly had not prescribed it; and a sale upon credit may be as fair as a sale for ready money. The act supposes a conveyance, before the payment of the purchase money. But the money was, in fact, offered before the deeds; which, in equity, was equal to actual payment. It is no objection, that the money had depreciated; for, the Court has allowed of payments in paper money, by executors, to themselves, for

debts due to the estates of their testators. In short, it was one of those transactions which sprang out of the times, and which cannot be disturbed, without laying open more wounds than it heals.

LYONS, Judge, delivered the resolution of the Court, to the following effect:

It was objected, that the trustees sold upon credit, and not for ready money; but this, at best, is doubtful; and we think, under the circumstances of the case, ought not to have been insisted on; for, they acted with the general approbation of the parties concerned; had no interest in the transaction themselves; and appear to have only wished to give satisfaction to those who had.

No question could have arisen in the case, if the parties having an interest in the subject had not become purchasers. But, if the sale was fair, and the purchase honest, why should that circumstance affect the case? Especially as their bidding, by creating a competition, must have enhanced the sale, and increased the price.

The purchasers were not to blame, that the money was not received sooner; they were ready to have made [532] payment, but it was postponed by consent, on their agreeing to pay interest.

The sale was made when paper money was current, and it was current also when the money was paid: so that what they had agreed to give, they actually paid; and thus strictly performed their contract.

The purchasers in this case asked no favor, so as to give the Court of Equity power of imposing terms, as was done in the case of *White* v. *Atkinson*, 2 Wash. [94,] for in that case, there was no payment of the purchase money. But, if the money had been actually paid, there can be no doubt but that a conveyance would have been decreed.

The doctrine, that the purchasers in the present case were bound to see to the application of the purchase money, cannot be maintained; and, upon the whole, the Court is of opinion, that the decree of the High Court of Chancery is erroneous and ought to be reversed.