REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

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Richardson's Executor v. Hunt.

a patent was to be granted to the party prevailing in the *caveat*. But if this were neglected until a patent should be actually obtained by the person in whose favour the commissioners should decide, I presume it was afterwards too late to sue out a *caveat*; the object of which is not to repeal a patent, but to prevent the emanation of one.(*a*) And, even if the party thinking himself aggrieved had such an equity as would, on a *caveat* prior to the grant, have entitled him to a preference, it would be no ground for a bill in equity to set aside the patent, unless he was prevented by fraud, or accident, from prosecuting a *caveat*.(*b*) Here, then, had Mr. *Ross* his remedy, if he conceived himself aggrieved by the judgment of the commissioners. But he has totally neglected it, and shown no cause whatever for such neglect, and, consequently, is bound by their judgment.

(*a*) 1 *Wash.* 40. *Wilcox* v. *Calloway.*

(*b*) *Johnson* v. *Brown*, 3 *Call*, 259 and *Depew* v. *Howard*, 1 *Munf.* 293.

On the ground of error in respect to interest, I concur with the judge who has preceded me, upon that point, as well as that in which I have spoken to; and am therefore of opinion, that the decrees be severally affirmed; the appellees, as far as in them lay, having complied with the terms on which they were to obtain their patents.

Judges ROANE and FLEMING were of the same opinion, and the decrees were unanimously affirmed.

Monday, March 18.

Richardson's Executor *against* Hunt.

1. All the residuary legatees, or distributees, ought to be parties to a suit for division of a *residuum*.

ELIJAH HUNT, and *Sarah*, his wife, one of seven residuary legatees in the last will of *Turner Richardson*, deceased, brought suit in the superior court of chancery for the *Richmond* district, against *John Richardson* and

2. A person acknowledging that he *considers* himself interested in the event of a suit, is not a competent witness, though in fact not interested.

Samuel Richardson, acting executors of the decedent, (*John* being also one of the legatees,) to recover her share of the estate; without making the other five legatees parties. *Elizabeth Ellis*, one of the legatees, was examined as a witness for the complainants, and her deposition seems to have been regarded as evidence by the commissioner upon an order of account; notwithstanding, upon being questioned, she acknowledged that she considered herself interested in the event of the suit. The clause in the will, under which the plaintiffs claimed, directed the residuary part of the testator's estate to be valued by three neighbours to be chosen by the executors; that his three daughters, *Sarah Hunt*, *Elizabeth Ellis* and *Ann Hunt*, should receive their parts in money, (to be raised by a sale of the property, by the executors,) and that the remainder should be equally divided among *John*, *Turner*, *Martha* and *Rebecca*, in negroes and other estate, according to such valuation.

The court of chancery, on the 4th of *June*, 1805, decreed, in favour of the plaintiff *Sarah Hunt*, (the suit having abated, as to her husband, by his death,) against *Samuel Richardson*, the surviving executor, that the defendant, out of the goods, &c. in his hands to be administered, do pay unto the plaintiff 235*l.* 14*s.* 3*d.* with interest on 144*l.* 6*s.* 3*d.* (which was one seventh part of the sum at which the whole residuary estate was valued,) from the first of *September*, 1803, till payment, and also the costs of suit; from which decree the defendant appealed.

Wirt and *Wickham*, for the appellant.

Peyton Randolph, for the appellee.

Monday, *April* 22. The judges pronounced their opinions.

Judge BROOKE. In this case, two points are insisted on by the counsel for the appellant: 1st. That all the parties

MARCH, 1811.

Richardson's Executor v. Hunt.

are not before the court; and, 2d. That the testimony of *Elizabeth Ellis* ought not to have been received by the commissioners. On the first point, I think there is no difficulty: the rule is, that all persons concerned in the demand, or who may be affected by the relief prayed, ought to be parties, if within the jurisdiction of the court:(*a*) the legatees of the residuary estate are all concerned in the demand, and may be affected by the extent of the relief granted in this case: depending on the residuary estate for the amount of their legacies, they are all materially concerned in the administration of that fund, and will all be, more or less, affected by the *quantum* which may be accorded by the court to the appellee: as, for example, if there has been a *mala fide* valuation of the property, or an irregular sale of it, so as to lessen its real value to the legatees, they would all be affected by the decree. In the case in 1 *Vesey*, jun.(*b*) relied on by the counsel for the appellee, Lord *Thurlow* decided under the idea that the legacy was a specific legacy, but reserved that point for consideration. The position, that the legacy, in the case under consideration, became a specific legacy, by the valuation and sale of the property, according to the directions of the will, for the payment of the money legacies, begs the question! It is predicated on the position that the valuation and sale were perfectly correct; a position that all the parties interested ought to have an opportunity of questioning, and, of consequence, ought to be in court for that purpose.

(*a*) *Mitford's Pleadings*, p. 39. and the cases there referred to.

(*b*) *Wainwright* v. *Waterman*, 311. 314.

On the second point, I am of opinion that the testimony of *Elizabeth Ellis* was improperly admitted by the commissioner: when asked the question, she professed herself to be interested in the decision of the suit. The policy of the rule of law on this point is, to exclude persons who have a strong bias on their minds from being placed in a situation where their interest may induce

them to depart from the truth; 1 *Peake*, 144. The case of *Fotheringham* v. *Greenwood*,(a) there cited, was a stronger case than the present: in that case the witness felt himself under an honorary engagement to make good a loss, and was held incompetent. I am of opinion the decree must be reversed, and the cause sent back; that proper parties may be made.(1)

(a) 1 *Strange*, 129.

Judges ROANE and FLEMING assented.

The decree was therefore reversed, and the cause sent back for all the legatees to be made parties, and direction was given that, on the hearing of the cause, the deposition of *Elizabeth Ellis* be not read in evidence; she being an interested witness.

(1) Note. According to the authorities cited in argument, the distinction, as to parties, seems to be that a specific legatee may sue the executor without making the other legatees parties; because, as *Wickham* observed, it is presumed that the executor has assets to pay legacies, unless he make the objection that he has not: but, in a suit by a residuary legatee, all the co-legatees must be parties; to make an end of the subject, and prevent multiplicity of suits. See 3 *Bro.* 365. *Parsons* v. *Nevil. Ibid.* 229. *Sherrett* v. *Birch. Wyatt's Prac. Reg.* 302. 2 *Ch. Cases*, 124. 1 *Ves.* jun. 311. 315. *Coop. Eq.* p. 39.

Cooke *against* Piles.

Thursday, April 4th.

Where a complainant is appellant from a superior court of chancery, the court of appeals has no jurisdiction, unless the subject in controversy be a freehold or franchise, or amount to one hundred and fifty dollars, exclusive of all costs, incident to the original judgment, or arising from injunctions, or appeals, subsequent thereto.

IN this case a judgment at law in the county court of *Fairfax*, was obtained by *Piles* against *Cooke* for ninety-nine dollars, and costs of suit; to which an injunction was granted by the same court, but afterwards dissolved, on a regular hearing, and the complainant decreed to pay the costs. The bill had stated, *inter alia*, that a forth-