REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

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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.

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PER CUR. The deed of trust from Hammond to Lindsey, of March the 28th, 1774, comprehending a security for the £225 mentioned in the agreement of October 27th, 1770, between Isbel, Jameson and Hammond, was a complete performance of the condition mentioned in the said agreement on the part of Hammond; and, as such, appears to have been accepted by Lindsey, as agent for Buchanans, Hastie & Co. Therefore, although Hammond, whilst the land remained in his possession, might hold it chargeable with any accidental deficiency in the new security, more especially if that deficiency was occasioned by his own fraudulent conduct: Nevertheless, as Lea was afterwards a fair purchaser of the [190] land, without other notice than what appeared from the several papers, which testified that the condition was performed, and the land exonerated; and this view of the papers confirmed by the proceedings of Buchanans, Hastie & Co. upon the attachment in Charlotte County Court: He, and the appellants under him, have superior equity to the appellees; and a right to have the agreement of Jameson specifically performed by a release of the legal title claimed under Isbel's deed of trust. Consequently, the decree of the High Court of Chancery is to be reversed with costs; and a decree entered for a release of all right to the land, under the deed from Isbel to Jameson.

COUNTZ *v.* GEIGER.

Monday, October 30, 1797.

If a *feme sole* devisee, having a right to lands in Lord Fairfax's boundaries, marry, and her husband, by force and menaces, gain her consent, that a patent should issue in his own name, her heir at law shall have a conveyance.

A *feme covert* must relinquish her equitable, as well as legal right, on a privy examination, separately and apart from her husband. Her answer, sworn to by her, is not sufficient to have that effect.

If an answer in Chancery be contradicted in several instances, it destroys its weight.

Lord Fairfax had a right to establish rules for issuing grants, and applicants were bound to conform to them.

This was an appeal from a decree of the High Court of Chancery, affirming a decree of the County Court upon the following case. The bill stated, that Geiger, the father of the plaintiff, being possessed of lands, for which he had obtained

a warrant from the proprietor's office in the Northern Neck, and had improved and cultivated, devised them to his wife, who was the plaintiff's mother, and to whom the plaintiff was heir at law. That Countz afterwards intermarried with the widow, had the land surveyed in the testator's name, (who had omitted it during his own life,) and then having forced the mother by ill usage to consent that the patent should issue in the name of Countz, and to make affidavit thereof, did afterwards obtain such patent in his own name from the proprietor's office accordingly; and that the mother has since died intes-
[191] tate: the bill, therefore, prayed that so much of the lands as were in the defendant's possession should be conveyed to him as heir at law, and compensation for that which had been sold by him, with an account of the rents and profits of that in possession.

The answer of Countz denied the improvements; stated that Geiger, the testator, had not pursued his right properly, and charged, that he had forfeited it by neglect. It averred, that he (Countz) had obtained the patent fairly, admitted the affidavit of his wife, but denied the force and ill usage in order to obtain it. A deposition mentions, that the deponent had seen Countz abuse his wife, but does not state the time when. The County Court decreed for the plaintiff. The defendant appealed to the High Court of Chancery, where the decree was affirmed; from which decree of affirmance, Countz appealed to this Court.

WILLIAMS, for the appellant.

Geiger died without carrying the survey into effect; and having devised the lands to his wife, she afterwards intermarried with Countz, and consented that the patent should issue in the name of Countz. All this was fair, and the circumstance of the affidavit, which is not proved to have been obtained with force or ill usage, does not affect the case.

But, upon another ground, Countz has clearly a right to retain the land. For, the testator not having pursued his right within proper time, *i. e.* within two years, had forfeited his title, which was re-vested in Lord Fairfax, who might grant it anew, according to the decision of this Court in *Curry* v. *Burns*, 2 Wash. 121.

Taking it, though, under the idea of a pursuit of Geiger's old title, still the plaintiff had no claim. For, if Lord Fairfax established rules in his office, for the conveyance of the rights of a *feme covert*, there is no reason why they should not be observed.

Under any point of view, then, the decree was wrong, and ought to be reversed.

PENDLETON, President, after stating the case, delivered the resolution of the Court to the following effect: [192]

The principles formerly established in *Curry* v. *Burns*, are well recollected and approved of by the Court. They were, that the proprietor had a right to establish such rules for granting his lands as he pleased, to which, those applying for grants were bound to conform. That having published those rules, by sticking them up in his public office, all applicants were bound to take notice of, and comply with them, without particular notice to each individual. So, that if the lands were forfeited, he might grant them to another; and, if he did so, the grant would be good, provided there was no fraud or deception in the person obtaining the second grant. But, if before any proceeding towards a second grant, the first defaulter applied, and performed, or offered to perform, what was required, he saved the forfeiture and had a right to the grant; agreeably to the spirit of the act relative to petitions for lapsed land, which saves the forfeiture, if the condition is performed at any time before the petition, though not within that prescribed by law.

These were, and are, the general governing principles: How they are to apply, depends upon the particular circumstances of each case. We do not, therefore, enquire how they were applied in former instances unlike the present, but consider how they ought to operate upon the present decision.

Exclusive of the wife's affidavit, her consent is only proved by the answer. But that is contradicted by the evidence in several important points; and, therefore, is deprived of that weight which is allowed to answers by the rules of a Court of Equity. And, it is not credible, that a wife, whose husband had long been in the habit of ill-using her, even so far as to proceed to correction, would voluntarily go to a Justice of the Peace, and swear that she was desirous of transferring her estate to him, to the prejudice of her own son.

The proprietor, it is apparent, did not mean to exercise his power of granting away this woman's lands, for the neglect in complying with the rules of his office; on [193] the contrary, he meant to preserve her right, and was deceived into making the grant by the oath, as an evidence of her consent.

But was that proper evidence?

A *feme covert* can't pass her legal title without a deed, accompanied by a privy examination, to evince that she does

not do it under her husband's influence. And, I presume, a Court of Equity would require some equivalent testimony of her freedom of mind, in parting with her equitable title; which proof is not afforded by the oath. For any thing which appears, she might be dragged before the justice, and the oath administered in the husband's presence, under the influence of some signal terror before communicated and kept up. For, it does not appear that the oath was administered apart from him, or that any enquiry was privily made of her, as to her freedom of mind in what she was doing.

The novelty of the proceeding gives suspicion of fraud, which is, indeed, apparent through the whole transaction. And, the Courts below, considering him as a trustee of the legal estate, for the use of the fair and conscientious *owner*, have rightly decreed a conveyance, and made him answerable for the money he received from the other entry. An objection is stated in the petition, that he only calls himself heir of the father, but not of the mother. He says, however, that he is son and heir of the father, and *son* of the mother, to whom the lands would have descended, but for the fraudulent deed, which is sufficient; especially, as it is not questioned by the answer.

GASKINS *v.* THE COMMONWEALTH.

[194]

Saturday, October 21, 1797.

No writ of error lies to a judgment of the General Court, after five years from the rendition thereof.

Interest is not due upon the damages, until after judgment, against a public collector.

These were writs of *supersedeas* to four judgments of the General Court, two in the year 1786, and the other two in the year 1788, upon the following cases: Gaskins was sheriff of Northumberland, for the year 1785, and did not pay the amount of the taxes due into the treasury, within the time prescribed by law. For default of which, motions were made, and the judgments aforesaid obtained on behalf of the Commonwealth, for the principal and damages with interest on both, from a date anterior to the rendition of the judgments. The error assigned was, "that interest was directed to be computed on the whole amount of the taxes due, and the dam-