REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

RICHMOND:
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LEE'S *infants by their next friend* v. BRAXTON. 1805. *April.*

If a decree be made against infants without an answer, it is erroneous.
So, if a day to shew cause be not given.
If a bill of review, shewing just cause, be offered, and refused by the chancellor, an appeal lies to the court of appeals.

Elizabeth Braxton filed a bill against several persons in the court of chancery, to recover dower in her husband's lands; and obtained a decree against the appellants, without any plea or answer in their behalf, although their mother had been appointed guardian *ad litem*. A bill to review that decree was offered on the part of the appellants, by *Dilliard*, as their next friend: 1. Because the yearly profits of the lands were rated too high. 2. Because *Ambrose Lee*, their ancestor, had purchased the lands before the intermarriage of *Braxton* and his wife, a fact discovered since the decree. 3. That the appellants were infants, undefended, and not to be prejudiced by the decree. The bill was sworn to by *Dilliard*. The chancellor received the bill as to the profits; but refused it as to the other allegations. And the infants, by *Dilliard*, appealed to the court of appeals.

Call, for the appellants. The purchase having been made before the marriage took effect, the appellee was not entitled to dower, although the deed was not executed until after the coverture. For if it be true that she could have recovered at law, yet, as she came into a court of equity, she was liable to the rebutting equity arising from the prior contract; especially, as a court of equity always considers that as actually done, which ought to be done. The bill of review was proper; for the appellants were infants not defended: and the court of chancery ought to have allowed them a day. But the omission to do so will not render their situation worse. Besides, the bill states, that the prior purchase was discovered, since the decree was pronounced.

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Warden, contra. The affidavit by the next friend is only that he believes, and not that he knows the facts stated in the bill to be true. Besides, the facts are not sufficiently proved: For *Woodroof* does not say, that he was a witness to the bargain; and *Frances Tucker* was interested, as she was entitled to dower in her husband's lands.

Randolph, in reply. The purchase and possession of *Ambrose Lee*, was prior to the marriage. *Frances Tucker* was not interested; for her husband died before the conveyance; and, at that time, a wife was not dowable of a trust. Besides, she was barred by the statute of limitations. The appellee was affected by the presumptive notice arising from *Ambrose Lee's* possession: and her claim was liable to be rebutted in equity. The bill of review was proper, as the facts were recently discovered; and the chancellor ought to have allowed a day to shew cause against the decree. The affidavit was sufficient; otherwise infants could never have the benefit of a bill of review; for a guardian, or next friend, could seldom make a more positive affidavit.

TUCKER, Judge. Does not the act of assembly which forbids the parol to demur, make some difference?

Randolph. No; for that only says the proceedings shall not stop: and it does not hinder the court of chancery from reserving to the infant a right to shew cause against the decree at a future day.

Warden, contra. *Frances Tucker* was interested; for she had a right to dower if the purchase was actually made before the marriage of the appellee. As *Ambrose Lee* was steward for col. *Braxton*, the appellee might well suppose that he was living on the land as steward, and therefore, is not affected by any presumption arising from his possession.

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Call. The act concerning the demurrer of the parol ought to have no effect. For, regularly, an infant's answer ought not to go into the circumstances of his case; but should commit him entirely to the protection of the court. Which, therefore, ought to allow him a day to exhibit his title, and shew cause against the decree. Besides, it appears that the person assigned guardian to defend the suit in the present case, would not appear, but suffered the decree to pass by default. It would, therefore, be contrary to every principle of justice, that the infants should be estopped by the decree.

Cur. adv. vult.

The court (absent *Fleming*, judge,) were unanimously of opinion, that the oath to the bill by the next friend of the infants was sufficient: That the decree being absolute against the infants, without any day given them to shew cause against it, was one of the cases in which a bill of review might be brought without leave of the court, *Mitford*, 78: and that the court ought to have admitted the bill of review *in toto*, and permitted the plaintiffs to proceed in the usual way to establish the allegations of it. The order refusing to receive the bill was therefore reversed; and the cause sent back to the court of chancery to be proceeded in accordingly.