REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME II.

BY WILLIAM MUNFORD.

NEWYORK:

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1814.

same in his hands, (which he refers to in his said answer as exhibits, but does not appear to have produced them,) he ought to produce such accounts and receipts, or to answer to interrogatories respecting them, if required so to do.

"And this court, approving of so much of the decree in the cross suit as directs that the appellant shall give bond to contribute towards the discharge of the testator *Joseph Williams's* debts, affirmeth the same; and, reversing so much of both decrees as is not approved of by this decree, the suits are remanded to the said superior court of chancery to be proceeded in, according to the principles of this decree."

6. A legatee is not entitled to a decree, but on the terms of giving bond and security (if demanded by the executor) to refund, in case it be needful, for the payment of debts.

Roberts's Widow and Heirs *against* Stanton.

Argued Wednesday May 30th, 1810.

IN *November*, 1797, *William Stanton* filed his bill in the superior court of chancery for the *Richmond* district,

1. It is error to enter a decree against *infant* defendants, without assigning them a guardian *ad litem*; and though the infancy did not appear in the original proceedings, yet, if it be alleged in a petition for a rehearing, (the decree being interlocutory,) a guardian *ad litem* ought to be appointed.

2. It is not error in a court of equity to direct *commissioners* instead of a *jury*, to state and report an account of the profits of *land*.

3. Rents and profits of land, the possession of which was unlawfully withheld by the ancestor in his lifetime, and by his heirs after his death, ought not to be charged against his *executors* and *heirs jointly*, but apportioned among them according to their respective interests.

4. As far as circumstances will permit, a court of equity will supply any defect in the execution of a power given by a will, to executors or trustees, to sell lands for payment of debts or legacies. A conveyance, therefore, by *one* executor or trustee *only*, (instead of *three*,) but in all other respects conformable to the intention of the testator in creating the trust, will be supported in favour of a purchaser for a *valuable consideration*; and this, notwithstanding it be provided by the will, that if one or more of the executors, or trustees, should die before the object of the trust was accomplished, others should be appointed, by the survivors, jointly with them to finish the execution of the trust.

5. A deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to its provisions, and there is no apparent erasure or alteration.

6. A *patent, though not registered,* is good *in equity* against a purchaser *having notice.* And *quære*, is it not also good *at law?*

7. In such case, information of the existence of the patent, by neighbourhood report, and from a person declaring he had seen it, together with knowledge of possession and cultivation by tenants of the patentee, is *sufficient notice*, to bar the laying a warrant upon the land *as waste and unappropriated.*

8. *Quære*, is a patent, *not registered*, good, *either at law, or in equity*, against a purchaser *without notice*; no proof appearing of *visible* possession, or cultivation, by the patentee in person, or by his tenants?

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against *Wilson Miles Cary*, executor of *George William Fairfax*, deceased, *Battaile Muse* and *Joseph Roberts*, defendants; charging, in effect, (among other things,) a purchase by the plaintiff, in or about the year 1791, of a tract of land, in *Culpeper* county, supposed to belong to the estate of the said *Fairfax*, which, under his will, was left to be sold by his executors; that *Cary* was the only acting executor in this country, and *Muse*, being his agent with unlimited powers, had sold the land and procured a deed to be made by *Cary* only; upon which the plaintiff gave bond and security for the purchase-money; that *Roberts*, under a pretence that *Fairfax's* title was not good, (his grant from Lord *Fairfax*, late proprietor of the *Northern Neck*, dated in 1747, having not been recorded in the proprietor's office,) had entered and surveyed the same land as waste and unappropriated, obtained a grant from the commonwealth, and taken possession; that the plaintiff had frequently applied to the said *Muse* for *Fairfax's* grant for the purpose of instituting a suit against *Roberts*, but had never been able to get it, *Muse* always evading compliance with his request; that he had also often proposed to vacate the contract, upon discovering the original title to the land was so defective, and that he could not obtain possession thereof, or the means of prosecuting a suit to try the title; which proposals were refused; that suit had been brought in the district court of *Dumfries*, and judgment obtained against him upon his bond for the purchase-money. He therefore prayed an injunction to stay proceedings on that judgment; a discovery and delivery of the title papers in the hands of *Cary* and *Muse*; that *Roberts* should answer particularly, as to his knowledge of *Fairfax's* patent, before his own entry; and be decreed to render up his grant to be cancelled; that by a decree of the court the plaintiff's title to the land might be perfected, and he quietly possessed thereof, or the said judgment perpetually enjoined, &c.

Wilson Miles Cary, by his answer, admitted that he was the executor of *George William Fairfax* in the bill named; that, by virtue of powers vested in him by the will, he empowered *Battaile Muse* to sell the land for the best price that could be obtained; that he had no doubt that the same was purchased by the plaintiff, to whom he executed a conveyance; but, as to the pretended objections to the title, he was an entire stranger.

The separate answer of *Battaile Muse* admitted the sale by him as agent; declared that no part of the land was disputed at that time; that *Stanton*, at the time he received his deed, was fully informed as to the title in every respect, and appeared contented as to the survey, only observing that, in case the original deed was lost, there might be a difficulty in keeping the title, or defending the land against state warrants; whereupon, he agreed to take *Ferdinando Fairfax's* bond of indemnity, which was given; that he several times saw the deed granted by Lord FAIRFAX to *G. W. Fairfax*, and was informed that the patent was not recorded, owing to neglect in the office, as the pages called for were left blank.

Roberts's answer admitted that he obtained a grant for a tract of land which the complainant claimed under his purchase; that his patent issued, in 1795, for 1,732 acres, (less by 574 acres than *Stanton* purchased,) which he entered under an impression that the same was vacant, and never before granted; that, afterwards, he heard that *Fairfax* had a patent for the land, which was in the hands of his executors; and that his executors had made an attempt to procure an act of assembly to cure some defect in it, but failed; that the defendant then insisted on *Stanton's* entering a *caveat* to his grant; but this he declined.

General replications were filed to the answers; and, in *December*, 1799, the cause was set for hearing on motion of the defendant *W. M. Cary*. In *June*, 1801, the suit abated, as to *Joseph Roberts*, by his death. Subpœnas

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to revive were awarded against his widow and executrix, and eight children his heirs at law; which being returned executed, the cause came on to be heard, *September* 27, 1804, on the bills, answers and exhibits; whereupon the court decreed that the injunction be dissolved; that the defendants, *Sarah Roberts*, &c. resign to the plaintiff possession of the land in question, "and account for the profits from the time the said *Joseph Roberts* came to the possession thereof;" to state and report which account certain commissioners were appointed.

From this decree an appeal was prayed by counsel, on behalf of the representatives of *Roberts*, and allowed; but, during the same term, a petition for a rehearing, in nature of a bill of review, (for it is called a *bill*,) was presented to the chancellor; stating, among other things, that many of them were *infants*, and incapable of conducting their cause; and that, owing to circumstances stated in the affidavit of *John Strode*, which is annexed to, and prayed to be taken as part of their bill, they were completely surprised at the trial. The court (observing that the former decree was interlocutory) awarded commissions to the parties for taking examinations of witnesses, to be read at the final hearing; saving to the plaintiff exceptions to that order. Commissions were accordingly issued, and several depositions taken, in the presence of *John Strode*, who is styled "agent for the representatives and heirs of *Joseph Roberts*;" and, at the final hearing, (*March* 26, 1805,) the court affirmed its former decree. But it nowhere appears in the record which of the children of *Roberts* (if any) were infants at the time of the decree; nor is there any person named, either as their testamentary, or statutory guardian, in the proceedings; nor was any guardian, *ad litem*, appointed by the court to defend them; nor is there any day given them, after they come of age, to show cause against the decree.

The defendants, representatives of *Roberts*, appealed to this court.

The general effect of the exhibits and depositions sufficiently appears in the following opinions, pronounced on *Monday*, *April* 1, 1811. But it is proper to mention that *Roberts* was proved, by sundry depositions, to have been informed, (before he made his entry,) by neighbourhood report, and a person, though not a party interested in the title,) who told him he had seen it, of the existence of *Fairfax's* patent. Many years possession and cultivation by tenants of the patentee was also proved, which must have been known to *Roberts*, who lived in the neighbourhood.

Botts, for the appellants.

Williams and *Warden*, for the appellee.

Judge TUCKER, after stating the case. The suggestion in the bill of review, that the defendants in the original suit were infants, and incapable of defending their cause judicially, was, I conceive, a sufficient ground for the court to have inquired into that fact; and, if they had no guardian already appointed, a guardian, *ad litem*, ought to have been assigned them by the court. I therefore think the cause ought to be remanded to the court of chancery, that a guardian may be there assigned to the infants, (if such there are now,) and such further proceedings had, as may be thought necessary and proper for their full defence, as in the case of *Lees* v. *Braxton*.(*a*)

(*a*) MS. *April*, 17. 1805.

If it be necessary at this time to say any thing on the merits of this cause, I would observe a circumstance not noticed by the counsel in the cause, which occurs upon inspection of Lord *Fairfax's* grant or patent to *George W. Fairfax*. From some cause or other, it hath an impossible date, for it bears date on the eleventh day of *Decem-*

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ber, in the thirty-third year of the reign of *George* II. *anno domini* one thousand seven hundred and forty-seven. This latter year corresponds with the twenty-first year of that king's reign, and not with the thirty-third. The patent is alleged not to have been recorded in Lord *Fairfax's* office, but that there is a blank leaf referred to at the foot of the patent, as the place of registration. On this circumstance great stress was laid in the argument, as creating a presumption of fraud, in respect to this patent. The two circumstances of the date, and of the omission to record it, make it proper, in my opinion, (if the chancellor should entertain any doubt upon the subject,) that a jury should be empannelled at the bar of the court of chancery, to try an issue, to be made up between the parties, whether this grant or patent, be the deed of Lord *Fairfax*, or not. Perhaps it may be found to have been recorded in the record books corresponding with the 33d year of *George* II.

With regard to the exception taken by a member of the court to the conveyance from *Wilson Miles Cary* to *Stanton*, the complainant in the original bill; (he being only one of three trustees, named in the will of *George W. Fairfax*; the other two (though long since dead) not appearing by the record to have renounced the trust, nor, indeed, to be dead;) I conceive that a court of equity ought to supply any defect in the execution of the power given by the will, as far as circumstances will permit; it not being controverted that the conveyance to *Stanton* was for a good and valuable consideration, and (in all other respects) conformable to the intention of the testator, in creating the trust.(*a*) For this purpose, I think, the proper course will be to direct the residuary devisee of the real estate of *George W. Fairfax*, in *Virginia*, to be made a party defendant in this suit, to show cause, if any he can, against the validity of that conveyance.

(*a*) 1 *Fonb.* c. 1. s. 8. note (*u*), and c. 4. s. 25. note (*h*); and *Powell on Powers*, p. 160. 163. 165. 170. 187. 204. and the cases there referred to.

Judge ROANE. In this case several objections are

taken on the part of the appellants; some of which go to the merits of the case, and others to the form of the proceedings.

As to the merits, it is first objected that the evidence of the grant to *George William Fairfax* was inadmissible, and not sufficient; the witness having never seen Lord *Fairfax* write, and only judging of his signature by comparison of the hand-writing. It is unnecessary to go into the general doctrine upon this point, as it is held,(*a*) that a deed of above thirty years' standing requires no further proof of its execution than the bare production, where the possession has gone according to the provisions thereof, and there is no apparent erasure or alteration upon the face of it. In the case before us, this possession is proved, to my satisfaction, by several witnesses, to have existed in favour of *George William Fairfax*, under whom the appellee claims.

(*a*) *Peake on Ev.* 110. *Bull. N. P.* 256.

2dly. It is said that, if the unregistered patent of *George William Fairfax* can prevail against the patent of *Roberts*, the question is purely legal, and cannot be relieved on by a court of equity. The answer is, on the contrary, that, admitting that *George William Fairfax's* deed cannot avail him at law for want of registration, it must avail him in equity, on the ground, which is fully proved, that *Roberts* knew of the existence of that patent, and of the possession of *George William Fairfax* by his tenants, before he made his entry; that, therefore, a registration was, as to him, unnecessary, and he proceeded, consequently, against conscience, to locate granted land which he knew belonged to another.(1)

(1) Note by the Reporter. As to this point, *Botts* contended that *Roberts* had not such knowledge of *Fairfax*'s patent as would bind him; notice not having been given, *by actually showing him the patent*, nor *by a party interested in the title*, nor *in the course of his proceeding* to get his patent from the commonwealth; all which circumstances must concur, to make the notice obligatory; in support of which position, he cited *Sugden's Law of Vendors*, p. 490. 1 *Vern.* 286. 3 *Ves.* jun. 478. *Jolland* v. *Stainbridge*. 2 *Eq. Cas. Abr.* 682. 3 *Atk.* 294. 392. 2 *Atk.* 242. 275. and 2 *Vesey*, 368.

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3dly. It is said that this omission to register the deed arose from the act of *George William Fairfax*, who himself was a principal clerk in Lord *Fairfax's* office; that it was a fraud in him, and, therefore, the patent should not avail him. The answer is that it is not proved that *George William Fairfax* was the clerk. It is only stated (by *D. Field*) that *William Fairfax*, who was probably the father of *George William Fairfax*, was the principal clerk about the time of the emanation of the patent in question.

4thly. It is objected that the sale by *Cary* alone, without the concurrence of the other executors, (or, to this purpose, trustees,) was not valid.

As to this point, the doctrine seems to be that there is a distinction between powers given to executors in their official characters, and to *A.*, *B.* and *C.*, who are also made executors; that, in the first case, all the executors who qualify answer the description, and may execute the power; but that, in the last case, a part of them cannot act, because a personal confidence was reposed in them, only in conjunction with the others. This point seems to have been taken by counsel, *arguendo*, in 1 *Wash.* 340. *Watson* v. *Alexander;* and in the case of *Johnson* v. *Thomson*,(*b*) it was decided in this court, that a sale by one executor under a power in a will was not good; it not being found that the other executor was dead or refused to act.

(*b*) *Fall Term*, 1804, *Call's* MS.

In the case before us, the power to sell is granted, it is

Williams, contra, insisted that *Roberts's* knowledge, before he made his entry, of the *existence of Fairfax's* patent, and of the possession by his tenants for many years, was amply sufficient on every principle. Besides, the doctrines relative to notice to purchasers in general, do not apply to the case of a person *taking up land*, which, at the time, is *settled and granted;* for he is not authorized to lay his warrant on any land *of that description*.

It was contended, too, by *Williams* and *Warden*, that a *patentee* is not responsible for the clerk's or register's neglecting to record the *patent*, in which respect it differs from a *common deed*, the holder of which is bound to have it recorded.

true, in the original will of *George William Fairfax*, to his executors, and then he goes on to name seven persons as his executors; but in his codicil the testator revokes and makes void the devise last mentioned, and devises the same land to *George Washington*, *George Nicholas*, and *Wilson Miles Cary*, by name, as trustees to sell, &c. and also appointed these three gentlemen his executors in the *United States*. *Wilson Miles Cary* only conveyed the land in question, and only qualified as executor in *America*; and it is not shown that the others were dead, or had refused to take upon them the execution of the will of the testator. If, therefore, Mr. *Cary* had acted in this case merely under a general power to executors to sell, it would be at least doubtful whether, under the decision in *Johnson* v. *Thomson*, it ought not at least to have been shown that the other executors were dead, or had refused to act; but, in this case, Mr. *Cary* was emphatically one of the trustees under the codicil of *George William Fairfax*. As to trustees, it is said, 2 *Fonb.* 184. that "there is a difference between them and executors; for that trustees have all equal power, interest and authority, and cannot act separately, as executors may, but must join, both in conveyances and receipts," &c. On the general principle, therefore, the law is clear against the validity of this conveyance; and that principle is greatly strengthened, in the present case, by the consideration that the testator has taken unusual pains in his codicil to provide, that, if one or more of his trustees should die before the trust is fully accomplished, then others should be appointed by the survivors, who jointly with them should finish the execution of the trust. This, then, is emphatically a case in which one of the trustees only was not competent to act; and I am sorry to be obliged to be of opinion to reverse the decree on this ground, as the merits seem clearly, in other respects, with the appellee.

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As to the power of a court of chancery to aid a defective execution of a power; while that is readily admitted, I do not think it extends to a case like the present, where there is a want of competency in the person acting, to execute the power, except in conjunction with others.

Some minor objections were made, which I will now briefly notice; though my opinion on the point just mentioned renders it unnecessary.

It is objected that the decree is erroneous in decreeing the heirs and widow of *Roberts* to account for the profits of the land in the lifetime of the husband and ancestor. When it is recollected that his widow stood also in the relation of an executrix to him, I should incline to understand this decree distributively, and that each of the appellants are decreed *pro ut* their several and respective characters.

Again, it is objected that the decree is erroneous in directing commissioners, instead of a jury, to state an account of the profits of the land, and report it to the court.

It is true, that in the case of *Eustace* v. *Gaskins*, 1 *Wash.* 188. it is said that the profits of the land, being in the nature of damages, should have been ascertained by a jury, and not by commissioners. But in *Kennedy* v. *Baylor*, (*ibid.* 162.) a decree of the court of chancery, affirming one of the county court of *Berkeley*, was affirmed by this court, although it was objected by counsel, and admitted to be the fact in the report of the case, that damage and injury done to the land while in the possession of the plaintiff was valued by commissioners instead of a jury. This is a much stronger case, against the solidity of the objection now taken, than either the case of *Eustace* v. *Gaskins*, or the case now before us: and, upon the whole, I am inclined to think that, if the general practice and usage of the court does not in general go the length of the principle decided in *Kennedy*

v. *Baylor*, (and, I think, ought not,) yet that that usage and practice is in conflict with the principle decided in *Eustace* v. *Gaskins :* such practice, too, is attended with great convenience and utility. I can see no difference, as to this point, between the profits of land, and of negroes ; and the profits of the latter are always estimated, and reported upon, by commissioners, and not by a jury.

As to what is said respecting the proceeding against such of these defendants as are infants, without appointing them a guardian; I concur that it was irregular. Had their interests been attended to in this particular, the whole testimony and merits of the case might have been varied in their favour.

On these grounds, I am of opinion that the decree should be reversed, and the bill dismissed; but without prejudice to any other suit which the appellee may be advised to institute to perfect his title ; as his case is probably a hard one, and probably the consideration he paid has enured to the benefit of *George William Fairfax's* representatives.

Judge FLEMING. In giving my opinion in this case, I must premise that, with respect to the patent of *George W. Fairfax* bearing an impossible date, to wit, the 33d year of the reign of *Geo.* II. *anno domini* 1747, I think it immaterial, as the date with respect to the day of month and year of the *christian æra* is correct.

A number of authorities have been cited to show that, although equity will not supply the non-execution of a power, yet it will supply any defect in the execution of a power, provided the same be for a good or valuable consideration. In the case before us, the trust or power was imperfectly executed; the conveyance of the land in question having been executed by one trustee only, instead of three; but it being for a valuable consideration, a court of equity may, I conceive, with propriety, supply the defect; so far, at least, as respects the appellants,

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who (we all agree) have no right to the land in controversy. The title, then, must either be in the appellee *Stanton*, or in the residuary legatees of *George W. Fairfax;* and, by making them parties to the suit, neither injustice nor inconvenience can, in my apprehension, arise to any person or persons interested in the decision of the cause.

On these grounds, a majority of the court have agreed that the following decree shall be entered:

"The court is of opinion that the said decrees are erroneous, in this, that it appears, by the bill for the rehearing of the cause, that some of the defendants, representatives of the said *Joseph Roberts*, deceased, were infants, and against whom the said decree, of the twenty-seventh day of *September*, 1804, was final as to the merits, and no guardian *ad litem* had been appointed to defend them: therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And it is ordered that the cause be remanded to the said court of chancery, that a guardian *ad litem* may be assigned to such of the defendants as may now appear to be infants; and that the residuary legatee, or legatees, under the will of the said *George W. Fairfax*, (in the proceedings mentioned,) of his real estate in *Virginia*, be made a party, or parties defendants, to show cause, if any they can, against the validity of the conveyance executed by the defendant *William M. Cary*, to the said *William Stanton*, the complainant in the original bill, for the lands which are the subject of this controversy; and that payment of the rents and profits of the said lands be apportioned among the widow and children of the said *Joseph Roberts*, according to their respective interests claimed therein; provided the right to the land in controversy be finally decreed against them, in favour of the appellee *William Stanton.*"