REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

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M,DCC,XCIX.

To The PUBLIC.

THE caſe of *Maze* and *Hamilton*, with one other, I had intended to publiſh in an appendix to this volume. But the manuſcript having been unfortunately depoſited in a houſe which was lately conſumed by fire. I have great reaſon to apprehend that it was either burnt, or by ſome other means deſtroyed.

PAGE.	LINE.	
11	41	*For* hinder *read* hinders.
54	26	*Inſert* by *before the words* the owner.
66	4	*Strike out the comma after* mother *and put a period.*
—	12	*Strike out the ſemicolon after* it *and put a comma.*
68	5	*For* empowed *read* empowered.
69	36	*For* 1 *read* 3.
70	17	*For* appellant *read* appellee.
71	2 & 3	*For* appellant *read* appellee.
87	8	*After* teſtimony *inſert* of.
98	17	*After* regarded *inſert* it.
99	31	*After* rule, *ſtrike out the mark of interrogation and put a period.*
106	12	*For* lands *read* land.
122	44	*For* forfeiled *read* forfeited.
139	7 & 14	*For* ſecurity *read* ſurety.
140	4	*For* principal *read* plinciple.
163	32	*Before* ſuperior *read* the.
182	21	*For* laws *read* law.
206	4	*After* it *inſert* to.
—	21	*For* principal *read* principle.
209	14	*For* determination *read* termination.
212	11	*After* but *inſert* where.
224	37	*After* idea *put a ſemicolon.*
225	40	*After* that *inſert* of.
227	3	*Strike out* not.
—	34	*After* endorſer, *ſtrike out a period and put a comma, after* 443 *ſtrike out the comma and put a period.*
242	14	*Strike out the ſemicolon after* fault.
243	24	*After* not *inſert* an.
244	41	*Strike out the ſemicolon after* declarations.
249	2	*For* is *read* as.
255	10	*For* prices *read* price.
—	12	*After* Johnſon, *ſtrike out the ſemicolon and put a comma.*
261	19	*Strike out the comma after the word* Stockdell, *and put a period.*
263	37	*For* law *read* all.
266	25	*For* points *read* point.
270	27	*Strike out the comma & put a period after the word* plea.
278	9	*For* 2 *read* 1.
288	40	*For* ſurvices *read* ſervices.
289	1	*For* ſtronger *read* ſtrong.
—	14	*For* centinental *read* continental.

39 *For*

Page	Line	
289	39	*For* colluſion *read* colliſion.
292	22	*For* deciſſion *read* deciſion.
——	30	*Strike out* of *after the word General.*
——	31	*For* Hooker *read* Hocker.
293	19	*After the word* intended *inſert*)
——	21	*For* legal *read* regal.
295	23	*After* Carolina, *put a comma inſtead of a ſemicolon, and ſtrike out the ſemicolon after the word* loci.
——	38	*For* deſribed *read* deſcribed.
296	8	*Strike out the comma after* bills.
——	35	*For* there *read* theſe.
300	11	*For* legal *read* regal.
301	26	*After* damages, *put a period.*
302	8	*For* is due *read* iſſue.
——	22	*After* verdict *inſert* ought.

executors are, whether the covenant reſpect real eſtate, or be purely perſonal. I conſider this point to be ſo plain, that it is unneceſſary to cite authorities to prove it.

THE COURT affirmed the judgment, without aſſigning reaſons.

HARVEY & WIFE, & others, *againſt* BORDEN.

BENJAMIN Borden being ſeiſed of a conſiderable real eſtate, by his will deviſes as follows, viz: "My will is, that "all my lands and eſtates in *New Jerſey* be ſold, and all my "lands on *Bulſkin*, *Smith's Creek*, and *North Shenando*, and "all my entries every where, and all my lands on the waters "of *James River*, ſhould be ſold, *excepting* 5,000 *acres of land* "*that is all good*, I give to my five daughters [by name] "that is 1000 acres of good land a piece to every one "of the ſaid five *acres*, (meaning daughters) above men-"tioned, to them and their heirs and aſſigns for ever." He then directs all the reſt of his lands to be ſold as aforeſaid, (excepting the tract he then lived on,) and be equally divided between his wife, his three ſons and ſix daughters. He then appoints his three ſons his executors, and empowers them to execute deeds for the lands which he had ſold, and ordered to be ſold. Only two of the executors named in the will, qualified. The teſtator was poſſeſſed of 92,000 acres of land on *James River*, as well as of other tracts on *Catawba*, a branch of the ſame river.

Joſeph Borden the plaintiff in this cauſe, claiming under *James Pritchard* and wife (the latter being one of the five daughters of the teſtator) filed his bill in the High Court of Chancery againſt *Harvey* and his wife (the latter of whom is the heir at law of *Benjamin Borden*, the eldeſt ſon and executor of the ſaid teſtator) for an allottment and conveyance of the 1000 acres deviſed to *Mrs. Pitchard* by the clauſe before mentioned. The bill ſtates that *Benjamin* the younger had purchaſed the ſhares of the other four daughters, and had received a conveyance from *Worthington* the former huſband of the fifth daughter,

(now

(now *Mrs. Pritchard*) under whom the plaintiff claims, but that she was not privily examined as the law directs, in consequence of which his title to her share was invalid.

The answer states that the part to which the daughter, under whom the plaintiff claims was entitled, was set apart by the said *Benjamin Borden* the younger, out of a tract of 20,000 acres on *James River*; that he sold considerable quantities of land to discharge the debts of the testator, and he insists, that if the plaintiff is entitled to the quantity now claimed, it ought to be laid off out of the 20,000 acre tract.

An amended bill was filed for the purpose of making certain persons defendants, who are stated to be in possession of 2,218 acres on *Catawba*, of the best land which belonged to *Benjamin Borden* the elder, under a voluntary conveyance from their mother *Mrs. Harvey*, the female defendant, and heir at law of *Benjamin Borden* the younger, and praying to have the 1000 acres claimed by the plaintiff laid off out of those lands.

The new defendants insist, that the plaintiff ought to have his 1000 acres laid off out of the large tract on *James River*, and not out of the *Catawba* lands, as there was not in the latter tract as much land, as would satisfy the bequest of 5,000 acres, and of course that tract could not have been contemplated by the testator, in the devise to the daughters.

By the report of sundry commissioners, appointed by an order of the Court of Chancery to state the situations, ascertain the quantities, and describe the boundaries of the lands whereof *Benjamin Borden* the elder died seised, and particularly of such parts as had been allotted by *Benjamin* the younger, to any of the daughters of his testator, it appears, that *Benjamin Borden* the testator, at the time of his death, was possessed of sundry tracts on *Catawba*, amongst which was 2,218 acres, reputed to be his best land, and which the commissioners think more nearly answers the description of that devised to his five daughters, than any other.

It does not appear from any part of the record, that the commissioners who took the privy examination of *Mrs Pritchard*, (who with her husband conveyed the land in question to the plaintiff,) were *justices of the peace*; they are not stated to be such in the commission, nor in the certificate. The deed from *Mrs. Worthington*, (now *Mrs. Pritchard*) and her husband to *Benjamin Borden* the younger, and which for want of her privy examination was void as to her, describes the 1000 acres thereby intended to be conveyed, to be on *one of the branches of James River*.

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The decree of the High Court of Chancery was as follows, viz: "That the defendants or such of them as are in possession of 1000 acres of land herein after directed to be assigned to the plaintiff do resign the said possession, and convey the said 1000 acres of land to the plaintiff at his costs, and pay to him so much of the profits of the said land since the commencement of this suit as shall exceed (if they do exceed) the value of the permanent improvements on the said land made by *Benjamin Borden* the younger, and by the defendants;" and commissioners were appointed to assign to the plaintiff one thousand acres of the land mentioned in the reports, to which *Benjamin Borden* the elder was entitled, and which is in possession of the defendants, or some of them, causing the said 1000 acres of land to be laid off by the county surveyor, 'in one entire parcel and in a convenient form; and to examine, state and settle the said account of profits and to estimate the said permanent improvements.

From this decree the defendants appealed.

MARSHALL for the appellant. The first question in this cause is, whether the appellee has any right at all? Secondly, whether the land decreed, best answers the intention of the testator?

1st, The act of 1748 *Ch.* 1, § 6, requires the commission for the privy examination of a *feme covert*, to be directed to two justices of the peace, which this is not. It cannot be denied, but that if the persons to whom the commission was directed were not justices of the peace, the deed could not pass the estate of *Mrs. Pritchard*, and therefore, the Chancellor has presumed, that that they were such as the law required. I cannot discover any ground upon which to raise such a presumption. The commissioners are not stiled justices of the peace in the instrument itself, nor does it appear from their own certificate that they were so. If either had been the case, a presumption might possibly have been created, so far at least as to lay the other side under a necessity of disproving it. It should at least appear upon the face of the instrument that the law has been pursued, or otherwise it can have no legal operation.

2d, The testator had one tract of 92,000 acres of land on the waters of *James River* in one body. The lands which are subjected by the decree to satisfy that clause in the will are upon *Catawba*, a *branch of James River*, and it appears by the report of the commissioners that there are not five thousand acres of land in this tract. From these facts it seems to follow inevitably, that the large tract of land best answers the intention of the testator, because out of that tract 5000 acres may be got in one

one body, and upon the waters of *James River*, ſufficient to ſatisfy the will: Whereas the land decreed is out of a much ſmaller tract than 5,000 acres, and is on the waters of *Catawba*. In ſome parts of the will, where the teſtator ſpeaks of other branches of *James River*, he calls them *by name*, clearly ſhewing, that he knew how to diſtinguiſh between *James River* and its branches.

STARK for the appellee. In no inſtance do commiſſions for privy examinations name the perſons to whom they are addreſſed as juſtices of the peace, and if they did, it would not prove that they were ſo. Neither would the fact be eſtabliſhed if the commiſſioners were to ſtile themſelves ſo in their certificate. The Chancellor was right in preſuming that they were magiſtrates, becauſe the law required them to be ſo, and if they were not, it was eaſy for the appellant to repel the preſumption by poſitive proof.

2d, It appears that *Benjamin Borden* the younger, diſpoſed of all the good land out of the large tract, and having a general power to ſell, under the will, he deprived the appellee of the power of reſorting to that tract, even if it had beſt anſwered the deſcription. The land on *Catawba* is in the poſſeſſion of perſons claiming under his heir as *volunteers*, and therefore they are in no better ſituation, than he would have been himſelf. The teſtator it is proved had not in any of his tracts 5,000 acres of good land *in a body*, and becauſe that quantity cannot be found in one tract, is the appellee to have no land at all? We are then to come as near it as poſſible, and however hard it may be upon the appellants, that their land ſhould be taken, yet it is to be attributed to the conduct of their anceſtor who has cauſed it by diſpoſing of all the other good lands.

CAMPBELL on the ſame ſide. The objection to the appellee's title ſeems to be built upon a miſapprehenſion of the act of 1748, which is merely directory to the clerk, and does not require that the perſons named in the commiſſion ſhould be therein ſtiled, "juſtices of the peace." The words of the law are "that it ſhall be lawful for the clerk to iſſue a commiſſion "to two or more commiſſioners *being juſtices of the peace*," &c. Whether juſtices or not, is a fact capable of proof, and the court will preſume they were ſo, until the contrary appears.

Benjamin Borden was bound as executor and truſtee, to reſerve 5,000 acres of land, all good, for the five daughters. He did reſerve lands on the *Catawba*, tho' not all in a body, nor does the will require it. Nay, it appears that that quantity of

good

good land in a body could not have been found in the eſtate of the teſtator. But it is ſaid, that the appellee ought to receive his quantity out of the 92,000 acres of land. *Benjamin* the younger, has diſpoſed of this land, and therefore it is holden either by purchaſers for valuable conſideration, or by volunteers, as the *Catawba* lands are holden. If the former, we cannot touch them. If the latter, may they not object to our claim with as much reaſon as the preſent appellants do?

The report of the commiſſioners appointed by the Chancellor to view the lands, leave no doubt, but that thoſe on *Catawba* will beſt ſatisfy the intent of the teſtator, and to that report there is no exception.

MARSHALL in reply. There is no proof that the 92,000 acres are ſold. But if there were it does not alter the queſtion, which is, do thoſe lands anſwer the deſcription given by the teſtator, better than the *Catawba* lands? I contend for the reaſons firſt mentioned that they do, and if ſo, and by the conduct of *Benjamin Borden* the younger, ſuch land cannot be obtained by the appellee as he is entitled to by the will, then his claim for compenſation will be againſt the eſtate of *Benjamin Borden*, and not againſt a part of his repreſentatives, who by this decree are to bear the whole loſs.

The opinion of the commiſſioners will not carry the claim from the 92,000 acres, if that was the tract contemplated by the teſtator. A part of this tract muſt at any rate have been taken to ſatisfy the deviſe, ſince there were not 5,000 acres on *Catawba*.

ROANE, J.—This is a plain caſe, and though contained in a voluminous record, the eſſential parts of it, lie within a ſmall compaſs. An objection is made to the title of the appellee, becauſe the commiſſion which was to enable *Mrs. Pritchard* to paſs away her eſtate, was not directed to *Juſtices of the peace*. The act of 1748 requires the commiſſion to be addreſſed to perſons *being Juſtices of the peace*, but does not preſcribe the form of it. It is certainly neceſſary that the commiſſioners ſhould *in reality* anſwer this deſcription, becauſe the law requires it, but it does not require that they ſhould be ſo ſtiled in the commiſſion. The queſtion then is, ought we to preſume the fact that they were juſtices? I think we ought. The law requires the clerk to direct it to ſuch perſons, and he ought not to be preſumed to have done wrong. The contrary might have been ſhewn, and if the party meant to avail himſelf of this objection he ought to have proved the fact. I can never agree that the party ſhould be ſurpriſed at the trial with an objection of this ſort, particularly, where the preſumption is in his favor. As

As to the location of the land claimed under the will, one thing is evident; which is, that the teſtator intended to give to each of his five daughters, 1000 acres of *good land*; and it is not required to lie in one body. But if it had been, the report proves that his intention as to quality could not in this reſpect have been fulfilled. It is to lie on the waters of *James River*; and ſo I think the *Catawba* lands do. But if it could be avoided, the land ought not to be laid off in ſmall ſurveys, and as it is in proof that the 5,000 acres of good land could not have been got in the large tract, in leſs than 20 ſurveys; the teſtator could not have meant that tract. *Benjamin* the younger, ſeems himſelf to have conſidered the *Catawba* lands as intended by the teſtator. Had he then a right to purchaſe up all the good land, and to impoſe the bad on the deviſees? It is ſhewn by the report, that there remains no good land unſold; and it would be highly unjuſt, that the executor ſhould by his conduct deprive any of the deviſees of that which the teſtator intended for them, and the appellants claiming merely as volunteers, ſtand in the ſituation of *Benjamin Borden* whom they repreſent. I think the decree ought to be affirmed.

FLEMING, J.—The firſt objection made by the appellant's counſel to the decree was, that the commiſſion was not ſo directed, or returned, as to paſs the eſtate of *Mrs. Pritchard*. It is duly executed by the perſons to whom it was directed, and the clerk is required to addreſs it to *juſtices of the peace*. The deed with the commiſſion is returned, and admitted to record. I do not think that we carry the doctrine of preſumption beyond its accuſtomed limits when we ſay, that to ſupport this deed, we will intend that the law has been obeyed unleſs the contrary appear.

The ſecond point reſpects the location of the land. The Chancellor diſcovering much difficulty in aſcertaining what lands would beſt fulfill the intention of the teſtator, very properly appointed commiſſioners to view all the lands of the teſtator on the waters of *James River*, and to report thereupon. Theſe commiſſioners had certainly the faireſt opportunity of judging, and after ſtating that *Benjamin Borden* the executor, had ſold almoſt all the good land out of the large tract, they report their opinion to be, that the lands on *Catawba* more nearly anſwers the deſcription given by the teſtator than any other. I am therefore of opinion that the decree is right.

THE PRESIDENT.—I concur fully in ſentiments with the other judges; and for the reaſons given by them, I am of

opinion, that the decree is right upon both points, and ought to be

affirmed.

LEE,

againſt

TURBERVILLE.

LEAVE was granted the appellant by the County Court of *Weſtmoreland* to build a mill. The appellee conceiving himſelf intereſted, prayed an appeal which was refuſed, becauſe it appeared to the court that he was no party. He then applied to, and obtained from a judge of the General Court a *ſuperſedeas* which removed the record before the Diſtrict Court of *Northumberland*, where the order of the County Court was reverſed, from which an appeal was prayed to this court.

LEE for the appellant. Before the court goes into the teſtimony which is about to be offered in ſupport of the judgment of the Diſtrict Court, I muſt object to the mode in which the cauſe was carried from the County Court. I believe it will not be contended on the other ſide, that there is error in the proceedings of the County Court *apparent upon the face of the record*, and therefore the appellee muſt expect to ſuſtain the judgment of the Diſtrict Court, upon evidence *debors* the record. If the appellee had *appealed* from the judgment of the County Court, I admit that he might have been let in, to controvert the propriety of the order, in the Diſtrict Court, upon the merits of the caſe, and for this purpoſe he might have gone into teſtimony, becauſe in ſuch a caſe, the court might have taken cognizance of the *fact*, as well as of the *law*. The County Court having refuſed the appeal, the party ought to have applied for a *mandamus*, or for a *writ of error*. But a *ſuperſedeas* could carry only *the law of the caſe* before the Diſtrict Court, and conſequently if there be not error upon the face of the record, this court muſt reverſe the judgment.

MARSHALL on the ſame ſide. The Diſtrict Court may grant a *ſuperſedeas*, or writ of error, and may receive appeals when allowed by an Inferior Court. A *writ of error* will give juriſdiction to the court to examine into facts in the ſame manner as

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