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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of chancery, "if the matter in controversy be equal in value, exclusive of costs," to 150 dollars, where the judgment sought to be reversed shall have been rendered in the general court, or high court of chancery, or be a freehold or franchise. The matter in controversy in this case, was a judgment in a county court for the sum, exclusive of costs, of only 99 dollars; and the question made both in the county court in chancery, and in the high court of chancery, from whose decision this appeal is taken, was whether that judgment should be enjoined, or suffered to take its course. Nothing, therefore, can be clearer than that this appeal is taken from a decree of the court of chancery, respecting a matter the value whereof, exclusive of costs, is below the standard which gives jurisdiction to this court.

In the case of *Hepburn* v. *Lewis*,(*a*) which was an appeal from the judgment of a district court refusing to enter judgment, upon a verdict for less than thirty pounds, where the writ was for fifty pounds, it was decided that this court had no jurisdiction of the appeal, which was therefore dismissed, on the ground that "the verdict was for less money than the law allows appeals to this court for, and was below the jurisdiction of the court."

(*a*) 2 *Call*, 497.

The principle in that case is decisive of the case before us, and the appeal must be dismissed.

Monday, April 1st.

Hite's Executor *against* Paul's Heirs.

MARGARET PAUL, in the year 1794, exhibited her bill, in the late high court of chancery, against

1. Where defendants holding lands by a *joint* title are decreed to surrender possession, and pay rents and profits, they are *not jointly and severally*, but *only jointly* liable.

2. A decree against an *executor*, for rents and profits received by the *testator*, ought *expressly* to direct that he pay the sum in question out of the assets in his hands to be administered: otherwise, it is to be understood as against him *personally*, and, therefore, erroneous.

, defendants; stating that "many years past, a certain *Joist Hite* sold to a certain *Thomas Hart* a tract of land, supposed to contain about acres, lying in the now county of *Berkeley*, and known by the name of , being part of a large quantity of land which the said *Hite* and others claimed under certain orders of council; that *Hart* sold part of the said land to a certain *John Miles*, of *Pennsylvania*, and received the purchase-money; that *John Miles*, after the purchase, to wit, on the 2d of *May*, 1747, by his will, devised the same to the plaintiff, and soon after died; that she, after the death of her father, the testator, intermarried with a certain *Paul*, who is now dead; that she and her father always resided in the state of *Pennsylvania;* that, after the purchase made by *John Miles*, *Thomas Lord Fairfax* having claimed the land, so sold, together with a much larger quantity, as part of the *Northern Neck* of *Virginia*, of which he was proprietor, he granted the greater part, or the whole, of the said land to his brother or near relation *George William Fairfax*, and to some others; that a suit in chancery was instituted, in the former general court of the then colony of *Virginia*, by the said *Joist Hite* and others, against the said *Thomas Lord Fairfax*, for the said lands, which came on finally to be heard in the court of appeals, when the lands were decreed to the complainants, but the rights of purchase under them were preserved; that, under this decree, the representatives of the said *Joist Hite and others*, obtained possession of the land in question, and refused to convey it to the plaintiff, who, therefore, (referring to the proceedings in the said suit as part of her bill,) prayed that the proper parties be decreed to convey to her the land aforementioned, and to account for the profits," and for the proper relief.

A subpœna to answer this bill was sued out against a number of persons as heirs, devisees and executors of

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Joist Hite, of *Robert M'Coy* the elder, of *William Duff*, and of *Robert Green* the elder, deceased.

An answer was filed, jointly and severally, by *Isaac Hite*, (one of the sons and executors of *Joist Hite*,) *Andrew M'Coy*, (eldest son and heir of *Robert M'Coy*, who was eldest son and heir of *Robert M'Coy* the elder,) and *James Williams*, (who married *Eleanor* only daughter and heir of *Moses Green*, deceased, who was one of the sons and devisees of *Robert Green* the elder, deceased,) the other defendants not appearing, and no further proceedings against them being set forth in the transcript of the record.

The respondents jointly said "they are utterly ignorant of the matters stated in the said bill, nor do they know any thing of the said plaintiff, or her pretended claim, and, therefore, can by no means admit it to be true, and pray that she may be decreed to make ample proof thereof. *Isaac Hite* moreover stated that he had understood from his brother *Jacob* in his lifetime, that his father, *Joist Hite*, sold about 12 or 1500 acres of land to a certain *Hart*, and executed a bond for the conveyance thereof; but when *Fairfax* brought suit, or, rather, entered his *caveat* against the issuing grants to the ancestors of the respondent, the said *Jacob Hite* went to the said *Hart*, who was indebted to *Joist Hite*, and proposed to him, that, if he would give up the said bond and cancel it, he the said *Jacob Hite* would relinquish a part, or all the debt, which *Hart* agreed to do, whereupon the bond was cancelled, and a discharge given agreeably to the contract; but the respondent knew nothing of this, of his own knowledge. The respondents further answering jointly, objected against the plaintiff's claim, the length of time which had elapsed before it was exhibited. They relied also upon the decree in the suit *Hite and others* against *Fairfax*; contending that, since that decree had been duly served upon the tenant in possession, (*Giles Cook*, tenant to *George W.*

Fairfax,) who stated his claim which, upon a hearing, was dismissed, the plaintiff ought not now to be at liberty to proceed against the respondents; all persons, who did not state their claim within a reasonable time, being bound by the decree."

To this answer the plaintiff replied generally; sundry depositions and exhibits were filed, by which the plaintiff's title to the land claimed by the bill was established, and it was proved that she had always resided in the state of *Pennsylvania*. There was no evidence, however, on either side, as to possession of the land by the defendants. The cause came on to be heard, the 12th of *September*, 1797, when the court of chancery was of opinion that the plaintiff's remedy to assert her title was not precluded by the decree in the case of *Hite and others* against *Fairfax;* because that decree was not served upon her; nor by the length of time; because the plaintiff, when her title accrued, was, and ever since had been, not resident within the limits of this commonwealth. The court, therefore, decreed, that the defendants do convey to the plaintiff, at her costs, the two hundred acres of land part of thirteen hundred acres, on *Elk Branch*, sold by *Joist Hite* to *Thomas Hart*, and surveyed for the said *Thomas Hart*, which two hundred acres of land were sold by the said *Thomas Hart* to *John Miles*, father of the plaintiff; that the defendants resign to the plaintiff possession of the said two hundred acres of land, to be ascertained by a survey, and pay unto the plaintiff the profits of the same from the 4th of *February*, 1791, when the subpœna in this cause was sued forth. Upon an appeal to the court of appeals this decree was affirmed; after which, the orders of survey and account of profits were carried into effect, and reports made thereupon to the superior court of chancery for the *Staunton* district. The commissioners who took the account were of opinion, that the rents and profits were worth 189 dollars annually, since the year 1791;

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but, "at the request of the defendants' counsel, they stated that they had understood from hearsay, or common report, that *Giles Cook*, sen. held the said land, by lease from *George W. Fairfax*, a number of years prior to the year 1791, and continued in possession until the year 1799, and then sold his lease to *John Dixon*, Esq. who held it until the year 1801, when General *William Darke* got possession of it under purchase from *Margaret Paul* the plaintiff. They farther stated, upon the knowledge and information of *Abraham Shephard*, one of their body, that neither the defendants, nor any one claiming under the defendants, ever had possession of said land."

The suit abated, as to the defendant *Isaac Hite* and the plaintiff, by their deaths, and was revived, on the motion of *Thomas Paul* and *Margaret Paul*, heirs of the plaintiff, against *Isaac Hite*, executor of that defendant, and against the other defendants by consent. It afterwards abated as to the defendant *Andrew M'Coy* by his death, and a *scire facias* against his executors and heirs was awarded, but does not appear to have been executed.

On the 8th day of *April*, 1805, the cause came on to be heard as to the other defendants, on the bill, answer, exhibits, depositions, report of the commissioners and exceptions thereto, filed by the counsel for the defendants, on two grounds;

1. "Because the rents and profits were valued too high;" (in support of which exception, however, no testimony was exhibited;) and, 2d. "Because the report was uncertain, in not clearly expressing whether the year 1791 was to be included or excluded in the aggregate estimate, and it did not appear when *Paul's* right ceased, so as to ascertain when the profits were to cease." The court of chancery overruled the exceptions; and, "Being of opinion that the defendants were severally, as well as jointly liable to the plaintiffs for the rents and profits of the lands decreed to be conveyed

by the order of *September* 12, 1797, adjudged, ordered and decreed that the defendant do pay to the complainants the sum of 1,872 dollars; that being, according to the valuation of the commissioners, the amount of the rents and profits of the land from the 4th of *February*, 1791, to the 1st of *January*, 1801, about which time, as appears, the possession of the said land was yielded to a purchaser under the plaintiff's ancestor: but the court suspended the pronouncing of any final decree as to the conveyance of the land until the cause should be revived against the representatives of *Andrew M'Coy*."

From this decree the defendants appealed.

Williams, for the appellants, among other points, made the following:

1. That the chancellor should not have proceeded to a hearing until all the parties who represent the rights of *Joist Hite*, *Robert M'Coy*, *William Duff* and *Robert Green*, (the original plaintiffs against *Fairfax*, &c.) were before the court.

2. That a decree for rents and profits ought not to have been entered against *Isaac Hite* alone, but the other defendants also.

3. That he should not have been compelled to pay the rents out of his own estate, but *de bonis testatoris*.

4. That, as *Isaac Hite* and others never were in possession of the lands in controversy, no rents and profits ought to have been decreed against them, or any of them.

Hay, on the other side, relied on the decree of the court of appeals affirming that of the chancellor dated *September* 12th, 1797, as precluding the 1st and 4th objections now taken. There were 15 or 20 defendants originally; only three of whom answered. No notice was taken of the rest. Yet this court affirmed the decree, and thereby declared that all proper parties were before the court. In like manner the defendants must

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have been considered as having been in possession of the land; otherwise, the decree making them liable for the profits would have been reversed.

As to the 2d point, the very principle, according to which the chancellor has decided, was assumed in the case of *Yancey* v. *Hopkins*, 1 *Munf.* 425. and sanctioned by this court; no discrimination being made between the defendants *Hopkins* and *Faris*, but both considered responsible for all the profits.

The only question in the cause is, whether the decree, against *Isaac Hite*, the executor, (being general, that he should pay so much money,) is to be satisfied out of his own goods, or out of the goods of his testator. In one breath, the suit was revived against him as executor, and it was decreed that he should pay. The decree, then, must be understood to be against him as executor, and payable out of the assets in his hands. This is a mere formal error, and not sufficient to set aside a decision substantially right.

Williams, in reply. I do not understand any of my objections to be precluded by the opinion of this court. The decree of *September*, 1797, declared the plaintiff's right to two hundred acres of land, but did not say where situated. This court, then, never passed upon the location of the 200 acres; but considered that as proper to be ascertained by survey. Upon the survey's coming in, and not until then, could this court know that the boundaries claimed by the plaintiff might interfere with the rights of persons not before the court; which has turned out to be the case. The same observation applies to the question concerning the rents and profits. That subject was not before this court. It did not appear that the land which should be laid off to *Margaret Paul* might not be in the possession of these defendants. The

report of the commissioners has since shown that they never were in possession.

The case of *Yancey* v. *Hopkins* is an authority directly against Mr. *Hay*. In that case *Faris* was the tenant in possession, and was decreed to pay the profits, together with *Yancey*, with whom he was *particeps criminis*. But here *Isaac Hite* (who never was in possession) is alone decreed against, exempting all the other defendants.

To determine the 3d point, the record alone must be consulted; and it does not appear that *Isaac Hite* had received a cent of assets. He was brought before the court, merely by a *scire facias*, to show cause why the suit should not be revived against him as executor; not by a subpœna to answer the bill. He might think the chancellor would not decree against him, when it appeared that his testator had never been in possession of the land. He, therefore, made no defence.

Monday, *April* 29th. Judge ROANE pronounced the following opinion of the court.

"The court is of opinion, that the said decree is erroneous in this, that the court below, being of opinion that the defendants are severally, as well as jointly, liable to the plaintiffs for the rents and profits of the land ordered to be conveyed by the decree of the 12th of *September*, 1797, ordered that the defendant *Isaac Hite*, executor of *Isaac Hite*, who was executor of *Joist Hite*, deceased, do pay to the complainants the sum of 1,872 dollars, the amount of the rents and profits of the said land from the 4th day of *February*, 1791, until the 1st day of *January*, 1801; whereas, by the said decree of the 12th of *September*, 1797, which was affirmed on an appeal to this court, the defendants are, jointly, and not jointly and severally, ordered to pay to the plaintiff the said rents and profits. The decree is also erroneous in ordering the said rents and profits to be paid by the

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said *Isaac Hite*, instead of ordering them to be paid by the said defendant *de bonis testatoris*."

Decree reversed with costs, and suit remanded to the court of chancery, "for proper parties to be made, and for further proceedings to be had therein agreeable to the principles of this decree."

Holliday and Wife *against* Coleman and Wife.

Argued Monday, March 25th.

1. A decree, by a court of competent jurisdiction, dismissing a bill, upon the ground that the deed under which the complainant claimed was *fraudulent*, is a complete bar to another *original* bill to try the validity of the same deed; the proper remedy, if such decree be erroneous, being by *appeal*, *writ of error*, *supersedeas*, or *bill of review*, and not by *original bill*.

2. The power of a court of equity to rule a tenant for life, of slaves, or other personal property, to give security that the property shall be forthcoming at his or her death, is to be exercised, *not as a matter of course, but of sound discretion*, according to circumstances.

IN this case, after argument by *Call* and *Wickham*, for the appellants, and *Warden*, *Botts* and *Williams*, for the appellees, the following statement was made, and opinion of the court pronounced, by the president, on *Monday*, the 24th of *June*.

In the year 1786, *Robert Spilsby Coleman*, and *Mary* his wife, exhibited their bill against *Lewis Holliday*, and *Betty* his wife, and stated that the said *Betty*, mother of the complainant *Mary*, was the daughter of *Zachary Lewis*, and intermarried with *James Littlepage*, by whom she had two children only; that the said *Zachary Lewis* departed this life, having first made his last will and testament, whereby he bequeathed to the said *Betty* an eighth part of his slaves and personal estate, and a negro girl over and above an eighth, for the term of her life, and after her death to go to her children by the said *James Littlepage*; that, after the death of the said *Zachary Lewis*, the said *James Littlepage* also departed this life, leaving the complainant *Mary*, and *Lewis*, his only children by the said *Betty*, who, being possessed of a considerable number of slaves, her absolute property, and being about to marry a second husband, executed a deed of trust to her brother *John Lewis*, whereby she settled two negroes named *Jenny* and *Sylvia*, upon the complainant *Mary*, after her death; reserving to her-