

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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DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, that on the twenty-first day of January, in the thirty-eighth year of the Independence of the United States of America, **LEWIS MOREL**, of the said district, hath deposited in this office the title of a book, the right whereof he claims as proprietor, in the words following to wit:

“ Reports of Cases argued and determined in the Supreme Court of Appeals of Virginia. Vol. II. By **WILLIAM MUNFORD**.”

IN CONFORMITY to the act of Congress of the United States, entitled “ An act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned;” and also to an act, entitled “ An act, supplementary to an act, entitled an act for the encouragement of learning, by securing the copies of maps, charts and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving and etching historical and other prints.”

THERON RUDD,
Clerk of the District of New-York.

Winston against Johnson's Executors.

Wednesday,
June 5th.

THIS was originally a suit, in the late high court of chancery, by *Noel Johnson*, a judgment creditor of *Geddes Winston*, who was alleged and proved to be insolvent, against him, his two sons, *Samuel Jordan Winston* and *William Winston*, and *William Radford*, one of his sons-in-law, to obtain satisfaction of the judgment out of certain lands and slaves conveyed by him after its date. From the joint answer of *Samuel Jordan Winston*, and *William Winston*, it appeared that *Geddes Winston* had given each of them three hundred acres of land lying in *Hanover*, but not any negroes; and that *Samuel Jordan Winston* had bought of his father sundry slaves, for which he owed him a balance of 100*l.* secured by bond. The answer of *William Radford* stated a title, in himself, (by purchase for a fair price confirmed by a well authenticated bill of sale,) to fourteen out of sixteen slaves, a mortgage of whom had originally been executed to him by *Geddes Winston*, which purchase satisfied the said mortgage.

1. It seems that voluntary purchasers of lands subject to the lien of a judgment are personally responsible, in equity, to the creditor, (the goods and chattels of the debtor being exhausted,) for half the profits (or so much of half as may be sufficient to satisfy the judgment) jointly and not pro rata, notwithstanding they hold tracts of unequal values, and by distinct conveyances.

2. Want of notice of the time and place of a commissioner's taking an account, or the court's acting upon the report too soon, (1) are not sufficient reasons for a bill of review, such objections not having been taken (as they ought to have been) before the rendition of the decree.

3. New matter is no ground for a bill of review,

unless, it was discovered since the decree was pronounced.

(1) Note. * * See the 17th Rule of Practice, 1 H. & M. vi.

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to remain due from him to his said father, and to have been secured by bond, and two of the sixteen slaves acknowledged by the defendant, *William Radford*, to have been mortgaged to him, are moreover subject to payment of the plaintiff's said demand." The decree therefore was, "that the said *Samuel Jordan Winston* do pay so much of the money remaining due by his bond aforesaid to the plaintiff as will satisfy the judgment aforesaid, if the said bond hath not been transferred to some other creditor of the said *Geddes Winston*; but, in case of such transfer, that the defendants, *Samuel Jordan Winston*, and *William Winston*, do account, before one of the commissioners of this court, for the rents and profits of the lands aforesaid perceived by those defendants during the lifetime of their father, and pay to the plaintiff one half of the said rents and profits, or so much thereof as shall be sufficient to satisfy his said judgment; and, in case of a deficiency, that the defendant *William Radford* do assign his right and title to the before-mentioned two slaves to the plaintiff; and that the defendants, *Samuel Jordan Winston*, and *William Winston*, do pay unto the plaintiff the costs expended by him in the prosecution of this suit."

This decree was affirmed by the court of appeals, in *April*, 1797. The account of rents and profits, thereby directed, was taken *May* 30th, 1799, by Master Commissioner *Dunscumb*, who stated in his report, that he "appointed that day for the defendants to render the account," and, they "failing to attend," he proceeded to form an estimate of the annual value of the lands by means of the affidavit of a certain *Samuel Perrin*, charging *Samuel J. Winston* with 75*l.* as one half of the amount thereof, from *July*, 1789, (the date of the deed of gift to him,) to *July*, 1795, when *Geddes Winston* died; and *William Winston* with 86*l.* 5*s.* calculating in like manner from *March*, 1790. When this report (to which there was no exception) was returned, does not appear in the record.

On the 5th of *October*, 1799, the chancellor decreed,

,, that the defendants, *Samuel Jordan Winston*, and *William Winston*, do pay unto the plaintiff 67*l.* 15*s.* 11*d.* (the amount of his judgment,) with interest on 28*l.* 7*s.* 3*d.* 1-2 from the 8th day of *October*, 1788, until paid, and the costs; and that the bill be dismissed as to the other defendant *William, Radford*."

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To this decree *Samuel Jordan Winston* filed a bill of review, on the following grounds: 1st. That Commissioner *Dunscob's* report was made *ex parte*, and, "to the best of his knowledge and belief, without any notice to him;" 2dly. "That the said report was confirmed the session after it came in, contrary to the practice of the court, and without the knowledge of his counsel;" and, 3dly. "That the decree ought not to have been against the defendants jointly; since it appeared by the report that the profits received by *William Winston* were greater than those charged to *Samuel J. Winston*; and the effect of this joint decree is that the latter, instead of being charged with half the debt, is made liable for the whole."

The bill of review also set forth sundry new matters; viz. "that, during the lifetime of the said *Geddes*, the complainant did not receive any rents or profits from the said lands, they being held by the said *Geddes*; that the profits stated by the commissioner greatly exceed the actual value of the land; that part of the said land is held by the widow of the said *Geddes* as tenant in dower; that the complainant has paid large sums of money on account of the said *Geddes's* debts, and is moreover charged by a decree, in a suit, *Dandridge and others against him*, for a considerable sum; that what he has paid, and is chargeable for, (exclusive of *Johnson's* claim,) is, he verily believes, fully equal to his interest in the said land; and that the bond given by him to his father having been transferred, a suit has been brought thereon, and he has discharged it." No reason was assigned for not bringing forward all these circumstances (except the last) in the answer to the original bill.

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Noel Johnson having removed to *Kentucky* before the bill of review was exhibited, an answer by *William Duval*, his attorney and agent, was received on his behalf, denying generally the allegations in it. Sundry depositions and exhibits were taken and filed in support of the new matter set forth in the bill. The cause came on to be heard, the 5th of *October*, 1805, when the chancellor affirmed the decree reviewed, "wherein error was not perceived," and dismissed the bill of review with costs; whereupon *Winston* appealed to this court.

Munford and *Wickham*, for the appellant. The proceedings subsequent to the decree, which this court affirmed, have not conformed to that decree, which was, that the defendants should account for the profits of the lands held by them respectively, that is, they should separately account, as they held separately. There is a great difference between a joint contract and such a case as this. Each was answerable only for the estate in his hands. Yet the decree was joint, and not *pro rata*. This was a direct departure from the decree of this court.

2. There are great objections to the commissioner's report on its face. In the first place, the order was not that he should make up an account; but that the defendant should render one. He had, therefore, no right to proceed *ex parte*, but should have reported to the court their default, and the court might have directed an attachment against them. Again, the commissioner was to report the rents and profits received by them; instead of which, he has stated the annual value by conjectural estimate.

3. The want of notice is an extrinsic objection, but sufficiently established by *Winston's* affidavit to the truth of the bill of review. In this case there being no proof, nor explicit statement by the commissioner that notice was given, the mere presumption was rebutted by *Win-*

ston's affidavit, and actual notice should have been proved by the other party.(1)

This objection was not taken in the original suit, because the report was not suffered to lie long enough in court. It was dated the 30th of *May*, and acted upon by the chancellor the 5th of *October* following; and it does not appear that the parties were heard; for the decree has this remarkable peculiarity, that it is not said to have been rendered "after hearing arguments of counsel," (as is customary,) but only "on consideration of the commissioner's report."

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Warden, contra. The decree against *Samuel J. Winston* and *William Winston* jointly was correct; for they answered jointly, and there was no reason for making a distinction between them, since they were both voluntary purchasers of lands, every part of which was equally liable to the plaintiff's demand. If the whole debt be taken out of the lands conveyed to the one, he may have his remedy out of those conveyed to the other.(2)

As to the want of notice; the phrases used by *Dunscomb* in his report, "that he appointed a day," and that the defendants "failed" to attend, sufficiently imply that they must have had notice. And, if they had not, they should have made the objection before the decree was rendered; for, from the date of the commissioner's re-

(1) Note. In his answer to the bill of review, *Duval* insisted that *Samuel J. Winston* had notice to attend the commissioner, "as would expressly appear by the papers filed in the original suit." But no paper proving such notice appears in the record.

(2) Note. The case of *Mason's Devises v. Peters' Administrators*, 1 *Munford*, 437. in which it was decided that where devisees are made responsible to simple contract creditors, upon the principle of marshalling assets, they shall be subjected, not jointly, but *pro rata*, does not appear to contradict this doctrine, as it respects the claim of a judgment creditor; because the marshalling assets being the mere creature of a court of equity, the court will manage it so as to do complete justice, and make an end of litigation; but the judgment creditor has a right in equity to as extensive a remedy as he had at law, by *elegit*.

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port, it must be supposed to have been returned within the term of the then high court of chancery, which commenced on the 12th of *May*, and not to the *September* term, as is pretended in the bill of review.

Cur. adv. vult.

Wednesday, September 25th. Judge ROANE reported the following opinion of the court :

“The court is of opinion, that there is neither any error apparent upon the face of the decree sought to be reviewed, nor any new matter shown in the case before us, which is competent to authorize the bill of review allowed in this case ; and is further of opinion that neither the allegation of the appellant that the report of the commissioner was made without due notice to him of the time and place of taking the same, nor that the said report did not lie long enough in court, prior to the rendition of the decree, (objections on neither ground having been taken in the court below,) are of a character to justify a bill of review. On these grounds, this court affirms the decree of the chancellor dismissing the bill of review, with costs.”



*Friday, June
7th.*

Gibson against Randolph.

1. The court of appeals has no jurisdiction to grant appeals from interlocutory decrees.

2. If, before the time limited by law for recording a deed has expired, a bill be filed to impugn it as fraudulent, the court cannot afterwards declare] it void, as against the complainant, on the ground of its not having been duly recorded.

THE chancellor for the *Richmond* district having pronounced in this case an interlocutory decree, on the 28th of *February*, 1811, a petition for the allowance of an appeal was presented here, but overruled on the ground of want of jurisdiction in this court to grant appeals from any but *final* decrees. Application was afterwards made to the chancellor, and the appeal allowed by him.