

REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF APPEALS

OF

VIRGINIA.

VOLUME I.

BY WILLIAM MUNFORD.

NEW-YORK:

Printed and published by Isaac Riley.

1812.

DISTRICT OF NEW-YORK, 25.

BE IT REMEMBERED, that on the eighteenth day of March, in the thirty-seventh 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. L. 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.”

CHARLES CLINTON,
Clerk of the District of New-York.

Yancey against Hopkins.

Thursday,
October 18.

LUND HOPKINS of the County of Powhatan, on the first of March, 1799, filed his bill in the late High Court of Chancery, against Robert Yancey and Richard Faris; setting forth that "Joseph Hopkins, father of the plaintiff, was in his life-time seised in fee of a tract of land in the County of Louisa, containing by estimation 400 acres, and, being so seised, departed this life in the year 1780, having first made his last will, by virtue of which the plaintiff became entitled in fee to the whole of the said land, after deducting his mother's dower; that, while the plaintiff was an infant, (but in what year he could not ascertain,) the defendant Robert Yancey, a Deputy Sheriff of the County of Louisa, pretending that taxes were due on the plaintiff's part of the said land, affected to expose the same to public auction, to raise the amount of those taxes; that no such taxes were due; or, if any, not more than 3*l.* or 4*l.*; that no notice was given of the time and place of sale; or, if any was given, it did not describe to whom the land belonged; that no persons were present, except Robert Yancey himself, and two other persons, (neither of whom bade,) when the plaintiff's part aforesaid, being worth from four to six dollars per acre, was struck out, by the said Yancey's direction, to himself, at the price of 4*l.* or some other equally trifling; that he not only acted fraudulently, but never was authorized in his conduct by the High Sheriff whose Deputy he was; that, combining with the defendant Faris, he had pretended to sell the said land to the said Faris; that both of them knew that the plaintiff was an infant at the time of the sale by auction, and did not exceed twenty-six years of age on the 23d day of November,

1. If land be listed by the Commissioner of the revenue to a wrong person, sold by the Sheriff as the property of such person, and conveyed by deed to the purchaser; it seems that the proper resort of the rightful owner for relief is to a Court of Equity, by which the deed may be cancelled, and a release, or reconveyance of the land decreed.

2. An authority given by law to any officer, whereby the estates or interests of other persons may be forfeited or lost, must be strictly pursued in every instance.

3. The land of an infant being, by mistake, listed by the Commissioner of revenue as the property of another person, and sold, as such, for taxes, in December, 1786; he- Sheriff in February, 1795; and afterwards sold by the Deputy Sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age.

ing bought by the Deputy Sheriff, who sold it; conveyed to him by the High Sheriff in February, 1795; and afterwards sold by the Deputy Sheriff; the right of the infant was established against the last purchaser; (who bought with full notice of all the circumstances;) notwithstanding the suit was not brought until six years after the plaintiff attained his full age.

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1798; that the plaintiff, in the year 1785, had removed from *Louisa* to the City of *Richmond*; that no application was ever made to his guardian, *Anthony Hayden*, for any taxes due from him; that he had never returned to live in *Louisa*; that *Faris* was well acquainted with all the circumstances of the said sale at auction; he living, at the time, on that part allotted to the plaintiff's mother for dower; that there was sufficient personal property on the said land to satisfy any taxes due thereon; that the said *Faris* had paid little or no money for the purchase made by him of the said *Yancey*; and that they both had derived considerable profits, having been in possession of the land ever since the auction aforesaid."

The bill therefore prayed "a *perfect* answer, from both the defendants, as to the premises; that all official or other writings, whether deeds or obligations, which had passed between them concerning the said land should be directed to be *cancelled*; that they should be decreed to surrender to the plaintiff possession of the land, and *account* with him for all rents and profits arising therefrom; or that he might receive any other or further relief more agreeable to equity."

The separate answer of *Robert Yancey* admitted "that he sold a part of the tract of land mentioned in the bill for the taxes due thereon for the years 1784 and 1785; but averred that he was fully authorized so to do both by law, and by his principal the High Sheriff; that he this defendant had paid the taxes of said land into the treasury, or that there was a judgment against his principal, he does not now recollect which, but inclines to believe the latter; that there was no property that this defendant knew of on said land, *of the estate of Hopkins*, whereof the taxes could be made; and, as the law then stood, there was no other alternative but to sell a part of the land for the taxes due; that the quantity of non-resident lands in the County of *Louisa* is very considerable; that, at the rate of taxation on lands at that time, the amount thereof, being unpaid, would have completely ruined this defendant, who was then just beginning to act for him-

self; that the land was sold in the name of ELIZABETH HOPKINS; that, in that name, it was charged by the Commissioners of the land tax, who by law make out the book for the Sheriff; that there was no land charged to JOSEPH HOPKINS, or LUND HOPKINS; that, by the will of *Joseph Hopkins*, then deceased, this land was left to his wife *Elizabeth Hopkins*,* who, at the time the assessment was made, occupied and possessed the same; consequently, the land was charged in the proper person's name; at all events, the land owed taxes to the Commonwealth, and it was the duty of the owner to come to the Sheriff and pay it."

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This defendant further said, that "the land was advertised four weeks in the *Virginia Gazette*, according to law; nay, that it had been twice advertised; that, on the last day, no person coming to pay the taxes, and this defendant knowing not to whom to apply, the said *Elizabeth Hopkins* having intermarried, and gone off, God knows where, the land was exposed to sale, and sold on one month's credit at the most noted place on the premises; that there were several persons present, either of whom this defendant believes could have purchased if they chose; that he did not wish to buy himself, and requested the bystanders to bid; none of whom making a bid, it was, after crying a considerable time, knocked out on this defendant at his bid; that he then gave notice that he would give up his purchase, if the executor of *Hopkins*, one *Anthony Hayden*, would come and pay up the taxes and expenses of selling the land in a short time; that he believes that said *Hayden* was advised thereof, for that he made application some time after (this defendant thinks about six or eight months) to know if the land would then be given up if the taxes were paid; that this defendant then offered to give up the same if he, *Hayden*, would repay him what he had advanced, and his expenses, &c.; that *Hayden* said he had no estate of *Hopkins* in his hands, but would try to settle it speedily; but so it is that this defendant has not

*Note. This allegation in the answer was plainly incorrect; the land being devised in the will to *Lund Hopkins* only.

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received one single penny, nor has said *Hayden* communicated with him about the land since; nor has any other person:" that, after waiting several years, "and having the annual taxes to pay thereon, this defendant had a deed made to him by the High Sheriff therefor, and, to indemnify himself for the original purchase, and the taxes which he had paid for about fourteen years, sold the same to the other defendant."

This defendant insisted "that the lands of *infants* were not exempt from the payment of those taxes more than any other person; *there being no provision in their favour in the law as it then stood;*" that from an acknowledgment in the bill it appeared "that the complainant had been of age more than *six* years in *November, 1798; which is double the time the law, as it now stands, allows infants to pay the arrears of taxes;* yet, during all this time, the complainant had not applied to this defendant to repay him the taxes which he had paid on said land: if an application of this nature had been made even three years ago, this defendant is confident that he would have given up the land upon the payment of the taxes, &c.; that this defendant did not have a deed executed until the year 1795; one reason for which was, that he did not wish to hold the land; but, in all this time, no person coming to repay him what he had actually advanced, he then determined to have a deed therefor." He farther denied having received any profit or emolument whatever from the said land, except the money arising from the sale thereof; averring that he always considered the land as poor, and of little value, and the rent no object; "the plantation which was on it being old field, and no improvements to accommodate a family."

The defendant *Richard Faris* in his answer averred "that he conceived himself a fair and *bona fide* purchaser;" that he was present at the sale by auction, relative to which, and to *Yancey's* declaration that he would give up the land, on receiving the taxes, &c. he mentioned the circumstances nearly according to *Yancey's* own statement; "that there was no property of the complainant, or of the estate of *Jo-*

seph Hopkins, deceased, on said land, at the time of the sale, nor for some considerable time before, whereof the taxes could be made; that *Anthony Hayden* lived out of the County of *Louisa*; that this defendant is well assured that the said *Hayden* knew of the taxes being due; that the land had not been occupied by any person since the sale, until the last year; except a part which *Anthony Hayden* rented out, and for which payment was made to him, and the complainant; that, after the death of *Joseph Hopkins, Elizabeth Hopkins*, widow of said *Joseph*, resided and lived on the said land, and held the whole tract as her own until she intermarried with one *Samuel Baber*; after which she took her third part of said land."

A number of depositions were taken and filed, from which, taken together, it appeared that *Yancey's* account was in substance correct, of the manner in which the sale by auction was conducted; of the declaration made by him at the time, and of the subsequent transactions; that, at the time, and before the sale took place, the said *Yancey* inquired of the persons present what part of the land would be least injurious to the tract, to be sold off for the taxes thereof; that the east end was generally agreed to be that part, and, accordingly, the part sold was laid off on the east end; that the land in question (together with many other tracts) was first advertised to be sold at *Louisa* Court-house on a Court day; but none were sold; it being doubtful whether a sale at the Court-house would be legal; that *Charles Yancey, sen.* one of the Deputy Sheriffs consulted *Edmund Randolph*, then Attorney-General; and, upon his advice, the sales were appointed to be upon the respective premises, and accordingly advertised as long as the law directed in *Thomas Nicholson's* paper, printed in the City of *Richmond*, specifying the day of sale of each tract; (which, as to the tract in question was the 19th of December, 1786;) that the same advertisement was set up at the Court-house, at *Trinity* Church, in the said County, and at other public places; (but it did not appear in evidence that it was set up at the Church

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of *Fredericksville* Parish, in which the land in controversy in this suit lay; which Church was in the County of *Albemarle*, but was nearest to the said land, and was the one that the *Episcopalians* resorted to from the neighbourhood thereof;) that there was no personal property on the land belonging to the estate of *Joseph Hopkins*, but there was property of *Richard Faris*, the defendant, who then lived on that part of the land which was allotted to the widow as her dower, having (before the sale for taxes) purchased her dower-land of *Samuel Baber* or *Beaver*, her second husband, after residing for some time thereon as a tenant; that, about the time the said *Faris* bought the land in dispute, he was heard to say "he expected to be sued for said land, but that he bought it to spite the rascal," alluding to *Lund Hopkins*, as a witness supposed.

It was also proved by Captain *William Hughes*, that, about the time of the sale, by auction, the price of *unimproved* lands was exceedingly low, and that sales were difficult to be made; that lands of a middling or lower class would scarcely sell at any price; that the land in dispute was poor, and situated in the upper end of the County, where lands were more unsaleable than lands nearer the centre; but, on the other hand, it was proved by *Paul Jones*, (third husband of the widow *Hopkins*,) that there is a considerable proportion of uncleared land on the tract in dispute; three-fourths, if not more, of which is *prime tobacco land*; and that there is a considerable proportion of the uncleared as well as the cleared land very valuable for meadow; that, in his opinion, the whole of the land in controversy is worth *five dollars at least per acre*; and that he knows of land adjoining thereto, and by no means superior in quality, that is now held up at forty shillings per acre." It appeared moreover from the deposition of *Charles Yancey, jun.* that the sales for taxes were generally favourable to the purchasers, owing to the scarcity of money; and the people, not having been accustomed to such sales, seemed to want confidence in them. It was

also proved that *Anthony Hayden*, the executor, lived in *Campbell County* at the time of the sale; and that the plaintiff, *Lund Hopkins*, was then an *infant*.

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Among the *exhibits* in the cause were, 1. The will of *Joseph Hopkins*; 2. The deed from *Waddy Thomson*, late Sheriff of *Louisa*, to the defendant, *Robert Yancey*, for the land in controversy, dated the 19th of *February*, 1795; 3. A writing dated *September 10*, 1785, signed (but not sealed) by *Samuel Beaver*, obliging him, his heirs, &c. to make a good right, for his wife's life, to *Richard Faris*, to 133 1-3 acres of land; being the place "where" the said *Faris* rented of *Samuel Beaver*, and likewise the place whereon the said *Beaver* lives:" 4. A certificate of the Clerk of *Louisa*, proving that on the 9th of *September*, 1782, the Court appointed Commissioners to lay off and allot to *Elizabeth Beaver* her dower in the estate of her late husband *Joseph Hopkins*; and that, on the 10th of *April*, 1799, their report was returned and ordered to be recorded; and, 5. A certificate of the auditor of public accounts, that the Sheriff of *Louisa* was debited with the revenue and certificate taxes for the years 1784, and 1785, on a tract of land in said County containing 400 acres, in the name of *Elizabeth Hopkins*, and that judgment was rendered on behalf of the Commonwealth against the said Sheriff for the certificate tax of 1784.

September 27, 1804, the Court of Chancery "being of opinion that the sale of the land which the plaintiff claimeth, by the defendant *Robert Yancey*, was a *fraud*, adjudged and decreed that the indenture among the exhibits between *Waddy Thomson*, of the one part, and the defendant *Robert Yancey*, of the other part, be cancelled, and that the other defendant, who was privy to the fraud, and a *particeps criminis*, release to the plaintiff all his, that defendant's, right and title in and to the land aforesaid; and that the defendants resign to the plaintiff the possession of the said land, and pay to him the profits thereof, since the sale thereof, after deducting the *taxes then due* for the same to the pub-

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lic; of which profits one of the Commissioners is directed to examine, state, settle, and to the Court report an account; and the Court ordereth that a copy of this decree be recorded in the County Court of *Louisa*.”

From which decree the defendants prayed an appeal, which was allowed them.

Nicholas and Botts, for the appellants.

Peyton Randolph and Hay, for the appellee.

On the *merits* of this case, all the points in controversy are so fully discussed in the ensuing opinions of the Judges, that a due regard to brevity compels the reporter not to insert the arguments of counsel.

As to the *jurisdiction* of the Court, it was contended for the appellants, that the plaintiff had a plain remedy *at law* by ejectment for the *land*, and trespass for the *mesne profits*; there being no proof of *fraud*; and the only ground of the relief sought being, that the sale was *illegal*.

But, on the other side, it was said, 1. That the *mistake* committed by the *Commissioners* in listing the land to *Elizabeth Hopkins*, the widow, when, in fact, it was the property of *Lund Hopkins*, her son, could be corrected in a Court of *Equity* only; that the Sheriff was bound to sell according to *their* lists; and therefore the conveyance from the High Sheriff to the Deputy was good *at law*, though not *in equity*. At any rate, it was *doubtful* whether the plaintiff could have succeeded in his action of ejectment, in opposition to that conveyance; and that was ground sufficient for a Court of Equity to entertain jurisdiction. (a)

(a) *Weymouth v. Boyer*, 1 Ves. y. jun. 417.

2. It was insisted, that the deed was *fraudulently* obtained by *Yancey* from the High Sheriff; for, in a *technical* sense, *fraud* may be committed without any *immoral* motive. He *might* have *thought* that he had complied with the requisites of the law in the sale of the land, and told the High Sheriff

so: but this representation was incorrect, and a deception, even, if not intended as such.

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Wednesday, November 7. The Judges pronounced their opinions.

Judge TUCKER. This was a bill brought by *Hopkins* to set aside the sale and conveyance of 200 acres of land, (part of a tract of 400 acres, in *Louisa* County,) sold on the 19th of *December, 1786*, by the Deputy Sheriff of *Louisa* County, for the taxes due thereon for the years 1784 and 1785, and purchased by *Yancey*, the Deputy Sheriff, (by whom the same was distrained and sold,) and afterwards conveyed to him by the High Sheriff; and then sold by the defendant *Yancey* to the defendant *Faris*. The Chancellor set aside the sale, and decreed that the deed should be cancelled.

It was objected by the appellants' counsel that the complainant had a plain remedy at law, by an ejectment, to recover the premises. But I am of opinion that he had a right to come into a Court of Equity for the purpose of setting aside a deed which might have obstructed his recovery in an ejectment. And it was more beneficial to the defendants that he should do so, as they might, by their answer, purge themselves of any imputation of fraud or collusion in making the sale. Besides, the object of the bill was to compel a reconveyance of the land from the defendant *Faris*, which a Court of Law could not enforce. And as a single verdict in ejectment might not have been conclusive, I think the parties pursued the most proper course.

The complainant at the time of this sale was an infant of very tender years, to whom the land was devised in fee-simple by his father, whose will bears date in *June, 1780*, and was proved and admitted to record in *Louisa* County, in *August, 1782*. It does not clearly appear that he had any guardian; none being appointed by the will. *Anthony Hayden* qualified as an executor. He resided in another County. The infant's mother removed from *Louisa*, in

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1785, having married another husband, who before that time (it would seem) sold her dower estate to the defendant *Faris*, who then actually resided upon the land. She did not return till 1795. *Faris* had property upon the land sufficient to have paid the taxes.

The land was charged in the Commissioners' books to *Elizabeth Hopkins*, the complainant's mother, and was sold by the defendant *Yancey*, and purchased by *him*, and conveyed by the High Sheriff to *him*, as the property of the said *Elizabeth Hopkins*, which had been sold for the taxes due thereon.

(a) *Jolinston,*
Guardian of
Hinton, v.
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M.S. S. P.
Kinney v. Be-
verley, 2 H.
& M. 318.

I will here premise (a) that, whenever an authority is given to any person, or officer, by law, whereby the estates or interests of other persons may be forfeited and lost, or otherwise affected, such authority must be strictly pursued in every instance. And any omission, or mistake, in the performance of those duties which the law prescribes, will vitiate the whole proceeding. More especially, where an act is in its nature so highly *penal*, that a man may absolutely lose his whole property, for a few days' neglect in the payment of a tax which has never exceeded one hundredth part of the valuation thereof by sworn Commissioners; and where the law has left the power of enforcing that penalty in the hands of a mere *ministerial* officer, who may, as in the present case, become the purchaser of the lands himself, for the bare amount of the tax due thereon. And, above all, in the case of an *infant*, without any guardian (as far as appears in this case) to protect him, or his property, from utter ruin and destruction.

By the act of *October, 1781, c. 40.* the Commissioners of the taxes are required to take an account in writing of the quantity of land *belonging to all PERSONS WITHIN THEIR COUNTY, (except their own,)* and also the name of the proprietor, or *proprietors* thereof; and ascertain the value thereof. And in all valuations pursuant to that act, the same rules and regulations are to be observed, with respect to and between landlords and tenants, (unless the contract

between them be specially otherwise,) as directed by the act of *October, 1777*, c. 2. s. 6. which provides, that, where the *landlord* shall reside out of the Commonwealth, or have no visible estate whereon to levy the pound rate, for the value of his land, in such case the pound rate shall be paid by, or LEVIED UPON, THE TENANT, not exceeding the annual amount of the rents which shall be allowed him by the landlord. The same act, sect. 8. further provides, that, where any lands shall be assessed in a County, wherein the proprietor doth not reside, nor hath any effects whereon to levy the said pound rate, and the Commissioners shall discover in what other County the proprietor lives, or hath effects, they shall transmit the assessment to such other County, there to be collected, &c.(a)

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(a) See *Chan. Rev.* 60, 61.

Neither the acts of 1781, c. 40. or *October, 1782*, c. 8. contain any specific provision on the subject of the tax on lands belonging to proprietors not residing in the County, as far as I can discover; so that the case of such proprietors is either wholly omitted, or falls under the provisions of the act of 1777, c. 2. s. 6. and 8. But, by the act for equalizing the land-tax, passed in *October, 1782*, c. 19. the duty of the Commissioners of the taxes is enlarged. By that act they are to make diligent inquiry of all lands within their County which had not been theretofore valued; and also of all alienations or partitions which may be made: and, for that purpose, they are to be furnished yearly by the Clerk of the General Court, and of the County, with lists of all conveyances or partitions within the preceding year in the respective Courts admitted to record; and if the purchaser or seller shall not, before a certain day, have satisfied the Commissioners as to the just value of the land, the same shall be charged as land of the best quality in the County.

From the exhibits it appears that *Joseph Hopkins's* will, wherein he devised these 400 acres of land to his son *Lund Hopkins*, the complainant, was proved in *Louisa* Court, two or three months only before the passage of this last act; that *Beaver*, who married *Hopkins's* widow, sold his wife's right

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therein, viz. 133 1-3 acres, to the defendant *Faris*, the 10th of *September*, 1785; and, by the several answers and other evidence in the record, that the *whole tract* was charged by the Commissioners of the land tax to *Elizabeth Hopkins*, and not to *Lund Hopkins*, to whom it was devised; that she had removed away in 1785, and, probably, (though that does not appear,) carried her children with her.

By the act of 1784, c. 91. one half the taxes for the year 1783, were remitted: and, for the other half, it permitted a distress to be made on the first of *September*, 1785. But the act of 1785, c. 38. postponed the time of making distress for the same until the first of *March*, 1786: so that *Faris* was in actual possession, either as a tenant, or as a purchaser, long before that period.

From this view of the case, it appears to me that the Commissioners of the tax either mistook or neglected their duty, by charging the *whole* land to *Elizabeth Hopkins*, to whom it was not devised, even during her widowhood, as I apprehend. The Sheriff also mistook his duty, I think, in selling the land itself, instead of distraining the property of *Faris*, who lived upon and claimed a title to a part, as a purchaser from *Beaver*, the husband of *Joseph Hopkins's* widow. Or, if the act of 1777, c. 2. before referred to, may be considered as in force so far as relates to the lands of proprietors not residing within the County, if the Commissioners had discovered where the proprietor of the land resided, they ought to have transmitted the assessment to the County where he resided, or *had effects*. But I am not altogether satisfied that this act was not repealed by the act of *October*, 1782, c. 8.; and, if so, it would seem that the case of non-residents' lands was omitted in that act, as well as that of 1781, c. 40. So that, whichever way the subject be taken, there has been a fatal mistake, either on the part of the Commissioners, or of the Sheriff, and consequently I conceive the sale to be absolutely void, as against the true proprietor of the land, who was the complainant, *Lund Hopkins*.

And here I will add that I proceed entirely on the ground of *mistake* in the officers of the Commonwealth, and *not of fraud* in the defendant *Yancey*, by whom the sale was made. I have not considered the case as to *Faris*, further than to say that he must be considered as a purchaser with full *notice*. For, knowing the land to have been sold, under colour of an authority given by law to a public officer, who was not the proprietor thereof, he was bound to inquire, and to take notice, whether that officer, and all others whose agency was required by law, had proceeded with due regularity in discharge of their duty.

On these grounds, and *not on the ground of fraud*, I am of opinion that the Chancellor's decree be affirmed.(a)

Judge ROANE. Seldom has a case occurred in which my opinion differed more diametrically from that of the Court below, than in the one before us. Instead of having committed an odious *fraud* meriting the unusual reprobation of directing the decree, rendered in this cause, to be recorded in the Court of the County in which the transaction happened, the testimony has entirely convinced me that the appellant *Yancey* acted with all imaginable fairness touching the sale in question. There is not an *iota* of testimony tending to produce any other impression upon my mind.

The taxes due on the land in question were debited to the Sheriff as due from *Elizabeth Hopkins*, (see the certificate of the auditor,) and it was not for that officer to consider them as due from any other; or, in other words, to depart from the Commissioners' books in this respect, and take upon himself the responsibility of settling the rights of property, and scrutinizing into titles: that the Sheriff was to govern himself, in this particular, solely by the Commissioners' books, who and who only were to make the necessary alterations therein resulting from conveyances, &c. is evident not only from the act of 1782, equalizing the land-tax, (which provision is also kept up to the present day,)

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(a) See the act of 1787, c. 42. to remedy abuses in sales of lands for taxes.

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but is moreover supported by the opinion of Judge TUCKER in *Kinney v. Beverley*, (2 H. & M. 330.) who says in emphatical terms, that those books are to be “the *guide of the Sheriff* in collecting the taxes.” There was no personal property upon the land belonging to the person to whom the tax was charged, whereof it could be made; and the Sheriff was consequently bound to sell the land itself. Nothing is more clear than that, according to the true construction of the acts by which this case is to be governed, *such* personal property only was liable to be taken, and not the property of *other* persons which might chance to be found upon the premises: and it was not until the act of 1790, c. 5. that a hint was given in our laws that the property of the *tenant* might be liable. The testimony in this case shews us, that this sale was duly advertised in the Gazette, and the deposition of *Charles Yancey*, sen. aided by other testimony, in the cause, entirely satisfies me that it was also duly advertised at the Court-house, and other public places in the County. Considering the great lapse of time which has occurred, and the fleeting nature of such circumstances, it is unreasonable to expect more satisfactory proof on this last point, than is furnished in the case before us. The sale was fairly and openly made at the most noted place upon the premises on a credit of one month; the bystanders were repeatedly invited to bid; their opinion was asked and followed as to the manner of laying off the land sold: it was not till after a failure to bid by other persons that the Sheriff himself made the bid which finally secured to him the land; and public notice was given at the sale, and afterwards repeatedly renewed, in particular, to the guardian of the appellee, that the land purchased might be redeemed in a reasonable time for his benefit. Yet a great length of time, amounting to many years, was suffered to elapse before any effort whatever was made to this effect; prior to which the land was sold to the other appellant.

With respect to the infancy of the appellee, although the

act of 1790, c. 5. has allowed three years for an infant to save his land, after his infancy has expired, I do not find that any provision was made in favour of *infants* by the acts of the period at which this transaction took place. *They* are therefore to be bound by the general words of the act, as well as adults. On this principle, I recollect it to have been somewhere decided that infants would have been bound by the general provision in the act of limitations, but for the special exception therein inserted in their favour.

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Objections, however, are made in this case, 1st. To the legality of the purchase by the *Sheriff* himself; and, 2dly. To the lowness of the price given for the land, whence, I presume, it was inferred, or supposed, that the transaction was fraudulent.

As to the first objection, it may be remarked that, while the law was imperious upon the Sheriff, under a heavy penalty, to finish his collection by a short and given day, without any other allowance than for *insolvents*, which certainly do not include persons having land liable for taxes; while it is a maxim of justice and sound sense, that, when the law requires a thing to be done, it also gives the necessary means of doing it; and, while there was no *express* inhibition at that day, in any statute, against the *Sheriff's* bidding for his own private emolument, such inhibition is not, on the other hand, to be inferred from the reason of the principle on which, in *other* cases, it has been held that certain descriptions of persons are disabled to purchase property offered for sale by themselves. The inhibition in those cases seems to arise from the confidence placed in, and the intimate knowledge acquired by, trustees, commissioners of bankruptcy, auctioneers, &c. which would enable them, if permitted to purchase, to avail themselves of facts coming to their knowledge in their several characters, and, by withholding them from others, to lessen the prices of the articles exposed to sale, to their own emolument.(a) But, in the case in question, no confidence

(a) *Sugden's Law of Vendors*, 391—405.

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his knowledge, which he might abuse to his own advantage: he has no other information on the subject than is derived from the books of the Commissioners as aforesaid: it would be too much to suppose him conscious of the particular circumstances attending all the tracts of land in his County. This case then does not seem to fall within the reason of the principle before mentioned; and it is not shewn by any adjudged case that the inhibition has in *England* been extended to Sheriffs, or Collectors, though, I presume, the case must have occurred in a thousand instances. It is true, indeed, that the act of 1787, c. 42. premising that abuses had taken place in this particular, declared that a purchase of lands sold for taxes by a Sheriff or Deputy Sheriff, and bought by himself, should thereafter be considered as held in trust for the payment of the taxes, and might be redeemed by the proprietor: but on this act it is to be remarked that it not only does not apply to this case, being posterior to it, but, on the other hand, admits and recognises the frequency of the practice of bidding by Sheriffs in such cases, or, in other words, the custom of the country in that particular; and, on this ground, brings this case within the reason of the decision of this Court in respect of executors, in the case of *Anderson v. Fox*, 2 H. & M. 245. In that case it was held, or seems to have been held, on this last ground only, *i. e.* the practice of the country, and the consequences resulting from departing suddenly from it, that a purchase by an executor from himself, if fair in all respects, should be supported. (See Judge TUCKER's opinion, p. 263.) If such considerations were considered to have this effect in a case coming directly within the principle aforesaid, (for an executor is emphatically possessed as well of the secrets, as of the confidence of the testator respecting his property,) much more so will they have that effect in cases in which such knowledge and confidence is wholly wanting: if they had this effect, in cases in which the purchase by the executor was entirely *voluntary*, much more so would they have

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that effect where the provisions of the laws on this subject would, as it were, inflict a penalty upon the Sheriff for not bidding, and where his bidding might be absolutely necessary to counteract combinations to defeat the collection of the revenue, whether arising from the sympathy of the bystanders, or other causes. As to the general custom on this point, it does not rest only on the recognition of the act of 1787, and various other acts of Assembly, but is admitted, in this case, by the deposition of *Charles Yancey*, sen. who also *instructed* the deputies acting under him to purchase, in case no other person would do so.

With respect to the *price* at which this land was sold, it is true it was remarkably low; but it is also proved that the land was of very indifferent quality; that lands of *that description* would scarcely sell at any price; and that there were a great many tracts offered for sale in *Louisa*, at the same time, and for the same purpose: indeed, according to the deposition of Captain *Hughes*, who on one occasion acted as cryer of these lands, it may be said that this tract, *comparatively*, sold *well*; for he tells us that *many whole tracts* of land were sold to pay the taxes, whereas only *half* of the tract in question was found necessary; whence it would seem that this land sold for 100 *per cent.* more than some other tracts in the same County.

On these grounds, and because the appellant *Yancey* was compelled by the *laches* of the appellee's guardian to hold the land, (which is also proved to have been very unproductive,) and pay taxes thereon, for a term vastly longer than that *subsequently* allowed, by law, to *infants* to come forward and redeem their lands, I am of opinion that the bill of the appellee ought to have been dismissed. While it is very probable that many abuses may have occurred in cases like the present, the testimony in this cause (while it is not seen that the purchase was at that time interdicted by the provisions of any *statute*, or any equivalent *principle*, and was sanctioned on the other hand by the *practice* of the

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country) convinces me that the appellant *Yancey* acted in the case in question with all imaginable fairness.

My opinion is to reverse the decree, and dismiss the bill.

Judge FLEMING. It has been well observed by Judge TUCKER that, whenever an authority is given to any officer, or other person, by law, whereby the estates or interests of other persons may be forfeited, or lost, such authority must be strictly pursued in every instance: and, I will add, that penal laws of every description are to be strictly construed; and nothing therein taken by implication, or intendment; and, more especially, where the estates or interests of *infants* may be affected: and the laws subjecting lands to be sold for the payment of taxes I consider as highly *penal*. By the act of *October, 1781, c. 40.* the Commissioners of the taxes are required to take an account in writing of the quantity of land belonging to all persons within their County, (except their own,) and also the name of the proprietor or proprietors thereof. Here, then, at the very threshold of the business, the direction of the law was departed from, by the Commissioners' mistaking the proprietor, and entering the whole 400 acres devised to *Lund Hopkins*, by his father *Joseph Hopkins*, as the land of *Elizabeth Hopkins*, when she had only a life-estate in one third part, as her dower therein. The Sheriff's books for the collection of the taxes were, no doubt, made out from those of the Commissioners; and thus the mistake was continued till the 19th of *December, 1786*, when the land belonging to *Lund Hopkins*, an infant of tender years, was sold, as the land of *Elizabeth Hopkins*, for less, perhaps, than a fortieth part of its real value; at a time, too, when it is in evidence that, at the day of the sale, there was property on the premises sufficient to have paid the taxes due, belonging to *Richard Faris*, who then lived thereon, as purchaser of the dower of *Joseph Hopkins's* widow, who, at that time, was married to *Samuel Baber*, or *Beaver*, and

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Paris afterwards became a purchaser of the land in controversy, with full knowledge of the preceding circumstances; having declared in the presence of *Martha Anderson*, (about the time he made the purchase,) that he expected to be sued for the said land, but that he bought it "to spite the rascal;" alluding to *Lund Hopkins*, as the witness supposed.

For these reasons, I think the decree is a just one; though not on the ground of any *fraud* practised by the Sheriff: and it is an invariable rule with me never to reverse a judgment, or decree, without a thorough conviction that it is erroneous.

By the majority of the Court the decree was AFFIRMED.



Mason's Devises against Peter's Administrators.

Monday,
October 22.

UPON an appeal from a decree of the Superior Court of Chancery for the *Williamsburg* District.

The suit was originally brought in the late High Court of Chancery, by *David Ross & Co.* and *Walter Peter*, against the executors and devisees of *James Mason*, deceased, and, having abated by the death of *Walter Peter*, was revived on behalf of *James Freeland* and *Robert Kenman*, his administrators. Its object was to obtain satisfaction, of certain simple contract claims upon the estate of the said *James Mason*, out of lands devised to his sons; the bill suggesting that the executors refused to pay them on the pretence "that there had not come to their hands sufficient of the personal estate of their testator, for the payment of his whole debts, and that they must first discharge the specialties, and such claims as are considered entitled to a preference in the distribution of the assets." The plaintiffs contended, that the devisees having had the benefit of the *personal* estate applied

1. A simple contract creditor, having obtained a judgment by default against an executor, cannot maintain a suit *in equity*, for marshalling assets, against the devisees of the landed property, until he has fully prosecuted his claim *at law*, against the executor and his securities.

2. A judgment by default, against an executor, is *prima facie* admission of assets of the real estate.

3. A judgment against the executor is no evidence against the heirs or devisees of the real estate.

4. A decree against devisees holding by several and distinct devises, ought not to be joint, but *pro rata*.

5. *Quere*, whether, and under what circumstances, a Court of Equity can decree a sale of land descended or devised, (without any specific *lien*, or any charge, either general or special, by a conveyance or will of the ancestor or devisor.) to satisfy a bond, or a simple contract creditor, claiming on the principle of marshalling assets? Especially, can such decree be made, in any such case, where the rents and profits of the land are sufficient to keep down the interest accruing on the debt?