REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

THIRD EDITION.

TO WHICH, (THROUGH THE FIRST THREE VOLUMES,) BESIDES THE NOTES OF THE LATE JOSEPH TATE, ESQ., ARE ADDED COPIOUS REFERENCES TO STATUTES AND SUBSEQUENT ADJUDICATIONS ON THE SAME SUBJECTS.

BY LUCIAN MINOR,

COUNSELLOR AT LAW.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

RICHMOND: CHAS. H. WYNNE, PRINTER.

GRAHAM ET AL. *v.* WOODSON ET UX. ET AL.

Thursday, April 24th, 1800.

A. leases to B. for twenty years; with liberty to B. of surrendering the lease at any time before the expiration of the term, on payment of five shillings. A. devises the rents during the lease, to his five daughters, and the fee simple afterwards to his son P., who sells to B. who surrenders the lease: this surrender shall not disappoint the daughters' legacies; but, B. will be decreed to pay the rents.
Interest allowed upon arrearage of rents, upon circumstances.*

This was an appeal from a decree of the High Court of Chancery; where Josiah Woodson and wife and others, brought a bill against Graham, and Philip Woodson; stating, that Matthew Woodson leased to Graham some coal mines in Goochland, for the term of twenty years; in which lease there is a proviso, that if Graham should think fit to surrender the lease before the expiration of the term, he should have liberty to do so, on paying the sum of five shillings. That this lease was made for the sole object of providing more competently for the lessor's daughters; and was subsisting at the death of Matthew Woodson; who devised the same, or, which is the same thing, the moneys arising therefrom, to his daughters, the plaintiffs. That the defendant P. Woodson, being entitled by devise from the said M. Woodson to the reversion of the said coal mines, after the expiration of Graham's lease, the said Graham, after the death of Matthew Woodson, purchased the said reversionary interest; and, thereupon, surrendered the lease, and gave notice thereof to the executrix and devisees aforesaid of Matthew Woodson. That this was done by Graham, to obtain the land for less than its value. That, by this means, the rights of the plaintiffs will be defeated, if the surrender should be allowed to prevail against them; which they insist it ought not, as the plaintiffs are entitled either to the money, or to the unexpired term of years in the land itself. The bill, therefore, prays an account and payment of the rent till the regular expiration of the lease by efflux of time; or, otherwise, that he may deliver possession of the lands to the plaintiff, during the residue of the term for which the lease was granted, and for general relief.

The answer of Graham admits the lease, and devise: insists upon his right to surrender, under the express [250]

* Interest was regularly allowed on rent arrear, by statute of 1827. Supp. to R. C. 256, § 3. See Code of 1849, p. 563, § 7.

words of the lease; and that it was on account of the right to do so, that he had agreed to give so high a rent. That the lease being defeasible in its nature, those claiming the benefits, were subject to the disadvantages of it. That the uncertainty of its duration, was frequently spoken of in conversations between the defendant and the said M. Woodson. That, after searching for coal for some time, without any competent success, the defendant, in the life-time of the said M. Woodson, had determined to annul the lease, unless he should, in a short time, find a body of coal which promised more. That things were in this state when the said M. Woodson died; and, in a short time afterwards, the apprehensions of the lease being ruinous to him increasing, he determined to abandon, when he was informed that the defendant P. Woodson would sell; and conceiving that a purchase would be the best means of recovering his expenditures already made upon the lease, he bought the fee simple. That this circumstance induced him to make greater exertions in seeking for coal; which, after great expense, he at length found in such a degree as to promise success. Yet, notwithstanding these prospects, he is willing to relinquish his interest in the coal lands, on receiving his expenditures, without interest, and a reasonable hire for the slaves which have been employed on them.

The answer of Woodson says, Graham, during the treaty for the reversion, frequently told him, he would give up the lease to his sisters, so as to prevent the defendant from receiving any benefit from it. That he sold his right to Graham, without any intention of defrauding the plaintiffs.

The depositions prove M. Woodson's intention of providing for his daughters by the lease. That Graham, when he bought the fee simple, secured £100 each to the two youngest daughters, if they were satisfied. And one of the witnesses [251] says, that after the purchase, Graham, in a conversation, said to the defendant Philip, that if he had thrown up the lease, he should have done it in favor of the legatees, and not of Philip, as that seemed to be his father's *will.*

The Court of Chancery decreed the defendant Graham to pay the rents with interest; and if he should choose afterwards to abandon the lease, to deliver the possession of the lands, during the unexpired term thereof, to the plaintiffs. From which decree, Graham appealed to this Court.

CALL and WICKHAM, for the appellant.

Insisted, *that* it was like the case of a specific devise; the devisee of which, is liable to all the casualties which may at-

tend the thing bequeathed. Thus, if there be a devise of a debt, and the debtor becomes insolvent, or the testator releases the debt, the legatee loses it altogether, and cannot claim satisfaction out of the other estate of the testator. That the lease in the present case was, in its creation, liable to be surrendered; and, therefore, if the testator did not make provision for that event, he meant that the interest of the daughters should depend upon the contingency in the lease, and determine with it, if the lease should be surrendered. Consequently, the daughters could no more claim compensation for the loss in this case, than the legatee of a debt could in the other. That the contingency of the surrender was a benefit which belonged to the remainder-man; and, if fortune threw it in his way, the daughters could not complain; because they had the devise as the testator gave it to them. For, he bequeathed it, subject to be destroyed at the election of the lessee, who was at liberty to exercise the right, when he pleased; and the daughters had no authority to control him, because the lease itself expressly bestowed the power on him. *That* it was strange reasoning to say, that the daughters were injured by the lessee's exercising a right which he had over the estate, and which right he had stipulated for in express terms. Consequently, the principles of the decree [252] were wholly erroneous, and the bill should have been dismissed.

But, if it were true, that the plaintiffs were entitled to the rents, which they by no means admitted, still the decree for interest was clearly wrong; because that is never given on rents, unless there be a penalty. [*Creuze* v. *Hunter*,] 2 Ves. jun. 163; [The Countess of *Ferrers* v. Earl *Ferrers*,] Cas. Temp. Talb. 2.

RANDOLPH, contra.

Contended, *that* the surrender was a stratagem to defeat the interest of the daughters, which would not be supported in a Court of Equity; because they were not to be ousted of their rights by a contrivance between the lessee and remainder-man. *That* there was less reason for it, in this case, than in others: because the defendant had in fact bought the estate himself before the surrender; which was a device, afterwards, made use of to defeat the legacies of the daughters; although their claim had enabled him to buy the remainder, at an under rate. *That* a devise of the rents, and a devise of the term itself, were substantially the same; and the true exposition of the will was, that he intended them to have the emoluments of the

land, during the term of the lease. *That*, therefore, the change of owners would not affect their interest. For, whether the possession of the land was with the remainder-man or the lessee, their claim was still the same. So, that if the remainder-man had retained the lands he would, after the surrender, have been liable for the rents, or else he must have yielded possession to the daughters; and, therefore, the defendant, who had less equity, must do the same. *That* the rents being for a liquidated sum, ought to carry interest; for, the uncertainty of the amount is the only reason why interest is not generally allowed.

Cur. adv. vult.

LYONS, Judge.

Delivered the resolution of the Court, that there was no error in the decree upon the merits; and as to the interest, that it was discretionary in the Court to allow it or not. [253] But, in this case, the defendant had no title to have it taken off, as he had endeavored to defeat the rents altogether, and thereby delayed the payment.

Decree affirmed.*

[* See next case.]

SKIPWITH *v.* CLINCH, EXECUTOR, AND OTHERS.

Thursday, April 24th, 1800.

A. takes a lease of B. in May, 1777, for twenty years. In August, 1778, a similar lease of the same estate is executed. The rents are to be settled by the scale of May, 1777.

Interest upon the rents refused.*

This was an appeal from a decree of the High Court of Chancery; where Clinch, as executor of Holt, together with the children of Holt, brought a bill against Skipwith, stating, that on the 23d of May, 1777, Skipwith leased of Holt, an estate for twenty years, at £150 per annum, with a proviso for payment of the further sum of £50 per annum, provided there

* See note to p. 249 *ante*; and Supp. to R. C. of 1819, p. 256, § 3; Code of 1849, p. 568, § 7.