REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME V.

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1804. *May.*

Wilkins v. Taylor.

of the body; because that would have created an estate tail in lands, and consequently gave the absolute property in a personal thing. But the present limitation is particularly favourable to the first devisee: For the words are, "In case of the death of my grand daughter *Sarah Cocke* without issue, I give her part to my grand daughter *Elizabeth Clements*." Which, according to all construction, gave the absolute property to *Sarah Cocke*, as the words, "*without issue*," would have created an estate tail in lands, and therefore transferred the absolute property in personalty. This construction is plainly most agreeable to the intention of the testator, who could not mean that the property should go over, if *Sarah* had children: and, as there is no time fixed for her issue to fail, the contingency was too remote to make it operate as an executory devise; for, to produce that effect, the contingency must be limited to a reasonable period; but this is indefinite; and, consequently, the devise over is void. I concur, therefore, with the rest of the court, that the decree of the high court of chancery should be reversed, and that of the county court affirmed.

1804. *April.*

CARTER'S *ex'or* *v.* CURRIE.

In a suit against a mercantile firm, the executors of the deceased partners, ought to be made parties.

Carter and *Trent*, were partners in trade. *Carter* died, leaving *Carter* his executor. *Currie* filed a bill in chancery against *Trent*, as surviving partner, and *Carter*, the executor, for relief concerning a lost bill of exchange. Pending the suit, *Trent* died. *Carter's* answer stated that *Trent* had agreed to pay the partnership debts; and that the plaintiff might have made his debt out of the partnership effects. The plaintiff demurred as well as replied to the answer,

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The suit was not revived against *Trent's* executors; and the chancellor decreed payment of the debt against *Carter's* executors, who appealed to the court of appeals.

Randolph, for the appellant. The protest is not properly verified; for a copy by the executors was not sufficient.

Wickham, contra. It is to be presumed that there was an affidavit that the bill was lost; and it is too late to make the objection after the answer is filed. The notarial copy is evidence of the protest; and indeed the only evidence of it when the original is lost; for the notary is bound to make a record. The writ was against *Carter & Trent*, and the judgment was against both: and therefore, although the declaration is imperfect and leaves a blank, it is not material; for the judgment is good until it is reversed. At any rate, the judgment is evidence of the bill; and the course of the court of chancery is to presume exhibits proved until an objection is made. Therefore, as no objection appears in the record, it will be presumed by this court, that the necessary proofs were made. *Carter* is liable, because he was a partner, and the bill is for a partnership transaction. He should have shewn that *Trent* had effects to satisfy the claim.

Randolph, in reply. The jurisdiction may be admitted, and the want of the affidavit waved: But the bill was not verified, because it is not shewn that the copy was taken from the books of the notary; for, at law, it would have been necessary to prove it; and the same rule holds in equity. The presumption of probat is only that it was proved to be such a paper as it purports to be, and not that it was derived from a more authentic source. The declaration is against *Trent*, surviving partner of ———; and it is an office judgment only, which could not be filled up, for want of the bill. This drove them into equity; and now the attempt is to support the suit in chancery by the imperfect judgment at law, or, in other words, to prove the propriety of the defective

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judgment by the judgment itself, which cannot be done. *Trent's* representatives should have been parties to the suit, or the omission accounted for.

LYONS, President, delivered the resolution of the court: That the decree was erroneous, as *Trent's* executors had not been made parties; and therefore that it was to be reversed, and the cause sent back to the court of chancery for the proper parties to be made, and further proceedings had.

1804. *May.*

READ *v.* READ.

A British subject, born before the revolution, could not before the treaty of 1794, inherit lands in this country.

In ejectment brought by the plaintiffs against the defendant in the district court of Staunton, the jury found a special verdict, which states, "That a patent issued to *William Beverley* and others for 118,491 acres of land, including those in the declaration mentioned, on the 12th of August, 1736: That *Beverley* in June 1750, gave a power of attorney to *Lewis* and *Madison;* by virtue of which they conveyed 300 acres, part of the lands, contained in the said patent, to *James Miller;* who entered and was seized: that *Miller,* in March 1754, conveyed to *Israel Christian;* who, in September 1763, conveyed to *William Fleming;* that *Robert Beverley,* in May 1765, conveyed two tracts of land, containing 560 acres, to *William Fleming;* who, in August 1767, conveyed 740 acres, part of the lands in the said patent contained, to *Robert Read,* late of Staunton: that the above mentioned conveyances contain the said 740 acres of land in the declaration mentioned: that the defendant *Margaret Read* was wife of the said *Robert Read: that the said* Robert Read *died, in October* 1787, *intestate, and without issue;* leaving the said *Margaret* his widow and relict, who