

DECISIONS OF CASES

IN

VIRGINIA,

BY THE

HIGH COURT OF CHANCERY,

WITH REMARKS UPON DECREES,

BY THE

COURT OF APPEALS,

REVERSING SOME OF THOSE DECISIONS.

BY GEORGE WYTHER,

CHANCELLOR OF SAID COURT.

SECOND AND ONLY COMPLETE EDITION, WITH A MEMOIR OF THE AUTHOR, ANALYSIS
OF THE CASES, AND AN INDEX,

By B. B. MINOR, L. B., OF THE RICHMOND BAR.

AND WITH AN APPENDIX, CONTAINING

REFERENCES TO CASES IN PARI MATERIA, AND AN ESSAY ON LAPSE;
JOINT TENANTS AND TENANTS IN COMMON, &C.,

By WILLIAM GREEN, Esq.

RICHMOND:

J. W. RANDOLPH, 121 MAIN STREET.

1852.

BETWEEN

THOMAS BAILEY and Anne his wife, *plaintiffs*,

AND

LEVIN TEACKLE, executor of Ralph Justice, Edward Ker, and William Harmanson and Henry Harmanson, executors of John Harmanson, *defendants*.

1751. A testator devised lands to his wife *during her widowhood*; and then to his daughter A. and her heirs after the time limited to her mother; also other land, and a negro to another daughter, and her heirs; and then added, "in case my two children should die without heirs of their bodies, then I give my said wife my plantation, [before devised to her and to A.,] during her life, and after her death to my brother: my will is that my wife have all my estate till the first child marries or arrives to the age of twenty one years; and my will is that there shall be an equal division of my estate and settlement."—HELD, that the condition annexed to the first devise to the wife, viz: the continuance of her widowhood, is not discharged by the subsequent devise to her until the elder child should be married or attain the age of twenty one years. She is entitled to all the estate: to part, if she continue a widow: and to the remainder, till the other event, whether she married again or not.
2. If she marry again, (as she did,) her title under the will to the land devised over to A. ceases; but her title to dower in it remains.
 3. A. died an infant, intestate and unmarried; and her share of the personalty was distributed among her mother, sister, and two half sisters; but HELD, that the half-sisters not entitled to share A.'s personal estate; and the feme plaintiff not being of age when married, the statute of limitations is no bar to recovering the portions received by the half sisters.
 4. The plaintiffs, A.'s sister and her husband, are entitled to two-thirds of the profits of the lands devised to A., made after the marriage of her mother.
 5. Insertion of testator's name at top or in any other part of a will, equivalent to signature at bottom.

RICHARD DRUMMOND by his testament devised as followeth: 'i give and bequeathe to my wife Catharine Drummond the land left me by my father Richard Drummond, lying on Hunting creek, containing 600 acres, including the half of Halfmoon island, during her widowhood; and i also give my said wife the use of my watermill, lying on the head of Hunting creek, during her widowhood. item i give and bequeath unto my daughter Alicia Drummond my abovesaid plantation, lying on Hunting creek, after the time limited to her mother, to her and to her heirs, and i also give my said watermill to my daughter Alicia, to her and to her heirs. item i give

The plaintiffs commenced their suit, first against the defendant Levin Teackle alone, by their bill filed in march, 1767, stating Richard Drummond to have died intestate, and alleging that Ralph Justice, after his marriage with the mother of the plaintiff Anne, entered into the lands and took possession of the slaves and other chatels of Richard Drummond, and received the profits thereof, and converted to his own use part of the personal estate, and demanding an account of those profits and personal estate, and praying a decree for the plaintiff Anne's proportions of them, or so much as had not been accounted for to her former husband William Justice.

The defendant, by his answer to that bill, admitted that the daughter Alicia's part of her fathers estate had been divided into four parts, and distributed among her mother, the plaintiff Anne, and her two half sisters, in such manner as he was advised the law directed; and alleged that Ralph Justice, whose possession of Richard Drummonds lands and other estate, from some time in 1756 until may, 1759, is admitted, delivered up the whole estate real and personal to William Justice, after the intermarriage of him and the plaintiff Anne, about the time last mentioned; which delivery, as the defendant insisted, discharged his testator from obligation to render any further account of that estate or its profits.

That cause was set for hearing in february, 1770. 14 of november, 1782, an order was made, by consent of parties, appointing commissioners to state and report an account of such part of Richard Drummonds estate as came into possession of his widow, before her marriage with Ralph Justice, and also of such part of the estate of Richard Drummond as came into possession of Ralph Justice after his marriage with Catharine Drummond, and of the nett profits of the whole estate from the death of Richard Drummond, and an account of such part of Catharine Drummonds estate as came to the possession of Ralph Justice, after his marriage aforesaid, and of the disbursements and applications by Ralph Justice, or his executor, in discharge of debts and in delivery thereof to persons claiming the same.

Similar orders, subsequent to this, appointed other commissioners, who made reports, upon which was no decree.

In may, 1787, the plaintiffs filed an amended bill, making the other defendants parties.

In the amended bill the plaintiffs set forth the testament of Richard Drummond, stated that it had been in possession of Catharine Drummond, from the time of his death, until the year 1765, when the plaintiff Thomas Bailey procured it to be proved, and obtained a commission of administration of that testators

goods, chatels and credits, with the testament annexed, that Catharine Drummond took her dower in the real, and received her distributive share of the personal estate of her said husband, and that the share of Alicia was distributed among her mother, the plaintiff Anne, and her two half sisters; stated the intermarriage of Ralph Justice and Catherine Drummond, his death, and appointment of an executor, and the marriages of the plaintiff Anne; insisted that the half sisters were not intitled to any part of Alicia's estate, and that the right of Catharine the widow, who did not renounce the benefit she might clame by the testament, to the profits of Hunting creek land, ceased by her marriage with Ralph Justice, or, if not, that the plaintiff Anne was intitled to two third parts of those profits, after the intermarriage; stated that the balance of the personal estate left by Richard Drummond, which came to the possession of Ralph Justice, amounted to 689 l. 12s. 3d, the profits of the said estate, during the widowhood of Catharine Drummond, that is from february, 1752, until may, 1756, to 634 l. 9s. 6d, and the profits during the possession of Ralph Justice, that is, from may, 1756, until 1759, to 372 l. 4s. 9d; charged Ralph Justice, and after his death his executor, with receiving moneys from the debtors of Richard Drummond and Catharine Drummond, and from the tenent of a plantation belonging to Richard Drummonds estate, for rent; and prayed the like decree as they prayed by the original bill against the defendent Levin Teackle, and a decree against the other defendents to refund the money wrongfully received for the shares of the two half sisters.

The defendent Levin Teackle, after admitting by answer the several facts stated in the amended bill, except the receipts of profits, debts, and rent, to so much of the bill as demanded the profits of Richard Drummonds estate demurred, insisting that, by his testament, his widow, and, in her right, Ralph Justice, after their intermarriage, were intitled to the profits; by further answer, alleged that Ralph Justice delivered up the estate to William Justice, former husband of the plaintiff Anne, after their intermarriage, and that the representatives of Catharine, the administratrix of Richard Drummond, were responsible for her transactions in that office, not the defendent; demurred to that part of the bill, which demanded an account of monies which had been due to the said Catharine, and with receiving which the defendent and his testator were charged, and of rent, because, first, the charges were vague, secondly, the executor or administrator of the said Catherine only can properly demand that account, and, thirdly, where the land for which the rent became due lieth, or when the rent became due, is not shewn;

and demurred to that part of the bill which inquired after the distribution of Richard Drummonds estate, because the defendent is not stated to be executor or administrator of Richard Drummond.

The defendent Edward Ker after by answer denying a demand from him by the plaintiffs before exhibition of their present bill, on account of any matter therein contained, and confessing himself, in right of his wife, to have received in february, 1762, 531.12s.8 $\frac{1}{2}$ for her distributive share of Alicia Drummonds personal estate, demurred to that part of the bill, which prayed a decree against him to refund the money so received insisting that his wife was intitled to it by the statute for distribution of personal estates undisposed by testament, and, if she were not intitled, that a demand of this nature, first made after the expiration of 27 years, ought not to be countenanced in a court of equity. and

The other defendent, executors of John Harmanson, by their answer, relied upon the statute for limitation of actions in bar of the demand against them.

The case was argued on the second day of march, 1793.

The validity of the writing, proved for the testament of Richard Drummond, to devise lands was not controverted, perhaps is not controvertible. the statute made in 1748 (chap. III of the edition in 1769, sect. VII) which required devises of lands to be written, and signed, and attested, or to be wholly written by the testator, dispensed unquestionably with attestation in the autograph. insertion of the testators name at the top hath been adjudged, and in any other part probably would be adjudged, equivalent to signature of his name at the bottom of the writing, for the purpose of signature being to indicate the author of the act, that indication in any part of the act seemeth sufficient. the testator indeed by the two last clauses in the writing sheweth an intention to sign it in presence of witnesses, but the absence of a ceremony, for signature before witnesses and their attestation were no more in this case, cannot frustrate an act defective in not one essential quality.

Upon the questions which were controverted the court delivered this

OPINION,

That the condition, annexed to the devise, by the testament of Richard Drummond, of his Hunting creek land, half of Half moon island, and a mill, to his wife Catherine, namely the continuance of her widowhood after his death. was not dis-

charged by the subsequent devise to her of all his estate, until the elder of his children should be married, or should attain the age of twenty one years ;

Because the presumption, that the testator, who with his own hand wrote his testament, did not remember, whilst he was forming the later devise, what was contained in the former, or that he had changed his mind, during the short time in which such an act as the writing this testament may be performed, seems less probable, than the presumption, that he supposed the condition expressed in the one would be understood in the other, and therefore the insertion of it in this would be an unnecessary repetition ; and that he had not changed an intention, indicated no less than three times in explicit terms, an intention originating from the contemplation, in his wifes future matrimonial alliance, if not of an effect which would more divide her affection, at least, of her inability to provide for her offspring by him so well as she might otherwise have provided for them :

And altho the wifes interest in the testators other land was determinable, not by her marriage, but, by another event, this difference, which that the testator designed may be doubted, no cause for it being discernible, if considerable at all, ought not to alter that interpretation of the testament according to which

The wife was intitled to all the estate to one part, if she continued a widow, and to the remainder, in either that, or the contrary event, until the elder of the children should have been married, or if she had not died, would have attained the age of eighteen years, when an equal division of the estate was directed to be, and the wife could have retained her dower only ;— but if she should marry again, then her title by the testament to the land devised to Alicia ended and her title of dower in it remained, (a) and by which interpretation a harmony will be in all parts of the testament one with another, the reverse whereof will be effected by any other interpretation.

And that the defendent Levin Teackle, out of the estate in his hands to be administered of Ralph Justice, ought to pay to the plaintiffs two third parts of the profits of the land, devised by the testament of Richard Drummond to his daughter Alicia, made by the said Ralph Justice, after his marriage with her mother, as well those received by himself, as those received, after his death, by his executor, which had not been accounted for with William Justice, the plaintiff Annes former husband.

(a) The plaintiffs supposed the widow, by not renouncing the testament, to have been barred of dower in the land devised to Alicia, but the act of general assembly to which they allude for this, 1727, chap. IV, of the edition in 1769, sect. XX! doth not extend to lands.

The court is also of opinion that the two sisters of Alicia Drummond by her mothers first husband, John Shepherd, were not entitled to shares of the said Alicias personal estate, because, altho the statute, then in force for distribution of the estates which the owners disposed not by testaments, provided 'if after the death of a father any of his children shall die intestate, without wife or children, in the lifetime of the mother, that every brother and sister, and the representatives of them shall have an equal share with her,' and although all the children of one woman, by divers men, are brothers and sisters to one another, yet in the same statute the words, 'and if all the children shall die, intestate, without wife or children, in the lifetime of the mother, then the portion of the child so dying last shall be equally divided, one moiety to the mother, and the other moiety to the next of kindred by the father,' immediately following the words before rehearsed, so that in this case, after the death of Alicia, if the plaintiff Anne had died intestate, having never been married, her portion would unquestionably, have been divided between her mother and next of kindred by her father, in exclusion of Shepherds daughters, suggest an argument which seems to prove, that by 'brother and sister,' were intended brother and sister by the same father, if the position, that the statute appointed those successors to an intestate, whom the legislature supposed his affection would have moved him to appoint, if he had made his testament, be true, as it is said to be; for the predilection towards a paternal uncle or aunt, or even remoter kinsfolk, in the case of the child dying last, cannot operate so powerfully, as the supposed predilection towards the sister by the father, in the present case operates to the exclusion of uterine sisters from the succession;

And consequently that the plaintiffs, in right of the wife, were intitled to one half of the shares of Alicia Drummonds personal estate, which were received by the defendents Edward Ker, and John Harmanson, the testator of the defendents William Harmanson, and Henry Harmanson, in right of their wives, the daughters of Catharine Drummond by John Shepherd, and were also entitled, if the said Catharine died intestate, to one third part of the other half;

And that the plaintiffs are not barred, by the equity of the statute for limitation of actions, of recovering the plaintiff Annes own half from the defendents Edward Ker, and William Harmanson and Henry Harmanson, unless she had attained her full age at the time of her marriage with her present husband in which case the plaintiffs are not barred of recovering that half from the defendent Levin Teackle,

Who by his answer to the original bill, having acknowledged himself to have distributed the personal estate of Alicia Drummond among her mother and three sisters, either, if such his intromission therein were wholly unauthorised, or if the administration thereof had been committed to him, was a trustee for those intitled to the said Alicia Drummonds estate :

And that upon the same principle the plaintiffs are not barred of recovering from the defendant Levin Teackle the plaintiff Annes third part, if her mother died intestate, of the other half of the shares received as aforesaid by the husbands of her sisters.

And the court, overuling such of the demurrers as this opinion contravened, directed master commissioner Hay to examine, state, and settle all accounts between the parties, according to the opinion, to inquire of the plaintiff Annes age at her marriage with the other plaintiff, and what testament her mother made, if she made a testament, and to report these matters, as they shall appear to him, with any other matters, by himself thought pertinent or by the parties required, to be stated, to the court.