REPORTS

OF

CASES

ARGUED AND DECIDED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

VOLUME IV.

RICHMOND:
PUBLISHED BY ROBERT I. SMITH.
Samuel Shepherd & Co. Printers.
1833.

Entered according to act of congress, on the eighth day of August, in the year eighteen hundred and thirty-three, by ROBERT I. SMITH, in the clerk's office of the district court of the eastern district of Virginia.

NOTE BY THE EDITOR.

There is no printed report of the decisions of the first court of appeals, and of those which have been omitted by reporters from that period to the death of Mr. *Pendleton*, although such a work is obviously wanted; and it is to supply that defect, that the present volume is published: which consists of two parts: the first includes all the important cases determined from the commencement of the first court, to its final dissolution in the year 1789; the second contains the unreported cases in the new court of appeals, from that period to the death of judge *Pendleton* in 1803, besides two cases in the general court, and court of admiralty.

1800. *April.*

WALCOTT *v.* SWAN.

S. agrees to locate certain lands for W. in the county of R. After which, he agrees to locate the same lands for M., with others, of whom S. was one; and, having received warrants from M. for that purpose, he accordingly locates the lands. Subsequent to this, W. contracts with S. that the latter shall transfer the entry made for M. to the county of L., and locate a very large quantity of warrants for W. on the lands in R. This shall not disappoint M.; but the lands in R. will be decreed him, on his releasing S. from his covenants; relinquishing his right to the lands in L.; and paying the fees of locating and surveying the entry for M. in the county of R.

For the location for M. created an inchoate right, which could not be defeated without his consent.

But he has a right to elect which he will take, the land in R. or that in L.: and, by bringing the suit for that in R., he does elect.

In carrying M.'s location into grant, the original entry is to be regarded in the same manner as if the transfer to W. had not been made.

Swan and *M'Rae* filed a bill in the high court of chancery, against *Walcott*, *Smyth* and the register of the land office, stating, that, upon the 21st of July, 1795, *Smyth* contracted with *M'Rae* (who had engaged to procure lands for *Swan*) to locate 300,000 acres in a certain tract of country lying in the county of Russel. That, in pursuance of the said contract, *M'Rae*, on the 14th of September, 1795, delivered warrants for 300,000 acres to *Smyth;* who located them in the tract of country aforesaid; but subsequently assigned the warrants and entries to *Walcott*, taking, in exchange, a location made for the latter in the county of Lee; which was of less value than the other, and did not correspond with *M'Rae's* contract. That the said entry of 300,000 acres, has been included in a large survey of 650,000 acres made for *Walcott*, and returned to the land office. The bill prayed that the register might be decreed to issue a patent for the 300,000 acres to *Swan;* that *Walcott* might assign that part of his survey to him; and that the plaintiffs might have general relief.

The answers of *Walcott* and *Smyth* state, that the latter had agreed, in June 1795, to locate (with warranty against

all claims but that of Kentucky) the tract of country aforesaid, for *Walcott* and others; who were to furnish warrants and money for that purpose in September following. That *Smyth*, from erroneous information, supposing the defendants to have abandoned the intention of proceeding with the contract, entered 300,000 acres of the land in *Swan's* name; but, upon discovering his mistake, contracted with the defendant to withdraw *Swan's* entry, which he conceived he had a right to do, and to locate 850,000 acres for the defendant in the above mentioned tract of country. That, in conformity with the last engagement, the large survey, including *Swan's* location, was made; and that the location in Lee is upon better land. That *Smyth* was not induced to make the foregoing arrangement from any improper motive; but from a real desire of acting fairly with regard to all parties; and that he was influenced by the reflection that he had bound himself to locate for *M'Rae* in Virginia, and it was doubtful whether the tract of country aforesaid did not lie in Kentucky.

One witness states that *Smyth* informed him that *M'Rae* insisted on a warranty of the title to the lands; but although he thought it good, he would take advice before he bound himself; and that he afterwards told him he had determined to accede to the terms proposed. The other witness mentions the price which *Walcott* said he was to pay for locating the lands.

The court of chancery delivered the following opinion: "That from the agreement of June, in the year one thousand seven hundred and ninety-five, between the defendant *Alexander Walcott*, *David Booth*, for himself, and as attorney for several other people, and *Austin Nichols*, of the one part, and *Alexander Smyth*, of the other part, the defendant *Alexander Walcott* and his associates derived no right to the land in controversy; because the defendant *Alexander Smyth* had no such right, but it was in the commonwealth until it should be regularly appropriated. That in the land office treasury warrants, which authorized

1800. *April.*

Walcott v. Swan.

the surveying and laying off land for the plaintiff *James Swan*, the words 'this warrant is executed. *H. Smyth*, S. R. C.' were a legal entry of the land in controversy, for the benefit of that plaintiff, and gave to him an equitable title against the commonwealth, and every posterior claimant under it, in that identical land; and that the surveyor could not transfer that right, nor could the defendant *Alexander Smyth* transfer it, except as to his own interest in one sixth part of the said land, without authority from his constituents. The agreement between him and the plaintiff *Alexander M'Rae*, of September, in the year one thousand seven hundred and ninety-five, did not in terms confer that authority, nor is such authority implied in, nor doth it flow from, the nature of the agent's office, as the defendant's counsel insisted: and, therefore, the court doth adjudge, order and decree, that the defendant *Alexander Walcott* do assign, to the plaintiff *James Swan*, all that defendant's right and title in and to three hundred thousand acres of land, part of the six hundred and fifty thousand acres of land certified to have been surveyed for him, and completed the seventeenth day of December, one thousand seven hundred and ninety-five, by the surveyor of Russel county; and that the defendant, *William Price*, or the register of the land office, for the time being, do make out in due form the letters patent of the commonwealth, to be presented to the governour for signature, granting to the plaintiff *James Swan*, the said three hundred thousand acres of land, to be holden by him for the use of the perons entitled thereto, by the articles of agreement, between the plaintiff *Alexander M'Rae* of the one part, and the defendant *Alexander Smyth* of the other part, of the fourteenth day of September, in the year one thousand seven hundred and ninety-five."

And to carry that opinion into effect, commissioners were appointed "for laying off, with any surveyor or surveyors whom the plaintiffs shall think fit to employ, the said three hundred thousand acres of land, in the place in which they ought to have been laid off by virtue of the entry, for the

plaintiff *James Swan*, if the defendant, *Alexander Smyth*, had not undertaken to transfer the entry to the other defendant; and in such manner as to exclude, in calculating and casting up the contents of the area of the plat, all prior legal claims." And the plaintiff, *James Swan*, was decreed to release "all his right and title in and to the lands entered for him in the county of Lee, by the defendant *Smyth*."

Walcott appealed to the court of appeals.

Call, for the appellant. If *Smyth* had entered the lands in question for himself, he would have been a trustee for *Walcott*, as the latter had a right to his services in procuring them for him: and a purchaser, with notice, from *Smyth*, would have stood in the same situation. But, in the present case, notice to *Smyth* was notice to *Swan;* for the knowledge of the agent is the knowledge of the principal. 1 *Bro. Cas. Parl.* 246. 4 *T. Rep.* 66. That *Smyth* was agent for *Walcott* also, does not alter the case; for it frequently happens that the same agent is employed by both parties; and therefore the policy of the law affects each of them with notice. 3 *Atk.* 648. Nor is it material that the title to the lands was, at the time of the contract, in the commonwealth: because such lands are notoriously offered by the public for sale, at a certain fixed rate, and any person may take them upon those terms. Therefore, when a particular parcel has been selected, and an agent employed to secure it, he cannot, in disregard of his first engagement, acquire them for another person. 3 *Atk.* 654. This would have been the consequence clearly, under the original contract between *Walcott* and *Smyth;* and the second agreement between them, which was but a continuance of the first, does not vary the result. Upon general principles, therefore, *Walcott* was entitled; but he was entitled also, upon other grounds. For *Smyth* was justifiable in exchanging the Russel lands for those in Lee, 1. Because such exchanges are usual; and the lands in Russel did not agree with the description required by *Swan's* contract, but those

1800. *April.*

Walcott v. Swan.

in Lee did. 2. Because he was a partner in *Swan's* location, and therefore had a right to abandon the first entry for one more suitable. However, if *Swan* were right, the decree is nevertheless wrong, 1. Because it allows him to take the 300,000 acres out of any part of *Walcott's* survey, without confining him to his own entry, and discharging *Smyth* from his warranty to *Swan;* for he ought either to be exonerated from the risk, or released from his covenant. 2. Because no provision is made for a return of the fees advanced by *Smyth.*

Randolph, contra. *Swan,* by his entry, acquired an inchoate right, but *Walcott* none; for his agreement was for personal services only, which created no lien. *Walcott's* contract was contrary to public policy; for the quantity stipulated for was so large that it amounted to a monopoly, and prevented that equal distribution which was necessary for the settlement of the country. *Swan* had not notice of *Walcott's* contract; but if he had been made acquainted with it, he might still have gone on: for *Smyth* was not an agent, but was at liberty to contract with any other person, notwithstanding his engagement to *Walcott;* and *Swan* is no more affected by it, than if a carpenter contracts with one man to build a house, and afterwards engages with another who knows of the prior contract, the latter is responsible to the first. *Walcott's* last agreement was not a continuation of the first; but an entire new contract, by which the first was waived. It is not probable that the lands lie in Kentucky; or that they do not correspond with *Swan's* contract: But be that as it may, he has a right to insist upon them, if he thinks proper, as they were located for him expressly. *Smyth* had no authority to exchange the Russel lands for those in Lee: The usage of surveyors did not justify it; for he acted under limited powers, and the location had established a right in *Swan* which he could not defeat. The decree does not give *Swan* an improper latitude, but only enables him to take his quantity according to his

entry. *Smyth* has no more claim to be exonerated from his covenant, than any other seller of a bad title: And, as to the fees, the chancellor may provide for them at the final decree.

Wickham, in reply. *Swan* having constituted *Smyth* his agent, is affected by his acts; and, as the latter had previously engaged to locate these lands for *Walcott*, the entry for *Swan* enured in equity to the benefit of *Walcott*. Therefore whether *Smyth's* conduct towards *Swan* be right or wrong is not material: for, if it was right, *Swan* has no cause to complain; and, if it was wrong, he has no redress against *Walcott*, but must resort to *Smyth*. As *Swan* was plaintiff in the court of chancery, he should have shewn either that he had equal equity and the law, or superior equity. But his equity was not superior, and we had the law; for *Swan* was obliged to come into equity. Therefore either the decree will be in favour of *Walcott*, or both parties will be dismissed, and left to contest their rights at law. The first contract with *Walcott* operated in nature of a lien, and put it out of the power of *Smyth* to procure the lands for others, as the state offers them to the first adventurer, and invites purchasers for the sake of the revenue. The objection with respect to the quantity to be located proves nothing; or, if any thing, it applies as strongly to the contract of *Swan* as to that of *Walcott*. The second agreement with *Walcott* was a plain continuation of the first; to which it was a mere addition, and no waiver. *Smyth* was bound to procure lands for *Swan* of a certain description; but he was at liberty to procure them where he pleased: And as the lands in Lee were better than those in Russel, and the latter not only differed from the description wanted for *Swan*, but probably lay in Kentucky, *Smyth* was not under any obligation for the sake of the legal quibble to injure *Swan*, and ruin himself, by proceeding to procure them under the contract with *M'Rae*, when he knew the title was defective, and the quality not such as he had

1800. *April.*

Walcott v. Swan.

engaged to furnish for *Swan*. That the exchange was justifiable is proved not only by the necessity that *Swan* was under of resorting to a court of equity to endeavour to prevent the legal title from being carried into effect, but from the circumstance that *Smyth* being a partner with *Swan* had a right to make it. *Swan* does not appear to have any object in obtaining these particular lands more than any others of equal value; but *Walcott* suggests very strong motives for preferring them; and therefore equity ought not to interpose merely for the sake of disappointing him. At all events, if *Swan* takes these lands, he should exonerate *Smyth*, who ought not to be bound, when an opportunity of correcting his mistake is denied him.

Cur. adv. vult.

ROANE, Judge. The testimony of Mr. *Pollard* is decisive that Mr. *Smyth* had the identical lands now in question, in view when he was introduced to Mr. *M'Rae;* and that being, then, well convinced in his own mind, as well as by the information derived from counsel, that the lands lay in Virginia, he had determined under that impression to engage with *M'Rae* on the terms proposed.

That these very lands were in contemplation of both parties when they made the contract, is also inferrible (taken in connection with *Pollard's* testimony) from this expression in the written contract itself; "and whereas said *Alexander Smyth* hath made a discovery of 300,000 acres of unappropriated lands lying within the limits of Virginia." The idea too, is further confirmed by the circumstances of the entry, for *Swan*, being made, by *Smyth*, within a very short time, after the contract was made upon the very lands now in question.

However general then the written contract may be, it is clear, that it was agreed and understood between the contracting parties, that the very lands now in question were the lands to be located by the one for the other.

If this be the case; if *M'Rae* had a right to an entry of these very lands under the agreement, a decision of this cause as to the right of an agent to withdraw or transfer entries, will not extend to cases of general contracts to furnish a given quantity of land, but not referring to any particular tract or parcel.

If Mr. *M'Rae* was entitled to come upon this very land, under his agreement with *Smyth*, however the latter, on finding the title of Virginia thereto not to be good, would have had a right to call on *M'Rae* to make his election, either to abide by the election, or permit him to change it, clearly it would follow that such an exchange could not be made without such permission, under the understanding of the parties, at the time of making the agreement; and this idea is much strengthened, in consequence of an inchoate right having been obtained for *Swan*, by the entry for the specific land in question.

M'Rae, in this view of the subject, may have similar and as strong reasons for insisting on this land as those urged by *Walcott* for insisting on his part; and the question is, whether, as *Smyth* had committed himself in his contract with *M'Rae* with respect to these very lands, he can, without *M'Rae's* consent, deprive him of them? In the event of *Smyth's* finding out, or thinking himself unsafe, as to these lands under his contract, a plain mode was open to him by consulting *M'Rae*, which however he has not done.

M'Rae however has made his election by bringing this bill, and having so made it, he shall be in precisely the same situation, as if he had made it on the application of *Smyth*; that is to say, *Smyth* shall be absolved from all liability as to the title of the lands, in case it should not be conformable to that stipulated for by the contract.

But it is argued that this right of *M'Rae* and *Swan* is affected by a fraud on the part of their agent, who had made a prior engagement in favour of *Walcott* and others, for the same lands, and that *Swan* and *M'Rae* his employers had in construction of law notice of the prior title of *Walcott* and his companions.

1800. *April.*

Walcott v. Swan.

However *Smyth* may have laid himself liable to *Walcott* under his first contract, in which he covenanted "not to locate any lands within the boundaries described for any other person, unless *Walcott & Co.* failed in performance of their part of the agreement;" yet, as it is stated by *Smyth* that the tract contemplated contained at least a million of acres; and as *Walcott & Co.* only contracted absolutely to take 500,000 acres, there was a considerable quantity of land not specifically and particularly bound by the first contract, for the second to operate on. At least, those decisions, which apply on this point with respect to titles to a definite ascertained portion of property, will not extend to a vague and indefinite contract of this kind. For it is the leading principle on this subject, that in order to affect a subsequent purchaser on the ground of implied notice of a former title, there must be something to lead such purchaser distinctly to a knowledge of such title with reference to the identical specific property in question.

On these grounds, it appears to me that the decree is right; but, in carrying the appellee's title into a legal grant, the original entry on his behalf should be regarded in the same manner as if the transfer to *Walcott* had never been made.

FLEMING, Judge. The appellees are clearly entitled to the land in controversy. That *M'Rae* actually stipulated for a location at that place is abundantly proved; and his title ought not to be defeated, unless a better were shewn; which has not been done. Indeed the circumstances give a very unfavourable aspect to the claim of *Walcott;* who contracted with *Smyth* to remove the location made for *Swan,* and to lay *his* warrants upon the same land. This attempt to defeat the adversary claim, so far destroyed his own; for the second contract was to that extent, a waiver of the first. I am therefore of opinion, that the decree is substantially right. But the appellees must release *Smyth* from his warranty, and pay him the monies advanced towards perfecting their title, with interest.

1800. *April.*

Walcott v. Swan.

LYONS, Judge. I agree with the other judges in the principles laid down by them; and the following decree is to be made:

"This day came the parties by their counsel, and the court having maturely considered the transcript of the record and the arguments of the counsel, is of opinion, that so much of the decree aforesaid, as directs the appellant to assign to the appellee, *James Swan*, all the appellant's right and title to the lands in the county of Russel, in the decree mentioned, before the appellees pay to the appellant the money advanced by him for surveyor's and register's fees on account of the said land, is erroneous: *And* that the said decree is also erroneous in not directing the appellees, on receiving the assignment aforesaid, to release and discharge *Alexander Smyth*, in the proceedings named, from all covenants and agreements on his part, contained in the articles entered into by him with the appellee *Alexander M'Rae*, on the 14th of September, 1795, referred to in the decree, so far as the said articles relate to the quantity, title, soil, or description of the lands covenanted to be located and surveyed for the appellees, by the said *Alexander Smyth*. *But* that there is no error in the residue of the said decree. Therefore, it is decreed and ordered, that so much of the said decree as is herein stated to be erroneous, be reversed and annulled. *That* an account be taken of the money advanced by the appellant and *Alexander Smyth*, or either of them, for surveyor's and register's fees; and that, on payment thereof, with interest, the appellant assign to the appellee, *James Swan*, all the appellant's right and title in and to the three hundred thousand acres of land, part of the six hundred and fifty thousand acres of land, certified to have been surveyed for him and compleated the 17th day of December, 1795, by the surveyor of Russel county: *And* that after such assignment shall have been duly made, and approved by the court of chancery, that the appellees release to *Alexander Smyth*, all actions and suits, and fully discharge him from all his covenants contained in the agreement, made be-

1800. *April.*

Walcott v. Swan.

tween him and the appellee *Alexander M'Rae*, on the 14th of September, 1795, before mentioned, so far as the articles relate to the quantity, title, soil, or description of the lands covenanted to be located and surveyed for the appellees by the said *Alexander Smyth*, within such time as the court of chancery shall direct: *And* that the same time be allowed the appellee, *James Swan*, to release his right and title to the lands in the county of Lee, according to the decree of the said court of chancery. *That* the residue of the said decree be affirmed; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here."

N. B.—The above report was mislaid when the case was published in 2 *Call*, 298: but having been since found, it was thought that it would be agreeable to the profession to see the opinions of the judges at large; and therefore they are now inserted.

1791. *November.*

MAYO *v.* CARRINGTON.

A testator, before the year 1782, devised that his executors should petition the legislature to emancipate his slaves; but if they should not be able to effect it, he devised part of the slaves to A., and the rest of them, and *all his other property*, to certain relations: this was an absolute disposition of the residuum, and not a devise upon a contingency.

The devise comprehended lands as well as personalty: for the mention of slaves did not restrict the bequest.

The words, *all his other property*, carried a fee in the lands.

William Mayo, as heir at law of *Joseph Mayo*, brought ejectment against *Paul Carrington* and others, for a tract of land in Mecklenburg county; and, by a case agreed, it appeared, that the said *Joseph Mayo*, by his will, made the 27th of May, 1780, and proved the 10th of October, 1785, after sundry specific devises of lands and chattels, pro-