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.

Entered according to the act of Congress, in the year 1854, by

A. MORRIS,

In the Clerk's Office of the District Court of the United States in and for the Eastern District of Virginia.

RICHMOND: CHAS. H. WYNNE, PRINTER.

of the parties' own choosing, to settle all matters in dispute between them; and it is a rule, that awards should always be construed liberally.* I think the items, including the damages stated by them, were clearly within the submission. The award, therefore, (which, although not formal, is founded in strict justice,) ought to be supported. I am for affirming the judgment.

LYONS, Judge. I concur with the other Judges, upon the first point made by the appellant's counsel; but differ from them on the other. There is a reference to damages generally; but, the principal and interest is the true measure of damages in law; and mere speculative injuries and conjectural inconveniences do not enter into the subject of damages, at all. The Court never enquires how the party got the money with which he paid the debt: but merely how much he paid? and when he paid it? Therefore, these conjectural damages being included, the award, I think, ought to [440] be set aside; but there is a majority of the Court for sustaining the judgment; and, consequently, it must be affirmed.

Judgment affirmed.†

[* *Hollingsworth* v. *Lupton* et ux, 4 Munf. 114; *Richards* v. *Brockenbrough's adm'r*, 1 Rand. 449; *Richardson* v. *Nourse*, 3 Barn. & Ald. 237.]

[† Holcomb afterwards endeavored to obtain relief in equity, but his bill was dismissed, on the ground, that he had been fully heard at law, it being a settled principle, that a Court of Chancery cannot revise the decision of a Court of Law, upon the same subject of controversy, where no circumstance is adduced to give Chancery jurisdiction. *Flournoy's ex'r.* v. *Holcomb*, 2 Munf. 34.]

GEORGE STEPHENS *v.* JAMES COBUN.

Saturday, November 8th, 1800.

The judgment of the Board of Commissioners, under the land law, is conclusive, and cannot be impeached.*

This was an appeal from a decree of the High Court of Chancery. The bill states, that John Stephens, in the spring of 1767, settled himself and family on Cobun's Creek, extend-

* By act of May, 1779, [10 Hen. Stat. at Large, p. 42-46,] "the counties on the Western waters" were to be allotted into four districts, for each of which the Governor should appoint four commissioners, to collect, adjust, and determine the claims of persons to pre-emption rights and other rights by settlement on land; and the judgment of those commissioners should be final—with certain exceptions.

ing down the said creek below an *agreed* line, which was afterwards made by the said John Stephens and Jonathan Cobun, so as to include 400 acres. That the said John Stephens built a house, and moved his family thither; clearing ten acres, and raising a crop. That the said agreed line continued, as a boundary between Stephens and Cobun until four years after, when Stephens died; during which time, Stephens lived on the land, and raised corn. That his widow lived on the said land five or six years afterwards, with his family: and then sold it to Jonathan Cobun, who sold to James Cobun, the defendant. That the plaintiff was then an infant, left by his mother, and supported by the bounty of his friends. That he was still an infant, when the commissioners sat; and, having no property, had no money to assert his right against the defendant, who then had the land in possession. That one Henry Stephens did, indeed, inform the Board, that the land belonged to the plaintiff; but, being poor and ignorant, he was unable to support the claim against the defendant; who, [441] apprised of it, brought forward the claim of Workman, who had tomahawked a few trees, as Cobun said, on the land, before said Stephens had settled there: by which means, the defendant obtained a certificate for the land. That Workman never had a residence in the country, except as a hunter; and, if he marked any trees, it was for convenience as a hunter. It therefore prays, that the defendant may convey; and that the plaintiff may have general relief.

The answer states, that John Stephens did *set down* on the land in the bill mentioned; and continued there, with his family, for some time. That both were wrongful; as Workman had previously improved and occupied the land; on which he had done work, as chopping and heaping brush; and that he had made some progress in building a house or cabin. But, going to remove his family thither, that said John Stephens intruded on the land, and held him out. That the agreement of Stephens and Jonathan Cobun, as to the *boundary line*, could not affect Workman; who was the true owner, *if any could be at that early period, before legal rights were obtained.* That Jonathan Stephens bought of Cobun's widow, and afterwards of Workman. That John Stephens knew of Workman's right, and offered £3 for it. That matters lay thus, until the commissioners sat; when the defendant was cited before them, at the suit of the plaintiff, by Henry Stephens. That the claim was fully heard, and decided for the defendant. Denies any fraudulent application for the certificate, or that he bought of Workman, with a view to defraud the plaintiff. Says, that

the defendant was threatened, by Lewis Rogers, with a suit founded on Workman's right; and, therefore, he bought it for a horse, which cost the defendant £22.

Jonathan Cobun says, that in '67 or '68, Jonathan Cobun, sen. and John Stephens settled on Cobun's [442] Creek, and, after dividing the lands by an agreed line, the said John Stephens settled on that now in dispute. That each division was improved: but he does not know which was the oldest. That Lewis Rogers forbid John Stephens to settle on the said land, as Rogers and another had improved it, and had planted corn; although the deponent never saw any. However, that he did see some trees, which had been deadened, and some appearance of brush heaps, and the foundation of a cabin, two or three logs high. But does not know, if the whole or any part of it was on John Stephens's land. That he saw the letters T. B. on a honey locust, in Jonathan Cobun's improvement, supposed to have been made by Thomas Banfield; who claimed the land, and gave up his right to Jonathan Cobun, sen. previous to the division, between Jonathan Cobun and John Stephens. That the plaintiff and the defendant were present, and consenting. That the plaintiff's mother gave bond to indemnify the defendant against the heirs of John Stephens; and the deponent was security thereto. That the plaintiff's mother was daughter of Jonathan Cobun, deceased.

Meredith says, that he had heard Workman say, he had sold his right to John Stephens, sen. for a quantity of liquor.

Ramsay says, that he had heard Rogers say, he and Workman had improved three places in one day; and that Workman lost his gun. Upon which, they went away; and, on their return, that Stephens and Cobun settled. After which, Rogers expected to lose, and sold for a horse, which he said was better than nothing.

A fourth witness says, that he heard Workman say, if he could find his gun, he would move away, as he did not like the country. That he did not understand that he had im- [443] proved. That the land in dispute is that which was improved by Banfield.

Scott says, that John Stephens and Jonathan Cobun, senr. settled on the lands and made a dividing line. That Stephens cleared 4 acres, and raised corn.

Evans says, that the plaintiff's mother was on the land; and, that 4 acres were cleared.

Banfield says, that he lay two weeks on the land; but, not with intent to settle it. That he never claimed or sold it.

That there were some small improvements, as brush heaps, deadened trees, &c. there, at the time; but, does not know who had made them.

Workman says, that he settled the lands. That there were brush heaps, and a house 3 or 4 logs high. That he planted corn; and began to clear a meadow. That he lost his gun and went away; leaving his crop in the care of Lewis Rogers. That he would have returned, but John Stephens, father of Geo. Stephens, had taken possession, and kept him out. That he sold his right to the said Rogers; which he would not have done, had he known of the commissioners sitting there. That some small time after he had left that country, the said Rogers alarmed him about the Pennsylvanians and their proclamation. That he never told John Sempson that he would not return. That he never said that the defendant was to pay him, if he gained the suit; although he might have said, that he was to pay the expense he was at in going to have depositions taken. That he never told Merrifield that he had given his right to John Stephens. That he never saw him. That Rogers told him that John Stephens had offered him £5 for the deponent's right.

Lewis Rogers speaks to the same effect as Workman; and says, that he bought of Workman and sold to the defendant.

C. Ratcliff says, that John Stephens drove a man off [444] a piece of land as she heard; and, that the said Stephens got on the land in dispute.

William Haymond says, that he was one of the commissioners. That Henry Stephens, on behalf of the plaintiff, brought suit for the lands in dispute, which was decided in favor of Cobun, because he had the oldest improvement, to wit: Workman's.

J. Ratcliff says, that he was present at the suit before the commissioners; and, that it was decided in favor of Cobun; who had Workman's right.

C. Ratcliff further says, that the trees were deadened. That there was part of a small cabin before John Stephens took possession; but, she knows not by whom it was put, further than that she heard Rogers say it was Workman's. That Rogers, in Workman's name, warned Stephens to go off the land. That Stephens refused, saying he had offered Rogers £3 for it. That she was present as a witness, before the commissioners; who decided for Cobun.

Decker says, that about the year 1765, Stephens, Workman and Lewis Rogers improved two tracts of land, as the deponent has heard; one for his father, the other for himself. That he

planted corn on both places. That the deponent, his father, and the said Workman left the country; and, that Rogers left it some time after. That in about two years after, old Cobun and John Stephens came and settled on the said land. That Stephens never bought Workman's right. That Rogers went off, on account of the Pennsylvania proclamation. That John Stephens claimed to a fence, but he does not know the agreed line. That he saw the corn planted by Workman.

There are amongst the papers in the record, a copy of the judgment of the commissioners; and a copy of Cobun's surveys.

The County Court decreed a conveyance to the plaintiff. The High Court of Chancery reversed the decree. [445] 1. Because, the plaintiff's ancestor had no title. 2. Because, the judgment of the commissioners was final, notwithstanding the infancy of the plaintiff, as it had not been reversed by the General Court. Whereupon, the plaintiff Stephens appealed to this Court.

RANDOLPH, for the appellant.

Upon the principles of equity and the evidence in the cause, the title was clearly in the appellant originally. For, the transitory possession of Workman, if indeed it be true he ever had it, cannot be admitted to have conferred any right, or if it did, he parted with it to Stephens. Therefore, unless the judgment of the commissioners has barred his claim, he was clearly entitled to a decree for the land. But, as he was an infant and his case not fully before the board of commissioners, their judgment ought not to preclude him.

CALL, contra.

The merits, as well as the law of the case, are in favor of the appellee. For, it is established beyond controversy, that Workman made the first settlement and improvement. Therefore, Stephens was an intruder on his right; and the weight of testimony is, that he never sold to any person but Cobun. The judgment of the commissioners is decisive; for the law expressly declares that it shall be final. Chanc. Rev. 93, [May, 1779, c. 12, 10 Stat. Larg. 35, 42-6.] The appellant was plaintiff, by a person who acted as his next friend, before the commissioners, and appears to have been fully heard. Therefore, he ought to be barred by the judgment: For, an infant plaintiff, when heard by his next friend, is as much bound by the judgment, as a person of full age. Besides, it

does not appear what testimony was before the board; and, perhaps, much stronger evidence was adduced by Cobun on the merits, than appears in the present record. For, although he [446] has thought proper to adduce some testimony on the merits, he was not bound to do so; and, therefore, if his testimony were defective, (which it is not,) yet that would not affect his case; because, the judgment is conclusive, and cannot be impeached.

But, for another reason, the decree of the Chancellor is right; namely, that Cobun and Rogers are no parties to the present suit; for, not having passed any deed for their title, and their rights having been drawn into controversy, they ought to have been made parties. *Buck* v. *Copland*, ante. 218, in this Court: which is the stronger in the present case, as their testimony is objected to on the ground of interest; and, they ought certainly to be heard by answer or deposition.

Cur. adv. vult.

LYONS, Judge, delivered the resolution of the Court, that the act of Assembly was conclusive; and, that the decree was to be affirmed.

Decree affirmed.

WALLACE ET UX. *v.* TALIAFERRO ET UX.

[447] *Thursday, November 6th,* 1800.

Construction of the 4 section of the *explanatory act* of 1727, *chap.* 4.

W. R. made his will in May, 1774, and devised to L. W. and C. T. sundry slaves, with the residue of his estate, subject to the payment of his debts and legacies; and appointed J. W. the husband of L. W. and R. T. the husband of C. T. executors; who qualified as such. In August, 1774, J. W. died, before any division of the estate of W. R. was made, and by his last will, bequeathed all his slaves to this daughter and his two sons. As J. W. was, at most, only possessed as executor, and not in right of his wife, her share of the slaves of W. R. survived to herself; and did not pass by the will of J. W.* (LYONS, j., dissenting from four other judges.)

This was an appeal from a decree of the High Court of Chancery, where Taliaferro and wife brought a bill, for relief

* Nearly accordant. *Gregory's* adm'r. v. *Mark's* adm'r. 1 Rand. 355.
But where wife is entitled to slaves in remainder or reversion, expectant on a life estate, and dies before the tenant for life, her husband surviving; he takes the slaves. See *Drummond* v. *Sneed post,* 491; *Dade* v. *Alexander,* 1 Wash. 30; *Wade* v. *Boxley,* 5 Leigh, 442.