REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
Printed by THOMAS NICOLSON
M,DCC,XCIX.

To The PUBLIC.

THE caſe of *Maze* and *Hamilton*, with one other, I had intended to publiſh in an appendix to this volume. But the manuſcript having been unfortunately depoſited in a houſe which was lately conſumed by fire. I have great reaſon to apprehend that it was either burnt, or by ſome other means deſtroyed.

PAGE.	LINE.	
11	41	*For* hinder *read* hinders.
54	26	*Inſert* by *before the words* the owner.
66	4	*Strike out the comma after* mother *and put a period.*
—	12	*Strike out the ſemicolon after* it *and put a comma.*
68	5	*For* empowed *read* empowered.
69	36	*For* 1 *read* 3.
70	17	*For* appellant *read* appellee.
71	2 & 3	*For* appellant *read* appellee.
87	8	*After* teſtimony *inſert* of.
98	17	*After* regarded *inſert* it.
99	31	*After* rule, *ſtrike out the mark of interrogation and put a period.*
106	12	*For* lands *read* land.
122	44	*For* forfeiled *read* forfeited.
139	7 & 14	*For* ſecurity *read* ſurety.
140	4	*For* principal *read* plinciple.
163	32	*Before* ſuperior *read* the.
182	21	*For* laws *read* law.
206	4	*After* it *inſert* to.
—	21	*For* principal *read* principle.
209	14	*For* determination *read* termination.
212	11	*After* but *inſert* where.
224	37	*After* idea *put a ſemicolon.*
225	40	*After* that *inſert* of.
227	3	*Strike out* not.
—	34	*After* endorſer, *ſtrike out a period and put a comma, after* 443 *ſtrike out the comma and put a period.*
242	14	*Strike out the ſemicolon after* fault.
243	24	*After* not *inſert* an.
244	41	*Strike out the ſemicolon after* declarations.
249	2	*For* is *read* as.
255	10	*For* prices *read* price.
—	12	*After* Johnſon, *ſtrike out the ſemicolon and put a comma.*
261	19	*Strike out the comma after the word* Stockdell, *and put a period.*
263	37	*For* law *read* all.
266	25	*For* points *read* point.
270	27	*Strike out the comma & put a period after the word* plea.
278	9	*For* 2 *read* 1.
288	40	*For* ſurvices *read* ſervices.
289	1	*For* ſtronger *read* ſtrong.
—	14	*For* centinental *read* continental.

39 *For*

Page	Line	
289	39	*For* colluſion *read* colliſion.
292	22	*For* deciſſion *read* deciſion.
——	30	*Strike out* of *after the word General.*
——	31	*For* Hooker *read* Hocker.
293	19	*After the word* intended *inſert*)
——	21	*For* legal *read* regal.
295	23	*After* Carolina, *put a comma inſtead of a ſemicolon, and ſtrike out the ſemicolon after the word* loci.
——	38	*For* deſribed *read* deſcribed.
296	8	*Strike out the comma after* bills.
——	35	*For* there *read* theſe.
300	11	*For* legal *read* regal.
301	26	*After* damages, *put a period.*
302	8	*For* is due *read* iſſue.
——	22	*After* verdict *inſert* ought.

JAMES BURNSIDES, Appellant,

against

ANDREW REID, SAMUEL CULBERTSON, & THOMAS WALKER. } Appellees.

AND

ANDREW REID Appellant,

againſt

JAMES BURNSIDES Appellee.

THIS was an appeal from a decree of the High Court of Chancery. The caſe, was,—Andrew Culbertſon having made a ſettlement on a piece of land called Culbertſon's bottom in the year 1753, or 1754, was compelled through fear of the Indians to leave it; after which, he ſold it to Samuel Culbertſon, who alſo lived on and improved it, and he too in 1755 was compelled to leave it from the ſame cauſe.

Although the two Culbertſon's were for many years prevented from returning to this ſettlement on account of the ſavage enemy, yet Samuel Culbertſon conſtantly aſſerted his claim to this land, and made frequent attempts to return to it.

In 1775, Thomas Farlow, having acquired the ſettlement right of two men by the names of Butcher and Gatliff to this land, being 355 acres, purchaſed the ſame from the Loyal company, paid the conſideration money, and procured the ſame to be ſurveyed on the uſual terms of that company. The ſurvey was returned to the appellee Thomas Walker, (the company's agent,) and Farlow took a certificate thereof in order to obtain a grant ſo ſoon as one could iſſue. The appellant. Burnſides having purchaſed the right of Farlow to this land, received an aſſignment thereof.

In 1782, Burnſides, as aſſignee of Farlow, who was aſſignee of Butcher and Gatliff exhibited his claim to this land, before the commiſſioners appointed by the act of 1779 to adjuſt diſputes between litigant ſettlers, and claimed under a ſurvey made by Farlow in 1775, *for ſettlement in* 1772, for 355 acres. The commiſſioners allowed him 400 acres (including the ſaid 355 acres) for his *ſettlement in* 1792 together with 600 acres pre-emp-

tion

tion adjoining. At the same session of the board of commissioners, Reid, on behalf of Culbertson exhibited his claim for the same land, asserting Culbertson's right of settlement in 1754, which was rejected by the commissioners, who decided the right in favor of Burnsides.

Burnsides states in his bill, that he laid his claim by *survey* before the commissioners; but they refusing to allow the validity of surveys under a company, gave the preference to *prior settlers*, in consequence of which, he was *obliged* to claim as for a *prior settlement*, or lose his land. At the time that these claims were before the commissioners, the claims of the loyal company (amongst others) were pending in the court of appeals, and in 1783, the surveys made under the companies were established and declared valid, where legally made.

In October 1784, Reid, as attorney for Culbertson, entered a caveat in the General Court against a grant issuing to Burnsides, stating in his petition, that at the trial before the commissioners, he was prevented by unavoidable accidents from producing testimony in support of his claim, which but for those causes, it was in his power to have furnished, and praying for a reconsideration of the case.

The General Court granted a hearing, and after the examination of witnesses and of the circumstance of the cases, Culbertson's claim was sustained, the sentence of the commissioners set aside, and 400 acres for settlement, and 600 acres pre-emption were adjudged to him.

To prevent a grant from issuing in consequence of this adjudication, and to compel Thomas Walker the agent of the company to yield his consent to a grant to the said James Burnsides of the land in question, Burnsides filed his bill in the High Court of Chancery. The bill amongst other grounds of equity states, that the plaintiff was precluded in the General Court, from bringing forward his claim *by purchase from the company*, because the determination of the commissioners had been given on a claim for *prior settlement*, and because the plaintiff's survey was in possession of the defendant Walker, and could not be produced. The injunction prayed for by this bill was granted till further order.

Pending this suit, and before answers were put in, Burnsides having in the year 1786 procured a survey to be made of 1200 acres of land including the land in controversy, and having obtained a certificate thereof, paid to the said Thomas Walker the purchase money, and procured an order to the register for a patent, which

actually

actually iſſued, founded on the judgment of the commiſſioners for 1000 acres, (though it had been ſet aſide by the General Court) and 200 acres by virtue of a land office treaſury warrant. To obtain a repeal of this patent, Reid filed a croſs bill againſt Burnſides.

Both cauſes coming on together, the judge of the Court of Chancery pronounced the following opinion and decree viz; "The court is of opinion that Burnſides, after obtaining an injunction to ſtay execution of a judgment by the General Court againſt him, having procured a ſurvey to be made, and a grant to himſelf to paſs the ſeal, of land, to which land the title of Samuel Culbertſon was aſſerted by that judgment, and which according to the judgment would have been ſecured to him by a grant, if Burnſides had not prevented it, was guilty of a fraud, becauſe the regiſter of the land office, if he had known ſuch a judgment to have been rendered, by which he was ordered to iſſue a grant of that land to the ſaid Samuel Culbertſon, ought not to have iſſued, and therefore probably would not have iſſued the grant to Burnſides. And the court is alſo of opinion that Reid, on whom the right of Samuel Culbertſon hath devolved, is not barred of relief againſt Burnſides, by the decree and order of the Court of Appeals, on hearing the claims of Walker and Nelſon, not only becauſe a claim under the ſurvey for Farlow, which Burnſides in his bill ſuggeſts to be the foundation of his title, doth not appear to have been eſtabliſhed by the decree and order of the Court of Appeals, and could not be legally eſtabliſhed, ſo as to bind the right of any who were not parties in that proceeding, but, becauſe the grant to Burnſides was founded, not on that ſurvey but, on a ſurvey certified to have been made for himſelf, in January 1786, by virtue partly of an entry, on a certificate from the commiſſioners for the diſtrict of Waſhington and Montgomery counties, for 400 acres, dated the 10th of September, 1782, which certificate of the commiſſioners, with their adjudication affirming the right of Burnſides, was annulled by the General Courts judgment aforementioned. And now the court would have pronounced ſuch a decree as in its opinion, if what followeth had not happened, ought to be made—a decree nearly like that which was pronounced in the caſe between James Maze, plaintiff, and Andrew Hamilton & William Hamilton defendants; but that decree hath been reverſed by the Court of Appeals; & this court, from that reverſal, ſuppoſeth, perhaps erroneouſly, the opinion of that honorable court to have been, that, by the order of council, granting

"leave

"leave to the Greenbrier company to take up 100,000 acres of land,
"lying on Greenbrier river, northweſt and weſt of the Cow-paſture
"and Newfoundland, all lands within thoſe limits, if they muſt
"be called limits, were appropriated, ſo that the company or
"their agent had power to ſurvey and ſell any parcel, which they
"ſhould chuſe, of ſuch land, although another man had ſettled on
"the parcel before the ſurveying and ſelling, and although the act of
"General Aſſembly, paſſed in the year 1779, had declared to be juſt,
"that thoſe who had ſettled on the weſtern waters, upon waſte and
"unappropriated lands, for which they had by ſeveral cauſes been
"prevented from ſuing out grants, under ſuch circumſtances, ſhould
"have ſome reaſonable allowance for the charge and riſk they had
"incurred, and that the property ſo acquired ſhould be ſecured to
"them; the honorable court ſeeming to have underſtood that, by
"the terms *waſte and unappropriated lands*, *to which no other per-*
"*ſon hath any legal right or claim*, the act intended lands
"which the company had not choſen to ſurvey, after, as
"well as before, they had been ſettled; whereas ſome,
"who have obſerved that the ſurveys made by orders of
"council, and confirmed by the act, are ſurveys of waſte and un-
"appropriated lands likewiſe, think the application of the term,
"*unappropriated*, in the caſe of lands ſurveyed by orders of coun-
"cil, to lands not ſettled before the ſurveys, would be found cri-
"ticiſm; eſpecially the act having dignified the ſettlement with
"the emphatical appellation of property, property acquired, and
"acquired at charge and riſk means of acquirement generally
"eſteemed meritorious; and think the words *lands, to which no*
"*other perſon hath any legal right or claim*, more reſtrictive than
"the words *lands unappropriated*, which comprehend lands to
"which no other perſon hath any right or claim, whether legal
"or equitable; and the honorable court ſeeming to have under-
"ſtood that the act, by the terms *upon lands ſurveyed for ſundry*
"*companies &c. people have ſettled, &c.* in the ſeventh ſection,
"deſigned to include lands ſurveyed as well after, as before, the
"ſettlements; whereas ſome commentators conceive that the in-
"terpretation, which confineth the words to ſurveys prior to the
"ſettlement, is not inconſiſtent with the rules of grammar, with
"the intention of the legiſlature, or with the principles of natu-
"ral juſtice. And this court ſuppoſeth the opinion of the honor-
"able court to have been, that where a ſettler of land, ſurveyed after
"his ſettlement by virtue of the company's order of council, had
"obtained a grant of the land, including an additional quantity in
"right of pre-emption, one, who was a prior ſettler, recovering

"the

" the ſettlement from the grantee on that principle, ſhall not re-
" cover with it the pre-emption land; whereas others think that
" he, who recovereth in right of priority, ought to be in the con-
" dition in which he would have been, and conſequently ought to
" have the pre-emption, to which he would have been intitled, if
" the poſterior ſettler had not obtained the grant. And this court
" alſo ſuppoſeth the rights of the loyal company, under whom
" Burnſides in the principal caſe claimeth, and the territo-
" rial limits of whoſe order of council are not more definite than
" thoſe of the other company, to be no leſs extenſive, and not leſs
" to be preferred to the rights of ſetters, than the rights of that
" other company; on theſe ſuppoſitions, this court, in order to
" ſuch a final decree as at this time is believed to be congruous
" with the ſentiments of the Court of Appeals, doth direct that
" a ſurvey be made of the 400 acres of land, for the ſettlement by
" Andrew Culbertſon, which may be laid down as either party
" ſhall deſire, to enable the court to decide between them on the
" propriety or reaſonableneſs of the location; that the patent of
" James Burnſides be alſo ſurveyed and laid down, to ſhew how
" much it includeth of the 400 acres; and when this ſhall be ad-
" juſted, the court doth adjudge, order and decree, that Burn-
" ſides do convey to Reid the inheritance of ſo much of the 400
" acres as ſhall be found to lie within the bounds of the ſaid pa-
" tent, with warranty againſt himſelf, and all claiming under him,
" and deliver poſſeſſion thereof, upon Reid's paying to him, at the
" rate of three pounds per hundred acres, for the quantity ſo to be
" conveyed, that as to thoſe 400 acres the bill of Burnſides be
" diſmiſſed; and, as to the reſidue of the land contained in the pa-
" tent, that the bill of Reid be diſmiſſed; but Reid is neverthe-
" leſs to be at liberty to proceed to ſurvey the 600 acres of land
" for his pre-emption, if he can find land to ſatisfy the ſame,
" without interfering with the ſaid patent, or any other prior
" claim."

From this decree both parties appealed, each from ſo much of it as partially diſmiſſed his bill.

CARRINGTON J. delivered the opinion of the court.

The act of 1779 gives a preference to original ſettlers, and ſo did the loyal company. The act grants to ſuch ſettlers 400 acres including their ſettlement, and a pre-emption of 600 acres adjoining, if ſuch lands can be found, to which no other perſon has a legal right. The Chancellor is miſtaken when he likens this to the caſe of Maze and Hamilton.* If the caſes were alike, as he ſtates them to be, this court would have eſtabliſhed the preſent decree without a diſſenting voice; and notwithſtanding the *criti-*

* See APPENDIX.

ciſms

ciſm: that have been paſſed upon that deciſion, this court upon a reviſion of that caſe conſider it to have been determined in ſtrict conformity with the law, and agreeably to the principles of equity. But how was the caſe of Maze and Hamilton? Maze's ſettlement was in 1764; Hamilton's not until 1770. Maze conſtantly aſſerted his claim of ſettlement right. In June 1775, Hamilton ſurveyed 1100 acres including Maze's ſettlement, and pending the diſpute got out his patent. The act of 1779 eſtabliſhed the right of prior *ſettlers*, and gives *pre-emption* when *vacant lands are to be found adjoining*. Though in that caſe the ſettlement was Maze's, yet the *adjoining lands* which would otherwiſe have been for *pre-emption*, were not vacant, having been ſurveyed by Hamilton under the authority of the Greenbrier company, anterior to the act of 1779. This court therefore conſidered that Maze had a right to his ſettlement, & Hamilton, having a right prior to that, under the law of 1779, was entitled to the remainder of his patent, and ſo determined it, with liberty to Maze to ſurvey his *pre-emption wherſoever elſe he could find vacant land*, and reverſed the decree. What is this caſe? Culbertſon proves his prior ſettlement inconteſtably, in which is included Farlow's ſurvey. Burnſides, not till 1786, (long after the determination in favor of Reid in the General Court,) made his ſurvey, and fraudulently obtained his patent for the ſettlement, and for pre-emption in the vacant lands adjoining. Until then, we hear of no title in the adjoining lands in any body. Therefore his patent was founded upon a rotten foundation, (ſo far as it included the ſettlement and pre-emption,) it being upon the judgment of the commiſſioners, which was declared void by the General Court. An attention to dates will point out the diſtinction between the two caſes. In the caſe at bar, the pre-emption of Samuel Culberſon is made to yield to the patent of Burnſides, altho' the lands adjacent to Culberſon's prior ſettlement were vacant at the time of the judgment of the General Court in 1784, eſtabliſhing Culberſon's ſettlement and pre-emption. Burnſide's ſurvey was not made, nor his patent obtained till 1786, and that by fraud, impoſing on the agent of the loyal company the commiſſioners certificate in 1781, which had been vacated by the General Court.

The decree of the High Court of Chancery is therefore erroneous in this, that after ſetting aſide Burnſide's patent for fraud, ſo far as it comprehended the lands adjudged by the General Court in 1784 to Samuel Culbertſon for his ſettlement right, it makes the pre-emption claim of the ſaid Culbertſon, founded on the

the ſaid judgment, yield to the patent of the ſaid Burnſides, which was not obtained until 1786, upon a ſurvey made in that year.

The decree is to be reverſed, and it is now decreed that a ſurvey be made of 400 acres for Culbertſon's ſettlement right, and 600 acres adjoining, which may be laid down as either party may require, to enable the Court of Chancery to determine as to the reaſonableneſs of the location; that the patent to Burnſides be alſo ſurveyed and laid down to ſhew how much it includes of the 1000 acres. And when this ſhall be adjuſted, the court doth adjudge &c. that Burnſides do convey to the ſaid A. Reid the inheritance of ſo much of the 1000 acres as ſhall be found to lie within the bounds of Burnſide's patent, with warranty againſt himſelf and all claiming under him, and deliver poſſeſſion thereof upon his paying to the ſaid Burnſides at the rate of £3 per hundred acres, for the quantity ſo to be conveyed: That as to thoſe 1000 acres, the bill of Burnſides be diſmiſſed, and as to the reſidue of the lands contained in the patent, that the bill of Reid be diſmiſſed, and that Burnſides pay coſts in each ſuit in the High Court of Chancery.