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IN THE

# COURT OF APPEALS

OF

# VIRGINIA.

BY DANIEL CALL.

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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.

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## JOHNSON *v.* BROWN.

*Tuesday, October 19th, 1802.*

Where equity is equal, the law must prevail.

If A. have such an equity as would, on a *caveat* prior to the grant, have entitled him to a preference, it would be no ground for a bill to set aside the patent, unless he was prevented by fraud, or accident, from prosecuting a *caveat.**

The entry is not a *legal* title; but is only the first step towards acquiring *waste* lands.†

The survey is a progressive legal step; but it is the *grant* only, which passes the legal title.

There are periods after which the Court will presume notice given by the Surveyor, and a dereliction of the entry by the party.

A survey annexed to the record, and not excepted to in the Court below, will be considered as admissible evidence in this Court: The more especially, if accompanied by the Surveyor's deposition.

*Quære.*—Whether the entry in this case was too vague?

If the lands surveyed be not within the description of the entry, a subsequent locator shall not be postponed, by the lands thus surveyed at a time future to his entry and survey, especially if he has obtained a grant.

This was an appeal from a decree of the High Court of Chancery. The bill states, that on the 20th of November, 1749, William Davies, for his father Robert Davies, entered with Thomas Lewis, surveyor of Augusta county, for 300 acres of land *between his father's land and the widow Bell's.* That on the 29th of August, 1753, Robert Davies sold the entry to J. Phillips; from whose son and heir the plaintiff purchased it on the 23d of May, 1789. And on the 12th of October, 1789, William Davies also assigned it to the plaintiff, for the consideration of £4 10s. That the entry being surveyed, and the plat returned into the Land Office, a patent issued thereon June 9th, 1792. That John Brown, in 1753, entered with the [260] same Surveyor, 230 acres of land, comprehending 190 acres of that above mentioned; and, in 1783, a patent

* After a grant issued, one claiming a prior equity against the grantee can in no case have relief in equity, unless for actual fraud in acquiring the legal title, or unless the claimant was prevented from prosecuting a *caveat* by fraud, accident, or mistake. And by *actual fraud*, in such a case, is meant the proceeding to procure a patent, after actual notice of a prior equity. *McClung* v. *Hughes*, 5 Rand. 453; *Jackson* v. *McGavock*. id. 590. See also *Lewis, &c.* v. *Billups, &c.*, 1 Leigh, 353.

† The purchase of a warrant from the commonwealth, and a consequent entry, is not a purchase of the land itself, until the *entry* is carried into *grant*. *Nichols, &c.* v. *Covey, &c.*, 4 Rand. 365.

Yet an inchoate right to land, held by entry and survey only, is real estate, and will descend to heirs, not to executors. *Morrison* v. *Campbell, &c.*, 2 Rand. 206.

for the same was obtained by his heir or devisee, from whom the bill prays a conveyance. The answer says that two surveys cannot be made on one entry; that if the plaintiff's survey had pursued the entry, it must have gone through patented lands; that the entry is too vague. That the plaintiff's survey was forfeited, and could not regularly have been surveyed, when it was.

There are several depositions with regard to the plaintiff's purchase; and the deposition of Poage, a surveyor, stating he had run certain lines; and annexing a plat comprehending the lands in controversy.

The Court of Chancery decreed in favor of Brown; and thereupon, Johnson appealed to this Court.

RANDOLPH, for the appellant.

The government could not have defeated Johnson's right; because, by the act of 1748, all entries were to stand good until notice was given by the Surveyor, on two Court days. Old edit. laws 220, § 20, [c. 19, § 8, 6 Stat. Larg. 36.] But Brown cannot be in a better situation than the government itself. The vagueness of the entry is not material. For the officer was satisfied, and all the entries of that day were as vague. The survey agrees with the entry, for a line run from it will touch the widow Bell's, as the plot exhibited by the appellee shews. But the plot itself is not authentic, as it was not made under any order of Court.

NICHOLAS, contra.

Having got the first patent, we had the legal right, and the plaintiff shews no equitable title to overthrow it, as there is no charge of any fraud in obtaining it, which there must be, in order to affect the legal title. *White* v. *Jones*, 1 Wash. 116. We had no notice of any prior entry, and therefore, [261] our conduct could not be fraudulent. But the entry is too vague, *Hunter* v. *Hall*, 1 Call, 206; and it is not material that it was under the old law.

The plot is evidence; for it is proved by the Surveyor; and was not excepted to in the Court of Chancery. Therefore, no objection to it should be allowed at this time. But if the plot be received, then it is manifest that Johnson did not pursue the entry in his survey; and, therefore, the survey itself is void as against us. But the entry was abandoned; for the lapse of time was so great, that a relinquishment ought to be presumed. *Picket* v. *Dowdel*, 2 Wash. 106. Besides, the

evidence proves, that Davies had forgot that he ever made the entry.

CALL, on the same side. The entry was too vague to operate against a subsequent locator, without actual notice: and it will not be material, if no act of Assembly, at that day, required as much precision, as the present laws do. For the act of 1779, [10 Stat. Larg. 57,] only enacted into a statute what was a law of equity before, as far as respected a subsequent locator; because it was a principle of general justice, that a vague and indefinite entry, from which no particular portion of land could be ascertained, ought not to prevent or disappoint a future locator. Otherwise, every man who wished to make an entry must have consulted every prior locator before he could have proceeded; which would have been an intolerable hardship.

It is under this view, therefore, that we say the entry is void; and not that it is *ipso facto* nullified against the public, or any other person. For, as against the public, the act of 1748, (*old edit. laws* 220,) may have full operation, and yet be void against a subsequent locator, without knowledge of the particular place entered for.

[262] This doctrine is attended with no inconvenience; because it was in the powever of the first locator to have been more precise, or to have surveyed at an earlier day: Whereas, according to the other idea, an immense space of country might have lain unappropriated half a century, until some prior locator was satisfied.

Hence it appears, that where there were conflicting entries, precision was as necessary before the act of 1779, as afterwards.

Let us examine, then, what has been held an insufficient entry since that act.

In *Hunter* v. *Hall*, 1 Call, 206, an entry of 400 acres on the south branch, adjoining Lord Fairfax's land, at the mouth of Mill Creek, was held insufficient; and yet that entry was fully as certain as this.

*Field* v. *Culbreath*, 2 Call, 547, was not like this: 1. Because it was for *all* the vacant land between certain lines; whereas, this is only for 300 acres in an immense space. 2. Because the survey, there, had reduced the location to certainty before the *caveat*. 3. Because the survey was upon the land described in the entry, and two of the lines actually agreed.

Upon the ground of precision, therefore, the entry, as against Brown, who was an innocent man, is clearly void, on account of the vagueness of it.

But the survey does not agree with the entry:

For the land surveyed does not lie between those of Robert Davies and the widow Bell; but it lies behind those of Robert Davies.

When a man describes a tract of land, as lying between two others, he means, that the body of it, at least, actually lies between them. A mere corner or mathematical point will not satisfy the description. But, in the present case, however, not even a mathematical point lies between them; [263] for the land surveyed is not comprehended between those described in the entry, but lies behind one, and recedes from both. So that, in the language of one of the Judges, [Lyons] in *Hunter* v. *Hall*, it may be said, that Davies, when he entered never expected to find the land he entered for at the place which has been surveyed.

But the entry was abandoned:

It was made in 1749, and no survey of the land took place until 1790, upwards of forty years. Therefore, according to *Picket* v. *Dowdel*, 2 Wash. 106, it was utterly void against a subsequent locator. For the rules there laid down expressly apply to the present case: because the warrant of Lord Fairfax was like that of the government, and he was as much bound by it. Of course, if the new grant could supersede the old entry and survey there, much more will it supersede a mere entry here.

But our case is stronger; because there is actual evidence here of the abandonment. For Perry says that Davies appeared to have no recollection of it; which is a clear proof of his having long since relinquished it; and Moffet says that Phillips offered to give it for nothing, into a bargain which they were treating about: a clear proof that he also had abandoned it.

But, by analogy to the three years after the patent before seating and planting, the failure to survey, patent and improve, ought to be held a dereliction. Else, other locators might have been put to inconvenience, and the public defrauded of the taxes.

But, for another reason, the defendant must succeed; [264] for he has got the legal estate, without any fraud; and his equity is at least equal. Therefore, a Court of Equity will not interpose between two innocent men, but will let the law prevail.

The survey is evidence; for the correctness of it has never been impeached before; and an order for a survey is never made without the request of the parties. But Poage swears that it is correct; and as he might have described the situation in words only, without the assistance of lines, it can never be an objection that he used lines to make himself better understood. Besides, this is a mere plat, composed of copies from his office; and if the copies could be read, so may the connected plat of them also.

But the plaintiff shews no title.

He does not shew any assignment of the entry from Robert Davies to Phillips, or from William Davies to himself. Neither does he produce any patent, or authority for making the entry.

RANDOLPH, in reply.

The record is probably defective. At all events there is reason to presume the assignment and patent to Johnson; and the Court will institute an enquiry to ascertain it. William Davies is stated to have assigned himself, with a knowledge that his father had previously done so. The entry is as certain as most of that day; indeed, it would be precise enough at this. *Field* v. *Culbreath*, 2 Call, 547. As to the lapse of time, it is no objection, as the act of 1748 preserves the entry, until the Surveyor gives the required notice. In this respect it differs from *Picket* v. *Dowdel;* because there was no such law or private regulation for the government of Lord Fairfax's office. But the doctrine in *Johnston* v. *Buffington*, 2 Wash. 116, is in our favor. There was no necessity that the whole land should lie between the tracts of Davies and Bell; [265] and lines might be so run, as to throw part between them. The analogy contended for, between this and the three years after the patent, cannot be maintained; such a position has never been laid down by the Court in any case. The objections to the evidence of the survey, cannot be obviated; and, upon the whole, the decree is erroneous, and ought to be reversed.

*Cur. adv. vult.*

PENDLETON, President, (after observing that as all the Judges who sat in the cause were unanimous, those present thought there would be no impropriety in proceeding to judgment in the absence of Judge ROANE,) delivered the resolution of the Court, as follows:

Upon the 20th of November, 1749, William Davies entered with the Surveyor of Augusta county, for 300 acres of land, *between Robert Davies' land and the land of the widow Bell.*

It is stated that Phillips purchased the entry of Robert Davies in 1753, and sold it to Johnson in 1789. Of this, however, no proof is exhibited; but let it for the present be admitted, without making it a precedent. It is proved that in October, 1789, Johnson purchased of William Davies his right to this entry, and be it also admitted, as stated, that he surveyed the land in dispute, under that entry, in 1790, and obtained a grant in 1792. In January, 1753, a survey appears to have been made for John Brown, grand-father of the appellee, of 230 acres, including the lands in dispute, on which it is said a patent issued in 1788, but it does not appear. Upon the 10th of June, 1770, Thomas Brown, father of the appellee, entered 400 acres, adjoining Phillips, his father's old tract, and his own land. March 1st, 1775, he surveyed the 190 acres in dispute, correctly answering the description of his entry; and February 1st, 1781, obtained a grant [266] for it. The present suit in Chancery was brought by Johnson, stating his equitable title to be prior and superior to Brown's; and praying a decree that he may convey the legal title. The bill was dismissed in Chancery, and from that dismission the appeal comes.

We first consider the case on general principles, as a claim to set up an equitable interest in opposition to a legal title; in which case the plaintiff, to succeed, must shew a superiority of equity to the defendant, for, if it be equal only, the law must prevail.

We then contrast the equity of the parties:

Brown appears to have proceeded regularly, fairly and legally, to acquire a title to vacant lands, and has, without fraud, obtained a patent. Johnson, on the other hand, appears to be a man searching for defects in his neighbors' land titles; hunting up and purchasing a stale, dormant claim, in order to disturb that title; and would rather seem to merit the penalty of the act against buying pretensed titles, than to be considered as a fair claimant in a Court of Equity. In this view, then, here is *no equity* set up against *law* and *equity*, and cannot prevail.

But let us suppose Johnson had such an equity as would, on a *caveat* prior to the grant, have entitled him to a preference; it would be no ground for a bill to set aside the patent, unless it had been suggested and proved that he was prevented by fraud or accident from prosecuting a *caveat.** On those

[**Noland* v. *Cromwell*, 4 Munf. 155; *Christian's devisee* v. *Christians et al.* 6 Munf. 534; *Lyne* v. *Jackson*, 1 Rand. 114; *Whittington et al.* v. *Christian et al.* 2 Rand. 353.]

grounds, this Court has sustained bills of this sort, and enquired into the equitable preference, as if on a *caveat;* but to admit such bills in all cases, without even suggesting an excuse for not having entered a *caveat*, would be to transfer the whole *caveating* business from the Courts of Law, where the
[267] Legislature has placed it, into the Chancery; which this Court cannot give sanction to. It was foreseen by the Legislature that there would be interfering entries and surveys, and the *caveat* was the remedy for settling all those disputes prior to the patent, to avoid the inconvenience of that solemn instrument being involved in contests of that kind.*

But we will gratify the plaintiff, as far as to suppose for the moment that we were sitting in judgment on a *caveat*, entered by Johnson against Brown, to prevent the patent on his survey of 1775. Here Mr. Randolph insisted that the entry gave a legal title to the land. If so, why come into a Court of Equity? But it is not correct to say the entry gave a legal title. An *entry* is the first legal step towards acquiring waste lands, and gives the person making it, if properly pursued, a preference to a *grant*, the true definition of an equitable interest. The *survey* is a progressive legal step; but it is the *grant* only, which passes the legal title.† However, the counsel insisted that the title, whether legal or equitable, was to stand good, at all times, until notice given by the Surveyor, and a neglect on the part of the person making the entry: which does not appear to have occurred in the present case. But, is there no period after which such notice, and a dereliction of the entry, shall be presumed? The law books abound with instances of similar presumptions, and we believe that not a precedent or reason can be found, to induce a Court of Equity to give its aid to resuscitate an entry which has slept for forty years, in order to disturb intervening legal titles, fairly obtained.

Again: To close the climax of defect in the plaintiff's claim, the *entry* gave no title, at any time, to the land in dispute: which will appear by recurring to the survey annexed to the record. That survey the Court think admissible, not only as it comes to us as a part of the record, without exception, but
[268] because it is authenticated by the Surveyor's deposition. Without enquiry whether the entry was too vague, *between Davies and Bell*, or whether two distinct surveys could be made upon one entry, it is most obvious that the land in

[* See amendment at Rev. 1819, Mar. 1819, c. 86, § 38, ed. 1819, p. 329] Code of 1849, p. 482, '3, § 23, '4

[† See *Morrison* v. *Campbell* et al., 2 Rand. 206.]

dispute is not within the description of the entry, since it does not lie *between Davies and Bell.* The counsel supposed, that if a line were drawn from Davies' corner at B. to Bell's at K., it would throw part of the land in dispute between the extreme points of that line, and satisfy the entry. This was ingenious, but not rational; since, as Bell's land lay to the *north-west* of Davies's, the entry must have the same position from Davies; and, therefore, it cannot be justifiable to go to the *south-eastern* corner of Davies's land, in order to discover the space between that and Bell's, which would throw Davies's land between the entry and Bell's, instead of the entry lying between the other two. Surely, to draw lines from the extreme corners and lines of Davies to those of Bell, in the parts where they approach each other, is the way to discover the space between them. For instance, the lines D. E. and E. F. of Davies, and the lines J. K. of Bell, are the approximating lines. Then draw a line from D. or E. to K. and from F. to J.: those lines will shew the space between those lands, and be the limits of the entry, which will not include a foot of the land in dispute. On every point, therefore, and every view of the case, the Court are unanimously, and without difficulty, of opinion that the decree is right, and ought to be affirmed, with costs.

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## Elliott's Executor *v.* Lyell.

*Saturday, October* 23, 1802.

Where a joint bond was given before the act of 1786, and after that act went into operation one of the obligors died, living the other; the obligation survived, and the executors of the deceased were exonerated.*

In the year 1798, Lyell, as assignee of Parish, brought debt against Robert Elliott, executor of Richard Elliott, upon [269] a joint bond given by the said Richard Elliott, Thomas Butler, and William Walker, to Parish, on the 17th day of October, 1782, and assigned by Parish to the plaintiff. Plea,

* For the act of 1786, see 1 R. C. of 1819, p. 359, § 3. And Code of 1849, p. 582, § 13.

The executors of two deceased obligors cannot be jointly sued in the same action. *Watkins' ex'ors.* v. *Tate,* post, p. 521.

But see Code of 1849, p. 639, '40, especially § 5, 6; and the joint or several recovery authorized by § 6, against one, or all, or any intermediate number of persons liable, whether individually or as representatives.