# REPORTS
OF
# CASES
ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY
*BUSHROD WASHINGTON.*

VOL. I.

*RICHMOND:*
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# JONES,
## *against*
# WILLIAMS & TOMLINSON.

THE appellees filed their bill in the High Court of Chancery against John J. Jacobs and wife, praying for a conveyance of a tract of land to which they were entitled in right of a settlement, made before the year 1775, and which had been granted to the said Jacobs and wife, by patent dated in 1784, in virtue of a survey made upon a military warrant by David Rodgers under whom Jacobs and wife claimed. This warrant was located in 1775, and the survey was returned in 1776; long subsequent to the settlement of the plaintiff's as asserted in their bill. Tomlinson's right of settlement having been affirmed by the commissioners in the year 1780, Williams alone entered a caveat against the emanation of a grant to Rodgers, but by an accident attending the transmission of subpoenas for his witnesses, the caveat was dismissed.

Jacobs and wife by their answer insist, that Rodgers had a right of settlement prior to that of the plaintiff's, and amongst other things disclosed, that they had sold to the appellant Jones.

Depositions were taken, which prove the prior settlement of the plaintiffs. After this, a new bill was filed by the plaintiffs, making Jones a party defendant, who appeared and put in an answer, in which amongst other things, he asserts a right in Rodgers by settlement, prior to that of the plaintiffs. No replication was put in to this answer, but the cause coming on to be heard upon the bill, answers, exhibits and *examinations of witnesses*, the court decreed in favor of the plaintiffs, from which decree the defendant Jones appealed.

MARSHALL for the appellant. This cause, as to the appellant, is to be considered as having come on, upon bill and answer: for the depositions having been all taken, before he was a party to the suit, and an entirely new claim being made, and new matter brought before the court, the evidence could not with any propriety be used against him. It would be most unreasonable, if claims not put in issue by the former bill, could be supported by the evidence taken on that bill. In 1 *Harr. Ch. Prac.* 108. It is laid down, that at any time before hearing, upon cause shewn, the plaintiff may obtain an order to add parties to his bill, but in this case, the cause is to be heard as

to such new defendant, upon bill and answer." In the same book p. 150, it is also said, that when a supplemental bill is filed, after publication, the court never gives leave to examine that, which was in issue in the former cause, and it is irregular to examine witnesses, to a matter, that was in issue, and not proved in the original cause, and such proof, is not to be read. So, if there be no proof of the new matter in the supplimental bill, it must be dismissed, unless such matter be admitted by the defendants answer.

If then, the cause is to be heard on the bill and answer, the state of the case will be simply this. The answer, positively denies the plaintiff's title; states a completely equitable right in the defendant, under a prior settlement by Rodgers, and that, converted into a legal title, by being carried into grant.

THE PRESIDENT delivered the opinion of the court.

The depositions are clearly inadmissible. The first answer is filed in 1789, disclosing the sale to Jones, but at what time, does not appear. If it had been, *pendente lite*, the depositions might perhaps have been read. The bill against Jones, is neither supplemental nor amended, for it contains new matter entirely, without noticing the former bill. The cause must therefore be heard upon the bill, answer and exhibits.

It appears, that under the act of Assembly passed in 1779, Rodgers was entituled to a grant on a military survey, returned in 1776. This however was subject to a caveat, upon the trial of which, the merits might have been heard, and decided.

A caveat was entered by Williams, and in consequence of an accident was dismissed; we shall therefore consider the case, as the General Court would have done, on a hearing of the caveat.

As to a right by settlement, Rodgers appears to have had the best; but no right whatever, could be acquired in this way, in lands formerly belonging to the crown, until the act passed in May 1779—before that time, those lands might have been entered, and patented by any person, notwithstanding prior settlements by others: and even this act, which considers settlers as entitled to some compensation for the risk they had run, allows them only a preference to such settlements in lands, as at that time were *waste & unappropriated*. As to priority of settlement, it might still remain a question between persons, both of whom claim under the same sort of title; but the law of 1779, does not set up rights of this sort, so as to defeat those legally acquired under warrants; it applies to controversies between mere settlers.

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The land in question therefore, was not *waste and unappropriated* in 1779, nor subject to the claim of a settler, however just it might be, because Rodgers was then entitled to a patent for it.

Decree reversed with costs and bill dismissed, each party paying his own costs in the High Court of Chancery.

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# BYRD *against* COCKE.

THIS was an action of debt brought by the appellee against the appellant as high sheriff, for levying an execution on the property of the plaintiff's tenant, without paying him an years rent, due at the time. The declaration "demands "£80, which the defendant owes and detains, for that the "defendant refused to pay the plaintiff the said sum of £80, "though he the defendant, as sheriff, levied an execution on "the property of J. Stith, which property was on the plaintiff's "premises, rented to the said Stith, for the said £80 a year, "and notwithstanding, the said Stith was in arrear to the "plaintiff, for the last years rent, to wit, for 1780 and although "the defendant was applied to for the said £80, contrary to "the form and effect of the act of Assembly &c. and the defen-"dant still refuses to pay the said £80 tho' often required &c. "to the plaintiffs damage £150" &c.—Plea *non assumpsit*—verdict and judgment for the plaintiff for £83:13:4 damage.—This judgment, being affirmed in the District Court, an appeal was prayed to this court.

The attorney general for the appellant.

This record though small, is as full of error as it can well be.—The writ is in case—the declaration in debt—the issue is *non assumpsit*, and verdict and judgment is entered for the plaintiff, though the jury have not found that the defendant *did assume.*

The declaration being in debt, makes an incurable error in the proceedings, at the very threshold. Debt will not lie in a case of this sort, where no contract exists, unless it were given by statute. It is brought too, against the sheriff for an act of *commission*, for which, even an action on the case would not lie. But if the action were proper, still the issue is immaterial, for tho' the defendant did not assume, yet he might be liable to the recovery of the plaintiff.

WICKHAM