REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

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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.

JOHNSON,
against
BUFFINGTON.

THIS was an appeal from the High Court of Chancery, affirming a decree of the County Court of *Hampshire*, wherein the appellee was plaintiff. The case was as follows: *Peter Peters* in the year 1753, obtained from the *Lord Proprietor* of the Northern Neck, a warrant to survey a tract of land within that District, which by his direction was surveyed for a certain *Frederick Unrod*, an indented servant of the said *Peters's*; but by the mistake of the said surveyor, (as the bill charges,) he was called *Vinegard* instead of *Unrod*. No patent was obtained from the *Proprietor* in the life-time of *Unrod*, who died many years ago, leaving a son *Jacob*, then an infant, who was by his mother sent into *Pennsylvania*, and there bound out an apprentice; he resided in that state always afterwards, and sold his right to *Buffington* in 1770.

Johnson made an entry with the surveyor, for 219 acres, part of this land, under the act of 1783, and having obtained a patent from the Register's office in 1789, brought an ejectment against *Buffington*, and recovered a judgment. The prayer of the bill was for an injunction, and for a conveyance, both of which were decreed by the County Court, from which an appeal was granted to the High Court of Chancery. That court being of opinion, that the equitable right of the appellee to the land in controversy, derived to him from the heir at law of the person for whom the land had been surveyed, was preserved by the acts of 1786, 1788, and 1790, and consequently was not subject to the entry and location of the appellant which was posterior to the survey, affirmed the decree of the County Court from which an appeal was prayed to this court.

LEE for the appellant. Whether in a case like the present, a Court of Equity will interfere, and take from *Johnson* his legal title is an important question. The decree seems bottomed upon an opinion, that the equitable right of *Buffington* was revived and preserved by the act of Assembly passed in 1786, Ch. 3, and the subsequent act continuing the operation of that law. But before I consider the operation of those laws, I will premise some objections against the interference of the Court of Chancery.

Chancery. In the first place, the warrant has not been so complied with as to entitle the party to claim a grant. The warrant was to survey 300 acres of land, instead of which, a plat for 450 acres was returned. Though this objection would have been done away, had *lord Fairfax made a grant*, it is now in full force where an application is made to this court to compel a conveyance. The warrant was not pursued in another instance; the length and breadth of the tract as delineated in the plat, do not bear that proportion to each other, which the warrant required. Neither are the names of the chain carriers inserted in the survey. These objections, when considered together with the neglect of *Unrad* and *Buffington*, in not perfecting this dormant title, are sufficient to deprive the appellee of the aid of a Court of Equity. It may also be seriously questioned, whether *Vinegard* in whose name the survey was made, is the same person as *Unrad*, and if so, there is an outstanding title in *Unred* which *Vinegard* could not transfer to *Buffington*.

I come now to consider the acts of Assembly. The first which passed upon this subject was in 1785, Ch. 47. The 4th section, after reciting, that since the death of the Proprietor of the Northern Neck, no mode had been adopted to enable persons having made entries before or since his death to obtain titles for the same, declares, "that where any surveys have "been heretofore made, or hereafter shall be made under en- "tries made in the life of the said *Proprietor*, or under entries "made with the surveyor of any county, under the act of As- "sembly aforesaid,* and which have been returned to the said "Proprietary office, or shall hereafter be returned to the Regis- "ter's office, the Register shall make out grants therefor, to "bear teste under the hand of the Governor and the seal of this "Commonwealth, in the same manner as is by law directed in "cases of other unappropriated lands; and the surveyors with "whom such entries have been made, are hereby directed and "empowered, to proceed to survey and record the same, and to "make return of such surveys to the Register's office, in the "same manner, and within the same time as is or shall be di- "rected in cases of warrants issued for other unappropriated "lands within this Commonwealth, and thereupon grants "shall issue in the manner herein before directed."

This law is to be construed either in a general or in a restrained sense. I contend for the latter, because of the inconvenience which would

* *October* 1782, C. 33.

would arise, if it were considered as intended to set up obsolete claims not carried into grant, and which were forfeited by the rules of the *Proprietor's* office; but more especially, in cases, where such claims would by relation, destroy posterior grants. The inconvenience, which the preamble of that law states, is, that by the death of *lord Fairfax*, many persons who had made surveys upon warrants issued from the *Proprietor's* office, could not obtain grants. The intention of the legislature was to provide a remedy, not for those who had forfeited their titles by a non-compliance with the rules of the office, but for those, who by the death of *lord Fairfax*, had been prevented from obtaining grants, upon entries made with the surveyors, under the act of 1782, Ch. 33, § 3, which enacts, "that all entries made "with the surveyors of the counties within the Northern Neck, "and returned to the office, formerly kept by the said *Thomas* "*Lord Fairfax*, shall be held, deemed and taken as good and "valid in law as those heretofore made under the direction of "the said *Thomas Lord Fairfax*, until some mode shall be taken "up and adopted by the General Assembly concerning the ter-"ritory of the Northern Neck." The act of 1786, Ch. 3, relates entirely to surveys thereafter to be returned. The words of the law are, "that the owners of entries for "lands within the District of the Northern Neck regularly "made before the 17th day of October in the year of our lord "1785, shall proceed to survey the same, which surveys, to-"gether with those already made upon like entries, shall be re-"turned into the register's office, on or before the 1st day of "October 1788, and on failure, such entries are hereby de-"clared void, and the lands liable to be located in the same "manner, as other unappropriated lands within the said Dis-"trict."

If the legislature intended to give validity to claims which had been forfeited and entirely gone, so as to do away posterior rights fairly and legally acquired, I should question very much the validity of such a law. But the legislature is not to be presumed to have intended an act so fraught with iniquity, and therefore, to avoid such a conclusion, the court will give to the law the limited construction for which I contend.

WILLIAMS for the appellee.—Whatever exposition the court may incline to give to the different acts of Assembly, yet I contend that *Johnson* can derive no right under them. The question is between *Johnson*, whose title is acquired under the legislature of Virginia, and *Buffington* claiming under the *Proprietor*

Though

Though *lord Fairfax* ſhould be admitted to have poſſeſſed a right of availing himſelf of the ſuppoſed forfeiture occaſioned by *Buffington's* not complying with the rules of the office, yet as he never did any act evincing ſuch an intention, (as by making a grant to ſome other perſon,) the argument reſpecting the forfeiture cannot avail the appellant. The legiſlature could not by any law diſpoſe of the rights of *lord Fairfax*, any more than they could diſpoſe of the rights of other individuals, and conſequently, *Johnſon*, not claiming under *lord Fairfax*, cannot ſet up a title to deſtroy one derived under him, and ſtill ſubſiſting. Again, admitting a right in the legiſlature to diſpoſe of the property of *lord Fairfax*, the act of 1782, which is the ſource, from which the inceptive right of *Johnſon* flows, does not warrant the title which he now ſets up. That act, provides a mode by which a right to the *unappropriated* lands in the Northern Neck might be acquired. But the land in queſtion had been previouſly appropriated by *lord Fairfax*, who, had a right to wave the forfeiture if he pleaſed. Indeed I do not think he could have availed himſelf of it, ſince *Unrod* was an infant at the death of his father, and always afterwards reſided out of this ſtate.

I admit that where the equity is equal, and one of the parties has alſo the law in his favor, he ſhall prevail. But if the legal title has been obtained by fraud, or, as in this caſe, by taking an advantage of one labouring under a legal diſability, he will not have the benefit of this advantage.

As to the identity of *Unrod*, I conſider it to be fully eſtabliſhed by the evidence. The objection to the variance between the warrant and the ſurvey could only be a queſtion between *lord Fairfax* and *Unrod*, not between the appellant, who claims under the *commonwealth*, and the appellee claiming under *lord Fairfax*.

The conſtruction given to the act of 1785 by Mr. *Lee*, ſeems to me to be a very unreaſonable one. For if the legiſlature conſidered *entries not ſurveyed* as worthy of being ſaved from forfeiture, a *fortiori*, they would ſave titles ſtill nearer a ſtate of perfection, namely, entries *then actually ſurveyed*.

LEE in reply. If it be true, that the appellant could derive no title under the legiſlature of Virginia, the application to a Court of Equity was unneceſſary, ſince he might have effectually defended himſelf at law; and therefore the court ſhould have diſmiſſed the bill.

The

The possession of *Buffington* is by no means a continuation of *Unrod's* possession. He was an unauthorised occupant of the land, and being there he purchased up this obsolete claim of *Unrod's*, in order to bolster up a right founded merely in possession.

FLEMING, J.—After stating the case, proceeded; the first objection made by the counsel for the appellant, was, that the survey did not pursue the warrant. But I think there is no weight in this, as the variance is only in the *quantity*. If the land had been *imperfectly* described, it might have been fatal.

The second objection was, that the act of 1785 only respected cases where surveys had not been made. I am clearly of opinion, that this act, notwithstanding the title of it, relates as well to entries as surveys, and comprehends the present case. *Unrod* (who I am satisfied is the same person as *Vinegard*) most certainly forfeited his right to a grant, if *lord Fairfax* had evinced an intention of availing himself of it, but not having done so, the land is to be considered as appropriated, and therefore, could not be regranted by the Commonwealth under the act of 1785.

CARRINGTON, J.—I have no doubt but that *Unrod* and *Vinegard* are the same persons, nor do I consider the variance, between the warrant and survey, as to the quantity, as being of any consequence. The title of *Unrod* was prior to that of *Johnson*, and since it was not defeated by any act of *lord Fairfax* in taking advantage of the forfeiture, the land could not be considered as *unappropriated*, and as such subject to be granted under the act of 1785.

THE PRESIDENT.—I feel no difficulty about the variance in the name of *Unrod*, nor in the quantity of land. According to the decision in the case of *Pickett* and *Dowdall*, it follows, that the right of *Unrod* was *liable to forfeiture* by the failure to apply for a grant within the time limited by the rules of the office, and by the non-payment of the composition and office fees. But as *lord Fairfax* did no act manifesting an intention to avail himself of the forfeiture, the title of *Unrod* rested upon his survey until 1786, and was confirmed by that act, which limited no time for the payment of the composition and fees. The act of 1786 relates, 1st, to entries; 2dly, to surveys not returned; and 3dly, to surveys returned, and ungranted. The act of 1788, Ch. 20, continues that of 1786, as to entries and surveys, and comprehends the three branches of the latter law.

Mr.

Mr. LEE contended that the conſtruction of the act of 1786 might be either extended or narrowed, and ſuppoſed that the latter was moſt conſiſtent with the juſtice of the caſe, and the intention of the legiſlature. My opinion is directly otherwiſe; and in this particular caſe, I ſhould feel very little diſpoſed to narrow the conſtruction, when I conſider that *Unrod* was an infant for many years after the death of his anceſtor, and that he reſided during that time and afterwards, out of this ſtate. It is immaterial to decide whether the commonwealth did, or did not ſucceed to the rights of the *Proprietor*, in caſes of ungranted lands. If ſhe did, yet no advantage has been taken of the forfeiture by her. If ſhe did not ſucceed to them, then, the land was legally appropriated by *lord Fairfax*, and conſequently could not under the act of 1785 be granted to any other perſon.

Decree affirmed.

CURRY,
againſt
BURNS.

THIS was an appeal from the High Court of Chancery. The caſe was as follows: In the year 1756, *Burns* obtained a warrant from the *Proprietor* of the Northern Neck, and in 1757, after the expiration of ſix months from the date of the warrant, he had a ſurvey made for 214 acres, (part of which is the land in controverſy) which was returned to the *Proprietor's* office.

In the year 1768, by the direction of *lord Fairfax*, one of his ſurveyor's ſurveyed 140 acres, (part of *Burns's* 214 acres,) for *Curry*, who was at that time an infant. In September 1770, a grant iſſued to *Curry*, and in the month of May preceeding, *Burns* offered to pay the compoſition money to *Bryant Martin* the agent of the *Proprietor*, and demanded a grant; but *Martin* refuſed to receive the money, ſaying that *Burns* was too late. *Burns* obtained a patent in 1788 from the Governor of the Commonwealth, and being in poſſeſſion, *Curry* brought an ejectment and recovered a judgment at law. *Burns* filed his bill in equity in the County Court of *Berkeley*, praying for an injunction, and for a conveyance of *Curry's* legal title. The County