REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
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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.

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

Court decreed a perpetual injunction and a conveyance, which was affirmed by the High Court of Chancery upon an appeal.

LEE for the appellant. *Burns* having failed to comply with the rules of the *Proprietor's* office by not executing his warrant within the limited time, forfeited all the right to which the warrant entitled him, and the *Proprietor*, having taken advantage of the forfeiture by granting the same land to *Curry*, the title of the latter is good against all the world. The offer to pay the composition money in 1770, could not excuse the forfeiture which had taken place many years before, since *lord Fairfax* had in 1768, authorised a survey for *Curry*, which was made in that year, and in the grant executed to him, the survey of *Burns*, and the forfeiture incurred by him are recited. The Chancellor in this case, as in that of *Johnson* and *Buffington*, has supposed that the act of 1786, relates back to the warrant, and revives all those obsolete claims, which had not been carried into a grant, so as to defeat posterior rights. The patent to *Burns* was obtained from the Register's office in the year 1788, so that the construction of the act of 1788 is not a point in this cause.*

WILLIAMS for the appllee. If *lord Fairfax* from his peculiar situation, was entitled to no exclusive privileges or prerogatives, (which it must be admitted he was not,) he was equally bound with other individuals by those general rules and principles of law which prevail in cases of contracts for the sale of property. If one man agree to sell land to another, upon condition that payment be made by such a day; tho' the purchaser should not on that day pay the money, yet if in a reasonable time afterwards he is ready to comply, he may upon application to a Court of Equity compel the seller to make him a conveyance. In this case, *lord Fairfax* agreed to sell the land in question to *Burns*

" * SEC. 1. Whereas the law authorizing the Register of the land " office to recive into his office plats and certificates of surveys that have " been or shall made, will expire on the last day of December one thou- " sand seven hundred and eighty eight, and it is represented to this Gener- " ral Assembly that many persons through unavoidable accidents have " been prevented from returning their plats and certificates aforesaid, to " the Register of the land office, whereby their lands may be forfeited: " for remedy whereof, Be it enacted by the General Assembly, that the " further time of two years, after the passing of this act, shall be allowed " for returning the same, within which time the Register of the land of- " fice, or his deputy, shall receive all plats and certificatesof survey, " althoug not returned within the time heretofore limited by law; and " and such lands shall not be considered as forfeited, or liable to forfei- " ture, on that account.

Burns, and received the office fees which constituted part of the purchase money. His objection to perfecting the contract because certain rules were not complied with, ought not to avail him, any more than a breach of a conditional sale in the case stated, could avail the seller. It is objected, that the survey was not returned within the six months limited by the rules of the office. Let it be remembered that the surveyors in the *Northern Neck* were appointed by *lord Fairfax* himself, and consequently that in this part of the business they were his agents and representatives. If the survey was not made and returned in time, it was not the fault of the individual, but of a servant of the *Proprietor*. *Lord Fairfax*, after he had received a part of the purchase money, might have prevented any person he pleased from obtaining a grant, by directions given to his surveyors to delay making the surveys, or by issuing so many warrants, that they could not be surveyed and returned in time. The returning of the survey was no part of the contract, but was merely directory to the officer.

But what are those rules of office which are said to be violated? They do not appear in this record, so as for the court to take notice of them.

In this case *Curry* appears to be a mere volunteer, and to have obtained the land from *lord Fairfax* as a *gift*. Of course he is in no better situation than *lord Fairfax* would have been. If then the *Proprietor* ought not to have taken advantage of the forfeiture, (if any such existed,) so as to grant the land again to *Curry*, the act of 1786 revives and preserves the right of the appellee.

THE PRESIDENT. In *Picket* and *Dowdall*, the court determined, that the act of 1786 did not apply to cases where there had been a grant from the *Proprietor*.

LEE in reply. *Curry* is said to be a volunteer, but there is no evidence in the record to support the assertion. The grant to him, is the same in form, with all the other grants of the *Proprietor*; it reserves the usual quitrents, and contains the same conditions. So that this case, is not on that account to be distinguished from the case of *Picket* and *Dowdall*.

ROANE, J.—The circumstances of this case are less strong against the relief which is asked for, than they were in the case of *Picket* and *Dowdall*. For 1st, The forbearance of *Burns* in coming forward to compleat his title has not been of so long a duration as in that case. 2dly, There is no evidence of an abandonment on the part of *Burns* of his right to the land. 3dly,

There

There is no proof here, farther than what is contained in the grant to *Curry*, that any advertiſement had been publiſhed by *lord Fairfax* between the time of *Burns's* ſurvey, and that made for *Curry*, requiring all thoſe who had ſurveys, to come forward, and compleat their title. This is recited in the grant, and the failure of *Burns* to comply with the terms of that advertiſement, is ſtated as the cauſe of the forfeiture. 4thly, It does not appear that at the time *Burns* required a grant of the land, and offered to pay the compoſition and other fees of office, (which time I fix to be in or about May 1770), *Curry* had paid his compoſition money, if indeed any was ever paid by him. The grant to *Curry* was not executed until the 10th of Sept. following. In this view of the caſe therefore, *Burns* may be conſidered as having ſtood upon better ground on account of his priority of ſurvey, than *Curry* did, unleſs by his own neglect he has loſt his right to demand the legal title. It appears by a memorandum of *Richard Rigg*, that he ſurveyed *Curry's* land by virtue of *lord Fairfax's inſtructions*, there being as I preſume no warrant for that purpoſe.

This ſurvey was made the 20th of Auguſt 1768, and muſt be conſidered as the commencement of *Curry's* claim. Between this period, and the time of the return of *Burns's* ſurvey, (which tho' not ſtated, may be preſumed to have been ſhortly after the ſurvey was made, viz: in Sept. 1757, there had been a lapſe of near 11 years, during which time, *Burns* had wholly neglected to come forward and compleat his title. The queſtion then is, whether after this delay, and the conſequent loſs of quitrents to the *Proprietor*, he had not a right to conſider the claim of *Burns* as forfeited, and to grant the land to another? I will not undertake to ſay what ought to be conſidered as a reaſonable time, to indulge the owner of a ſurvey, in completing his title; perhaps every caſe ought to ſtand upon its own particular circumſtances: but a delay of eleven years, unaccompanied with any exculpatory circumſtances on the part of the grantee, is certainly an unreaſonable time.

If a grant had been made to *Burns*, he would have forfeited his land by the non-payment of quitrents for the ſpace of three years; by this delay, he avoids the payment of them altogether. It was in all caſes important to the *Proprietor* that grants ſhould be taken out within a reaſonable time: It is preſumable, that it was underſtood by applicants that this ſhould be the caſe; and certainly, the ſpirit of equity does not dictate, that a party, by not performing his contract, ſhall be in a much

better

better ſituation, and the other contracting party conſequently in a worſe, than if the contract had been duly performed as underſtood by both parties. I put it upon the ground of an implied contract between the *Proprietor* and the individual applying for his lands, that the legal fees ſhould not only be paid, but that a title ſhould be obtained within a reaſonable time. On the authority of the caſe of *Picket* and *Dowdall*, the *ſurvey* for *Curry* is to be conſidered as an *entry on the part of the Proprietor* to take advantage of the forfeiture. This extinguiſhed the intereſt of *Burns*, and of courſe the grant to *Curry* purſuant thereto cannot be impeached. The court however, will judge in every caſe, whether a forfeiture had taken place, and if not, the entry and ſubſequent proceedings would be deemed invalid. The act of 1785 not having declared intermediate grants to be void, they muſt ſtand, unleſs they ſhould be adjudged to be ſo on account of the particular circumſtances attending them, and as there are none ſuch in the grant to *Curry*, I am of opinion, that the decree ſhould be reverſed, and the bill diſmiſſed.

FLEMING, J.—The warrant iſſued to *Burns*, bears date in 1756 and is ſurveyed in 1757, but not returned until 1770, at which time, and not before, he tendered the compoſition, and demanded his grant. But a ſurvey had in the mean time, been made for *Curry*, who in September 1770, obtained a grant.

This caſe, tho' it differs in ſome points from that of *Picket* and *Dowdall*, is fully within the influence of the principles there laid down. *Burns* has certainly forfeited his right by an unreaſonable delay in obtaining his grant, and *Curry*, having in the mean time obtained a legal title to the land, ought to retain it.

THE PRESIDENT. The principles which decidedly govern this caſe, were ſo fully declared in that of *Picket* and *Dowdall*, that it will be unneceſſary to repeat them. It is true, the two caſes differ in ſome points, and that difference ſo far as it extends, is in favor of *Burns*. The *laches* of *Burns* in not compleating his title, is in point of time much leſs inexcuſable than that of *Crap*. So too the tender of the compoſition, differs this caſe ſomewhat from that. Yet theſe points of difference, do not eſſentially affect the application of the principles laid down in that caſe. What may be conſidered as a reaſonable time for the owner of a ſurvey to compleat his title, I will not

pretend

pretend to ſay; But I accord in opinion with the other judges, that eleven years unaccompanied with circumſtances is too long.

Both decrees reverſed, and the bill diſmiſſed.

WROE,
againſt
HARRIS.

THIS was an appeal from a judgment of the Diſtrict Court of Northumberland, reverſing an order of the County Court, giving leave to the appellant to build a mill. The land on both ſides of the ſtream is ſtated to belong to him, but nothing is ſaid reſpecting the *Bed of the run*. The Diſtrict Court reverſed the order becauſe the writ of *ad quod damnum* was executed by the *deputy*, inſtead of the *High Sheriff*.

WASHINGTON for the appellant. It is wonderful that this opinon reſpecting the incapacity of a *Deputy Sheriff* to execute a writ of *ad quod damnum*, has ſo generally prevailed in this country. It is founded on a miſtaken notion, that the Sheriff, in executing ſuch a writ, acts *judicially*, and not *miniſterially*. It would puzzle any perſon I think, to ſtate a caſe, in which the Sheriffs in this country act judicially. In England, they are to ſome purpoſes judges in every ſenſe of the word, and whilſt acting in that capacity they cannot delegate their authority; but in all other caſes, the rule is, that they may act by deputy unleſs ſpecially commanded *to go in perſon*. This is laid down in 4 *Rep.* 65. where a ſimilar objection was made to a deputy's executing a writ of *Elegit*; but it was not ſuſtained. In every inſtance where it has been determined that the High Sheriff muſt execute a writ in perſon, he is either required by ſtatute to do ſo, as in an enquiry of *waſte*, *partition*, *accedas ad curiam*, *Rediſſeiſin &c*; or elſe he executes it in a *judicial capacity*, as in caſes of *admeaſurement of dower* and *paſture* which are *vicontiel* writs, and not returnable; conſequently, the deciſion of the Sheriff is judicial and final, unleſs the caſe be removed by *Pone* before the Court of common Pleas. F. N. B. 148. Clay's caſe 1 *Cro. El.* 10. *Dalt. Sh.* 34. So in a writ *de nativo habendo*, if it go to the ſheriff to *hold plea of the matter*, he