

REPORTS OF CASES
ARGUED AND ADJUDGED
IN THE
COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. II.

THIRD EDITION.

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.

RICHMOND:
PUBLISHED BY A. MORRIS.
1854.

Entered according to the act of Congress, in the year 1854, by

A. MORRIS,

In the Clerk's Office of the District Court of the United States in and for the
Eastern District of Virginia.

But this surely could be no objection in this case ; because the act of Assembly had expressly directed it ; and, therefore, if it be true that it was contrary to law in common cases, it clearly was not so in this ; for the Sheriff stood justified by the act.

Upon the whole, the exceptions taken by the plaintiffs' counsel, seem to me untenable ; and, therefore, I am for affirming the judgment.

LYONS, Judge. Concurred.

Judgment affirmed.

WOLCOTT AND OTHERS *v.* SWAN AND OTHERS.

Saturday, May 3d, 1800.

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S. agrees to locate certain lands for W., B. and N., in the county of R.; afterwards he agrees to locate the same lands for M.; and, having received land warrants from M. for that purpose, he accordingly locates the lands. After this, B. and N. abandon their contract to W., who renews the contract with S., who thereupon transfers the entrees of M. from the county of R. to the county of L. This shall not disappoint M., but the lands in R. will be decreed him, on his releasing S. from his covenants, and paying the fees of locating and surveying.

This was an appeal from a decree of the High Court of Chancery, where Swan and M'Rae brought a bill against Wolcott, Smyth, and Price, the Register of the Land Office, stating, that on the 21st day of July, 1795, the plaintiffs entered into a contract, concerning the location of certain lands; that Smyth stated to the plaintiff, M'Rae, a particular tract of country, lying in Russell county, as answering the description of the lands agreed to be located by the plaintiff, M'Rae, for the plaintiff, Swan. That after some conversation on this subject, the plaintiff, M'Rae entered into the annexed contract with the said Smyth. That under the said contract, the plaintiff, M'Rae, delivered to the said Smyth, land-warrants amounting to 300,000 acres, for which he took his receipt, dated the 14th of September, 1795. That these warrants were located by the said Smyth in Russell county, on the very lands, the plaintiff, M'Rae, believes, which had been described by him, and which he had stipulated to locate. That after this, the defendant, Wolcott, applied to the said Smyth, and gave him a considerable sum of money; in consideration of which he

assigned to the said Wolcott the warrants aforesaid, and the entries made for the plaintiffs; and took in exchange, a location which was made for the said Wolcott, in the county of Lee, on lands not answering, as the plaintiff, M'Rae, believes, the description of this contract, and of value considerably inferior to that which was actually located for the plaintiffs under their contract. That these lands have been included in a large survey of 650,000 acres, made for the said Wolcott, and returned to the Register; who, if not prevented, will issue a [299] patent therefor to the said Wolcott. That the said Smyth had no authority to dispose of the plaintiff's locations, after having made them; and, that if he even possessed such power, the motives for his conduct were such as would render the act totally void. The bill, therefore, prays that the Register may be enjoined from issuing the said patent to the said Wolcott; and be decreed to issue 300,000 acres thereof to the plaintiff, Swan; or that the said Wolcott may be decreed to assign that part of his said survey which was originally entered on the warrants of the plaintiff, Swan, to him, the said Swan; and that the plaintiffs may have general relief.

The answer of Wolcott states, some time in or about the month of June, 1795, that defendant together with Booth and Nichols, all of Connecticut, were in the county of Montgomery in Virginia, where they met with the defendant Smyth. That, after some conversation, respecting the unappropriated lands in Virginia, the said Smyth proposed to locate and survey, for them, a tract of country on the waters of the Big Sandy river, between the eastern and the main branches of the said river (and which the defendant avers to be the land in question) upon certain terms, which were acceded to by them. In consequence of which, articles of agreement were entered into, between the said Smyth of the one part; and the defendant, the said Booth and Nichols on the other: Whereby, the latter parties stipulated to return to Connecticut, and to procure the money which might be necessary to carry the contract into effect on their part, and to meet the said Smyth in the city of Richmond, on the 20th of September, following, for the purpose of delivering him land warrants, from half a million to a million and a half of acres, and of paying down such sums as they stipulated to advance, towards completing the business: On the other hand, the said Smyth agreed to locate the said warrants, upon the lands above described, to meet the defendant and his partners before-mentioned, at the city of [300] Richmond, on the said 20th day of September; and in

the mean time to enter into no negotiations for locating the said lands, with any other persons. That the said Smyth also agreed to warrant the title of the said land against all prior claims, except such as might be asserted by the State of Kentucky; it being questioned, whether the said lands, or some part thereof, did not lie, within the limits of that State. That in consequence of this contract, the defendant and the said Booth and Nichols returned to Connecticut, and succeeded in raising a sum of money, sufficient to enable them to comply fully with their agreement to the extent of 1,500,000 acres of land. But, to do this, so far as concerned the interest of the defendant, he was under the necessity of entering into contracts with several persons in that State, obliging himself to procure for them upon the contingencies expressed in his agreement with the said Smyth, so much of those lands as amounted to the defendant's interest in the said contract.* That the defendant together with the said Booth & Nichols, returned to Richmond, by the time appointed, prepared to perform their part of the contract, entered into with Smyth; and were much disappointed, on finding that the said Smyth had left that place a few days prior to the said 20th of September. That in this situation of things, the said Booth & Nichols relinquished to the defendant all their interest in the said contract: which he accepted, and determined to improve. For which purpose, he determined to purchase warrants, to the amount of 500,000 acres (although he came prepared to take up 850,000 acres) intending to procure as many warrants, as would cover the last mentioned quantity, if so much could be found unappropriated. That the defendant went immediately to the house of the said Smyth: who informed him, that, having understood before he left Richmond, that the defendant and his partners had abandoned the intention of meeting him at the time appointed, or of proceeding farther with the contract, he had supposed it unnecessary to continue longer at that place; and had, therefore, entered 300,000 acres of the land, mentioned in that contract in the name of the complainant Swan: But he acknowledged the prior obligation, [301] under which he was to comply with the contract he had made with the defendant; and affirming, that he had entered into no engagements with the complainant Swan, which obliged him to locate for the said Swan, the land in question, he for these, as well as for other reasons to be mentioned, entered

[* See *Coleman v. Wolcott*, 4 Day, 6, 1 Conn. R. (N. S.) 285, 2 Conn. R. (N. S.) S. C. (in error) 324.]

into a new agreement with the defendant to locate and survey, for the defendant 850,000 acres of the land mentioned in the first contract upon the same conditions and terms as were therein mentioned; so far as they respected the warranty of said Smyth, the sums to be paid by the defendants, and the times of payment: That Smyth also stipulated, to withdraw the above entry for 300,000 acres, and to locate and survey the same for the defendant. That the additional reasons, stated by the said Smyth, for withdrawing the said entry and transferring the same to the defendant, were such as convinced the defendant that the said Smyth possessed, not only the power to do so, but that it was also his duty. That he informed the defendant that he was bound to procure for the said Swan, lands of a particular character, and had also agreed to warrant them generally, and without exception. That he knew of a tract of unappropriated land in the county of Lee, which, in his opinion, would better correspond with the description mentioned in his contract; and above all, that this last mentioned tract was not involved in the question, whether the lands on Sandy river are within the territorial limits of Virginia or not? A risk, which he had not taken upon himself, in his contract with the defendant, and to which he did not wish to subject himself, or the complainant. That the [302] tract of land in Lee county, was more valuable, both as to soil and its vicinity to the settled parts of the State, than that in Russell county. That in consequence of this last contract, entered into with the defendant, the said Smyth did afterwards transfer to the defendant the entry made for the complainant Swan, and did locate and survey an equal quantity of better land, for the said Swan, or for the complainants, in the county of Lee. That the said Smyth surveyed for the defendant 650,000 acres of land in Russell county, conformably with his contracts, including the above entry of said Swan's; the plat and certificate of which, have been returned to the Register's office, a sufficient length of time for a grant to issue thereon. That the said Smyth has not located any lands for him in the county of Lee or elsewhere; and if had, the defendant was not bound, by his agreement with the said Smyth, nor could he consistently with his contracts in Connecticut, before spoken of, have consented to take lands in Lee county, although they were more valuable, than those in Russell. For, the defendant having expressly stipulated with those who advanced him money, to procure for them the very lands described in the said Smyth's contract, could not have ventured to exchange them for others. That

Smyth was not induced by any unfair or improper conduct of the defendant or by any pecuniary consideration, other than is before-mentioned, to transfer the said entry to the defendant. On the contrary, he believes, and did then believe, that the said Smyth had, as the necessary consequence of his contract with the complainant, a perfect power to act as he did; that he meant to act fairly towards all the parties; and that he was influenced by no other motives than a regard to the real interest of the complainant and himself; and a desire to fulfill, with good faith, his contracts with all parties. That to do this, it was necessary to remove the location of the said Swan from lands, which did not so well answer the description of the contract, and were besides, entangled in a [303] question of much difficulty, as to the title. On the other hand, he had identified this very land to the defendant; who, with a knowledge of the claim of Kentucky, had, notwithstanding, consented to take it up; and to take upon himself, the risk of this claim. That the defendant is advised, that, if the said Smyth hath violated any engagements which he hath made with the complainants, he is answerable to them; but that all acts performed by him, as their agent, if fair (as in this case they certainly were,) are binding upon the complainants in law and equity. That the defendant had a prior equity to that of the complainants to the land in question; which was known to their agent Smyth; which he was bound to protect; and which he could not have defeated, if such had been his wish.

The answer of Smyth states, that some time in the summer of 1795, the defendant fell in company with Wolcott, Booth and Nichols, at the Surveyor's office in Montgomery; who, being engaged in acquiring lands, the defendant described to them a tract of country lying between the branches of Sandy river, respecting which doubts were entertained, whether it lay in Kentucky or Virginia. And having apprised them of the nature of the question, entered into a contract with them to locate and have surveyed the said lands, as lying in Russell county; they taking the risque of the Kentucky right upon themselves. That by the contract, the defendant was to meet the said Wolcott, Booth and Nichols, in Richmond, on the 20th September, ensuing, to receive land-warrants, and so much money as was necessary to carry the contract into effect; but, it was verbally agreed by Nichols and the defendant, to meet a week earlier than the time mentioned in the agreement. That the defendant proceeded to Richmond by the time appointed; but received information from a person whom he

supposed entitled to his confidence, that the said Wolcott and his partners had abandoned the undertaking on their part; and having remained at Richmond until the arrival of the stage, by which he expected the said Nichols, and hearing nothing from him, the defendant took for granted the information which had been given him, and offered to locate the lands in question for others. That he was introduced to the plaintiff, M'Rae, and proposed to contract, to locate, for him, the particular lands in question, but he declined accepting the offer made him; not choosing to contract, unless for lands warranted within the limits of Virginia, and of a particular description. That the defendant had been misled to suppose, and then actually did suppose, the lands in question to approach nearer to the description required, than any other unappropriated lands he had heard of in Virginia, and, therefore, took the opinion of counsel, relative to the right of Virginia to those lands; which, founded on the information then given, was more favorable than his own. After which, he entered into a contract with the plaintiff, M'Rae, but did not therein stipulate to locate the lands in question for Swan. On the contrary, as he stipulated to procure lands *within* the limits of Virginia, and *not* mountainous, to have procured the lands on Sandy, would have been a direct violation of that stipulation. That, having received 300,000 acres of land-warrants, from the said M'Rae, and 100 dollars to bear incidental charges, the defendant left Richmond about the 16th of September, and went to Russell, and made an entry of 300,000 acres of the land in question; but, information then received, while on the frontier, materially changed his opinion of those lands, and caused him to repent of his contract, and to despair of fulfilling it, unless by locating those warrants on some other lands. That, on the arrival of the said Wolcott in [305] Wythe, in October following, the defendant, who had become convinced that surveying the lands on Sandy for Swan, would ruin himself and M'Rae, renewed his agreement to locate and survey those lands for Wolcott, who took the risque of the Kentucky right upon himself: And, in the contract, then entered into, it was stipulated, that the defendant should locate Wolcott's warrants according to the words of a location made for Swan, *which said Smyth has determined to remove*, it not having been then contemplated, reciprocally to transfer entries or warrants of one to another, by way of exchange. That the defendant did not, *in consideration of a sum of money*, assign to Wolcott the warrants of Swan, and the entries made thereon; but, the reason for the reciprocal transfers was

as follows: upon receiving the warrants of Wolcott to the amount of 500,000 acres, the defendant sent the whole of them to the office of the Surveyor of Russell, where they were lodged; it being meant they should be there finally executed. But, only 200,000 acres were entered, adjoining the entry made in Swan's name. The certificate of the Surveyor, that 300,000 acres thereof were unappropriated, was forwarded to Lee, in order to found an entry, to secure vacant lands in that county. That the defendant cannot now ascertain at what time he determined to adopt the mode of reciprocal transfers of the entries; nor does he suppose it material. That it was an unfortunate plan, as now appears, and *by no means necessary to effect the object*. That when the defendant sent Wolcott's warrants to Russell, had he then ordered Swan's to have been withdrawn, and founded each person's surveys on the warrants issued to him, the present difficulty would have been avoided; and he would have been thus cautious, had he suspected Swan or M'Rae of base principles, or supposed they would have ascribed such principles to him. That when he went to survey the lands in December following, he might still have withdrawn the different entries, and removed the warrants of each person to the land intended for him: But [306] to this plan, the following objections occurred: had the entry made in Swan's name in September been withdrawn, that might possibly have let in some younger claim to the same lands, by entry in Kanawha; and, if not, as the lands must have been left uncovered by an entry in Russell until the defendant could have travelled to Lee, withdrawn the entry there made in Wolcott's name, and returned, some other person might have covered the lands, by entry, in Russell or Kanawha, within that period. That, to prevent these consequences, and save himself a disagreeable ride of near 300 miles, *and with no other motive*, the defendant determined to transfer the entry on Swan's warrants to Wolcott on the Surveyor's entry book, in exchange for the entry on Wolcott's warrants in Lee, of like amount; and endorsed a memorandum thereof on all the warrants. After which, those 300,000 acres, (the entry of which was thus transferred,) and 350,000 acres entered, adjoining, in Wolcott's own name, were re-entered in his name, by way of amendatory entry, and then surveyed. That, had it not been for the confidence the defendant placed in the complainants, a doubt might possibly have suggested itself as to the propriety and validity of the mode of proceeding adopted by him. But, as a confidence existed, and as it is not an uncommon practice for persons entrusted with warrants

not assigned to them, surveyors and others, to make transfers of entries thereon; and as the defendant was more than a common agent, being a joint proprietor of the lands to be acquired in Swan's name, he had no suspicion, nor does he admit, that he exceeded his powers, particularly as the transaction was not to the detriment, but for the advancement of the complainant's interest, and tended to the fulfillment of both the defendants' contracts. That, in order that the return of Swan's plats should not be delayed, the defendant advanced the surveyor's fees out of his own pocket, without having received them, and being informed that a dispute would [307] arise respecting the lands, he wrote to the complainant M'Rae, a letter, in which was the following passage: "Whatever may be your determination or its consequences, it is plain you ought to pay fees on 300,000 acres of land, if you are entitled to so much of the lands surveyed for Mr. Wolcott, he is entitled to the lands surveyed for Mr. Swan, and the latter ought to be registered at *your* expense, as the former was at *his*. I therefore trust you will pay Mr. Price the Register's fees, on 300,000 acres. It may be so done I presume, as to have no effect on the question, if you make one; which I hope you will not. I have also a right to the surveyor's fees, which in *confidence* of being re-imbursed, I have advanced out of my own pocket:" That the complainants have withheld the Register's and Surveyor's fees; although they ask, that 300,000 acres of land, surveyed and registered at the charge of Wolcott, may be granted to Swan. That the transfer was not injurious to the complainants, having regard to the intrinsic value of the different tracts of land surveyed; and the defendant believes, that the land acquired in Lee county, is, to its quantity, among the most valuable acquisitions made in this State, since the last opening of the Land Office: It being chiefly land susceptible of cultivation, left by settlers of little foresight, and who surveyed small dispersed farms. On the contrary, the tract in the fork of Sandy, is, as the defendant is informed, and believes, an assemblage of steep hills; among which, on creeks, are some narrow bottoms covered with prior claims. That to satisfy the complainants of the attention of the defendant to their interests, an affidavit, to this effect, of a surveyor, who had surveyed a large quantity of those prior claims, entered in the office of Bourbon in Kentucky by the surveyor of Russell, himself, was transmitted by the defendant to Pollard their agent. That the complainants have been deaf [308] to the information given by the defendant, although the lands lie in Kentucky, as the defendant is con-

vinced; and he gives his reasons for thinking so. That no part of the defendant's conduct towards any of the parties has been unfair, or unjust: That, in making the transfer called in question, he was actuated by no improper motive; and only substituted an easy mode of effecting an object, in itself uncensurable, in place of a troublesome mode of effecting the same object. That the object, thus effected, was beneficial to those who complain, if they mean no unfair advantage of any other person; and that, therefore, and because of the usage in this respect, and of his interest in the thing transferred, the said transfer ought to be held valid, and the injunction dissolved. But, if the Court should be of opinion, to decree the lands to the complainants, the defendant prays they may be compelled to take them as a complete satisfaction of his contract with them; and that he may be exonerated from any responsibility for the title or description of the lands in question; as they are not the lands he has procured for the complainants.

The deposition of Pollard is as follows:

"Some time in the month of September, 1795, Alexander Smyth, of Wythe county, applied to me and informed me that he knew of a valuable tract of waste and unappropriated land, which he wished to obtain warrants to locate on, but had not the means of procuring them, and therefore would gladly interest me in the business, if I would furnish warrants, and proceeded to describe the lands and the part of the country in which they lay, in confidence that I would not discover it to any other person, if I did not become interested myself: on having my assurance that I would not, he informed me that the lands lay within the forks of Sandy river, and were of a superior quality to any that had been taken up for a considerable length of time, and were of consequence, a great object to any person who had the means of adventuring in [309] the business; that the cause of their remaining so long vacant, was owing to an opinion being generally had, that they were within the State of Kentucky, but that he had been at considerable pains to investigate the various laws which established and described the boundary line between Virginia and Kentucky, and was fully satisfied that the lands were within the former State.

"It not being convenient for me to engage in the business, and knowing that a large quantity of land-warrants had been issued in the name of James Swan, which were in the hands of Alexander M'Rae, unlocated, I informed Mr. Smyth that I would mention the subject to a friend of mine, who I knew had

warrants; and if he discovered an inclination to treat, I would then introduce him; which Mr. Smyth consented to. On the subject being mentioned to M'Rae, he desired an interview with the other immediately; and after being together some short time, Smyth returned and informed me that M'Rae would not contract with him, unless he would give him a general warrantee title to the land; and although he was well satisfied in his own mind that the title would be good, he had determined to take counsel before he would bind himself to give such a one as was required: he accordingly went off, and returning some time after, informed me that the gentleman or gentlemen with whom he had advised, after examining the laws on the subject, conceived with him, that the lands were clearly within the Commonwealth of Virginia, and that he had determined to engage with Mr. M'Rae on the terms he had proposed, June 5th, 1797."

Another witness says that Wolcott acknowledged that he gave the other defendant, Smyth, four cents per acre, inclusive of land-warrants, surveyor's and registering fees, for all the land in dispute between the above parties, and the rest of the land taken up by the said Wolcott in the forks of the Sandy.

[310] There are amongst the exhibits the agreement between Wolcott, Booth, and Nichols; that between M'Rae and Smyth; and that between Wolcott and Smyth, together with copies of the land-warrants, endorsements, transfers, &c.

The Court of Chancery delivered the following opinion: "That, from the agreement of June, in the year one thousand seven hundred and ninety-five, between the defendant Alexander Wolcott, David Booth for himself, and as attorney for several other people, and Austin Nichols of the one part, and Alexander Smyth of the other part, the defendant Alexander Wolcott and his associates, derived no right to the land in controversy; because the defendant Alexander Smyth had no such right, but it was in the Commonwealth until it should be regularly appropriated. That, in the Land-Office treasury-warrants, which authorized the surveying and laying off land for the plaintiff James Swan, the words, 'this warrant is executed. H. Smyth, S. R. C.' were a legal entry of the land in controversy, for the benefit of that plaintiff, and gave to him an equitable title against the Commonwealth, and every posterior claimant under it, in that identical land; and that the surveyor could not transfer that right, nor could the defendant, Alexander Smyth, transfer it, except as to his own interest in

one-sixth part of the said land, without authority from his constituents. The agreement between him and the plaintiff, Alexander M'Rae, of September, in the year one thousand seven hundred and ninety-five, did not in terms confer that authority, nor is such authority implied in, nor doth it flow from, the nature of the agent's office, as the defendant's counsel insisted: And, therefore, the Court doth adjudge, order, and decree, that the defendant, Alexander Wolcott, do assign to the plaintiff, James Swan, all that defendant's right and title in and to three hundred thousand acres of land, part of the six hundred and fifty thousand acres of land, certified to have been surveyed for him, and completed the seventeenth day [311] of December, one thousand seven hundred and ninety-five, by the surveyor of Russell county; and that the defendant, William Price, or the Register of the Land Office for the time being, do make out in due form, the letters patent of the Commonwealth, to be presented to the Governor for signature, granting to the plaintiff, James Swan, the said three hundred thousand acres of land, to be holden by him for the use of the persons entitled thereto, by the articles of agreement between the plaintiff, Alexander M'Rae, of the one part, and the defendant Alexander Smyth, of the other part, of the fourteenth day of September, in the year one thousand seven hundred and ninety-five." That Court, therefore, appointed commissioners, "for laying off, with any surveyor or surveyors whom the plaintiffs shall think fit to employ, the said three hundred thousand acres of land, in the place in which they ought to have been laid off by virtue of the entry, for the plaintiff James Swan, if the defendant Alexander Smyth had not undertaken to transfer the entry to the other defendant; and in such manner as to exclude, in calculating and casting up the contents of the area of the plat, all prior legal claims;" And decreed, "that the plaintiff James Swan should, within two months from that date, release all his right and title in and to the lands entered for him in the county of Lee, by the defendant Smyth." From which decree, the defendant Wolcott prayed an appeal to this Court.

This Court made the following decree: "This day came the parties by their counsel, and the Court having maturely considered the transcript of the record and the arguments of the counsel, is of opinion, that so much of the decree aforesaid, as directs the appellant to assign to the appellee, James Swan, all the appellant's right and title to the lands in the county of Russell, in the decree mentioned, before the appellees pay to the appellant the money advanced by him for Surveyor's and Register's fees on account of the said land, is [312]

erroneous: And that the said decree is also erroneous, in not directing the appellees, on receiving the assignment aforesaid, to release and discharge Alexander Smyth, in the proceedings named, from all covenants and agreements on his part, contained in the articles entered into by him with the appellee, Alexander M'Rae, on the fourteenth of September, 1795, referred to in the decree, so far as the said articles relate to the quantity, title, soil, or description of the lands covenanted to be located and surveyed for the appellees, by the said Alexander Smyth: But that there is no error in the residue of the said decree. Therefore, it is decreed and ordered, that so much of the said decree, as is herein stated to be erroneous, be reversed and annulled: That an account be taken of the money advanced by the appellant and Alexander Smyth, or either of them, for Surveyor's and Register's fees; and that, on payment thereof, with interest, the appellant assign, to the appellee James Swan, all the appellant's right and title in and to the three hundred thousand acres of land, part of the six hundred and fifty thousand acres of land, certified to have been surveyed for him, and completed the seventeenth day of December, 1795, by the Surveyor of Russell county: And that after such assignment shall have been duly made, and approved by the Court of Chancery, that the appellees release to Alexander Smyth all actions and suits, and fully discharge him from all his covenants contained in the agreement, made between him and the appellee Alexander M'Rae, on the fourteenth of September, 1795, before mentioned, so far as the articles relate to the quantity, title, soil, or description of the lands covenanted to be located and surveyed for the appellees, by the said Alexander Smyth, within such time as the Court of Chancery shall direct: And that the same time be allowed the appellee James Swan, to release his right and title to the lands in the county of Lee, according to the decree of the said Court of Chancery: That the residue of the said decree be affirmed; and that the appellees pay to the appellant his costs by him expended in the prosecution of his appeal aforesaid here."