REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY

BUSHROD WASHINGTON.

VOL. II.

RICHMOND:
Printed by THOMAS NICOLSON
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.

" riod; which being tried and certified to the ſatisfaction of the " ſaid High Court of Chancery, ſhall ſtand as the rule of com- " penſation inſtead of the former valuation, and with the inter- " eſt thereon from the ſaid laſt day of December 1779, after " deducting the eighteen pounds paid, be paid or tendered to " the appellee *Roger Atkinſon*, within ſuch reaſonable time as " ſhall then be allowed by the ſaid court to entitle him to the " conveyance in the above decree mentioned, or ſubject him " to the conſequence therein ſtated in caſe of his default."

MARTIN, & WILLIAM PICKET,

againſt

JAMES DOWDALL.

THIS was an appeal from the High Court of Chancery, in a ſuit brought by the appellee againſt the appellants for the conveyance of two tracts of lands. The caſe was as follows: *James Crap*, in the year 1741, obtained a warrant from the office of *lord Fairfax* for ſurveying a certain parcel of land lying in the Nothern Neck. The ſurvey was made and returned in the ſame year, but no further ſteps were taken towards obtaining a grant by *Crap*, who died in 1773. His ſon, aſſigned all his right in the ſaid land to the appellee, not conſidering it worth the expence of obtaining a grant. It appears by the depoſition of one witneſs, that the plaintiff applied at the office for the papers, (but at what time is not ſtated,) and that they could not be then found; but they were afterwards found in the year 1786, or in 1787. A grant of the land to *Crap* was made out and regiſtered in the *Proprietor's* office, but it was never executed by *lord Fairfax*. In December 1788, the appellee applied for and obtained a grant for theſe lands from the Commonwealth's land office.

In 1762, the father of the appellants obtained a warrant, from the *Proprietor's office*, and ſurveyed 243 acres, part of the land ſurveyed by *Crap*, for which a grant was made by *lord Fairfax* to his ſon, *Martin Picket*, one of the appellants, in the year 1780. In 1779, the other appellant *William Picket*, alſo procured a warrant, and ſurveyed 420 acres adjoining the above, which in-

cludes

cludes the balance of the land claimed by the appellee, for which he obtained a grant from *lord Fairfax* in the year 1780.

The appellee charges in his bill, that the appellants and their father had notice of the title of *Crap*, before they surveyed the land in queſtion, but this is denied by their anſwers, and no proof of it is made.

It appears that *lord Fairfax* eſtabliſhed ſundry rules in his office, reſpecting the terms on which lands might be acquired in the Northern Neck. Amongſt others, the following was inſerted in one of his entry books, which was begun in the year 1734, viz: " rules of the office. That the entries are not demandable after being made ſix months, or the warrants taken out to continue longer than ſix months in force, unleſs renewed or conſented to by the *Proprietor* or agent." It is proved by ſundry depoſitions, that at different periods from the year 1740, to the yearly 1764, notices were given by *lord Fairfax* in the public news-papers & elſe where, calling upon all perſons entitled to entries and ſurveys, to come forward within a limited time, and pay the compoſition and office fees, and receive their grants, or that their rights would be conſidered as forfeited and reveſted in the *Proprietor*. There is alſo ſtrong proof in the record of abandonment of the land in queſtion both by old *Crap* and his ſon after his death, on account of the indifferent quality of the land, and the expence of obtaining a grant.

The HIGH COURT OF CHANCERY, being of opinion, " that the grant to the plaintiff of the land to which he is entitled ought to have relation to the time of the warrant, by authority of which the ſaid land was ſurveyed, ſo as to be prior in effect, to the title of the defendants, both of whom had notice of that warrant and ſurvey before the grants under which they claim" decreed, that the defendants ſhould convey to the plaintiff at his coſts, with warranty againſt themſelves and all perſons claiming under them, their right and title in and to the land lying within certain bounds therein deſcribed, comprehended within the limits of *Crap's* ſurvey, and deliver poſſeſſion to the plaintiff of ſo much of the ſaid land as they hold, and account with, and pay to him the rents and profits thereof, from the 10th day of Auguſt 1789; from which decree, an appeal was prayed.

MARSHALL for the appellants. The rule of *lord Fairfax's* office was, that thoſe who did not within ſix months perfect their titles to lands for which entries had been made, could not afterwards demand a grant unleſs the ſame was conſented

to

to by the *Proprietor*. They were considered as having abandoned their right, and the estate revested in the *Proprietor*, who might grant the land to any other person. This rule is proved to have subsisted so early as the year 1734, of which the people in that District were constanly notified by advertisements inserted in the gazettes, and publicly posted up in the different counties. This rule being entered in the front of one of the entry books in the *Proprietor's* office, those who applied there to take up unappropriated lands, must be presumed to have had notice of it. The existence of the rule is further established by the depositions of many witnesses, and is further strengthened by a consideration of *lord Fairfax's* situation. Possessed of a very extensive territory, the value of which depended entirely upon its being parcelled out amongst those who as a retribution therefor were to pay him certain quit-rents, his revenue, as well as the means of supporting his office, depended upon the receipt of his fees, and of the stipulated rents, neither of which could be demanded, *until after a grant had been made*. It would have been highly unreasonable, that after a warrant had issued, the person owning it, should suffer it to lie dormant for many years, without going on to acquire the legal estate, and yet keeping off other applicants. I contend therefore, that *Crap*, by the rules of the office forfeited all right to the land, and that the *Proprietor*, might legally make any other appropriation of it. But independently of this point, I consider that the right of *Crap* was lost by abandonment, and rely for evidence of his intention to abandon, not only upon his declarations, as proved in the cause, but upon the unreasonable length of time which elapsed between the issuing of the warrant to him, and that to the appellants, during which period he seems to have shewn no disposition to obtain a grant.

I should insist if it were necessary that the appellants were purchasers without notice; for though it is proved that they had heard that *Crap* had taken up land, yet it does not appear that they knew it to be the land in dispute.

But I do not wish to rely upon this, because I contend first, that the right of *Crap* was completely lost by forfeiture, and secondly, if not so lost, yet a Court of Equity will never set up this dormant right in favor of a man, who has been guilty of such inexcusable neglect, and who has lain by and permitted the appellants to take up and enjoy the land.

CAMPBELL for the appellee. I shall consider the title of *Dowdall*.

1st, As it stands under the law.

2dly,

2dly, As affected by the acts of the parties.

And first, as it stands under the law. The rule laid down by the Chancellor is, that the grant has relation back to the warrant which is the inception of the title; gives authority to the public surveyor to lay off certain lands for a particular individual, and is in short the first and best evidence of a title, acquired either with, or without consideration. The grant is only *evidence* of a pre-existing right. But the objection to this commencement of our title is, that a forfeiture had in the mean time incurred, and therefore, a relation to the warrant would be improper. The forfeiture was produced by a non-compliance with the rules of the office; but what were those rules? One witness speaks of them as having been written in one of the entry books in *lord Fairfax's* office, requiring persons to compleat their titles within six months. Another, speaks of an advertisement of the *Proprietor's* in 1765, requiring all persons having claims to grants, to come in before September 1766, pay the fees and composition, and receive their grants. Another witness, speaks of an advertisement between the years 1740 and 1746 to the like effect, but fixing no time within which the parties were required to compleat their titles. Another witness says, that even if all these requisites had been complied with, it was in the election of *lord Fairfax* to make the grant or not as he pleased. Thus we see, that the rules and customs of the office are so vaguely stated, that no reliance can be placed in them. But the legislature, by the act of 1786, *ch.* 3. has regulated all these surveys, and referring back to the warrants and surveys, confirms the titles. But let me ask whether *lord Fairfax*, who in this respect is to be considered as a private individual, had any right to establish rules of property oppressive in themselves, and not warranted by the municipal laws of the country. He was at liberty to sell upon what terms he pleased. But having sold, he was as much subject to those laws and rules which prevail in contracts between other individuals as any other citizen was. He could not set up rules of his own to produce forfeitures not sanctioned by the common or statute laws of the land. Neither could his particular situation warrant it. If a private individual should sell land, and stipulate for payment by a certain day under any conditions whatever, he is as much injured by a non-compliance with the contract on the part of the vendee as the *Proprietor* was. Yet if the purchaser within a reasonable time should offer to pay, a court of equity would relieve against the legal consequences of his breach of contract, and compel a conveyance.

Secondly,

Secondly. How is the title of *Dowdall* affected by the acts of the parties?

The grants to the appellants, it is contended, deſtroys our right. But the loſs of the papers which prevented *Dowdall* from caveating the appellants, was ſuch an accident, as a court of equity ought to relieve againſt, and therefore the title of the appellants as oppoſed to that of the appellee, will be conſidered as if no grant had been made. It is evident that *lord Fairfax* did not ſuppoſe he was granting to the appellants lands claimed by the appellee, becauſe it was his cuſtom always to recite the forfeiture, where one had taken place.

But it is ſaid that *Crap* abandoned his right. Suppoſe he did, does this give a right to the appellants? He once had a title which he has neither given nor ſold to them. He has in ſhort done nothing to diveſt himſelf, or to veſt an intereſt in any other perſon. If he choſe not to occupy it, did the appellants thereby gain a right to it? Surely not. As to notice to the appellants I conſider it to be clearly proved.

MARSHALL in reply. It is not proved, (I conceive) that an application was made by the appellee for the papers before the transfer from *Crap* to *Dowdall*, and therefore, the argument of abandonment in *Crap* is not repelled.

It is true, that the grant relates back to the warrant, in caſes unattended by circumſtances which would render the relation improper; as if the ſale be conditional, or relinquiſhed, and a grant is made in the mean time to another, this relation to deſtroy the intermediate right could never be admitted.

As to the rule, it was entered in a book kept in the *Proprietor's* office, which was open to the inſpection of all perſons applying there to take up land. It is traced back to the year 1734 long before the date of *Crap's* warrant, and therefore, it was not as Mr. *Campbell* ſuppoſes, an arbitrary rule, made by the *Proprietor* for the purpoſe of forfeiting rights acquired under prior agreements with himſelf. But I aſk, was not the rule a reaſonable one? If dormant rights were permitted at any time to be revived, and to relate back to the warrant, no perſon could with ſafety have ventured to take up lands within that diſtrict, which would not only have been injurious to the *Proprietor*, but would have produced a great public miſchief. If a grant had been made to *Crap*, he would have forfeited the land by non-payment of the quitrents for three years. Can he then be in a better ſituation by having violated his engagements; or ought he thus to gain a benefit to himſelf, and to impoſe an injury upon another

ther by his own default? If the forfeiture were out of the queſtion, yet I would rely upon theſe conſiderations as ſufficient to deprive *Dowdall* of the equity he aſks for, upon the ſuppoſition of an implied contract. It is ſaid, the rule appears by the evidence to be very uncertain. This is not the caſe. The rule itſelf, as taken literally from the book in which it was entered, is an exhibit in the cauſe. The advertiſements of *lord Fairfax* were not intended to eſtabliſh a rule. He had a right to avail himſelf of the forfeiture without giving the parties an opportunity of preventing it. Theſe advertiſements were intended as an indulgence to thoſe, who had not complied with the rules of office, by granting them a further time to come in and avoid the conſequences of the forfeiture which had incurred. But they did not alter, or do away the rule.

The act of 1786 might be objected to, upon the ground, that the legiſlature could not grant away the property of *lord Fairfax* any more than it could that of any other individual. But it is unneceſſary to ſtir that queſtion. It is evident, that that law does not mean to authoriſe the regiſter to iſſue a patent for lands, which had before *been granted by the Proprietor.*

The PRESIDENT. It is ſurely unneceſſary to labour this point, as it is too plain to be argued. The act of 1786, is not to be conſtrued to extend to caſes, where a *grant had been previouſly made by lord Fairfax.*

MARSHALL. As to the forfeiture not being recited in the grant to the appellants, I am inclined to think that this was never done, but where *prior grants* had been made and forfeited, as for non-payment of quitrents, not ſeating and the like, and it was done in thoſe caſes, becauſe, if the forfeiture were not recited, the former grant might prevail over the latter. But this was not done I believe where the forfeiture accrued in conſequence of a non-compliance with the rules of office *in the earlier ſtages towards a title.*

But if an actual forfeiture had not taken place, yet I contend that the conduct of *Crap* and of *Dowdall* has deprived them of all claim upon the equity of this court. This is not a conteſt between *lord Fairfax* and *Crap*, but between two purchaſers under *lord Fairfax*. How is it, that a prior mortgagee ſtanding by and permitting another to throw away his money upon the ſame ſecurity, without diſcloſing his mortgage, ſhall be poſtponed? The principle of that caſe applies to the preſent. For *Crap*, having notice (as is to be preſumed) of the rule, and that many others might apply for a warrant to ſurvey the ſame land,

without

without a possibility of knowing what former appropriations had been made of it, he takes no step to perfect his title and to remove this difficulty out of the way of other applicants. *Lord Fairfax* could not have compelled those to receive grants who had obtained warrants, but the party might have abandoned the property if he pleased, and his refusing to abide by the rules of the office, was all he could do to evince his intended dereliction.

FLEMING, J.—When *lord Fairfax* established an office for the purpose of parcelling out the lands in that extensive territory, some rules were necessary, and as he differed from other individuals in the extent and nature of his property, those rules would of course be general. I think he had a right to establish such rules as he pleased, if they were reasonable. The one in question was established so long ago as the year 1734, long antecedent to *Crap's* warrant. It was, I think, considering *lord Fairfax's* situation, a reasonable regulation, and it is to be presumed that it was known to all persons, who took up land within that district of country. The revenue of the *Proprietor* depended upon his quitrents, which not being demandable before a grant was made, it was proper, that the party should within a limited time place himself in such a situation, as to render the contract as obligatory upon himself, as it was upon *lord Fairfax*, or that he should leave the property open for subsequent appropriations. *Crap*, made his entry in 1741, and died in 1773, so that 32 years elapsed, during which time he took no step towards perfecting his title. If in his life-time he had obtained a grant, he would have forfeited his estate by the non-payment of quitrents for three years, and it is unreasonable that by his own neglect, he should better his situation, and subject the other party to the contract, to an inconvenience resulting from that neglect. More especially in this case, when that other party had notified his intention to avail himself of the forfeiture unless the indulgence then held out was accepted, and the terms of it complied with, within a reasonable time. I am therefore of opinion, that the right of *Crap* was lost by his neglect, and that *lord Fairfax* might legally grant the land to the appellants, or to any other person.

CARRINGTON,—J. I consider this case to be so extremely clear, that it cannot be made more so by argument. The appellee having forfeited any right which he ever had to the land in question, by the most unreasonable negligence, has no ground upon which to establish an equity, which can entitle him to the relief afforded him by the decree. I think the decree ought to be reversed.

The

The PRESIDENT.—The appellants have obtained titles to the land in queſtion, prior in time to that of *Dowdall*, and conſequently have the law in their favor. Has *Dowdall* ſuperior equity to them, which ſhall warrant this court in depriving them of their legal eſtate? What is it he aſks? That the poſterior title which he acquired by his patent ſhould relate back to the warrant, which was the inception of that title, ſo as to deſtroy the intervening right of the appellants. There are ſuch things as relations in law, but they are legal fictions, invented for the purpoſes of juſtice, and not to work an injury to innocent third perſons, who in the mean time have fairly and legally acquired a title to the ſubject in controverſy. But if the doctrine were applicable to this caſe, there can be no queſtion, but that *Dowdall* might have availed himſelf of it at law, and could not require the interference of a Court of Equity.

This brings us to enquire into the conduct of the parties. Has *Crap* done all in his power to entitle himſelf to a grant, or has he ſo conducted himſelf as to have deprived himſelf of ſuch a right? If he has done all that it was neceſſary for him to do; then, as to *lord Fairfax*, the court would conſider *Dowdall* as ſtanding in the ſame ſituation, as if a grant had actually been made to him. But ſo far from it, he has done nothing which by the conditions under which he purchaſed, he ought to have performed, and therefore he has not even acquired an equitable right. It is objected, that the rules of the *Proprietor's* office were not only arbitrary and uncertain, but were locked up in ſecrecy. The anſwer given to this was compleat: they were made as public as they could be, and were reaſonable in themſelves. I have always been of opinion, that *lord Fairfax* was to be conſidered preciſely in the ſame ſituation, as any other citizen. That he held his lands under the grant made to him as other citizens did. But his ſituation in the mode of parcelling out his lands was very different. He was the *Proprietor* of an extenſive country, and therefore he could not make particular agreements with the different individuals who deſired to purchaſe portions of his lands. On this account he eſtabliſhed an office, employed different officers to tranſact the buſineſs of it, and laid down certain general rules defining the terms upon which he would grant his lands; and in forming thoſe regulations, he appears to have aſſimilated them as nearly as poſſible to thoſe eſtabliſhed in the crown office with reſpect to lands lying in the other parts of Virginia. How can thoſe rules be called ſecret, which were publiſhed in the entry books in the office,

and which were open to the inſpection of all perſons applying for land. It is not unreaſonable to ſay, that *Crap* muſt have known of the rule. He knew that the land was not to be given; he made no ſpecial contract with *lord Fairfax* reſpecting it; and it therefore became neceſſary for him to know, upon what terms he did purchaſe, and in procuring this information, he muſt have got notice of the rule in queſtion. Beſides, he proceeded ſome ſteps in conformity with the rule. He obtained a warrant, and procured it to be ſurveyed, tho' not in time. As to the reaſonableneſs of the rule it is nothing to this court. *Crap* was at liberty to purchaſe under it, or to let it alone, if he did not like the terms. The parties were the proper, and the only judges of this. *Crap* having ſurveyed the land went no farther. He paid neither fees, nor compoſition, and conſequently deprived *lord Fairfax* of ſuch a portion of his revenue. How then can we conſider him as ſtanding in the ſame ſituation, as if he had actually obtained a grant? It was objected, that *lord Fairfax* ſhould have made an entry to compleat the forfeiture, or ſhould have done ſome act tantamount to an entry. This might have been neceſſary if he had made a grant to the appellee, and the forfeiture had incurred afterwards,—as for non-payment of quitrents. It was not neceſſary, where the legal eſtate had never been out of him. But if it were, I think he did an act tantamount to an entry, by granting warrants to the two Pickets to ſurvey the land for themſelves. As to the cuſtom of reciting in ſubſequent grants the prior forfeiture, I ſuppoſe it was ſimilar to that which prevailed in the crown office, and there, it was never done, but in caſes where there had been *a prior grant.*

Concerning the advertiſements of *lord Fairfax*, I do not think he was in any manner obliged to give the notice for which they were intended. It was *Crap's* duty to perform the conditions which the rules of the office impoſed, by paying the compoſition, and applying for his grant. This he was at leaſt bound to do within a reaſonable time, and before the land was re-granted. The advertiſements held out an indulgence, which not having been accepted, nor the terms of it complied with, diminiſhes ſtill more the claim of *Dowdall* to the relief of a Court of Equity. It is true, that the appellants did not ſtrictly comply with the rules of the office, and of courſe they were liable to the legal effect of ſuch conduct, if a warrant had been granted to another. But this was not done; *lord Fairfax*, exerciſing a power which belonged to him, waved the forfeiture, and as a proof that he had done ſo, executed grants to them.

I

I think the abandonment by *Crap* is fully proved. It is true that *legal* rights once veſted, muſt be legally diveſted; but *equitable* rights may be loſt by dereliction.

It is unneceſſary to enquire if the *Pickets* had notice of *Crap's* title. Since if they had, it could not have affected them, unleſs *Dowdall* had been prevented by fraud from obtaining a legal title.

Upon the whole, I am of opinion that the appellants have ſuperior equity on their ſide, eſpecially againſt *Dowdall*, who ſeems to have come into the diſpute as a volunteer, under an idea, that the act of 1786 had given him a chance. But it is too clear, that that act cannot apply to caſes where grants had been made by the Proprietor.

THE OPINION of the COURT is, "that the appellee's "grant in the year 1788, ought not to have relation to the "time of the warrant, by authority of which the land was ſur-"veyed, dated in 1741, ſo as to be prior in effect to the intervening "title of the appellants; becauſe relation being a legal fiction adopt-"ed for the furtherance of juſtice, is not to be admitted in any "caſe to produce wrong and injury to others, nor particularly "in this caſe, where that relation comprehends a period of 47 "years, and tends to eſtabliſh a dormant claim in equity, ne-"ver perfected by *James Crap* the elder, by paying the office "fees and compoſition, ſo as to entitle himſelf to a grant of the "land, but on the contrary forfeited and abandoned by him, "and by his heir after his death, as being not worth the pur-"ſuit, in conſequence of which the *Proprietor* might lawfully "grant the lands to another, and accordingly did grant them "to the appellants, whoſe conduct in obtaining their ſaid grants "and legal preference appears to have been fair and irreproachable "ſo as to entitle them to more equity than the appellee, who "became a volunteer for reviving this dormant and abandoned "claim, ſome years after the date of the grants to the appel-"lants, and that the ſaid decree is erroneous."

DECREE reverſed with coſts, and the bill diſmiſſed with the coſts of the Court of Chancery.

JOHNSON