REPORTS OF CASES

ARGUED AND ADJUDGED

IN THE

COURT OF APPEALS

OF

VIRGINIA.

BY DANIEL CALL.

IN SIX VOLUMES.

VOL. I.

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TO WHICH, 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.

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was for £206, 10s. 2d. and costs, but to be discharged by payment of £103, 5s. 1d. with interest, to be computed after the rate of 6 *per cent. per annum*, from the 18th day of July, 1797, till payment, and the costs.

PER CUR. The judgment is erroneous in this: that it is "to be discharged by the payment of the sum due on the forthcoming bond, in the proceedings mentioned, with interest thereon at six *per cent.* instead of five *per cent. per annum;* the Court considering the said bond not as a new contract, (in which the concurrence of both parties is necessary,) but as a measure legally imposed on the creditor in his pursuit of his execution of the former judgment, which bore an interest of five *per cent.* only; and which alone the Sheriff could have raised, if the condition of the bond had been complied with, and he had proceeded to sale." The judgment of the District Court must, therefore, be reversed, with costs, and judgment entered for the penalty of the bond, with costs, in the District Court; but to be discharged by payment of £103, 5s. 1d. with interest after the rate of five *per cent.* [206] *per annum*, from the 18th day of July, 1797, till payment, and the costs.

HUNTER AND OTHERS *v.* HALL.

Friday, April 20, 1798.

1. A reasonable degree of strictness necessary in entries for lands.*
2. An entry of "400 acres of land on the South Branch, adjoining Lord F.'s land, at the mouth of Mill Creek," which is on the West side of the South Branch, could not be construed to embrace any land on the East side.
3. The dismission of a *caveat*, unless it be on the merits, is not binding, so as to defeat the caveator's right.

This was an appeal from the High Court of Chancery, where Adam Hall brought a bill against Hunter and others, stating that Terence Popejoy had made an entry, with the surveyor of Hampshire county, for 400 acres of land, lying in the said county, in the following words: "December 17th, 1783, Terence Popejoy entered 400 acres of land, adjoining the land of Ab. Keykendall, deceased; also, four hundred acres on the South Branch, adjoining Lord Fairfax's land, at

[* See *Currie* v. *Martin*, 3 Call, 28; *Johnson* v. *Brown*, 3 Call, 259; *Depew* v. *Howard* et ux. 1 Munf. 293; and *M'Arthur* v. *Browder*, 4 Wheat. 488, 493.]

the mouth of Mill Creek." That Popejoy, afterwards, having got a copy of the said entry from the surveyor's books, assigned the entry for the last mentioned 400 acres to Martin Brown, for value received; and that Brown, afterwards, for a valuable consideration, assigned to the complainant, who had it surveyed, and the survey returned to the Register's office. But that the defendants, Hunter and others, had a location and survey of lands made in that quarter, (which included a great part of that surveyed for the complainant,) and then entered a *caveat* against the complainant's obtaining a patent, which was afterwards prosecuted in the Winchester District Court. "That, the said *caveat* coming on to be heard in April, 1791, the same was dismissed by the Court." That, after Hunter's survey, the plaintiff being about to enter a *caveat* against issuing a patent to him, it was agreed, that the whole contest should depend on the determination in Hunter's *caveat*, aforesaid, against the complainant; but the defendants, [207] notwithstanding that agreement, had afterwards procured a patent, and thereby obtained a priority at law, by fraud. The bill, therefore, prays for relief against the patent, and that the defendants may be decreed to convey to the plaintiff.

The answer stated, that the defendants had entered and surveyed the land as vacant; that, hearing afterwards of Popejoy's entry, they, upon enquiry, found that Popejoy had taken a copy of his entry from the surveyor, in these words: "December 17th, 1783, then did Terence Popejoy enter 400 acres of land on the South Branch, adjoining the lands of the heirs of Abraham Keykendall, in Hampshire county, within the Northern Neck; signed Joseph Nevill, Surveyor." That Popejoy went with a deputy surveyor to survey the lands, but could find no vacant lands where he supposed there had been some; and therefore declined proceeding any further under his said entry; which he offered to the surveyor for his services; but the offer was rejected. That he sold the entry to Brown, for eighteen pence and half a pint of rum. That, from these circumstances, the defendants concluding that Popejoy and his assignees could have no title, under the said entry, filed a *caveat*, which was afterwards dismissed by them on the hearing, at the instance of the complainant, in order to avoid a decision on the merits, because the certificate of the entry made in the Register's office was not attested by the Register as the law required, but by one of his clerks. That the defendants never entered into such agreement as that stated in the bill.

The Court of Chancery was of opinion, that although Popejoy was disappointed in his first attempt to discover vacant land, yet, that he had not lost his right by dereliction, or the sale for a small consideration; but that the complainant had a title under the entry, "the description of the land in the entry, (as the terms of that entry are rehearsed by the surveyor, with whom it was made in his examination,) being verified of the land certified to have been surveyed by authority of the entry, and that the right of the plaintiff ought to be in the state in which it would have been, if the emanation of a grant to him had not been prevented by the *caveat* against it on behalf of the defendants, pending which *caveat*, the [208] obtainment of the grant to the defendants was an unfair practice." Therefore, the Court decreed the relief sought by the bill. From which decree, the defendants appealed to this Court.

ROANE, Judge. The appellants in this cause having a legal title to the land in question, by virtue of the patent of the 2d November, 1789, that title ought not to be divested, unless the Court should be of opinion that, under the equitable circumstances of his case, the claim of the appellee is paramount.

This position necessarily brings into comparison the claims of the two parties; and, unless that of the appellee should be deemed preferable, it would be impertinent to enquire whether, by any agreement stated or proved in the case, or by the act of 1779, independent of such agreement, the appellants were prohibited from taking out their patent, during the pendency of the *caveat* in the District Court of Winchester?

In making this comparison, we are not to infer that the judgment of the District Court, dismissing that *caveat*, which is stated in the proceedings in this cause, asserted a right in the appellee to the land in question, or that the *caveat* was, as it respected the merits of the title, groundless: for, by the act of 1779, [c. 13, 10 Stat. Larg. 50,] a *caveat* may be dismissed, because not authenticated in a particular manner; or because the survey was not within the time limited by law; or because the breadth of the survey is not equal to one-third of its length. But, in any of those cases, the title to the land is not decided; for, any person, even the same caveator, may, nevertheless, afterwards, by another *caveat*, on the ground of having himself a better right, oppose a grant. I mention this by way of controverting a position in the Chancellor's [209] decree, inferring, that because the *caveat* in this case was dismissed by the District Court, it must be presumed to

have been groundless: meaning thereby, as I understand it, in point of right; and that the right to the land in question was asserted by the judgment of that Court to have been in the appellee: to which right, it is the object of the decree to restore him.

Taking it, therefore, as a clear position, that the rights of the present parties, as relative to the lands in controversy, have never been compared together, nor the one preferred to the other, by the judgment of any Court; and that the dismission of the *caveat* does not necessarily imply the consequences which the Chancellor has inferred from it, we are now to make that comparison, and say whether, under the circumstances of this case, the legal title of the appellants must yield to the superior claim of the appellee? The act of 1779, prescribing the mode of locations, by the strict terms of it, presupposes a survey; for, without such survey, no person can strictly conform to its terms, in making a location: but, that act unavoidably requires, and has uniformly received, a liberal construction in this respect. It is not in my power, nor is it necessary in this case, to draw a line as to the particular extent of this latitude; but as, on the one hand, a strict adherence to the terms of the act, would produce infinite disputes and litigation, so, on the other, the spirit, as well as letter of the act, requires that we do not wholly disregard the landmarks which it has established, nor abandon the interests of posterior locators or adventurers.

This can only be done by holding locators to a reasonable degree of strictness in their entries.

The entry of Popejoy is for 400 acres of land, adjoining the land of Lord Fairfax, at the *mouth of Mill Creek.* These last words are descriptive of the particular tract of Lord Fairfax's land, which the land located was to adjoin, but they are not descriptive of any particular spot in the entry just preceding the one in question, and contained in the same instru-
[210] ment; that entry being only to *adjoin the lands of Abraham Keykendall, deceased.* But this tract of Lord Fairfax lies on the west side of the great branch of Potomac river; and, in order to come at the land in question, the appellee, beginning where he himself supposed his entry required him to begin, must not only take in the appropriated lands of other persons, but cross a river in itself considerable, and perhaps the largest in that country. In order to sustain this entry, as applicable to the land now in dispute, it ought at least to have been shewn, that it was usual in surveys in that part of the country, to run across that river. Evidence

of a contrary nature, though, has been given; as may be seen in the deposition of Henry Ashby. But, in truth, a location stated to be adjoining to a tract of land which only lies on the west side of that river, or (as is the case in the copy of the entry containing the assignment to the appellee,) stated to be on the west side of the river adjoining a survey of Lord Fairfax, can never be construed to extend to land on the east side of the said river. It is not, as to such land, a sufficient entry under the before-mentioned act of Assembly. Other adventurers could not reasonably suppose it to extend to such land. But if, in truth, the locator intended it to extend to such land, (of which, however, there is abundant evidence to the contrary, in the case,) it is better that he and those claiming under him, should sustain a loss, arising from their own negligence and omission, than that third persons should, by means of such negligence and omission, suffer an injury, which no prudence or foresight of their's could have averted.

For these reasons, I think the legal title of the appellants should not have been disturbed; but, that the bill of the appellee ought to have been dismissed.

LYONS, Judge. The only difficulty is with respect to the *caveat*. If it had been heard and determined on the merits, it would have been binding until reversed; but it was not, and, therefore, the case was open on the merits. Neither [211] Popejoy nor the surveyor expected to find land on the east side; and the purchaser could not be deceived, as he took the assignment on a copy of the entry; which was complete notice.

PER CUR. Let the decree of the Court of Chancery be reversed, and the following decree made in its room:

The Court is of opinion, that the entry of Terence Popejoy, with the surveyor of Hampshire county, on the 17th day of December, 1783, for four hundred acres of land, on the South Branch in the proceedings mentioned, under which the appellee claims title by assignment, to part of the land on the east side of the said branch, included in a patent since granted to the appellant David Hunter, did not express, nor was the same as understood by the surveyor, and acknowledged by the said Popejoy, intended to include any land on the east side of the said branch. That the appellee could not have been deceived as to the situation of the land so entered for, at the time of the purchase; as the copy of the entry on which the assignment was made by the said Popejoy, describes the land entered for as lying on the west of the South Branch. That

the appellants having afterwards located and surveyed land as vacant on the east side of the branch, and obtained a patent for the same, by which they acquired a legal title thereto, ought not to be deprived of that title by the appellee, who hath not shewn a better equitable title; and, although the *caveat* in the proceedings mentioned, was dismissed, it does not appear that the same was heard and dismissed on the merits of the case, but rather the contrary, and, therefore, no bar to the claim of the appellants under their location and patent: which was open for the decision of the Court of Chancery, and ought to have been in their favor, and that the said decree is erroneous. Therefore, it is decreed and ordered, that the same be reversed and annulled, and that the appellee [212] pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here; and, this Court proceeding to make such decree as the High Court of Chancery should have pronounced: It is further decreed, and ordered, that the appellee's bill be dismissed, and that he pay to the appellants their costs by them, about their defence in the said High Court of Chancery expended.*

[* See *Noland* v. *Cromwell*, 4 Munf. 155]