REPORTS

OF

C A S E S

ARGUED AND DETERMINED

IN THE

SUPERIOR COURTS OF LAW

IN THE

STATE OF SOUTH CAROLINA,

SINCE THE REVOLUTION.

BY ELIHU HALL BAY,
ONE OF THE ASSOCIATE JUDGES OF THE SAID STATE.

VOLUME II.

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1811.

when the second writ (which was valid) issued, the statute of limitations had run out and barred the recovery. Hopkins v. The Administrators of M'Pherson.

Rule for new trial discharged.

Present, BURKE, GRIMKE and BAY.

Orangeburgh 1798.

The Devisees of PHILIP HAWKINS, deceased, *against* AMBROSE ARTHUR and others.

TRESPASS to try title to land, before BAY, J.

This action was brought to try the title to a tract of land, adjoining the town of *Granby*, commonly called *Saxagotha* town.

A reservation of lands for the use of a town, is a covenant in law between the state and people, that those lands shall be appropriated only for the use of the inhabitants of said town, and for no other purpose; so that any grant obtained for the said lands afterwards, is null and void as much as a junior grant for lands which had been previously granted away.

Mr. *Holmes*, on the part of the plaintiffs, in support of their title, produced a grant to *Job Marion*, for 764 acres of land, dated in *February*, 1770, then said to be situated on *Santee* river, but in fact and in truth, situated on the west side of the *Congaree* river. He next produced regular conveyances from *Job Marion*, the grantee, to *Benjamin Farrow*; and also conveyances from *Farrow* to *Philip Hawkins*, under whom the plaintiffs claimed.

When these conveyances were inspected and examined by the surveyors, it appeared that only 72 acres were in dispute with the present defendants, which included the glebe lots in the town of *Granby*, and part of the common.

Mr. *Purcell*, and Mr. *Bynum*, two surveyors, were then called and sworn, and they both agreed in opinion with regard to the situation of the lands in dispute, which lay between the main road leading to *Charleston* and the *Congaree* river, and that it *was a part of Saxagotha town*; and both

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the surveyors concurred in opinion, that the plat annexed to *Marion's* grant, and the land specified in *Hawkins's* deed, covered or included the lands which were called and known by the name of the *Saxagotha* town lands; so that upon the whole, there was no dispute about the location or situation of the lands in dispute, as they were clearly included within the grant and the conveyances. Here the counsel for the plaintiffs rested his case; alleging that they had deduced a clear and regular title down from the original grantee, to the plaintiffs in this action, and had also established the fact of the location of the land in dispute being within the boundaries.

Mr. *Starke*, of counsel for defendants, stated, that the land in dispute was part of the town of *Saxagotha*, which had been laid out and reserved for the use of the *German* inhabitants of the township of *Saxagotha*, which was of considerable extent, and formerly had the privilege of sending a representative to the legislature of the state, and that it of right belonged to them and their descendants at this day; but that a spirit of speculation had, in or about the year 1770, gone abroad in *America*, (as it had done at several periods since,) and particularly in this then province; and that some artful person well acquainted with these lands and their situation, as well as with the adjoining lands around them, had made use of Mr. *Job Marion's* name, as a cover to obtain a grant for the 764 acres of land, the exact quantity reserved for the use of *Saxagotha* town and township. He then stated, that *George* II. late king of *Great Britain*, so long ago as the year 1730, soon after his accession to the throne, issued a proclamation to his countrymen in *Germany*, offering bounties of land, and other advantages civil and religious, in order to induce them to emigrate and settle in the upper part of this then province of *South Carolina*, in order to form a strong barrier against the incursions of the savages, who had been long troublesome in that part of the country. That in consequence of that proclamation,

numbers of the inhabitants of that part of *Germany*, which the name of the township bears at this day, did emigrate with their families to *Carolina*, and settled themselves down in the township which its name imports; where they and their descendants have remained to the present period. That for the accommodation and general convenience of these new settlers, a town of considerable extent was laid out, and reserved for them and their descendants inhabitants of the said township for ever, called *Saxagotha* town; which is admitted to be the tract which includes the land in dispute. That this town contained 764 acres, the exact quantity mentioned in *Marion's* grant, and both the surveyors who have been examined agree that it is the same land.

He next stated, that from the loss of many of the old records, and the carrying off a great many others of them by the enemy during the revolutionary war, and other public misfortunes which befel this country before and about that period, he had it not in his power to produce the council books of the old province of *South Carolina*, which contained the public proceedings of the then government of the province, and the transactions of the king's governors and councils, to whom the executive authority was entrusted; so as to shew the precise act of the *British* government, in making this reservation of land for a town for the use of the *German* inhabitants, who had settled in the above township, which was the highest evidence the thing was capable of. But he would offer the next best evidence of this application or reservation for the above purposes, which was an ancient plat or plan of the town of *Saxagotha*, under the hand of *Ralph Humphreys*, a former deputy surveyor-general of the said province, taken from the original entered in the council books, made by order of the governor and council of *South Carolina*, in pursuance of the king's instructions for that purpose, dated in 1732, and signed and certified by the said deputy surveyor-general. This, he contended, was such proof of the actual existence of the

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original, as ought to be admitted at this day, to prove the reservation and laying off of the town.

Mr. *Holmes*, the counsel for the plaintiff, objected to this plan being given in evidence, as not being of the highest nature. But the objection was overruled by the presiding judge, on the grounds, first, that transactions of this kind, such as reservations of land by the *British* government, for towns, forts, fortifications, and other special public purposes, differed greatly from grants, either under the great seal or the colonial seals; or even deeds or conveyances from one individual to another. The mode observed in making these reservations, was first, a declaration or rather resolution entered in the council books, that certain portions of land should be for ever reserved by the crown for some of the above public purposes; and directions were accordingly given to the surveyor-general, to lay off, by metes and bounds, the lands so reserved. After this survey was made and certified by the surveyor-general, it was returned to the governor and council, and the plat of such reserved lands, was entered in the council books, there to remain as a perpetual memorial or record of such appropriation. After which, there was no other evidence of such reservation, but the copies of plats certified by the surveyor-general, or his lawful deputies. Whereas, in the case of grants under the seal of the government, they were given to individuals, for their private use and benefit only, and they had the custody of these grants or charters, and could always have them ready to produce when called for, to shew their rights. So likewise in the case of deeds and conveyances, which is the reason why the law always requires that they should be produced as the highest evidence, or their loss or destruction regularly accounted for. Not so with regard to reservation of lands for public purposes, where the government remains as trustee for the public. In such case, there never was any grant or deed to individuals to produce. The only evidence of such reservation, is a copy of the plat entered in the council books, shewing

the lands reserved. Another ground for overruling the objection, was, that ancient deeds above thirty years standing prove themselves, and may be given in evidence without proof, especially where possession has gone along with it, and it was not denied, that many of the inhabitants were in possession of the lots in this reserved town. Upon the same principle, ancient plats and maps may be given in evidence. In the present case, the plat has every appearance of regularity and authenticity about it, signed and certified by the proper officer of the government, and is of more than sixty years' standing.

The plat was then produced and offered in evidence to the jury, and it appeared to be the same land, which was covered by *Marion's* grant, and containing exactly the same quantity. On this plat or plan of the town, the lots for the use of the inhabitants of *Saxagotha* township were laid down; and streets and squares for public purposes, were fairly and regularly delineated and represented on it; and among other things, there appeared to be a *square reserved for a church*, another for a court-house and gaol, another for a public market, and several others for public purposes. On this plan was also laid down and represented, a common appurtenant to the said town, for the use of the inhabitants and their cattle, and also sites for forts and fortifications, which were afterwards built and erected, for the defence of the said inhabitants against the depredations and incursions of the savages. So that every thing appeared to have been done by the crown, not only for the appropriation and reservation of the land itself, but for the convenience, comfort, security and protection of the inhabitants, who were to people and inhabit it.

Mr. *Starke* then called several old witnesses, who proved that a church had been built on the square reserved in the town for that purpose, in the year 1760; and that there had been an old church on the same spot before, which was called *Saxagotha* town church. An old man named

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Baughman, particularly swore, that he helped to build the church in the year 1760. After this testimony, Mr. *Starke* produced a number of old grants to the inhabitants of *Saxagotha* township, for farms, or plantations, or bounty, in each of which was a grant of a town lot also in *Saxagotha* town, as an appurtenant to their said plantations or farms; all which, he contended, proved incontestably, that this land had been reserved by the crown of *Great Britain* for a town, for the use of the inhabitants of *Saxagotha* township, and their heirs and descendants for ever. Here, he said, he would rest his clients' case, and submit it to a jury of the country.

After the testimony to the jury was closed on both sides, *Holmes*, for the plaintiffs, contended, that the fee of the soil had never passed from the crown of *Great Britain* (except for a few town lots) till the grant to *Marion*. That however the *British* government might originally have intended this land for the site of a town, yet time and circumstances had changed. They had seen that it would not answer for that design, and accordingly had granted it away for the purposes of cultivation and improvement as a farm. That as to the town lots which had been granted before the letters patent to *Marion*, he did not mean to contend, that the proprietors were not entitled to them. He was willing, therefore, that the jury should leave every such lot out of their verdict, if it was possible for them to designate them; but contended, that his clients were entitled to the residue of the 764 acres, whatever that might be, more or less.

Marshall, in reply for defendants, insisted, that the royal faith was pledged by the proclamation of *George* II. to his countrymen, whom he wished to settle in *South Carolina*; and it was consummated by his governor and council in *South Carolina*, when the town was laid off, and the plat returned to the council, and entered on the council books. This, he urged, was an act as formal, and as substantially

valid, as if he had affixed the great seal of *Great Britain* to it, or his seal of his then province of *South Carolina*. From that moment, the crown parted with its right and control over the soil of *Saxagotha* town, and became a trustee for the emigrant *Germans*, and their descendants for ever. He said, the time, the occasion, and the object were all worthy the consideration of the freemen of *South Carolina*. The time was a disastrous one; when the frontiers of this country were frequently ravaged by a murderous enemy. The occasion was to form a firm and permanent barrier to the incursions of this savage enemy; and the object was to secure to them and to their posterity, a convenient town, where they could in the time of peace, enjoy the good fellowship of society, and the mutual interchanges of commerce with each other.

That the government of *Great Britain* stood pledged to the inhabitants of this town, to secure to them these advantages, together with freedom and religious liberty; and no doubt can be entertained, that these advantages and blessings would have been perpetuated to them and their posterity, if the government of this country had still remained under that government. The revolution in *America*, and establishment of independence, made a new æra, and changed the powers of government from the crown of *Great Britain*, to the freemen of *America*; and shall they be less mindful of these important rights, than the *British* would have been? He hoped and trusted they would not; and that the good sense and justice of the country would uphold and establish those rights, against all the speculators in the world who would endeavour to deprive the inhabitants of them.

Mr. *D. Hall.* The moment the royal faith was pledged to the *Germans*, for the reservation of this town for their use, it was tantamount to a warrant of survey for vacant lands. When it was run out by the surveyor-general, it

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was similar to a return of the surveyor-general into the secretary's office; and when it was returned to the governor and council, and entered in the council books and confirmed on their part on behalf of the crown, it was as solemn a transfer of the right of the crown to the inhabitants of the town, as a grant under the great seal of *Great Britain*. Consequently, any grant for the same lands afterwards, was null and void; as much so, as a junior grant for the same lands would have been, if they had been granted to a private individual. There was one circumstance, he said, which had not been accounted for in this transaction, which had made an impression on his mind, and that was, that the land in *Job Marion's* grant, was stated to be situated on *Santee river*. Whereas, this land was on the *Congaree river*, at least thirty miles above the junction of the *two rivers*; which conveyed to him the idea, of a misrepresentation in the location of the land, which was a strong badge of fraud, and was of itself alone sufficient to render it a very suspicious transaction in the origin.

BAY, J. in charging the jury told them, it was necessary for them to determine whether there ever was this reservation for the town of *Saxagotha* by the crown of *Great Britain*, or not? If so, then the inhabitants of *Saxagotha* township, for whose use and benefit it was reserved, were most unquestionably entitled to it; and that there was this reservation most evidently appeared by the plat produced, which had every appearance of authenticity attached to it. In the first place, there must have been an order of council made to have this town surveyed and laid out, otherwise the surveyor-general would never have proceeded to make it. In the next place, it appears from the face of the plat as well as from the testimony of the two surveyors, that this town must have been actually run out by metes and bounds by the surveyor-general, as directed by the governor and council. Again, the uses and purposes for which it was surveyed and laid off, is most evident from the lots

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laid down on the plat, and the streets and squares laid off for public purposes. All which was confirmed by the return of the original plan to the governor and council, and the entry or record thereof in the council books, which appears to have completed this reservation. And this again is further confirmed by the building of two churches on the spot delineated on the plat, for that purpose, and the grants of the town lots annexed to the farms or plantations throughout the township. All these circumstances combined, formed such a mass of testimony in favour of this reservation, that the mind of man could not get over it. As to the legal effect of this reservation, there could be no question about it. It amounted to a covenant in law, between the crown and the people, for whose use and benefit it was intended; that the land contained within the boundaries of that plat, should for ever thereafter be appropriated and disposed of, for the use and benefit of the inhabitants of the said town and township, and their heirs for ever, and to and for no other intent and purpose whatsoever.

It was as solemn an act on the part of the government, as any grant could be under the great seal of the province; and any grant for the same lands afterwards must have been obtained by fraud or misrepresentation, and therefore null and void to all intents and purposes, as much as any junior grant obtained for land which had been formerly granted.

It appeared to him, that the king of *Great Britain* became a trustee for the use of the said inhabitants, as soon as the reservation was completed, until the whole of the lots were granted away among the said inhabitants and their descendants, and so remained till the revolution was accomplished; when the state of *South Carolina* succeeded to the trust, and now holds in trust all the ungranted lots and common, for the use of the inhabitants of the said town and township; and that no other appropriation can be made of said land, but for the use of the said inhabitants, agreeable to

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the true intent and meaning of the crown and people, when the said reservation was originally made.

The jury retired, and after remaining in their room a short time, returned a verdict for the defendants.

A notice of a motion for a new trial was then given by the plaintiffs' counsel, but it never was afterwards brought forward. They acquiesced in the verdict, and abandoned their claim.

Charleston District, 1798.

NATHANIEL BLISS NEAL *against* PHILIP LEWIS.

In a declaration for slander, where there are some counts good and others bad, a general verdict or finding will support the good counts. A man may insert as many counts as he pleases, and if any one is good, it is sufficient. Unless damages are very outrageous, court will not grant a new trial in slander.

SLANDER. Verdict for plaintiff. Motion in arrest of judgment.

The declaration in this case contained several counts:

1. For calling the plaintiff a rascal, a scoundrel, a liar and villain.

2. For calling him a damned swindler.

3. For calling him rascal, thief and scoundrel.

4. For repeating that plaintiff's bills had been protested in *England*, and that he was unworthy of credit.

After a very long trial, and a great deal of testimony on both sides, the jury found a general verdict against the defendant, with 3,000 dollars damages, without distinguishing on which of the counts in the declaration they founded their verdict.

This was, therefore, a motion in the first place in arrest of judgment; or, if the court should not think proper to grant that motion, then for a new trial.

In support of the motion in arrest of judgment, it was contended, that this declaration contained several distinct