

## THE CHANCELLOR :

This is then the case of an information filed in the year 1842, at the relation of a party whose title, whatever it is, commenced in 1841, to vacate a patent of land granted in 1795, which the patentee in 1797, sold and conveyed for a valuable consideration, to an individual who could not have had notice of the facts upon which the patent is now impeached.

It is certainly true, that a warrant of resurvey does not authorise a party to include vacancy not contiguous to the tract or tracts to be resurveyed—and it is equally well established law of the land office, that a person who has not a title to the land on which he obtains a warrant of resurvey, does not, in virtue of such a warrant, acquire a right of pre-emption in the adjoining vacancy—and yet the cases of *Hammond vs. Norris and Hammond vs. Warfield*, 2 *H. & J.*, 140, 141 and 151, show, that patents obtained from the land office by a party who has no legal title to the original, or upon a certificate of resurvey including vacancy not contiguous to the original, are nevertheless valid and available, unless some intervening right of a third party shall deprive them of their operation. These cases prove conclusively, that such grants are not void, though obtained irregularly and against the rules of the land office, and the case of *Hammond vs. Ridgely*, 5 *H. & J.*, 263, shows that a grant is not void, though the surveyor includes land not within his county, if no fraud is practiced, though upon caveat in the land office the grant would have been refused.

These departures, then, from the rules of the land office, will not void the grant, if the ingredient of fraud is wanting, and it is believed that no case can be found, on which a grant has been vacated except for fraud *in fact*, charged and proved. The cases in 1 *H. & J.*, 332 and 374, are very strong to show that actual fraud is indispensable in an attempt to vacate a grant. The case of *Hoye vs. Johnston*, decided by the Court of Appeals at December term, 1844, was a case of actual fraud upon the rights of a third party, who had previously acquired an interest in the land, and was put expressly upon that ground.

But this is not a proceeding to vacate a patent whilst the