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Bodley Vs. Taylor

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Appeal No. : 9 U.S. 191

Appellant : Bodley

Respondent : Taylor

Judgement :

Bodley v. Taylor - 9 U.S. 191 (1809)
U.S. Supreme Court Bodley v. Taylor, 9 U.S. 5 Cranch 191 191 (1809)

Bodley v. Taylor

9 U.S. (5 Cranch) 191

ERROR TO THE DISTRICT COURT OF THE

UNITED STATES FOR THE DISTRICT OF KENTUCKY

SYLLABUS

In Kentucky, it is a good ground of equitable jurisdiction that the defendant has obtained a prior patent for land to which the complainant had the better right under the statute respecting lands and in exercising that jurisdiction, the court will decide

in conformity with the settled principles of a court of chancery.

Entries of land in Kentucky must have that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum. If the entry be placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line.

If the entry be of a settlement and preemption to a tract of land lying on the east side of a road, the four hundred acres allowed for the settlement right must be surveyed entirely on the east side of the road and in the form of a square.

The call for the settlement right is sufficiently certain, but the call for the preemption right is too vague, and must be rejected.

A defendant in equity, who has obtained a patent for land not included in his entry, but covered by the complainants' entry, will be decreed to convey it to the complainants, but the complainants will not be required to convey to the defendant the land which they have obtained a patent for, which was covered by the defendant's entry, but which, by mistake, he omitted to survey.

Thomas Bodley, James Hughes, Robert Poague and Robert Campbell citizens of Kentucky, brought their bill in chancery against John Taylor, a citizen of Virginia, in the state court for the District of Washington, from whence it was afterwards, by consent, removed into the federal court for the District of Kentucky.

The bill states that on 17 October, 1783, Henry Crutcher and John Tibbs made the following entry with the county surveyor, *viz.,*

"Henry Crutcher and John Tibbs enters ten thousand acres of land on a Treasury warrant No. 18,747. as tenants in common; beginning at a large black ash and small buckeye marked thus (I.T) on the side of a buffalo road leading from the lower blue licks a northeast course, and about seven miles northeast by east from the said blue licks, a corner of an entry of twenty thousand acres made in the name of John Tibbs, John Clarke, John Sharpe, David Blanchard and Alexander

McClain, running thence with the said Tibbs & Co.'s line due east sixteen

hundred poles, thence south one thousand poles, thence west sixteen hundred poles, thence north one thousand poles to the beginning for quantity."

That the same having been surveyed, Crutcher assigned his half to Robert Rutherford, to whom and Willoughby Tibbs (the heir of John Tibbs), a patent was afterwards granted. Tibbs sold his right to Peyton, who sold a moiety thereof to Magill. Rutherford, Peyton, and Magill sold and conveyed the whole for a valuable consideration to the plaintiffs by deed dated February 15, 1799.

That the defendant Taylor having, on 22 May, 1780, made the following entry with the county surveyor, *viz.,*

"John Taylor enters three thousand acres of land upon a Treasury warrant adjoining John Walden on the north side of Johnson's Fork of licking, on the east and southeast sides, running up and down said creek, and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler,"

has caused the same to be surveyed expressly contrary to location, and so as to interfere with your orator's claim aforesaid, and having obtained a patent older than that obtained by the said Rutherford and Tibbs, notwithstanding he knows his claim is surveyed contrary to location, and although requested, he refuses to convey to the plaintiffs. The prayer of the bill was that the defendant should convey to the plaintiffs so much of the land included in the defendant's patent as interfered with the plaintiffs' patent, and for general relief.

The defendant by his answer denied the jurisdiction of the court as a court of equity because the plaintiffs stated in their bill no equitable ground of relief. He avers his ignorance of the plaintiffs' title and that he did not know until within a few days then past the mode in which his own location or survey was made. That he had employed one Ambrose Walden to cause them to be located. He denies all fraud in making his survey. He avers that he was a *bona fide* purchaser for a full

and

valuable consideration, prior to the title claimed by the plaintiffs. That no caveat was entered against his survey. That he regularly obtained his patent. That a considerable part of his land has been cleared and settled. That 20 years have elapsed since the entry. That the landmarks and geographical objects which were at that time visible, have been changed, altered, or destroyed by time.

He contends that if he has surveyed and obtained a grant for lands not described in his entry, and which he had no right to survey, he ought not to be compelled to convey them to the plaintiffs unless they will convey to him what he had a right to survey, and which they have surveyed, and for which they have obtained a patent. That the plaintiffs' entries cover almost all the lands which the defendant could have surveyed under his entry. That by the plaintiffs' delay the defendant has lost the power to locate his warrants elsewhere, if they are improperly located, which he denies.

He states that his entry was dependent on John Walden's, which depended upon Ambrose Walden's, which depended upon Jacob Johnson's. That Jacob Johnson's was first surveyed by the surveyor who surveyed the entries of the Waldens, and of the defendant. That although Jacob Johnson's survey was afterwards suppressed, yet that did not alter the actual location of the two Waldens and of the defendant. That his survey is correctly made according to the laws of Virginia when it was made, and while Kentucky was part of Virginia, and that by the same laws, and the compact between Virginia and Kentucky, at the time of separation, his prior patent, founded upon a prior equity, and obtained without fraud, cannot be vacated.

A survey and connected plat was made under an order of the court, and according to the directions of each party.

A jury came, according to the custom of Kentucky

in chancery suits, and being sworn to inquire of such facts as should be submitted to them, found the following facts, *viz.* That the place designated on the connected plat by the letter A. is the place called for as the beginning corner of John Tibbs & Co.'s entry of 20,000 acres, dated July 31, 1783, on the buffalo road leading from the lower blue licks to Limestone, which corner is also the beginning of an entry of 10,000 acres made 17 October, 1783, in the names of Henry Crutcher and John Tibbs, under which the complainants claim, copies of which entries are annexed to their verdict.

The following facts were agreed by the parties, *viz.:*

2. That the entry of 20,000 acres in the name of John Tibbs and others, and a survey made thereon, for 16,000 acres on 8 June, 1796, were assigned to the complainant Bodley, who obtained a patent therefor in his own name dated 21 April, 1798, and afterwards conveyed one undivided moiety thereof to the complainant Hughes, by deed duly recorded.

3. That the entry of 10,000 acres was made on 17 October, 1783, in the name of Henry Crutcher and John Tibbs, surveyed 14 March, 1784, registered 31 December, 1784, and patented in the names of Robert Rutherford, assignee of Henry Crutcher, and Willoughby Tibbs, heir at law of John Tibbs, deceased, 26 August, 1790, was purchased by Bodley 26 September, 1798, and conveyed to all the complainants jointly by deed duly recorded, dated 15 February, 1799. That the defendant's survey of 3,000 acres was made on 1 September, 1785, registered 1 November, 1785, and a patent obtained therefor dated 21 November, 1786.

4. That the grants issued by the register of the Virginia land office do not bear regular dates agreeably to the times the surveys were returned, but in

many instances the elder patent has issued on surveys returned several months after surveys on interfering claims were registered.

5. That the surveys of Jacob Johnson's settlement and preemption, as stated to have been surveyed in the defendant's first fact (hereafter stated), were made by the direction of Simon Kenton, his agent, who was also locator of the claims which call to adjoin the said Johnson's surveys, and were never admitted to record.

6. That Ambrose Walden's survey was made on 29 November, 1785, John Walden's the 27 December, 1785, and Jacob Johnson's settlement and preemption, as represented on the connected plat by lines thus, (000), was made on 9 April, 1789, registered and patents issued thereon to John Reed and Arthur Fox, assignee of Johnson dated 20 February, 1793.

7. That more than one entry and survey has been made on almost all the good land in the State of Kentucky.

8. That the several claims, watercourses, improvements, objects, and distances laid down on the connected plat, reported by the surveyor, are truly laid down and reported.

Facts for the defendant.

1. That the settlement and preemption of Peter Johnson heir at law of Jacob Johnson after being entered with the surveyor, were actually run out and surveyed as designated on the connected plat by the letters and figures M.N. 2 & 3, that the said surveys were made by a surveyor legally qualified to make the same, prior to the dates of the surveys made for Ambrose Walden, John Walden, and the defendant.

2. That the land surveyed for the said Peter

Johnson upon the said right of preemption, there are now 300 acres of cleared land, upon the said survey of Ambrose Walden 200 acres, upon John Walden's 400, and upon the defendant's 300 acres of cleared land.

3. That on 22 May, 1780, the land on which the entries of Johnson Ambrose Walden, John Walden and the defendant, were made, was uncultivated, and the country for fifty or sixty miles on all sides without an inhabitant, except Indians, by whom it was much infested, and only occasionally visited by hunters and land jobbers.

4. That on 22 May, 1780, and prior thereto, there were many cabins, marked trees, hunting camps and improvements then plain and notorious on Johnson's Fork, and the other branches of licking, of which there remain now no traces, and which are now wholly incapable of proof as to what was their exact position.

5. That since that time, a great change has taken place in the appearance of the country generally round and at the place where the defendant's entry lies. That the country is now thickly settled and in high cultivation. That great changes have taken place in the names of streams, roads, and other objects, and that few of those who frequented that part of this country in the year 1780 are now alive.

6. That the complainants, Bodley and Hughes, assignees of Tibbs & Co. are the proprietors of the 16,000 adjoining the 10,000 acres in the bill mentioned.

7. That the cabin represented on the connected plat as Jacob Drennon's is the improvement called for in his certificate for a preemption, which was claimed for him before the commissioners by Simon Kenton, who also located the complainants' claim of 3,000 acres.

8. That the place designated on the plat on the south side of Johnson's Fork as a cabin represents a cabin built prior to the first of May, 1780, by Simon Kenton, otherwise called Simon Butler and Jacob Drennon.

It was also agreed between the parties that on and before 21 February, 1780, the lower blue licks were generally and notoriously known by the appellations "the blue licks" and "the lower blue licks," and that the road on which the complainants claim their beginning was then generally and notoriously known by the name of the

upper road.

That the three buffalo roads laid down upon the connected plat in February, 1780, and before led from the lower blue licks as represented.

That upon any reasonable plan of surveying the defendant's entry of 3,000 acres, it would be covered by the younger entries of 10,000, and 16,000 acres, the property of the plaintiffs, and would include land of equal or better quality than that which it now covers.

That the land in dispute is of more value than $2,000.

The following are the entries made by the parties respectively, *viz.,*

"January 7, 1780"

"Peter Johnson heir at law of Jacob Johnson deceased, this day claimed a settlement and preemption to a tract of land in the District of Kentucky lying on the east side of the buffalo road leading from the blue licks to Limestone, nine miles from the lick on the upper road, by the said decedent's raising a crop of corn in the year 1776; satisfactory proof being made to the court, they are of opinion that the said Peter Johnson &c.; has a

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right to a settlement of four hundred acres of land, to include the above locations, and the preemption of one thousand acres adjoining, and that a certificate issue accordingly."

"February 21, 1780"

"Peter Johnson heir, &c.;, enters 400 acres in Kentucky by virtue of a certificate, &c.;, lying on the east side of the buffalo road leading from the blue lick to Limestone, nine miles from the lick on the upper road."

"May 22, 1780"

"Ambrose Walden enters 1,333 acres upon a Treasury warrant on the east side of Jacob Johnson's settlement and preemption on the waters of Johnson's Fork a branch of licking, to include two cabins on the north side of said fork, built by Simon Butler, and to run eastwardly for quantity."

"May 22, 1780"

"John Walden enters 1,666 2-3 acres upon a Treasury warrant, joining the above entry on the south and southeast, to include three cabins built by Simon Kenton, running east and southeast for quantity."

"May 22, 1780"

"John Taylor enters 3,000 acres upon a Treasury warrant joining John Walden on the north side of Johnson's Fork of licking, on the east and southeast side running up and down the said creek and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler."

The court below then proceeded to pass the following interlocutory decree:

"It is decreed and ordered that Duvall Payne of

Mason County do go on the land in controversy and survey the claim of the complainants, agreeable to their entries. Then survey the settlement entry of Peter Johnson heir of Jacob, to begin at a point nine miles below the lower blue licks on the buffalo road as it meanders leading to the mouth of Limestone, thence east so far that a line north two hundred and fifty-three poles will give 400 acres on the east side of the road. That he then run out the preemption of Johnson in a square to the cardinal points, to lay around the settlement, and give an equal proportion of land on the south and east which is to direct the lines on the north and west."

"That he survey Ambrose Walden's entry on the east of Johnson's preemption, then John Walden's in equal proportions on the south and east of Ambrose, and the defendant's on the south and east of John Walden, in equal proportion."

"That he then ascertain the interference between the claims of the complainants and defendant, which lie without the limits of the defendant's entry as it is now directed to be surveyed, and within the lines of the complainants' entry, mark the lines and make corners to this interference when ascertained, and make report to the next court."

After this interlocutory decree, and before the surveyor made his report, the following facts were agreed and admitted by the parties:

1. "That there is at the blue licks a salt spring on the south side of licking, which is south 36 deg. west 82 poles from another salt spring on the north side of licking."

2. That there are at the blue licks about 500 acres of land trodden and licked away by the resort of buffaloes and other wild beasts.

3. That the connected plat in this cause, and the survey executed in pursuance of the interlocutory

decree, are made out by superficial, that is surface mensuration, and the distance from the blue licks to the respective beginnings of the parties' entries, ascertained in the same way.

Afterwards, the surveyor made his report, with a plat stating that he had made the survey according to the decree, and found

"that part of the defendant's survey which is included within his survey when laid down agreeable to the decree, and is also within the complainants' survey, to be 1,076 acres, . . . and that part of the defendant's survey which is included in the complainants' entry when laid down agreeable to decree, and will not be in the defendant's survey when made agreeable to the decree, is in two tracts, one containing 2,034 acres and 24 poles, . . . the other containing 182 1-2 acres."

Whereupon the court decreed and ordered that the defendant should, before 1 December then next, convey to the complainants by deed, with warranty against

himself and those claiming under him, the two tracts not within his survey as laid down by the order of the court, and which were within the complainants' survey, amounting to 2,216 1/2 acres; and should pay the costs of suit.

Each party brought his writ of error.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

This is an appeal from a decree of the Court for the District of Kentucky by which Taylor was directed to convey to Bodley and others a part of a tract of land to which he held an elder patent, but to which Bodley and others claim the better right under a junior patent. The judge of the district court having directed such part of the land held by Taylor to be conveyed to Bodley and others, as appeared by certain rules, which he has applied to the case, to be within their and not within Taylor's location, and having dismissed their bill as to the residue, each party has appealed from his decree.

Previous to any discussion of the rights of the parties, it has become necessary to dispose of a preliminary question.

The defendant in the court below objects to the jurisdiction of a court of equity, and contends not only that the present case furnishes no ground of jurisdiction upon general principles, but that the land law under which both titles originate, in giving a remedy by which rights under entries might be decided previous to the emanation of a patent, has prohibited an examination of the same question after a patent shall have issued.

Had this been a case of the first impression, some contrariety of opinion would perhaps have existed on this point. But it has been sufficiently shown that the practice of resorting to a court of chancery in order to set up an equitable against the legal title, received, in its origin, the sanction of the court of appeals

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while Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken.

But it is an inquiry of vast importance whether, in deciding claims of this description, a court of equity acts upon its known, established, and general principles or is merely substituted for a court of law, with power to decide questions respecting rights under the statute, as they existed previous to the consummation of those rights by patent.

It has been argued that the right acquired by an entry is a legal right, because it is given by a statute, that it is the statutory inception of a legal title which gives to the person making it a right, against every person not having a prior entry, to obtain a patent and to hold the land. The inference drawn from this is that as the law affords no remedy against a person who has defeated this right by improperly obtaining a prior patent, a court of chancery, which can afford it, ought to consider itself as sitting in the character of a court of law, and ought to decide those questions as a court of law would decide them if capable of looking beyond the patent.

This reasoning would perhaps be conclusive if a court of chancery was by statute substituted in the place of a court of law, with an express grant of jurisdiction in the case. But the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself, and what can justify that assumption but the opinion that cases of this description come within the sphere of its general action? In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. It is believed that no exception to this rule is to be found in the books, and the state of land titles in Kentucky is not believed to furnish one. The true ground of the jurisdiction

of a court of equity is that an entry is considered as a record of which a subsequent locator may have notice, and therefore must be presumed to have it; consequently, although he may obtain the first patent, he is liable in equity to the rules which apply to a subsequent purchaser with notice of a prior equitable right. This certainly brings the validity of the entries before the court, but it also brings with that question every other which defeats the equity of the plaintiff.

The Court therefore will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery. It will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this Court as the principles of equity require its application.

Neither is the compact between Virginia and Kentucky considered as affecting this case.

If the same measure of justice be meted to the citizens of each state if laws be neither made nor expounded for the purpose of depriving those who are protected by that compact of their rights, no violation of that compact is perceived.

The Court will proceed, then, to inquire into the rights of the parties, and in making this inquiry will pay great respect to all those principles which appear to be well established in the state in which the lands in controversy lie.

Taylor holding the eldest patent, it is necessary that the complainants below should found their title on a good entry. The validity of their entry therefore is the first subject of examination.

It was made on 17 October, 1783, and is in these words:

"Henry Crutcher and John Tibbs enter 10,000 acres of land on a Treasury warrant, beginning at a large black ash and small buckeye marked thus, I.T., on the side of a buffalo road

leading from the lower blue licks a N.E. course, and about seven miles N.E. by E. from the said blue licks,"

&c.;

The only objection to this entry is that the beginning is uncertain.

Were the validity of this objection to be admitted, it would shake almost every title in Kentucky. If it be recollected that almost every acre of good land in that state was located at a time when only a few individuals, collected in scattered forts or villages, encroached on the rights of the savages and wild beasts of the country, that neither these sparse settlers nor those hardy adventurers who traveled thither in quest of lands could venture out to explore the country without exposing their lives to imminent hazard, that many of those who had thus explored the country and who made locations were unlettered men, not only incapable of expounding the laws, but some of them incapable of reading, it is not wonderful that the courts of Kentucky should have relaxed in some degree the "rigor" of the rule requiring an impracticable precision in making entries, should have laid hold of every circumstance which might afford that certainty which the law has required, and should be content with that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum.

The entry of Crutcher and Tibbs possesses this reasonable certainty.

The blue licks was a place of general notoriety, and there appears to have been no difficulty in ascertaining the point from which the mensuration should commence. There being only one of the three roads leading from that point, which ran nearly a N.E. course, no subsequent locator could doubt on which road this land was placed. The entry having called for visible objects on the road about

seven miles from the licks, those visible objects might be discovered without any extraordinary exertion, and if they could not be discovered, then that call,

according to the course of decisions in Kentucky, would be discarded and about seven miles would be considered as seven miles. But those objects remained, and it appears that no difficulty has arisen or ought to arise, on this point. The jury has found it to be the beginning called for in the entry.

The entry, therefore, of Crutcher and Tibbs is sufficiently certain, and the Court will proceed to examine the entry and survey of Taylor.

This entry being the last link of a chain commencing with Jacob Johnson, it is necessary to fix Jacob Johnson in order to ascertain the position of Taylor.

Jacob Johnson's title is a settlement and preemption; a certificate for which was granted by the commissioners on 7 January, 1780, in the following terms:

"Peter Johnson, heir at law of Jacob Johnson, deceased, this day claimed a settlement and preemption to a tract of land in the District of Kentucky lying on the east side of the buffalo road leading from the blue licks to Limestone, nine miles from the lick on the upper road, by the said decedent's raising a crop of corn in the year 1776. Satisfactory proof being made to the court, it is of opinion that the said Peter Johnson, &c.;, has a right to a settlement of 400 acres of land to include the above location, and the preemption of 1,000 acres adjoining, and that a certificate issue accordingly."

On 21 February, 1780, this certificate, so far as respected the settlement of 400 acres, was entered with the surveyor.

It is the opinion of the Court that the 400 acres

of land should lie entirely on the east side of the road, that it should begin at the distance of nine miles, and that those miles should be computed not by a straight line, but according to the meanders of the road.

In this respect, the Court perceives a clear distinction between a call for one place by its distance from another, if the intermediate space be entirely woods, or if a

stream, which cannot well be followed, passes from the one to the other, and where a road is called for which conducts individuals from point to point. The distance of places from each other is not generally computed by a stream not navigable, but is always computed by a road which is traveled. It is therefore the opinion of the Court that where, as in this case, there is no other call in the entry showing a contrary intent, and the entry is placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line.

The beginning of Johnson's settlement being found, and its western side being placed along the road, the next inquiry is in what manner the land is to be surveyed.

In order to give certainty to locations of this description, the courts of Kentucky have uniformly determined that they shall be understood as being made in a square. Johnson's line upon the road therefore must extend along the road until two lines at right angles from each end of this base shall, with a third line parallel to the general course of the road, include, in a figure which, if the road be reduced to a straight line, would make a square, the quantity of 400 acres on the east side of the road.

The next link in this chain of entries, on which the title of Taylor depends, is Ambrose Walden's.

On 22 May, 1780, Ambrose Walden entered

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1,333 acres on the east side of Jacob Johnson's settlement and preemption, on the waters of Johnson's Fork, a branch of licking, to include two cabins on the north side of said fork, built by Simon Butler, and to run eastwardly for quantity.

The cabins, it is said, cannot be found, or if found cannot be distinguished. The waters of Johnson's Fork would be too vague, and therefore the validity of this entry must depend on the call for Johnson's settlement and preemption.

This is said to be insufficient, because the preemption had not at that time been located with the surveyor, and the certificate of the commissioners was no location. Johnson's preemption therefore had, on 22 May, 1780, no locality; a subsequent entry could not depend upon it, for it might be placed in any situation or in any form, provided it be so placed as to adjoin his settlement in any point.

The argument with respect to the preemption appears to the Court to be conclusive. This preemption right certainly had no locality on 22 May, 1780, and an entry made to depend entirely on it would have been too vague, too uncertain, to be maintained. But it does not follow that the entry of Ambrose Walden is void. He does not call singly for the preemption, he calls for "the east side of Johnson's settlement and preemption right," and it seems to the Court that a fair application of the principles which have governed in Kentucky in similar cases will maintain this location.

The settlement was actually located; the preemption, at the time, had no other than a potential existence; and the uniform course of decisions appears to have been to discard one call which is either impossible or uncertain, and to support the entry if there be other calls which are sufficiently certain. The decisions have gone so far as to dismiss a part of the description of a single call if other terms of

description be sufficient to ascertain the thing called for. Now the call for the settlement right is valid and certain, and the Court is not of opinion that this certainty is rendered uncertain by being united to the call for a preemption which had no real existence.

The call appears to be substantially the same as if it had been for the land of Johnson. His settlement and preemption was perhaps the name which, in common parlance, designated this land even before the location of the preemption, because it was appendant to the settlement. It has been decided that a call for the land would be good, and the Court thinks that decision applicable to this case.

Against this has been urged the doubt which a subsequent locator would have entertained at the time whether Johnson might not have been permitted to locate his preemption on any land adjoining his settlement and whether Walden's entry calling for that preemption might be decided to be good and to be placed so as to bind upon it. This doubt, it is said, though now removed, then existed and would have operated on the mind of the subsequent locator.

The force of this argument will not be denied. But it must also be admitted that it applies with equal strength to the course of artificial reasoning which has governed the decisions of the courts of Kentucky and on which the titles of the people of that country depend. Subsequent locators must have doubted in what manner any of these questions would be decided. But having been decided, the certainty which they have introduced is carried back to the time when the location was made, and affirms that location.

It has also been said that it is uncertain which side of Johnson's settlement is the east side, and that in point of fact the upper side, or that furthest

from the blue licks, faces the east more nearly than any other.

However this fact may be, the Court is of opinion that the terms of Johnson's entry designate his east side. His settlement is to lie on the east side of the road. The road, then, in contemplation of the locator, forms the west side, and the side opposite the road must be the east side. The entry must have been so understood by all subsequent locators, and when they call for his east side, the intention to place themselves on the side opposite the road is sufficiently intelligible.

In this as in other difficulties which occur in the course of the inquiry, it is material to observe that the bill does not charge Taylor's entry to be void for uncertainty. On the contrary it impliedly admits the certainty of his location, and charges that his survey does not conform to it. The real question, then, is not whether Taylor shall be surveyed at all, but where he shall be placed.

The entry of Ambrose Walden, then, will lie on the east side of Johnson's settlement, that is, on the side opposite the road, and, this point being established, the manner in which his land is to be surveyed is free from further doubt. It is to be laid off in a square, the center of the base line of which is to be the center of the southeastern line of Johnson's settlement.

The next entry to be considered is that of John Walden. He enters 1,666 2/3 acres joining Ambrose Walden on the south and southeast, and to run east and southeast for quantity.

Although Ambrose Walden has no south side, yet it is sufficiently apparent that his southwest side was intended by the locator. The difficulty arises from the subsequent call of the entry to run east and southeast for quantity. A line drawn east from Ambrose Walden's southwestern corner would pass

through the middle of his land, and a line drawn southeast from the same corner would pass either through or so near his land as to make it almost impossible to suppose that the locator could have intended to make so long and narrow a triangle. The reasonable partiality of Kentucky for rectangular figures must therefore decide the shape of John Walden's land and regulate the manner in which this call of his entry is to be understood. Ambrose Walden's northwestern line must be extended to the south, and a line must be drawn due east from his eastern corner, so that a line parallel to his southeastern line intersecting a line drawn southeast from the extremity of the northwestern line of Ambrose Walden continued shall lay off 1,666 2/3 acres of land in equal quantities on the northern and southeastern sides of Ambrose.

It is not to be disguised that there is much difficulty in placing John Walden, but the Court can perceive no mode of placing him more conformable to the principles which prevail in Kentucky than that which it has adopted.

We are now brought to Taylor's entry.

On 22 May, 1780, John Taylor enters 3,000 acres adjoining John Walden on the north side of Johnson's Fork of licking, on the east and southeast side, running up and down said creek and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler.

There is to John Walden's land no east side, nor any side so nearly east as the southeast side. The word "side" being in the singular number and the same side answering better than any other both parts of the description, the land must lie on the southeast side.

It is also thought to be the more reasonable construction of the entry that the words "on the north side of Johnson's Fork" refer to the situation of

John Walden's land, not to the location of Taylor's. But this is probably not important in the case. Taylor is to lie on the southeast of Walden, to include an improvement made by Drennon and Butler, to run up and down the creek, and north for quantity.

With these calls, it would have been the opinion of the Court that Taylor could not cross the creek had not his entry called for an object on the south side of the creek. That object is the improvement made by Jacob Drennon and Simon Butler.

It has been said that the country was covered with cabins, and that therefore this call was no designation of the land that was located. This argument is correct so far as it is urged to prove that this would not be sufficient as a general description to enable subsequent locators to say in what part of the country this entry was made. Neither would the letters I.T. marked on a tree answer this purpose. But when brought into the neighborhood by other parts of the description, these letters serve to ascertain the beginning of the entry under which the claim adversary to that of Taylor is supported. So Taylor informs subsequent locators of the neighborhood in which his land lies by calling for the southeast side of John Walden's entry, on the north of Johnson's Fork, which is found by a reference to other entries which commence at a point of public notoriety. When brought to the

southeast side of John Walden, he is near the cabin called for, and it does not appear that there was in the neighborhood any other cabin which this entry could possibly be understood to include. This part of the description, then, will carry Taylor to the south side of Johnson's Fork, and if permitted to cross that fork, the favorite figure of the square must be resorted to. Against this it is said that in such a case the rule of Kentucky will carry him no further than barely to include the object of his call. But this rule cannot apply to this case, because it would give a survey the breadth of which would not be one-third of its length.

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It is impossible to look at the general plat returned in this case without feeling a conviction that the surveyor considered that fork which, in the plat, is termed Mud Lick Fork, as Johnson's Fork, and there is no testimony in the cause which shows that when this location was made, that middle stream which runs through Taylor's survey was denominated Johnson's Fork. The finding of the jury, however, that the roads and watercourses are rightly laid down must induce the opinion that this fact was proved to them.

In a case where the mistake is so obvious, the rule which, under circumstances so doubtful relative to place, deprives the person in surveying whose property the mistake has been made of his legal title appears to be a severe rule to be adopted in a court of equity. But such is the situation of land titles in Kentucky that the rule must be inflexible.

Taylor, then, must adjoin John Walden on his southeast side, where that line crosses Johnson's Fork, if it does cross it, and if it does not, then at its southeastern extremity, which will be nearest Johnson's Fork. If a square formed upon the whole line shall contain less than three thousand acres, then two lines are to be extended due north until, with a line running east and west, the quantity of three thousand acres shall be contained in the whole figure. If such a square shall contain more than three thousand acres, then it is to be laid off on so much of Walden's line as to contain the exact quantity.

This being the manner in which it appears to the Court that Taylor's entry ought to be surveyed, it remains to inquire whether, under the principles which govern a court of equity in affording its aid to an equitable against a legal title, the complainants below ought to recover any and if any what, part of the lands surveyed by Taylor, and if any, what terms are to be imposed upon them.

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The entry as well as patent of Taylor is prior to that under which the complainants in the district court assert their title. Of the entries made within their location, therefore, they had that implied notice which gives a court of equity jurisdiction of this cause. They cannot object to the operation of a principle which enables them to come into court. But in addition to this principle, they must be considered as having notice in fact of these locations. The position of the entries of both plaintiffs and defendant is ascertained by calling for certain distances along the same road from the same object. Crutcher and Tibbs, therefore, when they made their location, knew well that they included the Waldens and Taylor, and that their entry could give them no pretensions to the lands previously entered by those persons. If by any inadvertence the Waldens and Taylor have surveyed land to which Crutcher and Tibbs were entitled and have left to Crutcher had Tibbs land to which the Waldens and Taylor were entitled, it would seem to the Court to furnish no equity to Crutcher and Tibbs against the legal title which is held by their adversaries, unless they will submit to the condition of restoring the lands they have gained by the inadvertence of which they complain.

The Court does not liken this inadvertent survey of lands not within the location to withdrawing of the warrant and reentering it in another place. The latter is the act of the mind intentionally abandoning an entry once made; the former is no act of the mind, and so far from evidencing an intention to abandon, discovers an intention to adhere to the appropriation once made. Although their legal effect may be the same, yet they are not the same with a person who has gained by the inadvertence and applies to a court of equity to increase that gain.

Was this, then, a case of the first impression, the Court would strongly incline to the opinion

that Bodley and Hughes ought not to receive a conveyance for the lands within Taylor's survey, and not within his entry, but on the condition of their consenting to convey to him the lands they hold which were within his entry and are not included in his survey. But this is not a case of the first impression. The Court is compelled to believe that the principle is really settled in a manner different from that which this Court would deem correct. It is impossible to say how many titles might be shaken by shaking the principle. The very extraordinary state of land title in that country has compelled its judges, in a series of decisions, to rear up an artificial pile from which no piece can be taken by hands not intimately acquainted with the building without endangering the structure and producing a mischief to those holding under it the extent of which may not be perceived. The rule as adopted must be pursued.

Taylor, then, must be surveyed according to the principles laid down in this decree, and must convey to the plaintiffs below the lands lying within his patent and theirs which were not within his entry.

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