**Holmes Vs. Trout**

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**Court** : US Supreme Court

**Decided On :** 1833

**Appeal No.** : 32 U.S. 171

**Appellant** : Holmes

**Respondent** : Trout

**Judgement** :

Holmes v. Trout - 32 U.S. 171 (1833)
U.S. Supreme Court Holmes v. Trout, 32 U.S. 7 Pet. 171 171 (1833)

**Holmes v. Trout**

**32 U.S. (7 Pet.) 171**

*APPEAL FROM THE CIRCUIT COURT OF THE*

*UNITED STATES FOR THE DISTRICT OF KENTUCKY*

## SYLLABUS

Questions on the validity of certain entries of lands in the State of Kentucky.

A survey itself, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformable to the entry and the entry can be sustained, the call for the survey may support an entry. The boundaries of the survey must be shown. This principle is fully settled by the decisions of the courts of the State of Kentucky.

It has been a settled principle in Kentucky that surplus land does not vitiate an entry, and a survey is held valid if made conformably to such an entry.

The principle is well settled that a junior entry shall limit the survey of a prior entry to its calls. This rule is reasonable and just.

Until an entry be surveyed, a subsequent location must be governed by its calls, and this is the reason why it is essential that every entry shall describe with precision the land designed to be appropriated by it. If the land adjoining to the entry should be covered by a subsequent location, it would be most unjust to sanction a survey of the prior entry beyond its calls, and so as to include a part of the junior entry.

The locator may survey his entry in one or more surveys, or he may, at pleasure, withdraw a part of his entry. When a part of a warrant is withdrawn, the rules of the land office require a memorandum on the margin of the record of the original entry, showing what part of it is withdrawn.

In giving a construction to an entry, the intention of the locator is to be chiefly regarded, the same as the intention of the parties in giving a construction to a contract. If a call be impracticable, it is rejected as surplusage, on the ground that it was made through mistake; but if a call be make for a natural or artificial object, it shall always control mere course and distance. Where there is no object called for to control a rectangular figure, that form shall be given to the survey.

No evidence can be looked into in this Court, which exercises an appellate jurisdiction, that was not before the circuit court, and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying a record, a part of the evidence in the case had been omitted, it might be

certified in obedience to a certiorari, but in such a case it must appear from the record that the evidence was used or offered to the circuit court.

Under the laws of Kentucky, the canceling of a deed does not reinvest the title in the grantor.

Page 32 U. S. 172

In the circuit court, the appellants filed their bill in November, 1815, setting forth a title to 10,000 acres of land derived under an entry made by Edward Voss on 11 October, 1783, upon which patents duly issued, and charging that the defendants were in possession of the said lands, claiming title under entries made subsequent to that of Edward Voss. The bill prayed a discovery, that the defendants might be decreed to convey to the complainants their respective claims, to render possession of the land withheld, and for other and further relief.

After various proceedings in the case, by amended bills and otherwise, from 1815, the circuit court, at May term, 1829, gave the following opinion and decree:

The complainants state in their bill, that "Edward Voss, on the 11th day of October 1783, made, with the surveyor of the proper county the following location: Edward Voss enters 10,000 acres, by virtue of two Treasury warrants, Nos. 8991 and 8990, beginning at the northwest corner of Patton's 8,400 acres survey; thence, with Allen's line, westwardly to the river, and along Robert's line on the east for quantity; also, 5000 acres by virtue of Treasury warrant, No. 8989, beginning at the southwest corner of Patton's 8,400 acres survey, then westwardly with Patton, Pope and Thomas' survey; thence up the river, and on Patton's line on the east, for quantity." That surveys having been duly executed on said entries, the same were assigned to a certain Peyton Short, to whom patents were issued, bearing date the 12th and 14th days of March 1790; that on the 10th day of December 1796, Short conveyed to John Holmes, by deed, his whole claim to the land in controversy, but that by contract, it is now jointly held by the said Holmes and the other complainants; and that the above deed is held for their joint benefit. The complainants further state, that conflicting entries have been made by different

persons, since their location on the same land, and elder patents obtained; and they pray that a conveyance may be decreed to them, on the ground of their prior equity. In their answers,



the defendants deny the equity set forth in the complainants' bill, and, having the elder legal title founded upon valid entries and surveys, they pray that the bill may be dismissed.

Since the commencement of the present term, the complainants have filed an amended bill stating that the whole of the land in contest was purchased for the use and benefit of Holmes, Slater, Caton, and O'Mealy, and that subsequently, by the consent of Caton and Slater, O'Mealy became their trustee; that an agreement was entered into between the complainants and a certain John Breckenridge, deceased, by which he undertook to render certain services for which he was to have one moiety of the land; that the original deed to Holmes, never having been recorded, was handed to said Breckenridge, with other papers relating to the business, and with directions to Short to make a deed to the complainants and Breckenridge; that the said Breckenridge was in possession of the deed to Holmes, and authorized to receive a conveyance from Short to himself, and the complainants agreed with Short to cancel the deed to Holmes, which was done, by delivering it to Short, who cancelled it by erasing his name, and a new deed was made by him to Breckenridge, and to William O'Mealy, as trustee for John Holmes and William Slater, and to High Thompson, as trustee for Richard Caton, bearing date 21 September, 1804. The amended bill further states that Breckenridge departed this life in 1806, before his part of the contract was performed, and that a bill was filed against his heirs by the complainants for a reconveyance of the land; that on the final hearing of this case, the court decreed that, as Breckenridge had but in part performed his contract, the deed should be cancelled as to all the lands within two adverse claims, to-wit, that of the defendant Howard and _____ Williams or Brown, and the complainants were decreed to convey to Breckenridge's heirs one moiety outside of these claims; in pursuance of this decree, deeds were executed. The complainants state that the whole of the land in

controversy is included in John Howard's claim, under which the defendants claim, and is referred to in the deed from Breckenridge's heirs to them, and that since the date of such deed, the equitable title has been vested in them. To the amended bill Jeremiah Trout, Daniel



Trout, William Buchannan, Jacob Overpeck, John Moreland, Walter A. Moreland and William Moreland, defendants, answer, that they, with those under whom they claim, have been in the actual occupancy and peaceable possession of all the land claimed by them, in their former answers, for upwards of twenty years before the filing of the amended bill, and they deny the statements contained in it.

On filing the amended bill, the parties agreed that the suit should progress in the names of the parties to the record and that no advantage should be taken on account of the death of either of the parties since the pendency of the suit, and that the decree should be as valid as if the heirs of any such party were before the court. It was also agreed that John Howard entered on the land in controversy by virtue of his claim of 7,945 1/2 acres, by his tenants, and within the claim of C. Clarke; that the entry was within the boundary of said Clarke, and that Howard's claim wholly covered the claim of Clarke; that this entry was made in the year 1804, and continued without interruption, adverse to the claim of Voss and Short, set up by the complainants, until the year 1813, when Howard, in an action of ejectment, by virtue of Clarke's claim was evicted and possession taken by William Moreland, deceased, a purchaser from Clarke, and that such possession was continued by said Moreland until his death, and that his devisees have remained in the possession adverse to the complainants ever since. It was admitted that Daniel Trout, deceased, in the year 1808, purchased the claim of Daniel and Hite's 600 acres within the tract claimed by complainants, and at that time, by his two sons, Daniel and Jeremiah, entered into the possession, which is still continued; that the defendants, Overpeck and Buchanan, in the year 1818, entered in the possession of the above tract under the said Daniel and Jeremiah, and have resided on it until the present time, all of whose possessions are adverse to the complainants. The grant to Daniel and Hite is admitted to be elder in date than

Howard's or any other interfering claim; Clarke's grant is elder than Howard's, and Short's bears date after Howard's.

As the defendants possess the elder grant, the complainants must rely on their prior equity, and to show



this they endeavor to sustain the entry of Voss, under which they claim. This entry calls to begin at the northwest corner of Patton's 8,400 acres survey, and for Allen and Roberts' line. Patton's entry was made on 26 December, 1782, for 8,400 acres, upon a Treasury warrant, No. 12,311, about two miles up the first branch above the Eighteen-Mile Creek, beginning at a tree marked "J.P.", to run north five miles, then to extend off at right angles for quantity; this entry was surveyed on 20 September, 1783, and calls to begin at a mulberry, elm, and sugar tree marked "J.P.", standing on the bank of the first large creek running into the Ohio, above the Eighteen-Mile Creek, two miles up the said creek. On 11 October, 1783, John Allen entered 1,000 acres, part of a Treasury warrant, No. 14,198, beginning at the northwest corner of Patton's 8,400 acres survey and running with his line south 250 poles, thence down the creek on both sides westwardly for quantity, to be laid off in one or more surveys. Roberts' entry was made on 26 December 1782, the same day Patton's entry was made.

It is argued by the counsel for the defendants that Patton's entry, on which Voss' entry depends, is void for want of certainty and notoriety in its calls. The depositions of several witnesses have been read to sustain this entry. William Meriwether swears that Eighteen-Mile Creek was known previous to the year 1782, and that Patton's Creek is the first one running into the Ohio above Eighteen-Mile Creek except Bell's Spring Branch, which is not much more than a mile in length; that Patton's Creek was so called from the time the above entry was made, and was generally pretty well known by that name as early as October 1783. He does not recollect the year he became acquainted with the tree marked "J.P.", but he thinks, within a year or two after the entry was made he was at the tree, about two miles up Patton's Creek, lacking forty poles, in company with

persons who were about purchasing Patton's entry. The letters "J.P." were very large, and marked on a mulberry tree standing near the creek; that Patton informed him of the entry shortly after it was made, and that he had marked the tree and ran one of the lines before the entry was



made. He states that from the appearance of the tree, he has no doubt of its having been marked at the time, as represented by Patton. He further states he thinks it would be almost impossible for any person to have searched for the tree without finding it after finding the beginning corner of Patton's entry and survey; it would not be difficult, he states, for a subsequent locator to find the northwest corner by tracing the line; that he has traced this line several times to the corner, on the top of a bill, at a sugar tree and two ashes, which were plainly marked. At the beginning corner of Patton's survey, the witness states, there was an appearance of a large encampment, and several trees were marked, some with the letters "J.P." and others with the initials of his own name, and that the trees about the place were much chopped. Benjamin Roberts states that he believes Eighteen-Mile Creek has been generally known since the year 1780, and that he saw it in 1783; that Patton's Creek is the first one of any notoriety running into the Ohio above the Eighteen-Mile Creek, and it was generally known by that name in the spring of the year 1783. He thinks that a good woodsman, by searching up the creek agreeable to the calls of Patton's entry, could have found his beginning corner. Joseph Saunders states that he knew Eighteen-Mile Creek in June, 1780; that Patton's Creek is the first creek of any note above Eighteen-Mile Creek, and its name was derived from the entry of Patton. He states that in May, 1783, Patton showed him a mulberry tree marked "J.P." standing on the bank of Patton's Creek about two miles from the mouth, and said it was his beginning corner; the letters "J.P." were large and appeared to have been marked with a tomahawk, and the witness thinks the tree might have been found by anyone searching for it. Several other witnesses were acquainted with Patton's entry at an early period and with its principal calls, but not until some years after it was made.

No doubt can exist, that the Eighteen-Mile Creek was notorious at the time the entry was made, and that the branch called for is the one known by the name of Patton's Creek; between this creek and the Eighteen-Mile Creek there are one or two small branches, neither of which could be taken for the call in the entry, but it is objected to the entry that the call, "about



two miles up the first branch," is not sufficiently definite to direct a subsequent locator to the marked tree, that the side of the creek on which this tree stands is not designated, nor its distance from the creek, and that, by actual measurement on a straight line from the mouth of the creek, the distance to the tree falls forty poles short of two miles. It is also contended, by the calls of the entry, it would seem to have been the intention of the locator that the body of the land should be about two miles up the creek, rather than that point should constitute his beginning corner. This objection seems not to be well taken; the words of the entry are "James Patton enters 8,400 acres, &c.;, about two miles up the first branch above the Eighteen-Mile Creek, beginning at a tree marked *J.P.,'" and no one, it is believed, could mistake these calls or hesitate to conclude that the tree marked was the beginning corner; from this corner, the entry calls to run five miles north, &c.; The rule which governs in the construction of entries has been long fixed, and if this were not the case, it would obviously result from circumstances. Entries were made at an early day by individuals who were more acquainted with the stratagems of savage warfare than the precision of language; they were better hunters than critics. Entries must be construed by the popular signification of the words used, rather than by the grammatical arrangement of sentences. If the intention of the locator can be satisfactorily ascertained from the calls of his entry, it must be sustained. The call to run up the creek, in popular signification, directs the inquirer to follow the stream; as the Eighteen-Mile Creek is below Patton's Creek, any person beginning his search at that point for the marked tree would trace the Ohio to Patton's Creek, and would naturally seek for the marked tree on the lower side about two miles from its mouth; but it would not be unreasonable to require a search on both sides of the creek. This search would somewhat increase*

*the labor of a subsequent locator, but it would scarcely lessen the probability of finding the object. No witness saw the tree when it was marked, but Meriwether saw it one or two years afterwards, and from the appearance of the letters "J.P.", he seems to have no doubt that they were made at the time Patton represented them to have*

Page 32 U. S. 178

been made. Saunders saw these letters in 1783, and the tree was pointed out to him by Patton, as his beginning corner; this was within five months after the entry was made, several months before the entry of Voss. Several witnesses state that the beginning of Patton's entry could be found, by observing its descriptive calls. The variation of forty poles on a straight line from the distance called for in the entry is not considered very material. The circumstances under which this entry was made would authorize no one to expect greater accuracy; forty poles more or less than the exact distance of two miles is a sufficiently limited range for a subsequent locator.

Under all the facts established, the Court is of opinion that the entry of Patton is shown to possess all the requisites of a valid entry; this entry was surveyed on 20 September, 1783, twenty days before the entry of Voss. Voss' entry calls for the survey of Patton, though it does not appear at that time to have been recorded; the northwest corner of this survey, which is the beginning called for in Voss' entry, could easily be found by tracing the line from Patton's beginning corner; any variation in the length of this line, from the calls of the entry, cannot be material as to the defendant's entry, as the distance is controlled by the marked corner proved to have been made. The other calls in the entry of Voss are believed to be sufficiently certain to enable the holder of a warrant to locate the adjacent land, and that is a substantial compliance with the requisitions of the land law.

The other entry of Voss for 5,000 acres, which calls to begin at the southwest corner of Patton's 8,400-acre survey, contains all the requisites of a valid entry. To show a title from the patentee, a deed, bearing date 10 December, 1796, from him to John Holmes for 13,500 acres is given in evidence. The signature of the grantor

in this deed has been erased, apparently with the view of canceling it, but it is contended that if such an inference can arise from the erasure, it does not reinvest the fee in the grantor; that this can only be done by the solemnities of a deed duly executed. One of the subscribing witnesses to this deed, whose deposition is introduced to prove its execution states that he was written

Page 32 U. S. 179

to by Short to endeavor to make sales of the land for him; that upon being told by Holmes what was the best he could do with it, the witness advised him to sell it and told him that he thought Short would be satisfied, and the witness understood the land was sold. The witness states that from his letter book this deed appears to have been forwarded by him to Holmes on the 3 January, 1797. A letter from Short to Holmes, dated 29 September, 1794, in which he proposes to sell the lands at a certain price is read in evidence. This letter, however, treats Holmes as an agent to sell the land, and not in the light of a purchaser. An obligation signed by Short, dated 10 December, 1796, is also in evidence. In this obligation Short states that he

"has executed a deed to Holmes of that date for two certain tracts of land containing 13,500 acres, which said deed is deposited in the hands of W. Morton, of Lexington,"

and that should Holmes be dissatisfied with the warranty given in said deed, and it is not in pursuance of the *meaning and intention* of the above letter, he agrees to enter into such an instrument of writing. From the whole of this evidence it would seem to authorize the conclusion that the deed executed to Holmes was only designed to enable him to sell and make titles to the lands for the benefit of Short, but if any doubt remained on the subject, it is removed by a subsequent deed executed by Short for the same lands to Holmes and others, without any reference to the former deed, and by the amended bill of the complainants, who state that the first deed was cancelled by agreement between Breckenridge and Short and that they claim title under the one subsequently executed. The first deed, though absolute upon its face, was intended to make Holmes a trustee for the use of

Short, and the Court has no difficulty under the circumstances in considering it a nullity so far as it relates to the present controversy; this deed has never been recorded, nor does it seem to have been treated by the parties as a valid instrument. There is no satisfactory proof of its delivery. From all the facts, it appears most probable that it was forwarded to Breckenridge by Caton or some other person, and that it was never in the possession of Holmes nor intended to be delivered to him. By a letter, dated 13

Page 32 U. S. 180

January 1803, Holmes, by his trustee, O'Mealy, requested, W. Morton to surrender the deed to Breckenridge, who was authorized to receive a conveyance of the land from Short. The complainants must rely upon their conveyance from Short, dated 21 September, 1804. This deed conveys to John O'Mealy, trustee for John Holmes and William Slater, and to H. Thompson, trustee of Richard Caton, and to John Breckenridge, the tracts of land set forth in the bill.

From the amended bill it appears that Breckenridge was entitled to one moiety of the entire claim as a compensation for certain services to be rendered by him, that he died before the services were completed, and that the complainants filed their bill against his heirs and obtained a decree that cancelled the deed to certain parts of the land, which, in pursuance of such decree, were conveyed by the heirs of Breckenridge to the complainants. A question is here made by the defendants' counsel whether the title set up by the complainants in their amended bill, being different from that stated in the original bill, is not in fact the commencement of a new suit, and consequently gives to the defendants a right to insist on the statute of limitations in bar to the complainants' right of recovery. If such shall be the effect of the title set forth in the amended bill, it is agreed between the parties that advantage may be taken of it. In the first bill filed, the title is stated to have been derived from Short, the patentee to Holmes, with whom contracts were made by the other complainants for certain interests in the land. The amended bill sets up a title by deed from Short to John O'Mealy, trustee for John Holmes and William Slater, and to H. Thompson, as trustee for Richard Caton, and to John Breckenridge.

Between these derivations of title, in law there is an essential variation, but not in equity. The equitable interests of the parties may be the same under both deeds. In the first bill, the complainants state that although the title was acquired and is held by Holmes from Short, yet by contracts with said Holmes, the estate is their joint property, and that Holmes held it for their use; such an alteration in this bill as to state the deed to have been made by Short to the complainants instead of to Holmes does not change the complainants' equity, and cannot be

Page 32 U. S. 181

considered as the institution of a new suit. The case is, however, different so far as it respects the interest of the complainants under the decree against the heirs of Breckenridge. A conveyance from them to the complainants of a part of the land conveyed by Short to their ancestor was decreed on the ground that the consideration had in part failed. Breckenridge died before the services he agreed to render were fully performed. In the deed to him there was no reservation or condition. It was only by the aid of a court of chancery that the right of the complainants would be established and enforced against a part of the land. Until the decree which cancelled the deed was pronounced, the complainants possessed no claim in law or equity to the land in question which could be rendered effective against the claim of the defendants. To the decree, therefore, must the complainants look for the origin of their claim to the land. This decree was obtained in November, 1822, and for the first time a claim is set up under it in the amended bill.

Under the agreement of the parties, this part of the bill must be considered as the substitution of a distinct right essentially different from any pretense of claim contained in the first bill, and consequently cannot be considered in a more favorable point of view, as to the statute of limitations, than the assertion of the same right in a bill filed at the present term. It will follow, therefore, that the title to the land conveyed to the complainants, under the decree against the heirs of Breckenridge, so far as it covers the land which has been occupied by the defendants and those under whom they claim adversely to the complainants for twenty years before the filing of the amended bill, in law and equity is vested in the

defendants. The balance of the tract claimed by the defendants within the entry of Voss must be relinquished to the complainants, as they hold the prior equity. The interfering claims will limit Voss to the calls of his entry, but the surveys are not protracted in such a manner as to enable the court satisfactorily to designate the boundaries of the parties as fixed by this decision. Unless, therefore, the parties, from their local knowledge of the land, shall be able to lay down the interferences, it may be necessary to direct a survey.

Page 32 U. S. 182

"And afterwards, to-wit, on a subsequent day of the term and year last aforesaid, to-wit, the May term, 1829, the court orders and decrees that Jonathan Taylor, Surveyor of Oldham County, do lay off the land in controversy by beginning at James Patton's northwest corner, designated on the connected plat, and lay down James Allen's entry of 1,000 acres, running from said corner with patent line, south 250 poles, and at right angles for quantity, and also lay down said entry by running from the base line, so that the lower line will cross Barebone Creek the same distance that the base line crosses it; from Patton's northwest corner of said Allen with said lines, parallel to the several courses of the creek, within the said Allen's survey, when so made; and if Barebone will not be included within the survey of Allen when so made, the survey will be so varied as to make the creek pass out of the lower end of the survey, as near to the point of distance that strikes the upper line as the general course of the stream within the survey will admit, to include both sides of the stream. That he then lay down John Roberts' entry by running the first line thereof six miles parallel to the general course of the Ohio River from where a due west line from Patton's corner to the river will strike it to a point six miles on said river, when reduced to a straight line; that he then lay off Voss' entry of 10,000 acres by first running a due west line to the river, and, on the course of Roberts' line, until the quantity of 10,000 acres of land is obtained, and then the course of Allen's west line, when laid down parallel to Barebone, until its strikes the river; and then up the river, and with the course of Roberts' line as before directed. And that he then ascertain by metes and bounds the interference between the complainants' entry, when surveyed in each position, and the

defendants' surveys. And the court does further order and direct that the surveyor aforesaid survey and lay down the said claims in any or additional positions which either party may direct and make report to the court to enable the court to make a final decree."

Afterwards, at May term, 1830, of the circuit court, the following final decree was given by the court:

"The surveyor having made his report in pursuance to the

Page 32 U. S. 183

interlocutory decree of this Court, the court does decree and order that the defendants, John Moreland, William Moreland, and Walter Moreland, convey to the complainants, with special warranty, one-half or moiety of so much of Christopher Clarke's survey of 400 acres as is included within the line designated on the surveyor's report by the letter C, and figure 2, and the original lines of Clarke's survey below or south of said line. And the court does further decree and order that the said defendants and complainants make partition of the same and that the said Jonathan Taylor, the surveyor, divides and partitions the same as nearly equal in quantity and value as is practicable, and that he report to this court for its approval the metes and bounds of the moiety allotted to the complainants. And the court does further decree and order that the said defendants, John Moreland, William Moreland, and Walter Moreland, pay to the complainants their costs herein expended. And the court does decree and order that so much of the bill as seeks redress against the defendants within the claim of Daniel and Hite, to-wit, Daniel Trout, Jeremiah Trout, Jacob Overpeck, and William Buchannan be dismissed, and that the complainants pay to them their costs. And the court do order and decree, that the suit as to the other defendants named in the bill be continued."

From this decree the complainants appealed to this Court.

Page 32 U. S. 202

MR. JUSTICE Mc LEAN delivered the opinion of the Court.

This appeal is prosecuted by the complainants, to reverse a decree of the Circuit Court of Kentucky. The original bill was filed by John Holmes, Michael O'Mealy, Richard Caton, Hugh Thompson, and William Slater, who set up a title under the following entry:

"Edward Voss enters 10,000 acres by virtue of two Treasury warrants, Nos. 8991 and 8990, beginning at the northwest corner of Patton's 8,400 acres survey; thence, with Allen's line, westwardly to the river and along Roberts' line to the east for quantity; . . . also 5000 acres by virtue of Treasury warrant No. 8989, beginning at the southwest corner of Patton's 8,400 acres survey; then westwardly with Patton, Pope, and Thompson's survey; thence up the river and on Patton's line on the east for quantity."

The complainants represent that surveys having been executed on these entries, they were assigned to Peyton Short, who obtained that patents, bearing date 12 and 16 March, 1790. That Short afterwards conveyed both tracts to the complainant, John Holmes, who, by virtue of certain contracts, holds the land in trust for the other complainants, all the complainants having a joint interest in it. The entries of Voss are alleged to be valid, and also the surveys and patents. The defendants are represented to be in possession of a part of these tracts of land under grants older than the complainants', but which were founded on entries made subsequent to the complainants', and they pray that the defendants may be decreed to convey their respective rights to the complainants.



In May term, 1829, the complainants filed an amended bill in which they state that the land in contest was purchased for the use and benefit of Holmes, Slater, Caton, and O'Mealy. That by subsequent transactions, O'Mealy became the trustee of Slater and Caton, and that an agreement was entered into between the complainants and a certain John Breckenridge by which he undertook to render certain services for which he was to have one moiety of the land, and the original

deed to Holmes, never having been recorded, was by the complainants handed to Breckenridge with other papers which related to the business, accompanied with directions to Short to make another deed, and full powers, as they are advised, were given by them to Breckenridge to take a deed from Short vesting the title to one-half of the lands in himself and the other in the complainants. That Breckenridge having obtained possession of the deed made to Holmes, being vested in the power, did agree with Short to cancel that deed, and it was accordingly cancelled. And the complainants represent that O'Mealy, trustee for John Holmes and William Slater, and Hugh Thompson, trustee for Richard Caton, did, on 21 September, 1804, receive and take a deed to Breckenridge and themselves as above stated, and did deliver over the deed of Holmes to Short, who cancelled it by erasing his name therefrom. It is further stated in the amended bill that Breckenridge died before the services which constituted the consideration on which a moiety of the land was conveyed to him, were fully rendered, and on a bill being filed by the complainants against Breckenridge's heirs, they were decreed to convey to the complainants a certain part of their interest in the land. This decree was entered at November term 1822.

In answer to the amended bill, the defendants, Jeremiah Trout, Daniel Trout, William Buchannan, Jacob Overpeck, John Moreland, Walter A. Moreland, allege, that they had been in the actual occupancy and peaceable possession of all the land claimed by them for upwards of twenty years before the amended bill was filed.

It was agreed between the parties that John Howard entered on the land in controversy by virtue of his claim of

Page 32 U. S. 204

7,945 1/2 acres, by his tenants, within the claim of C. Clarke; that the entry was within the boundary of said Clarke, and that Howard's claim wholly covered the claim of Clarke; that this entry into the possession was made in the year 1804, and continued, without interruption, adverse to the claim of Voss and Short, and those who claim under them, until the year 1813, when William Moreland, a purchaser

from Clarke, brought an action of ejectment against Howard and evicted him. That possession was taken by Moreland, which has been held by him and his devisees ever since. It was admitted that Daniel Trout, in the year 1808, purchased the claim of Daniel and Hite's 600 acres within complainants' claim, and that Daniel and Jeremiah Trout entered into the possession under such purchase, and ever since have held, by themselves and their grantees, Overpeck and Buchannan, adversely to the complainants.

As the entry of Voss, under which the complainants claim, was made before the entries under which the defendants claim, the complainants have a prior equity, if their entry can be sustained. The validity of this entry, therefore, is the first point for examination. It calls to begin at the northwest corner of Patton's 8,400 acres survey, and for Allen and Roberts' line. Patton's entry was made on 26 December, 1782, for 8,400 acres, upon a Treasury warrant, No. 12,311, about two miles up the first branch above the Eighteen-Mile Creek, beginning at a tree marked "J.P.", to run north five miles, then to extend off at right angles for quantity; this entry was surveyed on 20 September, 1783, and calls to begin at a mulberry, elm, and sugar tree, marked "J.P.", standing on the bank of the first large creek running into the Ohio above the Eighteen-Mile Creek, two miles up the said creek. On 11 October, 1783, John Allen entered 1,000 acres, part of a Treasury warrant, No. 14,198, beginning at the northwest corner of Patton's 8,400 acres survey, and running with his line south, 250 poles, thence down the creek on both sides westwardly for quantity, to be laid off in one or more surveys.



Roberts' entry bears date on 26 December, 1782, the same day Patton's entry was made.

As Voss' entry can only be sustained by sustaining the survey and entry of Patton, it will be proper in the first place to inquire into their validity.

"To support the entry of Patton, several witnesses were examined. Meriwether Lewis states that Eighteen-Mile Creek, one of the descriptive calls in this entry,

was known previous to the year 1782, and that Patton's Creek is the first one falling into the Ohio above Eighteen-Mile Creek, except Bell's Spring Branch, which is not much more than a mile in length; that Patton's Creek was so called from the time the above entry was made, and was generally pretty well known by that name, as early as October, 1783. He does not recollect the year he became acquainted with the tree marked 'J.P.', but he thinks, within a year or two after the entry was made, he was at the tree marked, which stood two miles up Patton's Creek, lacking forty poles. The letters 'J.P.' were very large, and marked on a mulberry tree standing near the creek; that Patton informed him of the entry, shortly after it was made, and that he had marked the tree, and run one of the lines before he made the entry. From the appearance of the letters on the tree when he first saw it, the witness has no doubt that it was marked at the time represented by Patton. He was enabled to find the marked tree, without difficulty, from Patton's description of it, and he thinks that any subsequent locator could not have failed to find it. Having found the beginning corner of Patton's survey, the witness says, his northwest corner, which is called for in Voss' entry, could be found by tracing the line of the survey to that corner."

Joseph Saunders, another witness, states that in the year 1780, Eighteen-Mile Creek was well known, and that Patton's Creek is the first branch or creek of any note which falls into the Ohio above Eighteen-Mile Creek. In May, 1783, Patton showed him a mulberry tree marked "J.P.", standing on the north bank of Patton's Creek, about two miles from the mouth of said creek, which he said was the beginning corner of his entry. As the letters were large, and the tree stood on the



bank of the creek, the witness thinks it might have been found by anyone in search of it.

Several other witnesses prove that Eighteen-Mile Creek was well known before Patton's entry, and that Patton's Creek is the first considerable stream which falls into the Ohio, above Eighteen-Mile Creek, and that after Patton's entry, the creek was called by his name, but they were not acquainted with his entry and survey,

until some years after they were made.

It is first objected to this entry that in the case of *Meriwether v. Davidge,* 2 Litt. 38, the Court of Appeals of Kentucky decided it was invalid. Its descriptive as well as locative calls are not sufficient, it is urged, to lead an inquirer to the beginning called for, and that a marked tree is not a good call, though the calls which lead to it designate objects of notoriety, unless it be proved that the tree was marked at the time the entry bears date, or prior to that time. And, as there is no such proof in the present case, the entry must be considered void. These and other arguments are used against the validity of this entry.

As regards the decision of the Court of Appeals referred to, it may be proper to remark that it was made on a different state of facts from that which is proved in the present case. Meriwether Lewis, who was a party in that cause, could not, of course, be a witness, and on examining his deposition, it will be seen that he states several important facts respecting the entry.

The decision of the Court of Appeals was conclusive upon the rights of the litigant parties in all courts; but the inquiry into the validity of Patton's entry is only collateral to the merits of the present case, and a decision upon it, under such circumstances, can in no respect affect the rights which were settled in the case of *Meriwether v. Davidge.* This consideration, and the variance of the proof in that cause from the evidence in this, leave no doubt that the court should regard the validity of this entry as open for investigation in the present cause.

From the evidence, it is clear, that Eighteen-Mile Creek was publicly known before Patton's entry, and that the first branch



above Eighteen-Mile Creek, which suits the call, was the one on which the entry was made. A person, therefore, desirous of finding the beginning of this entry, could have no difficult in designating Patton's Creek. He must then search for the marked tree about two miles up this creek.

But it is objected that the entry does not state how near the creek the marked tree stands, nor on which side of it, and that it falls short of two miles, on a straight line, forty poles. The tree stands near the bank of the creek, as appears from the evidence, and the letters marked being large, could easily be seen. The variation of forty poles from the distance called for, was as little as could reasonably be expected, when the circumstances under which this entry was made are considered, and to look for the marked tree, within the range of forty poles, both up and down the creek, from the exact distance of two miles, would not require unreasonable labor of a subsequent locator. Nor does it seem to be unreasonable, that he should examine on both sides of the creek. Several of the witnesses say, from the calls in the entry, Patton's beginning corner could have been found without difficulty. This was all that the law required.

But it is said, that there is no proof, at what time the tree was marked. Lewis said, it was within a year or two after the entry purports to have been made; and he has no doubt, from the appearance of the marks, that they were made as early as the date of the entry. Experience enables a person to judge with great accuracy how long marks have been made, from their general appearance. In May 1783, only six months after the entry, Saunders saw the marked tree. From these facts, and other circumstances of the case, the evidence established, at least *prima facie,* that the tree called for was marked when the entry was made. If other trees were shown, bearing the same marks, at other places on the creek, it might create so great an uncertainty as to invalidate this entry; but no such facts are proved in the case.

After an attentive examination of the evidence in relation to this entry, the conclusion in favor of its validity may be safely drawn. In coming to this result, no established principle of law is controverted, nor any sound process of reasoning.

Page 32 U. S. 208

But it is contended that if the beginning of Patton's entry be established, it does not follow that the entry of Voss is good, as it calls for the northwest corner of Patton's

survey, which is not the beginning corner, and that a survey which has not been recorded, cannot support an entry. Voss made his entry about twenty days after Patton's survey was executed, and before it was recorded; but the call for the survey necessarily includes the entry, if the survey has been made in pursuance of the entry. It must be admitted that a survey, of itself, which had not acquired notoriety, is not a good call for an entry. But when the survey has been made conformable to the entry, and the entry can be sustained, as in the case of Patton, the call for the survey may support an entry. The boundaries for the survey must be shown, as has been done in the present case. *Johnson v. Marshall,* 4 Bibb 133; *Clay v. McKinney,* 3 A. K. Marsh. 576; also, the same book, 573, 577, 190.

Patton calls to run from his beginning corner, north five miles, and in making his survey, he ran near six. This shows, it is contended, that the entry of Patton has not been accurately surveyed, and consequently, Voss' entry must fail.

It has been long a settled principle in Kentucky, that surplus land in a survey does not vitiate it; and such a survey is held to have been made conformable to entry. The inquiry is not, therefore, whether the line of Patton, from the beginning corner to his northwest corner, which is called for by Voss, and the other lines of Patton, are the exact distances designated; but whether they were so made as to conform to his entry, within the established rule on the subject. Of this there can exist no doubt.

Anyone desirous of finding the beginning corner of Voss, having found the tree marked "J.P.", would trace the line running north to the corner called for by Voss. This he could have no difficulty in finding, although this line is longer than called for in Patton's entry.

That Patton's survey was made before the entry of Voss, appears from the date of the survey and other facts in the case.

From these considerations, the Court think that the complainants have sustained the entry under which they claim.

In the further examination of the case, it will be necessary to inquire whether the title set up by the complainants, under the deed executed by Short in 1796, or the one he executed to the complainants and Breckenridge in 1804, shall be held valid. Both deeds are for the same tract of land, and the complainants in this Court earnestly contend that their title under the deed executed in 1796, vests in them a good legal title. From the circumstances under which this deed was executed, and the subsequent proceedings in regard to it, as set forth in the amended bill, the circuit court held this deed to be null and void. With the view to establish the validity of this deed, the complainants alleged a diminution of the record, and this Court, at the present term, awarded a certiorari, directing the record of the suit in chancery by the complainants against Short and the heirs of Breckenridge to be certified, on the ground, that it is supposed to have been made a part of the record in the present case. That suit was brought by the complainants in the circuit court, to procure a reconveyance from the heirs of Breckenridge, of one moiety of the land in controversy, which had been conveyed to their ancestor by Short, under the deed of 21 September, 1804, on the ground, that he had died before the professional services, which formed the consideration of the grant, were performed. On the final hearing of this case, the court decreed, that the defendants should release a part of the land to the complainants, in pursuance of which deeds were executed.

On the hearing, several depositions and letters were read, tending to show, that the deed from Short to Holmes in 1796, was duly executed. A part of this evidence seems to have been extracted from this record, and used on the final hearing in the circuit court of the cause now under examination. This evidence has been certified up with the record, as forming a part of the case, but it is alleged that, as in the amended bill, the decree, and the deeds made in pursuance of it, in the case against the heirs of Breckenridge, were made a part of it, and as in the opinion of the court, there is a reference to the proceedings in that case, they form a part of the record in the suit now before the court. The decree and the deeds in that suit, which were made a

part of the amended bill, were incorporated into the record by the court below, and undoubtedly form a part of it; but it cannot be admitted that the evidence in that case, except so far as it was extracted and used in the circuit court, is admissible in this case. That suit was between different parties, and the points presented for the action of the court were different. No evidence can be looked into in this Court, which exercises an appellate jurisdiction, that was not before the circuit court, and the evidence certified with the record must be considered here as the only evidence before the court below. If, in certifying the record, a part of the evidence in the case had been omitted, it might be certified in obedience to a certiorari; but in such case it must appear from the record, that the evidence was used, or offered to the circuit court. It is to be regretted that on the hearing in the court below, any evidence was omitted which is deemed material in the case, but it is now too late to remedy the omission.

To prove the execution of the deed by Short to Holmes, in 1796, the deposition of William Moreton, one of the subscribing witnesses, was read. He proves his own signature, and also the signatures of James Russell and Francis Jones, who were also subscribing witnesses, and he proves the signature of the grantor, although a stroke of the pen is made over it. The witness further states, that he was written to by Mr. Short, to endeavor to make sales of lands for him, which he did not do; but on being asked "by John Holmes, what was the best he could do with the land, he advised him to sell, and told him, he thought Short would be satisfied." "That he understood the lands were sold, and the papers, or a part of them, between Short and Holmes in relation to the sales, were sent to him, as he believes, to close the business with Short. On the examination of his letter-book, he finds a copy of a letter to Mr. John Holmes, under date of January 3d, 1797, on which day, he forwarded to him, by Mr. Hughes, enclosed in said letter, the above deed."

On 10 January, 1803, Holmes wrote to Moreton from Baltimore, and says

"The lands you sold on account of Mr. Short were held by Thompson, Mr. Caton and myself. These gentlemen will correspond with you respecting them, to which

you will please to attend. I will thank you to do everything in your power to get the necessary title papers, &c.;, for my proportion; Mr. O'Mealy, my trustee, has the direction, who will direct you as it respects me."

Mr. Caton wrote to Moreton, it is presumed, at the same time, that the interest he had in the lands jointly, he sometime before transferred to William Slater, of Baltimore, who would write to him in conjunction with Mr. Thompson and Mr. O'Mealy, Mr. Holmes' trustee.

And on 13 January, 1803, Mr. O'Mealy, as trustee for John Holmes, William Slater and H. Thompson, wrote to Moreton enclosing the above letters, and they say

"The annexed letters from Holmes and Mr. Caton inform you of our being the proprietors and legal representatives of the land bought of Short, and heretofore held by Mr. Holmes, amounting, we believe, to 14,500 acres. By an agreement with Mr. Breckenridge, your senator in Congress, he has undertaken to procure us a good title, and to effect a sale of the lands. We therefore request that you will surrender into his hands all the papers and documents you may have relating to them, that the title may be vested in him by Short and yourself, and by this authority we require yourself, Mr. Short, and all others concerned to consider Mr. Breckenridge as our assignee for the lands in question, subject to the agreements entered into by Mr. Breckenridge and us."

The papers surrendered to Breckenridge in pursuance of this letter, were, "a copy of a letter from Peyton Short to John Holmes, dated Richmond, 29 September, 1794." "An original letter from Peyton Short to Mr. William Moreton, dated Woodford, 2 April, 1795." Also

"a copy of a paper, dated Baltimore, 9 May 1795, addressed to Mr. John Holmes, and signed by William Moreton, attorney for Peyton Short, respecting the conveyance of 14,000 acres of land,"

but these papers were not copied into the record, and there is no proof that they were used as evidence on the hearing in the circuit court.

From this evidence, without reference to the facts stated in the amended bill, it would be difficult to come to a satisfactory



conclusion, as regards the execution of the deed in 1796. There can be no doubt, from the deposition of Moreton, that it was signed by Short, and it is probable that it was forwarded to Holmes, as stated in Moreton's deposition; but there is no evidence of its having been received by him, or that he treated it as a valid instrument. It would seem from the letter of Holmes, dated 10 January, 1803, that he was not at that time in possession of this deed, for he requests Moreton "to do everything in his power to get the necessary title-papers," &c.; And the memorandum of the paper delivered to Breckenridge, dated 9 May, 1795, which was addressed to Holmes, and signed by Moreton, as attorney for Short, and which respected the conveyance of 14,000 acres of land, could not have referred to an absolute sale of the land to Holmes, it would seem, as Moreton states in his deposition that he did not sell to him. But even admitting that in this respect the memory of Moreton is incorrect, and that, as attorney of Short, he did sell the land to Holmes, does it not appear probable from the deposition of Moreton that the conveyance to Holmes was made with the view of enabling him to dispose of the land for the benefit of Short? And if this were the case whether Holmes first sold the land to his co-complainants, retaining an interest in it himself, or became interested in it by any other means, it does not appear that he was ever actually in possession of the deed or claimed title under it. If strong doubts rested upon this part of the case, a reference to the amended bill would dispel them. But the facts there alleged, it is insisted, were stated through the mistake of counsel, and that the rights of the complainants ought not, therefore, to be prejudiced by them.

On such an allegation, the court cannot disregard the case which the complainants have made in their bill. They allege expressly, that the deed executed by Short to Holmes, never having been recorded, was delivered up and cancelled by those who had full powers on the subject, and that another deed was executed by Short, upon proper authority, vesting the fee to one moiety of the land in Breckenridge, and the other in the complainants. And by reference to the decree, in the

case against the heirs of Breckenridge, it appears, that this deed was treated as a valid instrument, as the heirs were required to convey a part of the land held under it to the complainants.

The principle is admitted, that the mere canceling of a deed does not reinvest the title in the grantor, under the laws of Kentucky, but under the circumstances of this case, the Court is clear that the deed to Holmes must be considered as a nullity. It has been so treated by the parties themselves, not only, it would seem, by the decree against the heirs of Breckenridge, but by the express allegations of the amended bill. If, therefore, it were proved that this deed had been delivered to Holmes, or was found among his papers, after his assignment, the court could not hold it valid in opposition to the acts and allegations of the complainants. The conveyance may have been made with the sole view of enabling Holmes to convey to others who had purchased, and a different arrangement being made, as the deed had not been recorded, and Holmes not having acted under it, it was probably surrendered, with all other papers relating to the land, to Breckenridge, by those who had full power to do so, as stated in the amended bill, on which surrender Short executed the deed to the complainants and Breckenridge. Whatever may have been the facts in regard to the delivery of the deed to Holmes and its surrender, this Court have no difficulty in treating it as a void instrument, under all the circumstances of the case.

In this view of the facts, the complainants must rest their legal title to the land in controversy on the deed executed in 1804, agreeable to the case made in their amended bill. Whatever equitable claim the complainants may have had to this land, the deed to Breckenridge conveyed one moiety of it to him, and the next point of inquiry is whether the decree obtained against the heirs of Breckenridge, and the conveyances executed in pursuance of it, as set forth in the amended bill, must be considered as setting up a new right, so as to give to a part of the defendants the benefit of the statute of limitations which they plead.

The conveyance was executed to Breckenridge, on the consideration of services to be rendered in establishing the title to

Page 32 U. S. 214

the land. These services were only rendered in part, before the decease of Breckenridge, and on that ground, the court decreed that his heirs, to whom the land descended, should convey to the plaintiffs a part of the land.

Before the conveyances under this decree, the complainants could not be considered as having any claim to the land conveyed to Breckenridge, more than they would have had, if the contract had been to pay money instead of services, and he had failed in paying a part of the amount. In such a case, the complainants might have asked a rescission of the contract, except for so much of the land as had been paid for. Or they might have asked a specific execution of the contract, or have compelled the payment of the residue of the consideration, by an action at law. But until the complainants had made their election to proceed against the land, and had, through the decree of a court of chancery, obtained a conveyance of it, they possessed no specific right to the land, which they could enforce, either in law or equity, against persons in possession under an adverse claim. It therefore follows that the title set up in the amended bill, under the decree against the heir of Breckenridge, is a new right and must be considered as having been first asserted by the amended bill, and as this bill was filed in May term, 1829, the statute of limitations will constitute a good bar, so far as the right under the decree is asserted against the defendants, who have held adversely, twenty years or upwards. It is true the complainants are nonresidents, but so far as the land obtained by the decree against the heirs of Breckenridge is concerned, the statute had begun to run before the decree, and that proceeding does not arrest it.

The survey of Voss was made for 8,500 acres on 16 February, 1789, and the patent was issued to Short, as the assignee of Voss, on 16 March, 1790, for 8,500 acres. In running the lines of the survey, which purports to appropriate only 8,500 acres of the entry, they were made to include a large surplus of land, beyond the calls of the entry. But before this survey was executed, several entries were made,

under which a part of the defendants claim, and which are embraced in the survey. It becomes, therefore, necessary to determine between these conflicting rights.

The principle is well settled that a junior entry shall limit the survey of a prior entry to its calls. This rule is reasonable and just. Until an entry is surveyed, a subsequent locator must be governed by its calls, and this is the reason why it is essential that every entry shall describe, with precision, the land designed to be appropriated by it. If the land adjoining to the entry should be covered by a subsequent location, it would be most unjust, to sanction a survey of the prior entry, beyond its calls, and so as to include a part of the junior entry. This principle is not contested by the complainants, but they deny its application to the case under consideration. They insist that the designation of the number of acres in the survey, below the amount called for in the entry, was a mistake of the surveyor. That it was the intention of Voss to survey his entire entry, as is evidenced by the number of acres actually included in the survey. And the well settled rule is relied on, that surplus land will not vitiate a survey.

The intention of the surveyor can only be known by his official acts, and a resort to these, in the present case, will show that he intended only to survey 8,500 acres of the 10,000 acres entry. It is true, the lines include a very large surplus; but this, according to the rule stated, does not render the survey void. The locator may survey his entry into one or more surveys, or he may, at pleasure, withdraw a part of his entry. Where a part of a warrant is withdrawn, the rules of the land office require a memorandum on the margin of the record of the original entry, showing what part of it is withdrawn. It does not appear that any record of a withdrawal of a part of Voss' entry was made, and from this fact it is argued that none was intended to be withdrawn. The question is not exclusively one of intention, nor whether any part of this warrant has been withdrawn. If a withdrawal appeared upon the record, it would be conclusive, but must not the right to withdraw 1,500 acres of the entry be equally as conclusive as if it had been done? And is not this

right incontrovertibly established, by the fact that only 8,500 acres of the original entry have been surveyed and patented?

If a mistake was made by the surveyor, why was it not corrected before the emanation of the grant or at some subsequent period? This might have been done at any time by the holder of the claim. Whatever may be the fact in regard to a mistake of the surveyor, this Court cannot correct it; nor does it prevent the complainants from withdrawing 1,500 acres of the entry and making a location elsewhere, or perhaps from still executing the survey for this quantity under the original entry. If in the latter case the right would be barred by the statute of limitations, or in the former it would be ineffectual, from the lapse of time or the want of vacant land, the loss is chargeable to the negligence of the complainants and those under whom they claim.

From this construction of the survey it follows that the right asserted under it must be limited by the valid entries under which a part of the defendants claim to the calls of the entry which shall cover the quantity of acres that the surveyor purported to survey. The same construction must be given to the survey as if it had been made on an entry for 8,500 acres, which, by subsequent locations, was limited strictly to its calls.

As the line of Allen is called for as one of the boundaries of Voss' entry, it is necessary to give a construction to Allen's entry, and ascertain where this line should be established. Allen's entry was not surveyed, at the time Voss made his location. This entry call to

"begin at the northwest corner of Patton's 8,400 acres survey, and to run, with his line, south 250 poles, thence down the creek on both sides for quantity; to be laid off in one more surveys."

The circuit court directed the survey of Allen's entry to be so made, from the base line called for, as that the lines shall include Barebone Creek, and be parallel to its several courses, &c.;

It appears from the survey executed in pursuance of this

construction of Allen's entry, that near where the creek falls into the Ohio River, there is a bend in it which renders it impracticable to include the mouth of the creek in the survey; but, with the exception of this bend, the creek is included. As it is impracticable to include the mouth of this creek in the survey, it is insisted by the complainants' counsel, that this survey of the entry is incorrectly made, and that the court should have directed it to be made, by running at right angles from the baseline for quantity.

In support of this position, several authorities have been cited. In the case of *Preeble v. Vanhoozer,* 2 Bibb 120, the court says,

"That the call to run eastwardly is an indefinite expression, signifying on which side of the base line the land is to lie, and that a rectangular figure is not to be departed from unless the calls of the entry are incompatible with that figure."

But in the same case, the entry called to include an improvement, and the court decided, that the length of the given base and the call to include the improvement being incompatible, the former must yield, so far as necessary, to comply with the latter. In Hardin 208, the construction of an entry is given by the Court of Appeals of Kentucky. They say, that in the construction of entries, it is difficult to lay down general rules that will not necessarily admit of many exceptions. Each case must frequently depend upon its own peculiar circumstances; but it is evident that every entry itself must be resorted to for discovering the locator's intention, in construing which, the whole entry, like other writings, should be taken together.

"But if, from a fair and reasonable exposition of the entry, a call appears to have been made through mistake, and is repugnant to the locator's intention, it ought to be rejected, the court says, as surplusage, and not suffered to vitiate the whole entry. Therefore, they say, the object called for should not be so repugnant, as to be incapable of misleading a subsequent inquirer with ordinary caution. . . . It should be practicable to comply with the call; and in general it should be a tangible object, either natural or artificial, not a mere ideal one."

The court also says that a certain line should be run southwest,

"not only because they conceive the locator's intention sufficiently manifest, but because they esteem it a

Page 32 U. S. 218

good rule that the lines of every survey should be as nearly parallel to each other, and a nearly at right angles, as the calls of the entry will admit, and when not controlled by such calls as evidently show the locator's intention to be otherwise, the court will give its calls this construction, as being the most reasonable, and the least subject to exception."

These views contain the general principles which have been established in Kentucky, and by which entries in that state must be governed.

It will be observed that in giving a construction to an entry, the intention of the locator is to be chiefly regarded the same as the intention of the parties in giving a construction to a contract. If a call be impracticable, it is rejected as surplusage on the ground that it was made through mistake, but if a call be made for a natural or artificial object, it shall always control mere course and distance. Where there is no object called for, to control a rectangular figure, that form shall be given to the survey. These principles must now be applied to the call for the creek in Allen's entry.

It is objected that this creek is not called by any particular name, and the reason no doubt was that, at the time Allen's entry was made, no name had been given to it. Nor was any name given to the creek on which Patton's entry was made. Subsequently to that entry, it was called Patton's Creek, from the fact of his entry having been made on its bank. Barebone Creek seems to be a stream of some magnitude, and it does not appear that there is any other creek which answers the call in Allen's entry. This creek is a natural object, and is crossed by the base line of the entry, and could anyone doubt the intention of the locator, under such circumstances, to include the land on both sides of the creek, by his call

"to run down the creek on both sides, westwardly, for quantity? It is true, the mouth of this creek is not included in the survey which was directed by the circuit court, but the mouth of the creek is not called for specifically; and it does not appear, but that if the exact quantity of land called for in the entry had been surveyed, that the creek would have passed through the whole length of the tract. The call is not to run

Page 32 U. S. 219

to the Ohio River, but 'down the creek on both sides for quantity.'"

It would be difficult to make a call more specific than this, or one which would be less likely to mislead any subsequent locator. Is the fact that the creek, by an unusual deviation from its general course near its junction with the Ohio, passes out of the boundaries designated calculated to mislead anyone? Suppose it passed out of the limits of the survey five or ten poles before the lines closed; would this, by the principles laid down, require the call to be rejected? Could that fact lead anyone into error? And unless such a deviation would require the court to reject the call, it cannot be rejected on the ground alleged. The creek, by the survey executed, runs through the tract about seven-eighths of the entire length of the line, and the extraordinary bend which carries it out of the survey cannot vitiate the call nor render it substantially repugnant.

The question which arises out of these facts is whether this call shall not control the survey so as substantially to conform to it. The call to run westwardly, having nothing else to control it, would, according to the established rule of construction, require the lines to be run at right angles from the base. But the Court is clearly of opinion that the call to run down the creek on both sides for quantity must control the survey, and that the construction given to the entry by the circuit court was correct.

This line of Allen's entry being established, it forms the lower boundary of Voss' survey, and it remains only to say that, agreeable to the calls of his entry, the survey must be extended up the river and along Roberts' line, so as to include

8,500 acres. The survey cannot be extended beyond this limit so as to interfere with valid entries which were made before the original survey of Voss. This was the construction given to the rights of complainants under their entry and survey, and this Court sustain that construction. The decree of the circuit court must be affirmed with costs.

*Decree affirmed.*