Finley *v.* Williams and others. (*a*)

Land law of Kentucky.

In Kentucky, the courts of law will not look beyond the patent, but courts of equity will; and will give validity to the elder entry against an elder patent.[1]

Between pre-emption-rights, the prior improvement will hold the land against a prior certificate, entry, survey and patent.

It is not essential to the dignity of an entry upon a pre-emption-warrant, that the entry should, in terms, call for the improvement, although it must in fact include such improvement.

An entry calling for "the Big Blue Lick," will not support a survey and patent for land at the Upper Blue Lick, the Lower Blue Lick being generally called "the Big Blue Lick," although there may be other calls in the entry which seem to designate the Upper Blue Lick as the place intended.

This was an appeal from the decree of the Circuit Court for the district of Kentucky, in a suit in chancery, brought by Finley to compel Williams and others, who had the elder patent, to convey certain lands to the complainant, which he claimed by virtue of a prior settlement.

The cause was argued by *Pope*, for the appellants, and *Clay*, for the appellees, on the 22d of February 1813, in the absence of the reporter.

*165] *February 28th, 1815. (Absent, Todd, J.) Marshall, Ch. J., delivered the opinion of the court, as follows:—This cause depends on the land law of Virginia, which is also the land law of Kentucky, that state having formed a part of Virginia, when the act was passed in which the titles of both plaintiff and defendant originated. Both parties claim the land in controversy, by virtue of improvements made previous to the first day of January 1778, which improvements were recognised by the act generally termed "the previous title law," and gave the persons making them a pre-emption of 1000 acres of land, to include the improvement, on paying therefor the price at which the state sold its vacant lands, "provided they respectively demand and prove their right to such pre-emption, before the commissioners for the county to be appointed by virtue of this act, within eight months."

In the year 1781, an act passed which, after reciting that, by the discontinuance of the commissioners in the district of Kentucky, many good people of the commonwealth were prevented from proving their rights of settlement and pre-emption in due time, owing to their being engaged in the public service of this country, enacts, that the county courts in which such lands may lie, be empowered and required to hear and determine such disputes, and that the register of the land-office be empowered and directed to grant titles, on the determinations of such courts, in the same manner as if the commissioners had determined the same.

It appears, that in the year 1773, John Finley, the plaintiff in the cause, marked and improved the land in controversy. He entered into the continental service in the year 1776, and continued therein throughout the war. His claim was not made before the commissioners, but was made to the

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(*a*) February 28th, 1815. Absent, Todd, Justice.

[1] McArthur *v.* Browder, 4 Wheat. 488; Blunt *v.* Smith, 7 Id. 248; Hunt *v.* Wickliffe, 2 Pet. 201; Garnett *v.* Jenkins, 8 Id. 75; Brush *v.* Ware, 15 Id. 93. And see Johnson *v.* Towsley, 13 Wall. 85–6.

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court of the county in which the lands lie, by which court his claim was allowed, and the following certificate was granted :

"At a court held for the county of Fayette, March 12th, 1782, application and satisfactory proof being made, this court doth certify that John Finley is entitled to the *pre-emption of 1000 acres of land, situate [*166 on the main branch of Licking Creek, to include an improvement made in the year 1773, by said Finley, and to be bounded by a survey made, at the time, for him, which includes the Upper Blue Lick, by virtue of such marking out and improving, and his being in public service when the commissioners sat in the district, and thereby prevented applying for the same."

A pre-emption warrant was obtained, and on the 14th day of November, in the year 1783, an entry was made with the proper surveyor in the following words : "John Finley enters 1000 acres of land on a pre-emption warrant, No. 2526, on Licking, to include the Upper Blue Lick, and bounded on three sides by the line of an old survey made in the year 1773, beginning," &c. This entry was surveyed, and a patent issued thereon.

William Lynn, under whom the defendants claim, made an improvement on the same ground, in the year 1775, and laid his claim before the commissioners, who allowed the same, and granted a certificate therefor, dated the 20th day of November, in the year 1779, in the following words :

"William Lynn this day claimed a pre-emption of 1000 acres of land, at the state price, lying on the south side of Licking Creek, known by the name of the Big Blue Lick, to include the said lick, lying in a short bend of the said creek, by improving the same in the year 1775, &c."

On the 22d of June 1780, Lynn, having obtained a pre-emption warrant, entered the same with the proper surveyor, in these words : "William Lynn, James Barbour and John Williams enter 1000 acres of land upon a pre-emption warrant, beginning a quarter of a mile below the Big Blue Lick, on Licking, on the south side thereof, running on both sides of the said creek, and east and south for quantity." This entry was so surveyed as to include the lands in dispute, and a patent was obtained thereon of an earlier date than that of Finley.

Upon this patent, an ejectment was brought, and judgment obtained by Lynn, Barbour and Williams. Finley has brought this suit to compel a conveyance of that part of the land held by Lynn and others, which is included in his patent. On a hearing, *it was the opinion of the cir- [*167 cuit court, that Lynn and others held the better title ; in conformity with which a decree was made. From that decree, Finley has appealed to this court.

The peculiar state of titles to land in Kentucky, a senior patent being, in many cases, issued on a junior title, and it being a rule in their courts of law not to look beyond the patent, have settled the principle, that courts of equity will sustain a bill brought for the purpose of establishing the prior title by entry, and of obtaining a conveyance from the person holding under a senior patent issued on a junior entry. The courts of the United States have conformed to this practice, and adopted the principle. It is also settled, in Kentucky, that, between pre-emption rights, the prior improvement will hold the land, although the certificate of the commissioners, the entry,

the survey and the patent, be all posterior, in point of time, to those obtained by the person who has made an improvement of a later date.

It follows, from these established principles, that Finley must prevail, unless he has lost the right acquired in consequence of his improvement. The circuit judge was of opinion, that this right was lost by the form of his entry with the surveyor. Not having, in that entry, called, in terms, for his improvement, that judge was of opinion, that although his entry does, in fact, comprehend his improvement, yet he has surrendered the preference which his pre-emption warrant gave him, and sunk his claim to the level of a common treasury warrant. This court can perceive no reason for that opinion. The law requires that the entry shall, in fact, include the improvement, but does not make it essential to the dignity of the entry, that the improvement shall, in terms, be called for. The certificate expressly states that the land granted is to include the improvement; and the entry, which is made with remarkable precision, conforms exactly to the certificate in the description of the land intended to be taken.

*168] *But it is contended by the defendant, that whatever may be the opinion of the court on this point, Finley's title as to a pre-emption must yield to that of Lynn, in consequence of his having omitted to assert his claim before the court of commissioners. The legislature could not, it is said, after permitting the time for making this claim to expire, revive it, to the prejudice of any other person who had acquired title to the land. It is added, that the decisions in Kentucky have been adverse to titles to pre-emptions depending on certificates granted by the county courts, in cases where they come into competition with titles gained before the grant of such certificates.

This court would not willingly depart from the state decisions, if they have settled the principle the one way or the other; and would, therefore, have deferred the determination of this cause, until more certain information could be obtained, had it rested solely on the validity of the plaintiff's title as founded on a pre-emption. But on an inspection of the record, the entry of the defendants is deemed so radically defective as necessarily to yield to the title of the plaintiff, should his warrant even be reduced to the grade of a treasury warrant.

The law requires that the holder of a land-warrant "shall direct the location thereof so specially and precisely as that others may be enabled with certainty to locate other warrants on the adjacent residuum." Such has been the difficulty of making special locations, that much of the precision which the law would seem to require, has been dispensed with; but a reasonable and practicable certainty has always been deemed necessary; and wherever the material and principal call of a location has been calculated, instead of informing, to misguide subsequent locators, the location itself has been brought into hazard, and it has often been determined, that the survey was made on other land than that which the entry covered. In examining these questions, the courts of Kentucky have universally and properly deter-

*169] mined, that all subordinate calls in an entry must yield to a principal *call to which they may be repugnant. If a great and prominent object, immovable and durable in itself, and of general notoriety, be called for in a location, that object must fix and locate the entry, although other

minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator really intended to take other land.

In the entry of Lynn and others, there is such a principal call. The Big Blue Lick is perhaps an object of as universal notoriety as any in Kentucky. But there are two Blue Licks on the same creek, and both of them are large licks. In such a case, the locator would certainly be at liberty, and it would be his duty to designate the lick he intended to take; for if his entry would apply to the one as well as to the other, it would be justly chargeable with a vagueness which would leave subsequent locators unable to locate with certainty the adjacent residuum. This entry has, in its terms, designated the lick intended to be included: it is "*the* Big Blue Lick." The entry does not call for *a* Big Blue Lick, but for *the* Big Blue Lick, thereby excluding any other lick than that which was emphatically denominated *the* Big Blue Lick. We are then to ask, which of these licks a man in Kentucky, holding a warrant which he intended to locate, would suppose was *the* Big Blue Lick?

Upon this subject, the testimony is not doubtful. It is in full proof, that at the time the entry of the defendants was made, and for some years before, the Lower Blue Licks were generally called the Big Blue Licks; and that where the defendants have surveyed was known by the name of the Upper Blue Licks. They were sometimes, though rarely, distinguished from each other as the Upper Big Blue Licks and the Lower Big Blue Licks; somtimes as the Upper and the Lower Blue Licks; but the term *the* Big Blue Licks, when used without the word "upper" or "lower," was universally understood to designate the Lower Blue Licks.

The company which made this location in 1775 had not discovered the Lower Blue Licks, and therefore denominated the spring which they did discover, "the *Big Blue Lick;" but the name originated and expired with themselves. It was never adopted by the people of the country. It is probable, that Lynn did contemplate the Upper Blue Licks, when he made his entry; but between conflicting entries, a mistake of this kind is fatal to the person who commits it. In the case of *Bodley* v. *Taylor* (5 Cr. 191), it was impossible not to perceive that Taylor intended one creek, when he named another; but subsequent locators could judge of his intention only from the words of his entry. [*170

But it is contended, that there are other explanatory calls in the entry, which cure the defect which has been stated, and designate, with sufficient certainty, that the Upper Blue Lick was intended to be included in the entry. The entry is said to require a lick on the south side of Licking; and the spring which issues at the Upper Blue Lick is on the south side. The words are, "beginning one-quarter of a mile below the Big Blue Lick, on Licking, on the south side thereof." The locator intends to describe his beginning; and these words are to be construed with reference to that intention. Do the words, "on Licking," describe the place of beginning, or the location of the Big Blue Lick? The latter was unnecessary, because there was no Big Blue Lick, except on Licking; and because, were the fact otherwise, the lick would be ascertained by calling for a beginning, a quarter of a mile below it on Licking. But the beginning might be a quarter of a mile below the lick, and yet not on the creek. The beginning would be, in some degree, uncertain, unless it be fixed by those words. The entry is

understood, as if it were expressed thus: "beginning on Licking, on the south side thereof, a quarter of a mile below the Big Blue Lick." If reference be had to the certificate granted by the commissioners, that places the land, not the lick, on the south side of the creek. A cabin and a marked tree, in a country full of cabins and marked trees, cannot control a call made for an object of such general notoriety as the Big Blue Lick. A subsequent locator would look for them only at the Big Blue Lick.

*171] *It is the opinion of this court, that the decree of the circuit court be reversed and annulled, and that the defendants be decreed to convey to the plaintiff so much of the land comprehended within this grant, as appears by the survey made in this cause to lie within the bounds of the grant made to the complainant.(*a*)

Decree reversed.

(*a*) The opinion of the circuit court, consisting of Judges TODD and INNES, was as follows:—The claims of the parties in this suit commenced as pre-emption rights, yet by their subsequent acts in making their entries with the surveyor, they have reduced them to the footing of treasury-warrant claims, by omitting in their entries to call for their respective improvements, the foundation and essence of pre-emption rights. *Bryan and Owings* v. *Wallace*, Hughes 194. These circumstances render it unnecessary for the court to express an opinion as to the description of persons contemplated to be relieved by the act of the Virginia legislature which passed in May 1781.

The defendants derive their title under an entry made the 22d of June 1780, in the words following, to wit: "William Lynn, James Barbour and John Williams enter 1000 acres upon a pre-emption warrant, beginning one-quarter of a mile below the Big Blue Lick, on Licking, on the south side thereof, running up both sides of the said creek, and east and south for quantity," which being of elder date than that of the complainants, the defendants holding the elder grant for the lands in controversy, I shall, therefore, consider the validity of their entry first, and test thereby their right to the land in dispute, which, if it be defective, and cannot be supported, must yield to the complainant, whose entry, in that case, is deemed good and valid for so much as it can legally cover.

The important call in the entry of the defendants is "the Big Blue Lick, on Licking, on the south side thereof." The validity of this entry rests on the following points: Was the lick, described in the connected plat filed in this suit, by the name of the Blue Lick, on the 22d day of June 1780, and prior to that time, generally known and called by the name of "the Big Blue Lick?" Does it lie on the south side of Licking? Is it a big lick? If the lick was not notoriously known by the name of the "Big Blue Lick" prior to June 1780, is the identity thereof so described as to put a subsequent locator on his guard?

By the testimony taken in this cause, the lick in controversy was discovered by the complainant and his fellow adventurers, in the year 1773, and was by them called the Upper Blue Lick, in contradistinction to another and larger lick, which had then been discovered by some of the company, lower down Licking. In the year 1775, another company of adventurers, consisting of five persons, of whom William Lynn was one, discovered the lick, and by them it was called the "Big Blue Lick," and from the entry made with the surveyor, by Lynn, it was so known to him, and called by that name, on the 22d day of June 1780. From the year 1777 to the present day, the lick has been, generally, and perhaps, universally, with the above exception by Lynn, designated by the name of the Upper Blue Lick. The weight of testimony preponderates, as to the name of the lick, in favor of the complainant. Therefore, as to the notoriety of the lick by the name of "the Big Blue Lick," the entry of the defendants is defective. Although it often happens, that notoriety of an object called for in an

entry cannot be satisfactorily proved, yet the identity thereof may be so described, *that it may be found by reasonable inquiry and searching therefor, and when found, known by the description. In that case, identity is equal to notoriety. [*172

I will now inquire how far the identity of the lick called for in the entry of the defendants can be supported? All the witnesses in the cause speak of the lick in question, as being a blue lick, and it is so admitted by the parties who, in their admission, represent the salt water issuing from the spring to be of a bluish color. There is no testimony which proves the existence of any Blue Lick, on Licking, except the Upper and Lower Blue Licks. The testimony establishes two salt springs on the south side of Licking; that the one lowest down is less than the upper spring; that there is another salt spring on the north side of Licking, at the place called the Lower Blue Licks, which is larger than that on the south side of the stream; and that there is no salt spring on the north side of Licking, opposite the upper lick. The witnesses also, when speaking of the lower salt springs, describe them generally as one entire object, "the Lower Blue Lick," or Licks; and William Brooks describes both the Upper and Lower Blue Licks, as big licks, and that the upper spring discharges most water.

The courts in this country have always endeavored to sustain an entry, if by reasonable construction it be possible. For this purpose, they will reject an absurd or superfluous call; they will supply a word; they will consider a call not proved as expunged; and although there are more allegations than are proved, yet if enough is proved to render the entry sufficiently certain, the court will support it.

These observations are made, to show that the courts will go great lengths to support defective entries, in imperfect and unimportant calls, and are not applicable to the entry now under consideration, which, in itself, is considered as possessing sufficient identity to put a subsequent locator upon inquiry, and when found, to know the place by the description contained in the entry. The Upper and Lower Blue Licks had received appropriate names, as early as the year 1777. The Lower Blue Licks, although there were at that place two salt springs, one on the north and the other on the south side of Licking, had received an appropriate name, conveying the idea of unity. This was not the situation of the Upper Blue Lick, which, although it had also an appropriate name, by which it was most generally known, at the time the entry of the defendants was made, yet it lies altogether on the south side of Licking.

The testimony taken in this cause supports every call in the entry of the defendants. All the witnesses concur, that the place designated in the connected plat as a blue lick, is entitled to that appellation. Brooks says that both the licks, *i. e.*, the Upper and Lower Blue Licks, are big licks; and in answer to a request to express his opinion which of the two was the largest, said he would recommend an examination; and the upper lick is on the south side of Licking. These facts apply to the description given in the defendants' entry, and will not apply to the Lower Blue Licks. Therefore, as no entire blue lick is proved to exist on the south side of Licking, except that designated in the connected plat, the entry of the defendants is sustained, and the court is of opinion, that no doubt could exist in the mind of a subsequent locator, upon viewing the Upper and Lower Blue Licks, and comparing the situation and other circumstances attending the Upper Blue Lick, with the entry, but that it was the place described, and would defeat any idea of ambiguity, if it had occurred. On examining the connected plat, I find that the defendants have commenced their survey on Licking, about one hundred poles below the lick, whereas, by the entry, they ought to have begun only eighty, that being the precise distance called for as the point of beginning of their survey. To rectify which, a new survey was ordered, upon the return of which, the defendants were decreed to convey to the complainants so much of the land as was in the defendants' original survey, and was now left out by the new survey, as interfered with the complainant's survey, and that the complainant's bill be dismissed as to all the residue.