*McIver's Lessee *v.* Walker and others. (*a*)

Land law of Tennessee.

If there is nothing in a patent to control the call for course and distance, the land must be bounded by the courses and distances of the patent, according to the magnetic meridian.[1]

Course and distance must yield to a call for natural objects.

All lands are supposed to have been actually surveyed, and the intention of the grant is to convey the land according to the actual survey.

If a patent refer to a plat annexed, and if in that plat, a water-course be laid down as running through the land, the tract must be so surveyed as to include the water-course, and to conform as near as may be to the plat, although the lines thus run do not correspond with the courses and distances mentioned in the patent, and although neither the certificate of survey, nor the patent, calls for that water-course.

Quære? Whether parol evidence can be given, that the surveyor intended to express the courses, according to the true, and not according to the magnetic, meridian?

Error to the Circuit Court for the district of East Tennessee, in an action of ejectment, brought by the plaintiff in error against the defendants. The case is thus stated by the Chief Justice in delivering the opinion of the court:

On the trial, the plaintiff produced two patents for 5000 acres each, from the state of North Carolina, granting to Stockley Donalson, from whom the plaintiff derived his title, two several tracts of land lying on Crow creek, the one, No. 12, beginning at a box-elder, standing on a ridge-corner to No. 11, &c., "as by the plat hereunto annexed will appear." The plat and certificate of survey were annexed to the grant.

The plaintiff proved that there were eleven other grants of the same date, for 5000 acres each, issued from the state of North Carolina, designated as a chain of surveys joining each other, from No. 1 to No. 11, inclusive, each calling for land on Crow creek, as a general call, and the courses and distances of which, as described in the grants, are the same with the grants produced to the jury. It was also proved, that the beginning of the first grant was marked and intended as the beginning corner of No. 1, but no other tree was marked, nor was any survey ever made, but the plat was made out at Raleigh, and does not express on its face that the lines were run by the true meridian. It was also proved, that the beginning corner of No. 1, stood on the north west side of Crow creek, and the line, running thence down the creek, and called for in the plat and patent, is south 40 degrees west. It further appeared, that Crow creek runs through a valley of good land, which is on an average about three miles wide, between mountains unfit for cultivation, and which extends from the beginning of the survey No. 1, in the said chain of surveys, until it reaches below survey No. 13, in nearly a straight line, the course of which is nearly south 35 *174] degrees *west, by the needle, and south 40 degrees west, by the true meridian. That in the face of the plats annexed to the grants, the creek is represented as running through and across each grant. The lines in the certificate of survey do not expressly call for crossing the creek; but each certificate and grant calls generally for land lying on Crow creek. If the lines of the tracts herein before mentioned No. 12 and 13, in the said

(*a*) February 9th, 1815. Absent, Livingston, Story and Todd, Justices.

[1] s. c. 4 Wheat. 444.

chain of surveys, be run according to the course of the needle and the distances called for, they will not include Crow creek or any part of it, and will not include the land in possession of the defendants. If they be run according to the true meridian, or so as to include Crow creek, they will include the lands in possession of the defendants. Whereupon, the counsel for the plaintiff moved the court to instruct the jury, 1. That the lines of the said lands ought to be run according to the true meridian, and not according to the needle. 2. That the lines ought to be run so as to include Crow creek and the lands in possession of the defendants.

The court overruled both these motions, and instructed the jury, that the said grant must be run according to the course of the needle, and the distances called for in the said grants, and that the same could not be legally run so as to include Crow creek, and that the said grants did not include the lands in possession of the defendants. To this opinion, an exception was taken by the plaintiff's counsel. A verdict and judgment were rendered for the defendants, and that judgment is now before this court on a writ of error.

The Chief Justice, in stating the case, omitted the fact, that testimony was offered by the plaintiff at the trial, to prove "that the surveyor who made the plats and certificates of survey annexed to the grants, had regard to the true meridian, and not to the course of the needle, in making the said certificates of survey, and intended the courses of the surveys so to be run;" which testimony was rejected by the court below, as inadmissible—but the court admitted evidence "that *the general practice of making surveys by surveyors, has been to run to the courses of the needle.' [*175

Swann, for the plaintiff in error.—The court below ought not to have rejected the testimony to prove the intention of the surveyor to run the lines of these grants by the true meridian. It corroborates the plat annexed to the grant. The rule of construction as to grants from the state, especially in Virginia, North Carolina and Tennessee, differs from the rule as to other deeds. Course and distance may be controlled by parol evidence of the actual manner in which the survey was made, and of the actual marks and bounds made upon the land, at the time of the survey. The courts have not stopped at a natural object called for, if parol evidence be given that, according to the actual survey, the line extended beyond that object. The marks control the course and distance of the patent. *Baker* v. *Glasscock*, 1 Hen. & Munf. 77; *Bustian* v. *Christie*, 1 Taylor (N. C.) 116; *Standen* v. *Bains*, 1 Hayw. 238; Ibid. 378; *Blount's Lessee* v. *Masters*, MS.; *Herbert* v. *Wise*, 3 Call 239.

If the witness had testified that a survey had been actually made, and that it included the creek, it would have been admissible testimony. But the plat was intended to be a substitute for an actual survey. It was a part of the patent, annexed to it, and referred to by it. It was as much a part of the patent, as if it had been inserted in it. It shows, that the land ought to be laid off so as to include the creek, as plainly as if the patent had expressed it in words. The course, south 40 degrees west, is ambiguous; it may mean a magnetic or a meridianal course. The question is, what was the intention of the surveyor? How shall it be ascertained? The most direct mode of ascertaining it is, to prove his declarations at the time. It

is true, that by proving what was the general practice of surveyors, you may infer his intention ; but that is a secondary mode of proof, and less certain than proof of his declarations at the time he made the particular survey in question. This is not bringing parol evidence to contradict or to control the plat, but to corroborate and confirm it. If a grant is capable of two
*176] constructions, the court *must adopt that which is most beneficial to the grantee. *Miller* v. *White*, 1 Taylor (N. C.) 163.

Jones, contrà.—The general practice of the country is to survey by the compass, and all the courses expressed in surveys refer to the magnetic meridian. A certificate of survey, therefore, is always supposed to express magnetic courses, unless the contrary be expressed on its face. No parol proof can be admitted to contradict what is so strongly implied. It would be a dangerous practice ; it would be a difficult thing for a common surveyor to ascertain the true meridian, and there is no law of North Carolina which compels him to do it. The testimony offered was not to prove any act of the surveyor, but his intention.

There is no natural boundary called for in the patent. The general expression that the land is on Crow creek, cannot control the course and distance. The expression in the patent, " as by the plat hereunto annexed will appear," refers only to the courses and distances, and not to the actual location of the land. The figure of a creek, delineated on the plat, without any reference to it in the certificate of survey, cannot control the boundaries actually described. Not a word is said about the lines including or crossing Crow creek ; and in order to include the creek, you must deviate from the straight line called for.

C. Lee, in reply.—The intent of a grant must be effectuated, if by any means, consistent with the rules of law, it can be done. The intent of this grant cannot be effectuated by the mode of survey directed by the court below. The plat, annexed to the grant, shows the intent to be to make the survey conform to the nature of the ground, so as to include the creek and the valley, and exclude the mountains. The law of North Carolina requires the plat to be annexed to the deed, which is thereby, and by the reference to it in the body of the deed, made a part thereof; and contains a plain declaration that the grantee shall have the valley through which the creek runs.
*177] *On what ground could the testimony of the intention of the surveyor have been rejected by the court, when they admitted testimony to show the general practice to be, to survey by the magnetic meridian? That general practice was only a fact from which the jury might infer, in the absence of positive testimony, what the intent of the surveyor was. It was a grade of evidence, inferior to positive testimony of the intention. It was only *primâ facie*, not conclusive evidence of his meaning. There was no law of North Carolina which required the surveyor to go by the magnetic, and not by the true meridian. He was at full liberty to adopt the true meridian, if he pleased. We say, he did so, and the plat itself is evidence of the fact ; for it could not otherwise be consistent with itself. You must run the lines according to the true meridian, to include the creek.

Marshall, Ch. J.—Does not difficulty arise, in consequence of the grant having been made, without actual survey?

C. Lee.—That is a matter between the state and the grantee. After a grant, no stranger can take advantage of such a defect. The state may waive the objection, if it chooses to do so.

Swann.—It has been settled, I believe, in North Carolina that when a grant has actually been made, no inquiry shall be made by the state as to the survey, &c. In *Dickey* v. *Hoodenpile*, 1 Hayw. 359, the judge says, "when a grant has issued, we can look no further back; all previous proceedings must be considered as regular."

March 1st, 1815. (Absent Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows:—"It is undoubtedly the practice of surveyors, and the practice was proved in this cause, to express in their plats and certificates of survey, the courses which are designated by the needle; and if nothing exists to control the call for course and distance, the land must be *bounded by the courses and [*178 distances of the patent, according to the magnetic meridian. But it is a general principle, that the course and distance must yield to natural objects called for in the patent. All lands are supposed to be actually surveyed, and the intention of the grant is, to convey the land, according to that actual survey; consequently, if marked trees and marked corners be found, conformable to the calls of the patent, or if water-courses be called for in the patent, or mountains, or any other natural objects, distances must be lengthened or shortened, and courses varied, so as to conform to those objects.

The reason of this rule is, that it is the intention of the grant, to convey the land actually surveyed, and mistakes in courses or distances are more probable and more frequent, than in marked trees, mountains, rivers or other natural objects, capable of being clearly designated and accurately described. Had the survey, in this case, been actually made, and the lines had called to cross Crow creek, the courses and distances might have been precisely what they are, it might have been impracticable to find corner or other marked trees, and yet the land must have been so surveyed as to include Crow creek. The call, in the lines of the patent, to cross Crow creek, would be one to which course and distance must necessarily yield. This material call is omitted, and from its omission arises the great difficulty of the cause.

That the lands should not be described as lying on both sides of Crow creek, nor the lines call for crossing that creek, are such extraordinary omissions, as to create considerable doubt with the court, in deciding whether there is any other description given, in the patent, of sufficient strength to control the call for course and distance. The majority of the court is of opinion, that there is such a description. The patent closes its description of the land granted by a reference to the plat which is annexed. The laws of the state require this annexation. In *this plat, thus [*179 annexed to the patent, and thus referred to, as describing the land granted, Crow creek is laid down as passing through the tract. Every person, having knowledge of the grant, would also have knowledge of the plat, and would, by that plat, be instructed, that the lands lay on both sides of the creek; there would be nothing to lead to a different conclusion, but a difference of about five degrees in the course, should he run out the whole

chain of surveys, in order to find the beginning of No. 12 ; and he would know that such an error in the course would be corrected by such a great natural object, as a creek laid down by the surveyor in the middle of his plat. This would prove, notwithstanding the error in the course, that the lands on both sides of Crow creek were intended to be included in the survey, and intended to be granted by the patent.

It is the opinion of the majority of this court, that there is error in the opinion of the circuit court for the district of East Tennessee in this, that the said court instructed the jury, that the grant, under which the plaintiff claimed, could not be legally run, so as to include Crow creek, instead of directing the jury, that the said grant must be so run as to include Crow creek, and to conform as near as may be to the plat annexed to the said grant ; wherefore, it is considered by this court, that the said judgment be reversed and annulled, and the cause be remanded to the said circuit court, that a new trial may be had according to law.

The Chief Justice added, that he did not think the question about the true meridian had much to do with the case. The court decided it upon the plat. If it had not been for the plat, they should have said, that the land ought to be surveyed by the magnetic meridian.

Duvall, J.—My opinion is, that there is no safe rule but to follow the needle, making allowance for variation, according to practical observation.

Judgment reversed.

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*180] *Owens *v.* Hannay. (*a*)

Practice in error.—Transcript.—Alien enemy.

It is not necessary, that the transcript of the record should contain the names of the jurors.

Semble: That if it appear by the record, that the plaintiff below was a subject of Great Britain, and a war break out between Great Britain and the United States, after rendition of the judgment below, and before affirmance on the writ of error, the plaintiff in error cannot take advantage of the fact, that the original plaintiff is an alien enemy; but the judgment may be affirmed.[1]

Error to the Circuit Court for the district of Georgia, in an action of *assumpsit*, upon a special promise to pay interest upon the amount of a decree in chancery, in consideration of forbearance.

The plaintiff below was stated in the declaration to be an alien and British subject, and the defendant a citizen of Georgia. A demurrer to the declaration having been overruled, the defendant pleaded *non assumpsit*, upon which issue, the verdict and judgment were against him, in May 1811, and he brought his writ of error. In the transcript of the record, which came up, a blank was left for the names of the jurors, but in other respects the record appeared to be perfect. The verdict and judgment were fully stated.

War was declared by the United States against Great Britain, on the 18th of June 1812, and continued at the time of the argument in this court.

(*a*) February 8th, 1815. Absent, Livingston, Story and Todd, Justices.

[1] See Buckley *v.* Lyttle, 10 Johns. 117.