commissioners who negotiated the treaty, to the secretary of war, on the 10th day of January 1806. But without inquiring into the weight to which such a letter is entitled, in such a case, it is to be observed, that the letter agrees with the terms of the treaty. It says, that the three square miles reserved for the particular disposal of the United States, were "opposite to and below the mouth of the Highwassee." It is unnecessary to make a further comment on this letter, than to say, that there is no expression in it which appears to the court to countenance, in the slightest degree, the idea, that the word "below" in the treaty was used by mistake instead of the word "above."

The facts, that the agents of the United States took possession of this land lying above the mouth of the Highwassee, erected expensive buildings thereon, and placed a garrison there, cannot be admitted to give an explanation to the treaty, which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below; and the United States cannot have intended to deprive him of it, by violence, and without compensation. This court is unanimously and clearly of opinion, that the circuit court committed no error in instructing the jury, that the Indian title was extinguished to the land in controversy, and that the plaintiff below might sustain his action. The judgment is affirmed, with costs.

Judgment affirmed.

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*Simms *v.* Guthrie *et al.* (*a*) [*19

Land law of Virginia.—Pre-emption right.—Injunction bill.—Relief in equity.

The land law of Virginia, which gives a right of pre-emption to those who had marked and improved land, before the year 1778, refers that right to the time when the improvement was made, and to the time of the passage of the act, and not to the time when the claim for such pre-emption was made before the court of commissioners.

If an entry be made, by the assignee of a pre-emption right, it will be good, although the name of the assignor be not mentioned in the entry, if the entry refer to the warrant, and it mention an improvement; provided, the place be described with sufficient certainty, in other respects.

A bill in equity to enjoin a judgment at law, is not to be considered as an original bill, and therefore, it is not necessary, in a court of limited jurisdiction, to make other parties, if the introduction of those parties should create a doubt as to the jurisdiction of the court.[1]

A complainant in equity cannot obtain a decree for more than he has asked in his bill.

Error to the Circuit Court for the district of Kentucky, in a suit in chancery. The facts of the case, as stated by the Chief Justice, in delivering the opinion of the court, were as follows:

Charles Simms, the plaintiff in error, having obtained a judgment in ejectment, for certain lands lying in Kentucky, in possession of the defendants, for which the said Simms held a patent, prior to that under which the defendants claimed, a bill of injunction was filed by them, praying that he might be decreed to convey to them so much of the land in their possession, as was included within his patent.

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

[1] Where a bill does not relate to some matter already litigated in the same court, by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one. Christmas *v.* Russell, 14 Wall. 69.

It appeared in evidence, that in the year 1776, a company, of whom John Ash was one, marked and improved several parcels of land, lying on the waters of Salt river. John Ash made an improvement on the waters of the Town fork of Salt river, soon after which, William McCollom, another member of the same company, made an improvement, at a spring on the same stream, about 700 yards below him. Ash complained that McCollom had encroached on his rights, by approaching too near him; upon which, they agreed to decide by lot, who should be entitled to both improvements. Fortune determined in favor of Ash, and McCollom relinquished his rights, and improved elsewhere. Ash afterwards settled both improvements, and planted peach stones at that which was made by himself.

In April 1780, before the court of commissioners appointed in conformity with the act generally denominated the "previous title law," John Ash obtained a certificate in the following words: "John Ash, sen., claimed a pre-emption of 1000 acres of land, in the district of Kentucky, on account of marking and improving the same, in the year 1776, lying on the waters of
*20] the *Town fork of Salt river, about two miles nearly east from Joseph Cox's land, to include his improvement. Satisfactory proof being made to the court, they are of opinion, that the said Ash has a right to a pre-emption of 1000 acres of land, to include the above location, and that a certificate issue accordingly."

This certificate was assigned to Terrell and Hawkins, who, in April 1781, made the following entry thereon, in the surveyor's office of the county in which the lands lie: "Terrell and Hawkins entered 1000 acres, No. 1226, on the waters of the Town fork of Salt river, about two miles nearly east from Joseph Cox's land, to include his improvement." This entry was surveyed and patented, and the defendants claim under it. The date of this patent was on the 6th of March 1786.

The entry of Charles Simms was made on the 13th of April 1780, his survey on the 25th of the same month, and his patent issued on the 19th of April 1783.

The claim under an improvement being of superior dignity to that of Charles Simms, his title must yield to that of the defendants in error, if theirs be free from objection. The land law of Virginia, under which all parties claim, requires that locations shall be made so specially and precisely, that other persons may be enabled with certainty to locate the adjacent residuum. The situation of Kentucky, covered with conflicting titles to land, has made it necessary that this requisition of the law should be enforced with some degree of rigor, while the ignorance of early locators, the dangers to which they were exposed, and the difficulty of describing, with absolute precision, lands which were held by a very slight improvement, made on a single spot, and which could not be immediately surveyed, induced the courts of that country, for the purpose of preserving entries so far as was consistent with law, to frame certain general rules, of very extensive application to cases which occurred. One was, that the designation of any particular spot of general notoriety, or such a description of it, in relation to
*21] some place of general notoriety, *as would clearly point it out to subsequent locators, would give sufficient notice of the place intended to be appropriated, and that a failure to describe the external figure of the land should be supplied, by placing the improvement in the centre, and

drawing round it a square, with the lines to the cardinal points, which should comprehend the quantity claimed by the location.

The court below was of opinion, that there was sufficient certainty in the certificate of John Ash, sen., and in the entry afterwards made with the surveyor, by Terrell and Hawkins; that the improvement intended to be claimed by Ash was that which he won of McCollom, and that the land should be surveyed in a square form, with the lines to the cardinal points, including the improvement won of McCollom in the centre. A survey having been made in conformity with this interlocutory decree, the court ordered the defendant below to convey severally to the plaintiffs in that court, so much of the land claimed by them, as was included in his patent. To this decree, Charles Simms sued out a writ of error.

Swann, for the plaintiff in error, contended: 1. That Simms having the first entry and first patent and judgment at law in ejectment, his title must prevail. The entry of Terrell and Hawkins in 1781 cannot be connected with the settlement of Ash. It does not refer to it, and the want of such reference cannot be aided by any extrinsic evidence. The entry must be in itself sufficient, or it can avail nothing. *Patterson's Devisees* v. *Bradford*, Hardin 108.

2. The entry, if it can be connected with the certificate of the commissioners in favor of Ash, is still void for uncertainty. There were two settlements by Ash, and it does not appear to which the commissioners alluded; or if it does appear to which they alluded, it was to the first settlement of Ash, and not to that which was begun by McCollom. *Myers* v. *Speed*, Hughes 95; *Craig* v. *Doran*, Hardin 140. The land ought to have been surveyed from Ash's first settlement, and not from that which he won from McCollom.

**Jones*, contrà.—1. The first objection is, that the right of pre-emption never belonged to this land, because it is said that Simms had a prior claim. But the act only excludes from the right of pre-emption, lands to which a legal title had been acquired, prior to the date of the act. The law refers back to the improvement, and gives the pre-emption, notwithstanding an intermediate title. Simms must show that his title commenced before the passing of the land law. [*22

2. The second objection relates to the vagueness of the entry. The entry of Terrell and Hawkins was made upon warrant No. 1226, and refers to it. That warrant was lodged with the surveyor, and refers to the pre-emption certificate of Ash. The cases cited to show that you cannot make a vague entry certain, by reference to another paper, are of recent date, and if they are to be understood as the opposite counsel contends, would be in opposition to the analogous cases. In the case of *Patterson's Devisees* v. *Bradford*, Hardin 108, it is said, that if the entry calls for an improvement, you may refer to the certificate to show where the improvement was. So, in *Greenup* v. *Kenton*, Hardin 16, the court decided, that you might refer to another paper, to show what was ambiguous in the entry.

It is also said, that it appears by extraneous evidence, that there were two improvements by Ash, and therefore, that the entry is uncertain. The question is, whether the improvement was sufficiently notorious to give notice to subsequent locators. It might have been as notorious as any other

object. The cabin, the spring, the run and the location of Joseph Cox were all well known. But it is in proof, that one of the improvements was abandoned. They were near each other, and formed only one plantation or settlement. The evidence is, that Ash's improvement means the cabin where his widow now lives.

*23] *Swann*, in reply.—The pre-emption of Ash ought to be laid off from his first improvement. Ash renewed both improvements, viz., Ash's and McCollom's, as such. The question is, which was Ash's settlement, at the time referred to in the certificate of the court of commissioners? What did he mark and improve, in the year 1776? It is the improvement made in 1776 only, to which the commisioners refer. The cabin was built after the certificate.

February 14th, 1815. (Absent, Johnson, J., and Todd, J.) MARSHALL, Ch. J., after stating the facts of the case, delivered the opinion of the court, as follows :—

The first error assigned is, that the entry and survey of the plaintiff in error being prior to the claim made by Ash before the court of commissioners, gave him a legal right to the land so entered and surveyed, not to be affected by the subsequent claim of Ash. The words of the act of assembly are, "That all those who, before the said first day of January 1778, had marked out or chosen for themselves any waste or unappropriated lands, and built any house or hut, or made other improvements thereon, shall also be entitled, on the like terms, to any quantity of land, to include such improvements, not exceeding 1000 acres, and to which no other person hath any legal right or claim."

The court is clearly of opinion, that the words of the law refer to the time when the improvement was made, and to the time of the passage of the act; not to the time when the claim, founded on that improvement, was made to the court of commissioners. If the land, when improved, was waste and unappropriated, if, at the passage of the act, no other person had "any legal right or claim" to the land so improved, such right could not be acquired, until that of the improver should be lost.

The second error is, that the entry made by Terrell and Hawkins with the surveyor has no reference to the *pre-emption certificate of Ash, *24] and is, therefore, not a good and valid entry of Ash's pre-emption right. Terrell and Hawkins were assignees of Ash; and this ought to have been expressed in the entry. Those words are omitted. In consequence of their omission, it does not appear whose improvements is to be included.

Upon this point, the court has felt a good deal of difficulty. If the entry with the surveyor could be connected with the certificate of the commissioners, this difficulty would be entirely removed. But the court is not satisfied, that according to the course of decisions in Kentucky, such reference is allowable. The court, however, is rather inclined to sustain the location, because its terms are such as to suggest to any subsequent locator the nature of the omision which had been made.

Terrell and Hawkins enter 1000 acres of land, "to include his improvement." It was, then, a warrant founded on the improvement; and that improvement was made, not by them, but by a single person. Of that single person, Terrell and Hawkins were, of course, the assignees. The

place was described with such certainty as would have been sufficient, had the assignment been stated. On coming to the place, Ash's improvement would have been found. The mistake, therefore, does not mislead subsequent locators: it does not point to a different place. They are as well informed as they would have been by the insertion of the omitted words. The entry, too, contains a reference to the warrant which the law directed to be lodged with the surveyor, and to remain there, until it should be returned, with the plat and certificate of survey, to the land-office.

3. It is also objected, that some of the defendants in error do not show a complete legal title under Terrell and Hawkins, for which reason, they have not entitled themselves to a conveyance from Charles Simms; and that one of them, John Meigs, has obtained a decree for 140 acres of land, although in the bill he claimed only 100 acres. *Regularly, the claimants who have only an equitable title ought to make those whose title they assert, as well as the person from whom they claim a conveyance, parties to the suit.[1] For omitting to do so, an original bill might be dismissed. But this is a bill to enjoin a judgment at law, rendered for the defendant in equity against the plaintiffs. The bill must be brought in the court of the United States, the judgment having been rendered in that court. Its limited jurisdiction might possibly create some doubts of the propriety of making citizens of the same state with the plaintiff, parties defendants. In such a case, the court may dispense with parties who would otherwise be required, and decree as between those before the court, since its decree cannot affect those who are not parties to the suit. [*25

It is certainly a correct principle, that the court cannot decree to any plaintiff, whatever he may prove, more than he claims in his bill. Nothing further is in issue between the parties. It is not necessary to inquire, whether anything appears in this cause, which can prevent the plaintiff from availing himself of this principle; because the decree will be opened on another point, in consequence of which, this objection will probably be removed.

4. The fourth error is, that John Ash having two improvements, it is uncertain, which he claimed before the commissioners, and his entry is, on this account, void; or if not so, then his claim was for the improvement made by himself, and not for that won from McCollom. It is admitted, that if the terms of the entry are such as to leave Ash at liberty to select either improvement, it is void; and that if the terms of the entry confine him to either, he must abide by his original election. Upon considering the testimony on this point, the court is of opinion, that the entry may be construed to refer to one improvement in exclusion of the other; but that the improvement referred to is the one first made by himself. Let the several members of this description be examined.

*John Ash, sen., claimed 1000 acres of land, &c., "on account of marking and improving the same, in the year 1776." They were *both* marked and improved in the year 1776, the one by Ash himself, the other by McCollom. The description proceeds, "lying on the waters of the Town [*26

[1] But see Kerr *v.* Watts, 6 Wheat. 559, where it is ruled, that no one need be made a party complainant, in whom there exists no interest; and no one a party defendant, from whom nothing is demanded.

fork of Salt river, about two miles nearly east from Joseph Cox's land." Both improvements are on the same water-course; but that made by Ash is nearer the distance and the course from Joseph Cox's land, mentioned in the certificate, than that made by McCollom. If, then, it be not absolutely uncertain, to which improvement reference is made in the certificate, this court is of opinion, that the improvement made by Ash himself is designated.

Is there any testimony in the cause which can control the meaning of the terms of the certificate, when viewed independent of that testimony? There is evidence that the improvement at McCollom's spring was generally known in the neighborhood. But there is no reason to believe, that the improvement originally made by Ash himself was not also known, nor is there any reason to believe, that he had abandoned it. On the contrary, he added to it, by planting peach stones, after having won that made by McCollom. It is also in proof, that at the court of commissioners, in April 1780, in conversation with Thomas Polk, whom he then designed to call on to prove his improvement, he said, that he intended to settle at McCollom's spring. Supposing this to amount to a declaration of his intent to found his claim to a pre-emption on the improvement commenced by McCollom, and completed by himself, that intent, not appearing in the certificate and entry, could not control those documents. But the court is not of opinion, that the conversation will warrant this *inference. The whole case *27] shows that Ash retained his claim to both improvements, and designed to include both in his pre-emption. They are both included in his survey. His declaration, therefore, that he meant to settle at McCollom's spring, and the subsequent building of a cabin at that spring, no more proves which improvement was the foundation of his title, than if he had declared a design to settle at any other place on the same tract of land, and had carried that intention afterwards into execution, by building at such a place.

This court is of opinion, that there is error in so much of the decree of the circuit court as directs the survey of Ash's pre-emption to be made on the improvement commenced by McCollom, which is at black A. in the plat to which the decree refers; and that the said pre-emption right ought to be surveyed on the improvement originally made by Ash himself, which is at figure 2, in the said plat. The decree, therefore, must be reversed, and the cause remanded to the circuit court, with directions to conform their decree to the opinion given by this court.

The Decree of this Court is as follows:—This cause came on to be heard on the transcript of the record from the circuit court, and was argued by counsel; on consideration whereof, the court is of opinion, that there is error in so much of the interlocutory and final decrees of the said court, as directs Charles Simms to convey to the plaintiffs in that court the land included in his patent and in the survey directed to be made by that court, of the claim of the said plaintiffs, which survey was ordered to be made in a square form, including the improvement at McCollom's spring, which is designated in the plat by the black letter A in the centre; and that the said decrees ought to be reversed and annulled, and the cause remanded to the circuit court, with directions to cause the said pre-emption right of the said Ash to be surveyed in a square form with the lines to the cardinal points, and in-

cluding improvement originally made by the said John Ash, sen., which is designated in the plat filed in the said cause by figure 2, in the centre; and with further directions *to order the said Charles Simms to convey to the plaintiffs in the circuit court, respectively, the land included in his patent, and lying within their several claims as made in their bill, and as sustained by the evidence in the cause. All which is ordered and decreed accordingly. [*28

Speake and others *v.* United States. (*a*)

Embargo-bond.—Estoppel.—Alteration.

A bond taken by virtue of the 1st section of the embargo law of January 9th, 1808, is not void, although taken by consent of parties, after the vessel had sailed.

The obligors are estopped to deny that the penalty of such a bond is double the true value of the vessel and cargo.

The name of an obligor may be erased from a bond, and a new obligor inserted, by consent of all the parties, without making the bond void; such consent may be proved by parol evidence; and it is immaterial, whether the consent be given before or after the execution of the deed.[1]

Error to the Circuit Court for the district of Columbia, in an action of debt for $8787, upon a bond dated 14th April 1808, taken by the collector of the port of Georgetown, with condition to be void, if the brig Active "should not proceed to any foreign port or place, and the cargo should be relanded in some port of the United States." The bond was executed by Speake, the master of the vessel, and by Beverly and Ober the owners of the cargo, in compliance with the 1st section of the act of congress of the 9th of January 1808, entitled "an act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States." (2 U. S. Stat. 453.)

The defendants having pleaded, severally, sundry pleas, upon which issues in fact were joined, pleaded jointly (after *oyer*): 1st. "That they ought not to be charged with the debts aforesaid, by virtue of the writing obligatory aforesaid, because they say, that the said writing obligatory was required and taken, by one John Barnes," collector, &c., "by color of his said office as collector as aforesaid, and by pretence of an act of congress, entitled," &c. (the act of January 9th, 1808, 2 U. S. Stat. 453), "which said writing obligatory and the condition thereof were not taken by the said *John Barnes, collector," &c., "pursuant to the said act of congress, but contrary thereto in this, viz., that the said writing obligatory was not sealed or delivered by the said Robert Ober, until after the vessel in the condition of the said writing obligatory mentioned, had received a clearance in due form from the said collector, and after she had been allowed to depart, and had actually departed from the said port of Georgetown, under the clearance so as aforesaid granted to her, by reason whereof, the said writing obligatory is void and of no effect in law; and this, the said defendants are ready to verify; wherefore, they pray judgment, if they ought to be charged with the debts aforesaid, by virtue of the writing obligatory aforesaid." To this plea, there was a general demurrer and joinder. [*29

(*a*) February 10th, 1815. Absent, Todd, Justice.

[1] Knapp *v.* Maltby, 13 Wend. 587; s. p. Penny *v.* Corwithe, 18 Johns. 499.