*Polk *v.* Wendall *et al.*

Land law of Tennessee.—Construction of state statutes.

The act of North Carolina (1783, ch. 2), opening the land-office, did not prohibit a person from making several different entries, amounting in the whole to more than 5000 acres, nor from purchasing the rights acquired by others by entries, nor from uniting several entries in one survey and patent; and such union of several entries is allowed by the act of 1784, ch. 19.

In a patent, the obliteration of the consideration does not make void the grant.

In cases depending on the statutes of a state, the settled construction of those statutes, by the state courts, is to be respected.

In Tennessee, the younger patent on the elder entry, prevails over the elder patent on the younger entry.[1]

A patent justifies a presumption that all the previous requisites of the law have been complied with.

A patent is void at law, if the state had no title, or if the officer who issued the patent had no authority so to do.[2]

In North Carolina, the want of an entry nullifies a patent.

After the cession of land by North Carolina to the United States, the former had no right to grant those lands to any other grantee, who had not an incipient title before the cession. The question, whether such incipient title existed, is, therefore, open at law.

Polk's Lessee *v.* Hill, Windel *et al.*, 2 Overt. 118, reversed.[3]

This case, as stated by the Chief Justice in delivering the opinion of the court, was as follows :

This is a writ of error to a judgment in ejectment, rendered in the Circuit Court of the United States for the district of West Tennessee. On the trial, the plaintiff below, who is also plaintiff in error, relied on a patent, regularly issued from the state of North Carolina, for 5000 acres of land, dated the 17th day of April 1800, which patent included the lands in controversy.

The defendants then offered in evidence a patent issued also from the state of North Carolina, and dated on the 28th of August 1795, purporting to convey 25,060 acres of land to John Sevier, which patent also comprehended the lands in controversy. To the reading of this grant, the plaintiff objected, because: 1. By the laws of the state of North Carolina, no grant could lawfully issue for as large a number of acres as are included in that grant. 2. The amount of the consideration originally expressed in the said grant, appears to have been torn out. 3. The said grant, on its face, appears fraudulent, the number of acres mentioned being 25,060, the number of warrants forty, of 640 acres each, and yet the courses and distances, mentioned in its body, include more than 50,000 acres. These objections were overruled and the patent went to the jury. To this opinion of the court, the counsel for the plaintiff excepted.

The counsel for the plaintiff then offered to prove, for the purpose of avoiding the said grant—

1. That the forty warrants of 640 acres each, mentioned *in the said grant, purport, on their face, to have been issued by Landon Carter, entry-taker of Washington county, and that the land covered by the said grant is situated between the Cumberland mountain and Tennessee river, and not within the said county of Washington. [*88

[1] Ross *v.* Read, 1 Wheat. 482. See Miller *v.* Kerr, 5 Id. 1.

[2] Patterson *v.* Winn, 11 Wheat. 380.

[3] For a further decision in the court below, after this reversal, see 2 Overt. 433; which was again reversed in 5 Wheat. 293.

2. That the consideration of ten pounds for every hundred acres was fraudulently inserted in the said grant, by procurement of said grantee, John Sevier.

3. That no entries were made in the office of the entry-taker of Washington, or elsewhere, authorizing the issuing of such warrants.

4. That the pretended warrants are forgeries.

5. That at the time of the cession of the western part of the state of North Carolina to the United States, and at the time of the ratification thereof by congress, on the ——— day of ——— 1790, the said pretended warrants did not exist, nor were any locations or entries in the offices of the entry-taker of Washington county, from which they appear to have issued, authorizing their issuance.

6. That no consideration for the said land was ever paid to the state of North Carolina, or any of its officers.

And to prove that since the execution of the said grant, the consideration mentioned therein had been altered from fifty shillings to ten pounds, the counsel for the plaintiff offered to read as evidence, a letter addressed by the said John Sevier, to James Glasgow, then secretary of state for the state of North Carolina, in the words following, to wit:

"Jonesborough, 11th November 1795.

"DEAR SIR:—I am highly sensible of your goodness and friendship in executing my business at your office, in the manner and form which I took the liberty to request. Permit me to solicit a completion of the small
*89] remainder *of my business that remains in the hands of Mr. Gordon. Should there be no impropriety, should consider myself much obliged to have ten pounds inserted in the room of fifty shillings. I have directed Mr. Gordon to furnish unto you a plat of the amount of three 640 acres, which I consider myself indebted to you, provided you would accept the same, in lieu of what I was indebted to you for fees, &c., which I beg you will please to accept, in case you can conceive that the three warrants will be adequate to the sum I am indebted to you. I am, with sincere and great esteem, dear sir, your most obedient servant, JOHN SEVIER."

"Hon. James Glasgow."

Indorsed thus—"Hon. Mr. Glasgow, Secretary of State."
"Mr. Gordon."

The counsel for the defendants objected to the reception of this testimony, and it was rejected by the court. To this opinion also, an exception was taken.

A general verdict was rendered for the defendants, on which the court gave judgment. This judgment has been brought up to this court by writ of error.

C. Lee, for the plaintiff in error.—Two questions arise in this cause. 1. Whether the fraud does not vacate the grant to Sevier? 2. Whether the evidence of that fraud should not have been admitted?

*90] *1. The invalidity of the grant to Sevier appears upon its face. It is mutilated, by the erasure of the consideration: and it has been fraudulently altered in a material part. By the law of North Carolina, the survey must be annexed to the patent, and is a substantial part of it. From

this survey, it appears, that under forty warrants, for 640 acres each, amounting to 25,060 acres, there have been granted to him more than 50,000 acres. These objections having been made at the trial below, ought to have excluded the patent from the consideration of the jury.

There is a difference between a public and a private grant. A patent must be issued according to the requisites of the law, or it will be void. It takes effect merely by the provisions of the law, and if not made pursuant to law, can convey no title. *Fermor's Case*, 3 Co. 77 ; *Legate's Case*, 10 Ibid. 110 ; *Lord Chandos' Case*, 6 Ibid. 55 ; Barwick's Case, 5 Ibid. 93 ; Co. Litt. 260.

In a case of a sale of land by a sheriff for taxes, the proceedings must be regular and according to the law which authorizes the sale, or it will be void. So, under the bankrupt laws, and the Lords' act, in England. The same rule of law applies to a grant from a state ; and the party may take advantage of it, in ejectment. *Lord Proprietary of Maryland* v. *Jennings*, 1 Har. & McHen. 145. So, if a bond or release be offered in evidence, the other party may show it was obtained by fraud. And if any objection appear upon the face of the instrument, the court will take notice of it. *O'Neale* v. *Thornton*, 6 Cr. 70.

2. The court ought to have permitted the plaintiff to give evidence of the fraud, and of the want of foundation for the patent. In ejectment, the deeds are not declared upon, nor set forth in the proceedings, so that the opposite party has no opportunity to plead the fraud, or the erasure, &c. He can only produce these facts in evidence, by way of objection, so as to prevent such deeds from being read in evidence to the jury.

*If the entry-taker in Washington county had no authority to issue the warrants for these lands, they are void. The evidence of that [*91 fact ought, therefore, to have been admitted.

The evidence of collusion between Sevier and the secretary of state, and of the other facts stated in the bill of exceptions, ought to have been received. For however slight the evidence might have been of some of the facts, yet it ought to have been left to the jury. *Maryland Ins. Co.* v. *Woods*, 6 Cr. 50. The court below decided, that no evidence could be given to invalidate the patent, except what regarded the entries.

Mr. Lee cited the following statutes of North Carolina, from Iredell's revised code, p. 205, the act of 1777, ch. 1, § 3, 4 ; Ibid. p. 322, the act of 1783, ch. 2, § 2 ; Ibid. p. 345, the act of 1784, April session, by which the lands were ceded to the United States. And the acts of 1784, October session, p. 386, ch. 19, § 6 ; 1778, p. 252 ; 1786, ch. 20, § 20 ; 1789, ch. 3, p. 467, and 1791, ch. 21, § 5.

Jones, contrà.—1. The first objection was to the admission in evidence of the patent to Sevier, for any purpose. There was nothing on the face of the patent to make it void. It was not mutilated. There were blanks in it, but no mutilation ; and there is no evidence that it was mutilated. There could be only three kinds of consideration ; fifty shillings, ten pounds, of military service. It could not, by law, be either the first or the last ; it must therefore have been ten pounds. The act of the officer carries a presumption that the proper consideration was paid ; and the statute shows what that consideration ought to have been.

2. The next objection is, that the grant comprehends 50,000 acres instead
*92] of 25,060. But the grant is only for the 25,060, although the *survey may include more. The statute which prohibits grants for more than 5000 acres, does not vacate such grants. It is only directory to the officer; and such grants are recognised by the laws of North Carolina. 1784, ch. 19. The excess is no evidence of such fraud as will vacate the deed. The defendants were not bound to show the correctness of their entries; nor anything else prior to the patent. The entries were merged in the patent.

As to the second bill of exception: it presents but one point. The only evidence offered and rejected was the letter of Sevier to Glasgow. For although it states that the plaintiff offered to prove other facts, yet it does not state that he offered evidence of those facts. But if the bill of exception imports that such evidence was offered, yet the defendants were innocent purchasers. The contest is not between the original parties. They were not bound to look beyond the patent: and if the facts were proved, which the plaintiff offered to prove, yet the patent is not thereby made void, but voidable by proper process. The king may avoid his grants where a subject could not (*Legate's Case*, 10 Co. 113); but it must be either by *quo warranto* or *scire facias*, or information in the nature of a *quo warranto;* which is a process in the nature of a proceeding *in rem:* there is no instance where it has been declared void, when brought collaterally into question. And although a statute declares a grant void, yet it is not actually void, but voidable. 7 Bac. Abr. 64, B; *Fletcher* v. *Peck*, 6 Cr. 180. In the case from Harris & McHenry's reports, the state of Maryland sought to set aside the grant, by an information, and it only shows that upon such a process, the fraud upon the state may be given in evidence. In the present case, no fraud or irregularity has been sufficiently alleged to set aside the deed.

1. It is said, that the lands did not lie in Washington county. This is no objection; because the party had a right to remove his entry.

*93] *2. The charge that the consideration of 10*l.* was fraudulently inserted, is too vague and general. If the party had not paid the 10*l.*, he was still indebted to the state in that sum; and the deed is not for that cause void as to an innocent purchaser.

3. That there were no entries authorizing the warrants. This objection is equivocal, and involves questions of fact and law.

4. That the warrants were forgeries. The patent cannot be declared void for any prior irregularity. In ejectment, you must stop at the patent; and the prior patent gives the better title.

5. That at the time of the cession of the lands to the United States, there were no entries authorizing the warrants. This is in substance the same as the third objection. It is too general and vague, and involves fact and law.

6. That no consideration was paid. This, if true, does not avoid the patent; for if the money was not paid, Sevier remains debtor for it to the state.

With regard to the letter to Glasgow, it is not material, what alteration was made as to the consideration. No evidence of alteration was important, unless it were such alteration as would vacate the deed. This

letter contains no such evidence. It must have referred to some other patent; because the letter was dated in November 1795, and refers to some instrument, then incomplete; but the patent in this case was completed in the preceding August.

As to the issuing of the grant by the state of North Carolina, after the cession of the territory to the United States, the act of cession provided for the issuing of such grants upon entries previously made. It does not appear, that the entries in this case were not made before the cession. The plaintiff's grant was also issued by the state of North Carolina, five years after the defendant's.

C. Lee, in reply.—The practice of England, as to revoking patents, is no rule respecting the land laws of this country. The [*94 register of the land-office is only an officer of the law; can transfer nothing but according to his authority, and cannot grant contrary to law.

The patent is void on its face. It appears to have been obliterated. This fact, together with the letter to Glasgow, ought to have been left to the jury, as tending to prove a fraudulent alteration in the deed.

Unless the patent conveys all the land within the described bounds, it is vague and uncertain. It cannot be limited to the 25,060 acres. If it conveys anything, it conveys the whole 50,000 acres.

February 21st, 1815. (Absent, Todd, J.) MARSHALL, Ch. J., after stating the case, delivered the opinion of the court, as follows:—The first exception is to the admission of the grant set up by the defendants in bar of the plaintiff's title. This objection alleges the grant to be absolutely void, for three causes.

The first is, that no grant could lawfully issue for the quantity of land expressed in this patent. If this objection be well founded, it will be conclusive. Its correctness depends on the laws of the state of North Carolina.

The act of 1777, ch. 1, opens the land-office of the state, and directs an entry-taker to be appointed in each county, to receive entries made by the citizens, of its vacant lands. The third section of this act contains a proviso, that no person shall be entitled to claim a greater quantity of land than 640 acres, where the survey shall be bounded by vacant land, nor more than *1000 acres between lines of land already surveyed for other [*95 persons. The fourth section fixes the price of land thus to be entered, at fifty shillings per hundred acres; after which follows a proviso, that if any person shall claim more than 640 acres for himself, and 100 acres for his wife and each of his children, he shall pay for every hundred acres exceeding that quantity, five pounds, and so in proportion. But this permission to take up more than the specified quantity of lands at five pounds for every hundred acres, does not extend to Washington county.

In June 1781, ch. 7, the land-office was closed, and further entries for lands prohibited. In April 1783, ch. 2, the land-office was again opened, and the price of lands fixed at ten pounds for each hundred acres. The ninth section of this act authorizes any citizen to enter, with the entry-taker to be appointed by the assembly, "a claim for any lands, provided such claim does not exceed 5000 acres." This act limits the amount for which an entry might be made. But the same person is not, in this act, forbidden to

make different entries; and entries were transferrible. No prohibition appears in the act, which should prevent the assignee of several entries, or the person who has made several entries, from uniting them in one survey and patent. The court does not perceive, in reason, or in the directions of the law respecting surveys, anything which should restrain a surveyor from including several entries in the same survey. The form of surveys which is prescribed by law, if that rule should be considered as applicable to surveys made on several entries united, may be observed, and in this case, is observed, notwithstanding the union of different entries.

In April 1784, ch. 19, the legislature again took up this subject, and after reciting that it had been found impracticable to survey most of the entries of lands made adjoining the large swamps, in the eastern parts of the state, agreeable to the manner directed by the acts then in force, without *96] putting the makers thereof *to great and unnecessary expenses, empowered surveyors in the eastern parts of the state to survey for any person or persons, his or their entries of lands in or adjoining any of the great swamps in one entire survey. The third section enacts, "that where two or more persons shall have entered, or may hereafter enter, lands, jointly, or where two or more persons agree to have their entries surveyed jointly, in one or more surveys, the surveyor is empowered and required to survey the same accordingly, in one entire survey; and the persons so agreeing to have their entries surveyed, or entering lands jointly, shall hold the same as tenants in common, and not as joint tenants." The fourth section secures the same fees to the surveyor and secretary as they would have been entitled to claim, had the entries been surveyed and granted separately.

As all laws on the same subject are to be taken together, it is argued, that this act shows the sense of the legislature, respecting the mode of surveying entries, and must be taken into view, in expounding the various statutes on that subject. It evinces unequivocally the legislative opinion, that as the law stood previous to its passage, a joint survey of two entries, belonging to the same person, or to different persons, could not be made. The right to join different entries in the same survey, then, must depend on this act. The first and second sections of this act relate exclusively to entries made in or adjoining to the great swamps, in the eastern parts of the state. The third section is applicable to the whole country, but provides only for the case of entries made by two or more persons. It is, therefore, contended, that the court cannot extend the provision to the case of distinct entries belonging to the same person.

For this distinction, it is impossible to conceive a reason. No motive can be imagined, for allowing two or more persons to unite their entries in one survey, which does not apply with at least as much force for allowing *97] *a single person to unite his entries, adjoining each other, in one survey. It appears to the court, that the case comes completely within the spirit, and is not opposed by the letter of the law. The case provided for is, "where two or more persons agree to have their entries surveyed jointly," &c. Now, this agreement does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor, that the assignee may survey the entries, jointly or separately, at his election. The court is of opinion, that under a sound

construction of this law, entries which might be joined in one survey, if remaining the property of two or more persons, may be so joined, though they become the property of a single person.

The second objection to the admission of the grant is, that the amount of the consideration originally expressed on its face appears to have been torn out. The grant stands thus: "for and in consideration of —— pounds," &c. The court is unanimously and clearly of opinion, that there is nothing in this objection. It is not suggested, nor is there any reason to believe, that the words were obliterated for fraudulent purposes, or for the purpose of avoiding the grant. They may have been taken out by some accident; and there is no difficulty in supplying the lost words. The consideration paid was ten pounds for each hundred acres; and there can be no doubt, that the word "ten" is the word which is obliterated. Had the whole grant been lost, a copy might have been given in evidence; and it would be strange, if the original should be excluded, because a word which could not be mistaken, and which, indeed, is not essential to the validity of the grant, has become illegible.

The third exception is, that the grant, on its face, appears fraudulent, because it has issued for 25,060 acres of land, although the lines which circumscribe it, and which are recited in it, comprehend upwards of 50,000 acres. Without inquiring into the effect of a grant conveying *50,000 acres of land, under a sale of 25,000 acres, it will be sufficient to observe, that in this case, the surplus land is comprehended in prior entries, and is, consequently, not conveyed by this grant. This exception, therefore, is inapplicable to the case. It is the opinion of this court, that there was no error in permitting the grant under which the defendant claimed title, to go to the jury. [*98

The remaining exceptions were taken, after the grant was before the jury, and are for causes not apparent on its face. They present one general question of great importance to land-holders in the state of Tennessee. It is this—Is it, in any, and if in any, in what, cases, allowable, in an ejectment, to impeach a grant from the state, for causes anterior to its being issued?

In cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the state where that construction is settled, and can be ascertained. But it is not understood, that the courts of Tennessee have decided any other point bearing on the subject than this, that under their statutes declaring an elder grant founded on a younger entry to be void, the priority of entries is examinable at law; and that a junior patent founded on a prior entry shall prevail in an ejectment, against a senior patent founded on a junior entry. The question whether there are other cases in which a party may, at law, go beyond the grant, for the purpose of avoiding it, remains undecided.

The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the state from imposition. Officers are appointed to superintend the business; and rules are framed prescribing their duty. These rules are, in general, directory; and when all the proceedings are completed by a patent, issued by the authority of the state, a compliance with these rules is pre-supposed. That every prerequisite has been performed, is an inference

properly deducible, and which every man has a right to draw, from the existence of the grant itself. It would, therefore, be extremely *unreasonable, to avoid a grant in any court, for irregularities in the conduct *99] of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent. But there are some things so essential to the validity of the contract, that the great principles of justice and of law would be violated, did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title was acquired, might be examined. In general, a court of equity appears to be a tribunal better adapted to this object than a court of law. On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself; and should he be allowed to use them, the holder of the elder grant might often be surprised. But in equity, the specific points must be brought into view; the various circumstances connected with those points are considered; and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation; and the decision of a court in the last resort upon them is decisive. The court may, on a view of the whole case, annex equitable conditions to its decree, or order what may be reasonable, without absolutely avoiding a whole grant. In the general, then, a court of equity is the more eligible tribunal for these questions; and they ought to be excluded from a court of law. But there are cases in which a grant is absolutely void; as where the state has no title to the thing granted; or where the officer had no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law.

Having premised these general principles, the court will proceed to consider the exceptions to the opinion of the circuit court, in this case, and the testimony rejected by that opinion.

The case does not present distinct exceptions, to be considered separately, but a single exception to a single opinion, rejecting the whole testimony offered by the plaintiff. The plaintiff offered to prove, that no entries were ever made, authorizing the issuing of the warrants on which the grant to Sevier was founded, and that the warrants themselves were forgeries. He also offered *to prove, that at the time of the cession to congress of *100] the territory in which these lands lie, the warrants did not exist, nor were there any locations in the office from which they purport to have issued, to justify their issuing.

In the state of North Carolina itself, the want of an entry would seem to be a defect sufficient to render a grant null. The act of 1777, which opens the land-office and directs the appointment of an officer in each county, denominated an entry-taker, to receive entries of all vacant lands in his county, directs the entry-taker, if the lands shall not be claimed by some other person, within three months, to deliver to the party a copy of the entry, with its proper number, and an order to the county surveyor to survey the same. This order is called a warrant. The ninth section of the act then declares, "that every right, &c., by any person or persons, set up or pretended to any of the before-mentioned lands, which shall not be obtained in manner by this act directed, or by purchase or inheritance from some person or persons becoming proprietors by virtue thereof, or which shall be obtained in fraud, evasion or elusion of the provisions and restrictions thereof,

shall be deemed and are hereby declared utterly void." The act of 1783, which again opens the land-office, appoints an entry-taker for the western district, and prescribes rules for making entries in his office, and for granting warrants similar to those which had been framed for the government of the entry-takers of the respective counties.

In the year 1789, North Carolina ceded to congress the territory in which the lands lie, for which Sevier's grant was made, reserving, however, all existing rights under the state, which were to be perfected according to the laws of North Carolina. This cession was accepted by congress. Sevier's survey is dated on the 26th day of May 1795.

*The lands for which the warrants were granted, by virtue of which the survey was made, lie within that district of country for [*101 which the land-office was opened by the act of 1777. Had the survey been made on the land originally claimed by these warrants, it must have been a case directly within the ninth section of the act; and the right is declared by that section to be utterly void. But the survey was made on different lands, by virtue of an act which empowers the surveyor so to do, in all cases of entries on lands previously appropriated. This clause in the law, however, does not authorize a survey, where no entry has been made; and such survey would also come completely within the provision of the ninth section. In such case, there is no power in the agents of the state to make the grant; and a grant so obtained is declared to be void.

This subject is placed in a very strong point of view, by considering it in connection with the cession made to the United States. After that cession, the state of North Carolina had no power to sell an acre of land within the ceded territory; no right could be acquired under the laws of that state. But the right was reserved to perfect incipient titles. The fact that this title accrued before the cession, does not appear on the face of the grant; it is, of course, open to examination. The survey was not made until 1795, many years posterior to the cession. It purports, however, to have been made by virtue of certain warrants founded on entries which may have been made before the cession. But if these warrants had no existence, at the time of the cession, if there were no entries to justify them, what right could this grantee have had at the time of the cession? The court can perceive none; and if none existed, the grant is void for want of power in the state of North Carolina to make it.

If, as the plaintiff offered to prove, the entries were never made, and the warrants were forgeries, then no right accrued under the act of 1777; no purchase of the land was made from the state; and, independent of the act of cession to the United States, the grant is void by the express words of the law.

If entries were made in the county of Washington, *but no com- [*102 mencement of right had taken place in the ceded territory, previous to the cession, so as to bring the party within the reservation contained in the act of cession, then the grant must be void, there being no authority in the grantor to make it. In rejecting testimony to these points, the circuit court erred; and their judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.