

RUSSELL *et al.* v. Trustees of the TRANSYLVANIA UNIVERSITY.*Land law of Kentucky.*

A question under a bill in chancery, to obtain from the defendants a conveyance of a tract of land, in Kentucky, held by them, as the property of the original grantee, confiscated to the state, and claimed by the plaintiffs, under an equity arising from a sale made by the original grantee, of another tract of land, to which it was alleged, he erroneously supposed himself legally entitled, under the same warrant and survey: Bill dismissed.

The return of the surveyor into the office, is the only legal identification of the land, on which the right of the individual attaches.

APPEAL from the Circuit Court for the district of Kentucky. This cause was argued at a former term, and continued to the present term for advisement.

*JOHNSON, J., delivered the opinion of the court as follows:—The object of this bill is to obtain a conveyance from the defendants, of a tract of land in the state of Kentucky, granted to one Alexander McKee, through whom both parties claim. The survey was made under a warrant from Lord Dunmore, then governor of Virginia, issued the 2d of April 1774. The complainants claim under a chain of title regularly deduced from McKee; the defendants, under an act of the legislature, vesting McKee's lands in them as confiscated property. But it appears, and is explicitly acknowledged in the bill, that the conveyance from McKee describes, by metes and bounds, a tract of land wholly different from that which the trustees hold. This court feels no difficulty in conceding, that whatever equity the complainants have a right to claim against McKee, this court is bound to decree against the trustees; for the act of the legislature could only have been intended to operate upon the interest of McKee, and not to defeat the rights of those who held, or might claim, the land, to the prejudice of McKee himself.

The equity set up by the complainants depends upon the following allegations: That the warrant was placed in the hands of one Douglas, a surveyor; that under that warrant, together with a number of others then in his hands, he surveyed what, in that country, is called a block of surveys (by which we understand a number of connected and dependent surveys, each containing the same quantity of land); that in this block of surveys were contained both *that which was conveyed to the claimants, and that which the defendants hold, each of 2000 acres. The bill then proceeds in the following words: "That the said McKee, who resided at a great distance from the land in question, was furnished with a boundary of a 2000 acre survey, agreeably to that which is contained in his aforesaid deed, as the boundary of his 2000 acre survey." "And afterwards, without his knowledge, the surveyor substituted the 2000 acres which is described

commerce is to be conducted with good faith towards belligerents. Their rights are to be respected, as well as those of neutral nations. It is not sufficient, that a part only, but the whole property covered by the policy must be neutral. And if a cover is attempted for enemy's property, by an intermixture with neutral, it is held to subject the whole to confiscation. *Blagge v. New York Ins. Co.*, 1 Caines 565. And if the general agent of a neutral cargo cover enemy's property in the same vessel, though without the consent or knowledge of his principal, the property of his principal is condemnable (notwithstanding it may be distinguished by the papers), and the warranty of neutrality is not fulfilled. *Phoenix Ins. Company v. Pratt*, 2 Binn. 308.

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in the survey, for that which was originally intended for him." But they aver, "that it was the intention of the parties to the said deed, that by it should pass the 2000 acres survey, by whatever boundary described, to which the said McKee was entitled under the warrant granted to him as aforesaid."

By the land laws of Virginia, the return of the surveyor into the office is the only legal identification of the land on which the right of the individual attaches. So that the warrant of Lord Dunmore being a general, not a specific, warrant, there can be no doubt, that McKee never acquired any right, legal or equitable, in the land described in his conveyance. It is also admitted, that the land, of which the defendants are seized, was McKee's land, and derived to him through a warrant of Lord Dunmore, and a survey made by Douglas; so that if the other material allegations of the bill were supported by evidence, it is possible, that this court might be induced to think the complainants' case a good one.

As to the fact that the description by which McKee sold to the complainants was the first communicated *to him, this court can attach [435] to it no importance; for, independently of its being unsupported by proof, it is not alleged by whom the communication was made. Nor, if it had been made by the surveyor, is it shown to us, that it would have bound him in making his return; or, if obligatory upon him, that it would have affected the rights of a third person, claiming under the return actually made into the office.

As, then, it is admitted, that the description in McKee's conveyance designates a tract wholly different from that held by the defendants, the whole equity of the complainants must depend upon the alleged intention of the parties, McKee and Ross, at the time when the former conveyed to the latter.

And here we find the case wholly unsupported by proof. It is only in the conveyance itself, in the answer of the defendants, or the extrinsic evidence in the cause, that we can look for proof of such intention. A conveyance of all McKee's lands, surveyed under a warrant, specifically described, might have placed the complainants on a different ground. But the deed does not specify the date of the warrant, the number of acres, nor the person to whom it issued. The words are (after describing the metes and bounds), "surveyed by virtue of a warrant from under the hand and seal of John, Earl of Dunmore, under the king's proclamation of 1763." Now, *non constat*, but that the warrant here referred to may have passed through a long course of conveyances down to McKee. Nor does the deed [436] state that the land was surveyed for McKee, and so far may have *been perfectly consistent with the survey returned in favor of another person. The deed itself, then, furnishes no evidence of intention, and the answer does not admit it.

But it is contended, that the deed, taken in connection with one of the certified facts, "that but one of Lord Dunmore's warrants ever issued to McKee; that but one survey of 2000 acres was ever returned in his name under that warrant; and that this was the only survey of 2000 acres to be found in the office, in McKee's name, under any warrant," shows that he must have intended to convey that surveyed for him, and no other. But the majority of the court think otherwise. Had the deed described the land conveyed, as a tract of 2000 acres, surveyed for McKee himself, there might have been some ground for this argument. But the deed is not so

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expressed ; and for aught we know, McKee may have been proprietor of many grants, surveyed under Dunmore's warrants, in the name of others, and conveyed to him. Such an intention ought not to be inferred from slight circumstances, nor precipitately acted upon. Where A. conveys to B., by metes and bounds, the circumstances ought to be very strong, to prove that he meant to convey any other lands than those specifically described, before this court would be induced to set aside one deed, and decree the execution of another. If the vendee may set up such a ground of equity, the vendor may do the same ; and the intrinsic difficulties which such investigations would present, would make it generally better to leave the parties to their remedy at law. *If a person, supposing himself possessed [*437 of a specific tract of land, in a certain neighborhood, should contract for the sale of that land to another, it does by no means follow, that he would have sold him any other tract, in the same vicinity, to which, without his knowledge, he was then entitled, much less, that he would have sold it for the same price.

It is a consideration of no little importance in this case, that the bill expressly alleges McKee's ignorance of the actual return of the surveyor. And on what ground are we to presume, that if he had known it, he would have sold the tract which it covered at all, or sold it at the price expressed in the deed to Ross? Its value might have been treble that of the other, and there is reason to think that this court would have been induced, under very strong circumstances only, to decree in favor of those complainants against McKee himself. The sale of a warrant, or of any survey that may be made under a warrant, would be in the nature of a wager or speculation, and might be sustained. But where an individual, supposing his warrant located on black acre, when it is, in fact, located on white acre, conveys the former, by metes and bounds, it must be a strong case, that will sanction a court in setting aside the conveyance of the one, and decreeing that of the other.

It is in vain to say, in this case, that the defendants are bound to show that McKee ever had, in fact, an interest in any survey of 2000 acres beside the one in litigation. The answer puts the complainants on their proof, and it is from them that the evidence is to proceed, upon which our decision is to be founded. *Besides, how are the defendants to be conusant of [*438 a fact like this? Their privity forces upon them no knowledge but what has relation to this single tract of land ; and even as to that, coming in, as they do, under an act of confiscation, there can be no reason for requiring of them evidence to such a fact. A necessary unavoidable implication or inference from the evidence adduced by the complainants is the only possible ground upon which such a necessity could be contended for, and even this, in our opinion, does not exist.

In this case, the court explicitly avows, that it has been not a little disposed to look unfavorable on a claim of such great antiquity. Nearly forty years have elapsed since McKee conveyed this land to Ross. Almost every party and every witness must now be no more ; and to undertake, at this late day, to inquire into the intentions of parties, in a transaction so very remote in time, might be attended with difficulties and evils which cannot now be foreseen.

Decree affirmed.