divided in opinion, and was argued by counsel: On consideration whereof this court is of opinion, that there is no error in the record and proceedings of the circuit court, for which judgment ought to be arrested. And this court is further of opinion, that a division of the judges of the circuit court, on a motion for a new trial, is not one of those divisions of opinion which is to be certified to this court for its decision, under the act, entitled, "an act to amend the judicial system of the United States." All which is ordered to be certified to the United States court for the sixth circuit and district of South Carolina.

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*550] *KERR *et al. v.* WATTS.

Decree.—Bonâ fide purchaser.

The decision of this court, in Massie *v.* Watts, 6 Cranch 148, revised and confirmed.

Who are necessary parties in equity.

The rule applied in equity to the relief of *bonâ fide* purchasers, without notice, is not applicable to the case of purchasers of military land-warrants, under the laws of Virginia.

Such purchasers are considered as affected with notice, by the record of the entry, and also of the survey; and subsequent purchasers are considered as acquiring the interest of the person making the entry; so that purchases under conflicting entries are considered as purchasing under distinct rights; in which case, the rule as to innocent purchasers, does not apply.

The principle, that only parties or privies, or purchasers *pendente lite*, are bound by a decree in equity, how applied to this case.

The surveys actually made on the military land-warrants in Virginia, have not the force of judicial acts, or of acts done by the deputations of officers, as general agents of the continental officers.

APPEAL from the Circuit Court of Ohio.

Ferdinando O'Neal was owner of a Virginia military warrant for 4000 acres of land, dated the 17th of July 1783, and employed Nathaniel Massie, a deputy-surveyor, to locate it, and to survey and return the plats. John Watts purchased the right of O'Neal, and on the 7th of January 1801, paid Massie 50*l.*, in full satisfaction for locating and surveying the warrant. On the 3d of August 1787, Massie made an entry on part of O'Neal's warrant
*551] for 1000 acres. On *the same day, an entry had been made for 1000 acres for Robert Powell, which was purchased by Massie.

On the 27th of January 1795, Massie made an entry in his own name, for 2366 acres, and the bill filed in the court below, by the respondent, Watts, against the appellants, Kerr and others, charged, that on the 26th of April 1796, Massie fraudulently made a survey for O'Neal, for 530 acres, purporting to be made upon his said entry of 1000 acres; but, in fact, on different land, having fraudulently appropriated to himself the land covered by O'Neal's entry, by surveys made on Powell's and his own entries, having purchased Powell's warrant and entry, before the surveys were made. The bill further stated, that Massie had obtained grants upon his survey.

Watts commenced a suit in chancery against Massie, in the state court of Kentucky, claiming a conveyance of the legal title, and proceeded to a final hearing upon the merits, in the circuit court of Kentucky, to which it had been removed; which last court, in the November term 1807, made an interlocutory decree, in favor of Watts, and directed the proper surveyor to lay off the several entries, in the manner pointed out in that decree, and to report to the court, in order to a final decree in the premises. The cause was finally

decided, by a decree directing Massie to convey the 1000 acres to Watts, according to certain metes and bounds reported, and to deliver possession, &c.; and upon performance of *the decree by Massie, Watts was directed to transfer to him 1000 acres of O'Neal's warrant. Massie [*552 appealed to this court, where the decree of the circuit court was affirmed, at February term 1810. (6 Cranch 148.)

Massie refused to convey or deliver possession, when demanded; and in the meantime, part of the property recovered had been laid out into lots of the town of Chilicothe, and the bill charged the appellants, and others, who were made defendants in the present suit, with having in possession, respectively, part of the complainant's property, and claiming to hold the same by titles derived under Massie. The record of the proceedings in Kentucky, and in the supreme court, were referred to, and made part of the bill in this case. The entries before mentioned are as follows:

"No. 503: Captain Robert Powell enters 1000 acres of land, &c. Beginning at the upper corner, on the Scioto, of Mayor Thomas Massie's entry, No 480, running up the river 520 poles, when reduced to a straight line, thence, from the beginning, with Massie's line, so far that a line parallel to the general course of the river shall include the quantity."

"No. 509: Captain Ferdinand O'Neal enters 1000 acres, &c. Beginning at the upper corner, on the Scioto, of Robert Powell's entry, 503, running up the river 500 poles, when reduced to a straight line, and from the beginning, with Powell's line, so far that a line parallel with the general course of the river will include the quantity."

*"No. 2462: Nathaniel Massie enters 2366 acres, &c., on the bank [*553 of Scioto, corner to Robert Powell's survey, No. 503, thence, with his line, south 43° east, 293 poles; south 80° east, to the upper back corner of Thomas Massie's survey, No. 480, thence, with his line, south 10° west, to Paint creek, thence, up the creek, to the corner of Thomas Lawes's survey, thence, with his line, and from the beginning, up the Scioto, to the lower corner of Daniel Stull's survey, thence, with his line, so far that a line south 10° west, will include the quantity."

But these entries depended on one which preceded them on the entry-book, made by Thomas Massie, as follows:

"No. 480: 1787, August 3d. Thomas Massie enters 1400 acres, &c. Beginning at the junction of Paint creek with the Scioto, running up the Scioto, 520 poles, when reduced to a straight line, thence, off, at right angles, with the general course of the river, so far that a line parallel thereto will include the quantity."

This court, in the case referred to, decided, that Thomas Massie's survey ought to commence at the mouth of Paint creek; and that the upper corner on the river should be placed at the termination of a right line, at the distance of 520 poles, and the survey extended out at right angles with the general course of a right line supposed, from the beginning to the upper corner: and that, from the upper corner of Thomas Massie's survey, a point on the river, at the distance of 520 poles, on a right line, should be *ascertained for the upper corner of Powell's, and that the real course [*554 of a right line from Thomas Massie's corner to Powell's upper corner, should be considered as a base, from which Powell's survey should be extended, by lines at right angles therewith, except only so far as the lower

line might interfere with Thomas Massie's property. The survey of O'Neal to depend upon the same principles in relation to the survey of Powell.

The object of the present suit was, to carry into execution against the defendants, who had acquired Massie's title, the decree against him in Kentucky, affirmed in this court. The court below, by their decree, gave relief against each, for the specific property claimed by the answer of each, construing the entries according to the principles of the former decision, except in varying the complainant's survey, by a decision, that a piece of land, called an Island in the river, was part of the main shore, when the entries were made, and included as a part of the bank. The defendants all submitted to the decree, except Kerr, Doolittle, Joseph Kirkpatrick, sen., Joseph Kirkpatrick, jun., and the heirs of James Johnston, who appealed to this court.

February 15th. The *Attorney-General* and *Scott*, for the appellants, argued: 1. That the survey made for Powell ought to be established, because made under the superintendance of officers to whom the state of Virginia had deputed the sovereign and exclusive authority to regulate such
*555] surveys, similiar to the *powers of commissioners to adjust pre-emption rights: and that their determination was conclusive, being an inseparable condition annexed to the grant from the state. 2 Vent. 365; 3 Ch. Cas. 135. The existence and power of these agents has been recognised by the court. *Wallace* v. *Anderson*, 5 Wheat. 291.

2. The appellant, Kerr, is an innocent purchaser without notice, who holds the legal estate, with superior equity, and therefore, cannot be disturbed by the alleged equity of Watts. The cause having been set down for hearing, on the bill and answers, his answer is conclusive evidence as to every fact which it states (Wheat. Dig. tit. Chancery, pl. 142; *Leeds* v. *Marine Ins. Co.*, 2 Wheat. 380), and it does state, that at the filing of the bill, he had the legal title; and that, before either party purchased, the entries had been surveyed, and become matters of record. A survey returned and recorded is notice. 3 Binn. 118. He is not affected by the supposed fraud of Massie, in making Powell's survey. Massie was only one of several mesne purchasers of Powell's rights; and if Powell, the original holder, was innocent, a subsequent purchaser under him has a right to the shield of his innocence, even though such purchaser had notice. 2 Atk. 242; 11 Ves. 478; Sugd. on Vend. 438. Nor is the appellant a *lite pendente* purchaser, because the former suit was brought in Kentucky, out of the jurisdiction where the land lies. 2 P. Wms. 482. The rule is borrowed from the common
*556] *law; and its analogies must, therefore, be pursued. A verdict and judgment at law, or a decree in equity, affecting the title to land, are local in their nature. The *lis pendens* must be on the question of title directly, and not incidentally. The principle is confined to those who attempt to originate a title *pendente lite;* and is never extended to those who had acquired a title previously, and who ought, therefore, to have been made parties to the *lis pendens*. Its policy is to prevent the parties from alienating, and thus evading the justice of the court. Even if the appellant had no legal title, but had only the better right to call for it, he could not be affected in equity by the pendency of the former suit. 2 Vern. 599. Nor is he bound as privy to the former decree. No person can be bound as such, who ought to

have been made a party: as to all who ought to have been parties, such a decree is considered as a fraud. 1 Binn. 217; 2 Ibid. 40, 455; 3 Ibid. 114. Those only are privies, who acquire this interest subsequent to the institution of the suit, by the decree in which they are sought to be affected. Besides, the question here is substantially different from that which arose in the former case. There, it was as to the responsibility of an agent to his principal, for an alleged fraud. Here, it is as to the dispossession of a *bonâ fide* purchaser.

Doddridge and *Hardin*, contrà, stated, that they should not examine the correctness of the *decision in the former case, nor the question whether the appellants were bound by the decree against Massie, [*557 under whom they claim; since, whether they were bound by it as a *res judicata* or not, the court would not change the application of the former adjudication, unless the appellants showed themselves to be purchasers for a valuable consideration, without notice, or unless the respondent had been guilty of some gross negligence. The defence of being a purchaser, without notice, can never be set up by or against one claiming under a different original title. It is admitted to be the general rule, that where the cause is set down for a hearing, on the bill and answer, the answer of the defendant is conclusive: but where the answer proceeds upon the ground of making the defendant an innocent purchaser, and the records, &c., made part of the bill, show that he cannot be such, there, the law charging him with notice from the registry, forms an exception to the rule. The title of the respondent is an imperfect legal title; and his claim being a matter of record, cannot be treated as a latent equity, for negligence in prosecuting which, he shall lose his property. In the system of land laws which has been established in this country, land titles commence by a record, and the very first step confers an inchoate legal title.

March 16th, 1821. JOHNSON, Justice, delivered the opinion of the court. —This cause has its origin in the case decided in this court between *Watts* and *Massie*, in the year 1810. *That suit came up from the Kentucky [*558 district, and was prosecuted there because Massie, the defendant, who then resided in that state, and either was, or was supposed to be actually seised of the land in question. Since that decision, it has been ascertained, that the present defendants are in possession of the land, or the greater part of it; and Massie having changed his residence to Ohio, this suit has become necessary, both to enforce the former decree against him, and to obtain relief against the actual possessors of the land.

In the course of discussion, the court has been called on to review its decision in *Watts* v. *Massie*, and it has patiently heard, and deliberately considered, the able and well-conducted argument on this subject. But after the maturest reflection, it adheres to the opinion, that, whether the case be viewed with reference to the time, intent and meaning of the calls, to analogy to decided cases, or convenience in the voluntary adoption of a principle of the most general application; that laid down in the case of *Watts* v. *Massie*, for running the lines of the land called for, cannot be deviated from. So far, therefore, as Massie himself, and his privies in estate, are concerned, Watts is now entitled to the full benefit of that decision.

But there are various other defendants, and several grounds of defence assumed in this case, which are unaffected by the decision referred to. It is contended, in the first place, that there is a radical defect of parties. That
*559] the representatives *of O'Neal and Scott, through whom the complainant claims, and those of Powell and Thomas Massie, supposed to be hostile to his interests, ought to have been made parties. On this point, there may be given one general answer. No one need be made a party complainant, in whom there exists no interest, and no one party defendant, from whom nothing is demanded. Watts rests his case upon the averment that all the interests once vested in O'Neal and the Scotts, now centre in himself, and provided he can recover the land now in possession of those actually made defendants, he is contented afterwards to meet the just claims of any others who are not made defendants. No rights will be affected by his recovery, but those of the actual defendants, and those claiming through them. As to the supposed interference of the lines ordered to be surveyed, with those of Thomas Massie, or Powell, the former is merely hypothetical, by way of reference, or imaginary; and the latter is only asserted, on the ground that Massie had acquired all the interest in Powell's survey that Powell ever had. There was, therefore, nothing to demand of Powell, as the case is exhibited by the record. It must be subject to these modifications, that the *obiter dictum* of the court, in the case of *Simms* v. *Guthrie*, 9 Cranch 25, is to be understood.

It is next contended, in behalf of Kerr, and several other defendants, that they claim through purchasers who were *bonâ fide* purchasers, without notice, for a valuable consideration. And at first view, it would seem, that
*560] the principles so often applied to the relief *of innocent purchasers, are applicable to the case of these defendants, wherever the facts sustain the defence. But it will not do, at this day, to apply this principle to the case of purchasers of military land-warrants, derived under the laws of Virginia. In all the courts in which such cases have come under review, the purchasers have been considered as affected by the record notice of the entry, and also of the survey, such as it legally ought to be made, as incident to, or bound up in, the entry. It is altogether a system *sui generis*, and subsequent purchasers are considered as acquiring the interest of the enterer, and not necessarily that of the state. So that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case, the principle here contended for does not apply; since the ignorance of a purchaser of a defective title, cannot make that title good, as against an independent and better right. These principles may safely be laid hold of, to support a doctrine which, however severe, occasionally, in its operation, was perhaps indispensable to the protection of the interests acquired under military land-warrants, when we take into consideration, the facility with which such interests might otherwise, in all cases, have been defeated by early transfers.

It is further contended, that the defendants are not bound by the decree in the case of *Watts* v. *Massie*, because neither parties, nor privies, nor *pendente lite* purchasers. That those who come not into this court, in any one
*561] of those characters, are not subject to the direct *and binding efficacy of an adjudication, is unquestionable. But it is not very material, as to the principal question in this case, whether the parties are to be affected

by the former adjudication directly, or by the declared adherence of this court to the doctrines established in that case. The consequence to the parties on the merits of the case is the same.

But in one view, it is material, and that is, with regard to the proof of the exhibits, through which Watts, the complainant, deduces his title through the Scotts, from O'Neal. As Massie, in the former case (the record of which is made a proof of this), acquiesced in this deduction of Watts's title, we are of opinion, that it is, as to him and his privies in estate, a point conceded. As to parties and privies, the principle cannot be contested ; and as to *pendente lite* purchasers, it is not necessary to determine the question, since the only defendants who have appealed from the decision below, to wit, Kerr, the Kirkpatricks, Doolittle and the Johnsons, claim under purchases made long anterior to this scrip, in Kentucky. Those defendants certainly were entitled to a plenary defence, and where they have, by their answers, put the complainant upon proof of his allegations, as to his deduction of title, the question arises, whether it appears from the record, that the deduction of title was legally proved.

There can be no doubt that this question passed *sub silentio* in the court below, but it does not appear from anything on the record, that the point was waived ; and we are not at liberty to look beyond *the record, for the evidence on which the deduction of title was sustained. Although [*562 we entertain no doubt, that exhibits may, on the trial, be proved by parol testimony, yet a note on the minutes, or on the exhibits, became indispensable to transmit the fact to this court ; and as the case furnishes no such memorandum, we must consider the assignments through which Watts derived his title from O'Neal, as not having been established by evidence. Such was the decision of this court in the case of *Drummond* v. *McGruder*, 9 Cranch 122. But Kerr is the only one of these appellants who has expressly put the complainant on proof of his title. The rest of the appellants having passed over this subject, without any notice, in their answer, the question is, whether they waived their right to call for evidence to prove these exhibits. We are of opinion, they have not ; and that the complainant is always bound to prove his title, unless it be admitted by the answer.

There are two principles of a more general nature, of which all the appellants claim the benefit, and which, as the cause must go back, will require consideration. It is contended, that Nathaniel Massie was the acknowledged agent of both O'Neal and Watts, and that the complainant is precluded by his acts done in that capacity. This argument is resorted to, as well to fasten on Watts the survey made in his behalf, above the town of Chilicothe, as a relinquishment of all claim to a location at the place now contended for in his behalf. But in neither of these views *can this court apply [*563 this principle in favor of the defendants ; for, it follows from the principles established for surveying O'Neal's entry, that the survey made by Massie on O'Neal's entry, was illegal and void ; and, certainly, when employed in locating the entries made in favor of Powell and himself, Massie was not acting as the agent of O'Neal or Watts, but as the agent of Powell, or, in fact, in his own behalf. The survey, on which this argument rests, was at best partial, and it is conclusive against it, to observe, that the powers of Massie, as agent of Watts, were limited to the entry and mechan-

ical acts of the survey. The recording of that survey, and all those solemn acts which give it legal validity, it does not appear that his powers extended to. Watts never recognised that survey, or assumed the obligatory effects of it, by any act of his own, and in fact, in the event (though not a material circumstance to the result we come to), it has since been ascertained, that it was not only made off Watts's entry, but on land appropriated by another.

But it has been contended also, that all these surveys actually made on the military land-warrants of Virginia, derive the authenticity and force of judicial acts, or of acts done by the general agents of the continental officers, respectively, from the superintending and controlling powers vested in the deputations of officers, as the law denominates them, appointed by themselves to superintend the appropriation of the military reserves set apart for their use. It is to be presumed, it is contended, that every *564] survey made by their authorized surveyors, was *made under their control and direction. This court does not feel itself authorized to raise any such presumption. The powers actually exercised by those commissioners, were limited to very few objects. The surveying of entries, at a very early period, became a judicial subject; and the commissioners, or rather deputations of officers, never assumed a right to adjust the conflicting interests of individuals upon the locating and surveying of such entries. To appoint surveyors, to superintend and direct the drawing of lots for precedence among the locators, to direct the survey for officers and soldiers, not present or not represented, and to determine when the good lands between the Cumberland and Tennessee should be exhausted, comprehended all the powers with which they were vested. As individual agents, capable of binding their principals, they appear in one case, and only one, which was, when the officer or soldier was absent and unrepresented. And as to judicial powers, there is no provision of the act that vests them with a semblance of such a power, unless it be to judge of the right of priority as determined by lot. But here, also, they appear more properly in the character of ministerial officers, discharging a duty without the least latitude of judgment or discretion. Their powers in nothing resemble that of the courts of commissioners established through the back counties of Virginia. As to the subjects submitted to the boards so constituted (of which military warrants were no part), those boards were expressly vested with judicial power. But the powers of the deputations of officers were purely minis- *565] terial. *And if it be admitted, that they might have exercised the power of defining the principles on which surveys should have been made, yet it is certainly incumbent on him who would avail himself of that power, to show that it was exercised, and to bring himself within the rules prescribed by their authority.

Decree reversed as to these appellants, and sent back for further proceedings.