

Littlepage v. Fowler.

in satisfaction of the debt due from the father to the son, and not for the consideration of love and affection, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a *valuable*, for a *good*, consideration, and a violation of the well-settled rule of law, that parol evidence is inadmissible to annul, or substantially vary, a written agreement.

But that was not the object for which the evidence was offered, nor the effect it was intended it should have. It could not, in any respect, vary or alter the deed, or give to it a different construction or operation between the parties to it. The defendant had attempted to invalidate the deed, by going into proof of circumstances out of the instrument itself, and unconnected with it, and which circumstances, it was contended, *showed *215] a fraudulent intention in the grantor, in conveying the lot in question to his son. And the evidence of the father's being indebted to the son, was to meet and repel the presumption of fraud which was attempted to be raised against the deed, by reason of such extrinsic circumstances. The evidence which has been admitted to show the fraud, and that which was offered to rebut it, related to collateral and independent facts unconnected with the deed, and could not, therefore, in any manner, vary or alter its terms.

The third exception was, accordingly, well taken. The judgment of the court below must, therefore, be reversed, and the cause remanded, with directions to issue a *venire de novo*.

Judgment reversed.

LITTLEPAGE v. FOWLER and others.

Land-law of Kentucky.

The following entry is invalid, for want of that certainty and precision which the local laws and decisions require: "January 27th, 1783, J. C. L. enters 20,000 acres of land on twenty treasury warrants, No. 8859, &c., beginning at the mouth of a creek falling into the main fork of Licking, on the north side, below some cedar cliffs, and about 35 miles above the Upper Blue Licks, and running from said beginning up the north side of Licking, and bounding with the same as far as will amount to ten miles when reduced to a straight line, thence extending from each end of said reduced line, a northerly course, at right angles, to the same, for quantity."

*216] *Appeal from the Circuit Court of Kentucky.

February 14th, 1826. This cause was argued by *Bibb*, for the appellant; (a) and by *Talbot*, for the respondent. (b)

(a) Citing, *Johnson v. Pannel*, 2 Wheat. 211; *Hite v. Graham*, 2 Bibb 143; *White v. Wilson*, 3 Id. 542; *Whitaker v. Hall*, 1 Ibid. 79; *Bodley v. Taylor*, 5 Cranch 224. *McGee v. Thompson*, 1 Bibb 132; *Marshall v. Currie*, 4 Cranch 176, 177; *Bush v. Todd*, 1 Bibb 64; *Whitaker v. Hall*, Id. 73; *Roberts v. Huff*, *Hardin* 382; *Taylor v. Kincaid*, Id. 82; *Bowman v. Melton*, 2 Bibb 153.

(b) He cited *Hite v. Graham*, 2 Bibb 144; *McKee v. Bodley*, Id. 482; *Whitaker v. Hall*, 1 Id. 79; *Craig v. Hawkins*, Id. 53; *Smith v. Walton*, 3 Id. 153; *Carland v. Rowland*, Id. 127; *Webb v. Bedford*, 2 Id. 259; *Greenup v. Lyne*, Id. 370; *Mercer v. Irvins*, Id. 471; *Landrum v. Hite*, 1 A. K. Marsh. 419; *Bartas v. Calhoun*, 2 Id. 169.

Littlepage v. Fowler.

February 23d. JOHNSON, Justice, delivered the opinion of the court.— This cause comes up by appeal from the circuit court of Kentucky, in which the appellant filed his bill to compel the defendants to convey to him 20,000 acres of land, in right of a prior entry. The defendants, having obtained the prior patent, relied upon their prior legal rights; and on the hearing below, the bill was dismissed. The entry on which the complainants relied was in these words:

“January 27th, 1783: John Carter Littlepage enters 20,000 acres of land on twenty treasury warrants, No. 8859, &c., beginning at the mouth of a creek falling into the main fork of Licking, on the north side, below some cedar cliffs, and *about thirty-five miles above the Upper Blue Lick, and running from said beginning, up the north side of Licking, and [*217 bounding with the same, as far as will amount to ten miles, when reduced to a straight line, thence extending from each end of said reduced line, in a northwardly course, at right angles to the same, for quantity.”

The only question in the cause is, whether this entry contains that legal precision which the land laws of Kentucky require, to make an entry a valid appropriation of the land. For the defendants, it is contended, that it is vague, and calculated either to mislead a subsequent locator, or impose upon him an unreasonable labor in the effort to identify it. On this subject, the rule of the law of that state, and the rule of reason, is, that the objects called for to designate the land appropriated, should be specific; and, if not notorious in themselves, that they should be so indicated, with reference to those which are notorious, as to enable a subsequent locator to discover and identify them, by using ordinary diligence.

The locative calls in this cause are, a creek emptying into the main fork of Licking, on the north side, below some cedar cliffs. It is not pretended, that these objects have the attribute of notoriety, and in order to lead to their discovery, the subsequent locator is referred to the main branch of Licking river, and the Upper Blue Lick, which are notorious, and to the position and distance of the beginning point of the entry, with reference to the lick and the river. *A subsequent locator, then, having this entry in his hand, and proposing to appropriate the adjacent residuum, [*218 proceeds to the lick, as his starting point; when there, he knows that the land lies above him, with reference to the river, upon the river bank, and, in the language of the entry, “about thirty-five miles above the Upper Blue Lick.” The first question which then occurs to him, is that which has constituted the principal subject of argument in this cause. Upon what principle is the distance here called for to be computed? For the appellant it is contended, that he should pursue the meanders of the river, or the most practicable route by land; for the appellee, that he must apply the mathematical principle to the entry, and take the shortest line that can be drawn between the two points; and both contend, that they are sustained by adjudicated cases.

We have examined those cases, and are satisfied, that neither party is supported in his doctrine, as a universal principle; but that the courts of Kentucky, with that good sense which uniformly distinguishes their efforts to extricate themselves from that chaos of rights, in which political relations, and inveterate practice, had involved them, have left each case to be governed by its own merits, wherever distance has been resorted to as the means of identifying a locative call. And certainly, the sense in which

Littlepage v. Fowler.

the enterer uses the reference to distance, is the only general rule that can govern a court in construing *an entry. That sense may be gathered *219] from his language, or inferred from the habits of men, and the state of the country; but, as he is responsible for the sufficiency of his entry, it would be unfair to impose an arbitrary and unusual meaning upon the language of unlettered men, exploring a country, covered with thickets, and replete with dangers.

For these reasons, the straight line, as the means of ascertaining a locative call, has certainly been rejected as a general rule. Such was the case in *Hite v. Graham et al.*, 2 Bibb 144, 145; *McKee v. Bodley*, 2 Ibid. 482; *Whitaker v. Hall et al.*, 1 Ibid. 79. As the method of surveying an entry, however, the meanders of a river are always reduced to a straight line, and to this class of cases are all those quoted for the appellee to be referred. *Craig v. Hawkins's Heirs*, 1 Bibb 53, and many others. Yet, in the case of *McKee v. Bodley*, before cited, both the direction and admeasurement of a straight line are resorted to, for the purpose of verifying a call lying on the side of a road. And the reason is obvious; in that case, the shortness of the line, as well as the phraseology of the entry, rendered it admissible that the enterer referred to distance as ascertained by direct measurement.

One general rule is never departed from, to wit, that when distance is indicated by a road, it shall be held to mean, by the meanders of a road. (*Whitaker v. Hall, supra and passim.*) So also, where there is no road or trace, the most *usual route, if there be proved such a route to exist, *220] seems to be the rule. So, it is laid down in *Hite v. Graham et al.*, in which also the general rule as to the sense in which the language of entries is to be received, is explicitly declared to be "according to the popular acceptance, at the time when the entry was made." And although, in the case of *White v. Wilson*, 3 Bibb 542, a learned judge is reported to have said, "that there seems to be a diversity of opinion as to the most natural construction of a locative call in an entry, where a given distance, up or down a water-course, is specified," we cannot but think, that the same rules which govern the cases on the subject of distances by land, have been distinctly and rationally applied to distances called for with reference to water-courses.

Distances on the Ohio are invariably measured according to its meanders. *Hite v. Graham*, 2 Bibb 143; *Johnson v. Pannel's Heirs*, 2 Wheat. 207. Nor is there anything arbitrary in the rule, nor leading to a result so indefinite as the supposed distinction between great and small water-courses. Their navigable character furnishes the rule by identifying them with highways, and thus the popular acceptance of terms still furnishes the distinction. This is very obvious, from the case of *Hite v. Graham*, in which the court say, "as the Ohio is the usual way of passing from one point on it to another, and was, at an early day, the great highway of coming to that part of this country," &c. And in the same case, speaking of the Little *221] Sandy, the court observes, "This call, like that for distance on the Ohio, is not explicit as to computing it. But this stream, though, like the Ohio, navigable, is not, like it, impassable, except occasionally; and a person, in passing from one point of it to another, is not necessarily confined to the winding of the stream. A direct line, however, would be impracticable to travel and use, put it out of the question as being a way in

Littlepage v. Fowler.

which a call of this kind would ever be understood by any one." And thus, in the case of *Bowman v. Melton*, 2 Bibb 153, where the call was for thirteen or fourteen miles up a small stream, the court observed, "It, indeed, is not probable, that the distance along the meanders of the water-course was intended, because, it is believed, that it never was usual to travel with the meanders of a small stream, to ascertain the distance of one object from another; nor is it probable, that the distance by a direct line was intended, because it would extend beyond the head of the water-course. But it is rather to be presumed, that reputed distance was meant."

Since, then, all the testimony goes to establish, that Licking, above the Upper Blue Lick, is not a navigable stream, at least not so as to be resorted to as a highway, especially for ascending navigation, it follows, that the inquiries of a subsequent locator, who wished to appropriate the residuum adjacent to this entry, or of the surveyor who had a warrant to survey it, would be for a creek entering into Licking, on the *north side, at a distance from the lick of about thirty-five miles, by some practicable [*222 route. The answer to this inquiry, as appears from the evidence, would direct him immediate to the fork of Licking. For Morrow, one of the witnesses, swears, that he could reach that point by travelling in a practicable route, about thirty-five or forty miles (p. 486 of the record), and in a direct line it is ascertained to be about thirty miles. Nor would the call for the cedar cliffs be wanting here, for it is worthy of remark, that the call is not for a cliff adjoining, or near to, or in sight of, the mouth of the creek, but merely for a cliff, at an indefinite distance above the mouth of the creek. Whereas, all the witnesses who are examined to identify the mouth of Foxe's creek, where this entry is claimed to lie, answer, under the impression, that the cliff is to be immediately above or adjoining the mouth of the creek. In this particular, there is much reason to believe, that Foxe's creek stands alone on the north side of Licking; but the call is vague and indefinite on this point, since it is answered, if the creek is below the cliffs, at any reasonable distance.

We will now suppose the locator dissatisfied, or in doubt, with regard to the object thus found, and, returning to the lick, resolved to renew his researches. The idea of finding the mouth of Foxe's creek, by following a direct line, is out of the case, since no course is furnished him by the entry, on which to pursue his researches for this object. He must, then, either renew his inquiries *for some other creek of the description called [*223 for; or, adopting the meanders of the river as his guide, pursue his way up its margin. In answer to his inquiries, it is obvious, that any creek lying between the north fork of Licking and Foxe's creek, would be recommended to his examination, in preference to Foxe's; because the latter must be farther removed from the distance of thirty-five miles than any one lying above it. If, then, the enterer intended to appropriate his land at the mouth of Foxe's creek, it is obvious, that his call for distance is calculated to mislead, not to direct, a subsequent locator.

But, as there is no evidence in the cause, of any road, trace or explored route, leading from the lick to the mouth of any of these creeks, let us suppose the explorer at liberty to take the course contended for in behalf of the appellant, and to thread his way up the meanders of the river. When he reaches the mouth of Foxe's creek, he finds himself short of the distance

Littlepage v. Fowler.

called for, by more than one-third of the whole, that is to say, by eleven miles. Does the cause afford any ground, or the cases any principle, which will authorize his stopping there? The call is for a creek "about thirty-five miles" above the lick. We are not disposed to restrict the appellant to the rigid rule formerly laid down by the courts, by which the word "about" was rejected, and the entry limited to the number called for. In surveying *224] entries, there is little doubt that this is the rule; but, in *measuring distances, a more liberal rule is laid down in the more modern case of *Jones v. Plummer*, of which we are disposed to allow the party the full benefit. (2 Litt. 162.) It is in these words, "according to repeated decisions of this court, under the word 'about,' the subsequent adventurer might be required to stop a little short of, or extend the search a little beyond, the distance called for." But according to the principle of this rule, if he might stop eleven miles short, he may advance eleven miles beyond the distance called for; and two and twenty miles search, or even the half of it, on the margin of such a stream, or any stream, would be too much to require of a subsequent locator.

Had the object called for had any claim the the attribute of notoriety, it might have had some greater claim to indulgence, on the principle of *Taylor v. Kincaid*, Hardin 82, or, had there been proved a known and received computation of distance attributed to the object, it might have been considered with reference to the principle in *Bowman v. Melton*, 3 Bibb 153. But there is no evidence of any received estimation of distance from the lick to the mouth of this creek; nor is there the least evidence that it took the name of Foxe's, prior to the entry. On the contrary, and this furnishes another legal objection to this entry, there is evidence, that *225] at that time, and a year before, (a) it bore the name *of Indian creek, and there is on the record a copy of an entry, (b) made upon it by that name, in the same year, and only seven months junior to the entry of the appellants. Indeed, the time and incident that gave it the name it now bears, are positively proven to be contemporaneous with the survey.

And finally, if resort be had to the means of testing the identity of the call admitted in *McKee v. Bodley*, to wit, course and distance in a right line, we find the test entirely fatal to the call in this distance. The course is not given, and the distance is not one-third of that called for. And we further find, that there are at least two streams on the same river which answer the call, when subjected to this test, infinitely better; to wit, that now called the north fork, but which was formerly known as an undistinguished creek, and Warwick's creek or run, the former near thirty-five miles, and the latter twenty-seven and a half on a direct line from the lick.

On no principle, therefore, can this entry be supported, and the decree below must be affirmed, with costs.

Decree accordingly.

(a) John McIntire's deposition.

(b) Shephard's entry.