

*TAYLOR's Devisee v. OWING and others.

Land-law of Kentucky.

AN entry calling for the land to lie on the east side of Slate creek, a south-west branch of the main fork of Licking, "beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek, at the north-east side, it being the place of beginning for S. M.'s entry of 20,000 acres," is defective in certainty and precision; and its defects are not aided by the reference to S. M.'s entry for "20,000 acres, lying on the west side of Slate creek, south-west branch of the main fork of Licking creek, beginning where the buffalo road crosses Slate creek, at the mouth of a branch, emptying in on the east side there thereof; there are several cabins," &c., "to include a large quantity of falling timber," &c.

APPEAL from the Circuit Court of Kentucky.

February 11th, 1826. This cause was argued by *Talbot*, for the appellant; and by *Trimble*, for the respondents.

February 22d. MARSHALL, Ch. J., delivered the opinion of the court.—The appellant filed a bill in the circuit court of the United States for the district of Kentucky, praying a conveyance of a tract of land, for which the defendants had obtained elder patents, and which the plaintiff claimed in virtue of a prior entry, which was made on the 6th of January 1783, and is in these words:

"James Taylor enters 12,000 acres of land, on ten treasury warrants, No., &c., to be laid off in one or more surveys, lying on the east side of Slate creek, a south-west branch of the main fork of Licking; [*227 beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek, on the north-east side, it being the place of beginning for Samuel Meredith's entry of 20,000 acres; running from thence, with said Meredith's line, down Slate creek, bounding with the same, the distance of three miles, when reduced to a straight line, from the beginning to his lower corner; thence continuing down the east side of Slate creek, bounding with the same, as far as will amount to three miles, when reduced to a straight line, from Meredith's lower corner; thence extending from each end of this reduced line of six miles, a north-east course, and continuing said course, until a line at right angles to the same shall include the quantity of vacant land, exclusive of all legal prior claims."

The entry of Meredith was made on the 30th of November 1822, and is in these words:

"Samuel Meredith enters 20,000 acres, lying on the west side of Slate creek, south-west branch of the main fork of Licking creek; beginning where the buffalo road crosses Slate creek, at the mouth of a branch emptying in on the east side thereof; there is several cabins on said ———; running, from the beginning, down Slate creek, and bounding thereon, as far as will amount to three miles, when reduced to a straight line; then, from the beginning, running up Slate creek, and bounding thereon, as far as will amount to three miles, when reduced to a straight line, from the beginning, to include to a large quantity of fallen timber; and then to extend [*228 from the upper and lower end of these lines, on the bank of Slate creek, a west course, until a line running due south and north shall include the quantity of vacant land required to be lain off, in one or more surveys."

The defendant contends, that this entry is invalid, because it does not

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describe the land it seeks to appropriate with such certainty as to enable a subsequent purchaser to avoid it, and to locate the adjacent residuum.

The land is to lie on the east side of Slate creek, a south-west branch of the main fork of Licking. Slate creek was well known by this name, but it is a stream of considerable extent, and the law requires, that the particular part of it on which Taylor's land is placed, should be designated so specially and precisely, that a subsequent locator, using due diligence, and possessing ordinary intelligence, might appropriate the adjoining vacant lands. The plaintiff contends, that this certainty is to be found in the description of Taylor's place of beginning. It is in these words : beginning where a buffalo road crosseth said creek, at the mouth of a branch emptying into said creek, on the north-east side, it being the place of beginning for Samuel Meredith's entry of 20,000 acres."

It is the plain dictate of good sense, which is supported by the whole current of decisions in Kentucky, that an entry, to satisfy the law, must describe the place with sufficient accuracy to be found and known by others, *229] and in terms which *will not fit other places equally well with that intended to be appropriated. The particular descriptive words, or, in the technical language of the country, the locative calls of the entry, are a buffalo road, crossing Slate creek, at the mouth of a branch emptying into the creek, on the north-east side, and Meredith's beginning. The plaintiff contends, that these words describe the mouth of Little Slate creek. Little Slate is a creek which empties into Slate, on its north-east side, some say 30 or 40, others 50 or 60 miles, by the meanders of that stream, above its mouth. The whole length of Slate is not mentioned by the witnesses, but it is sufficiently apparent, that its source is a considerable distance above its mouth. Two creeks, Little Slate, and Mile creek, Roe's run, and several branches, empty into it, on the north-east side, and it is crossed by numerous buffalo traces, some of which are not far from the mouths of four streams, though no one is so near as that just below the mouth of Little Slate. The crossing place near that creek is stated to be ten or twelve yards below its mouth, by some of the witnesses, and by others to be rather more.

The objections made to this entry, are not only that it is vague, but that it is calculated to mislead. It calls for a buffalo road, crossing the creek, at the mouth of a branch emptying into it on the east side. This trace is said to be so small as not to be generally denominated a road ; the traces made *230] by buffaloes are stated to be *of various dimensions, from three to ten or twelve feet wide, and sometimes wider. This near the mouth of Little Slate is about a foot wide, and is nearly lost in the bottom. It is represented by some of the witnesses rather as a deer path than a buffalo road. These traces have been called, by the inhabitants, roads, traces and paths. Some of the witnesses say, that these names are used indiscriminately ; others, that they designate larger or smaller routes ; the words "road" being applied to a large trace, and "path" to a small one ; that the trace at the mouth of Little Slate would never have been spoken of as a road.

Although the distinction between a road and a path is common throughout our country, yet, the court must have supposed, that it was not taken in Kentucky in reference to the traces of buffaloes, had the witnesses concurred in making this declaration. But they have not concurred in it ; many of them aver, that the distinction is as applicable to tracts of this description

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as to others, and is in as common use. The court, therefore, cannot avoid supposing, that a subsequent locator, finding this small path near the mouth of Little Slate, and understanding that there were considerable roads, near the mouths of other streams, would think that this could not be the road required by Taylor's entry.

There is a still more important variance in the character of the stream itself. The entry calls for a branch, and Little Slate is a considerable creek. It could scarcely be mistaken for what *is denominated a branch; [*231 and a subsequent locator, intending to lay his warrant at this place, could not reasonably suppose, that it was already appropriated by an entry professing to begin at the mouth of a branch. In argument, the counsel for the plaintiff has sought to get over this difficulty, by varying the language of his entry. He treats the question as if the entry had called for a branch of Slate creek, and shows that Little Slate fits this call. The argument would have been strong, had the language of the entry sustained it; but the words are, "the mouth of a branch, emptying into Slate." The difference between "a branch of Slate," and "a branch emptying into Slate," is obvious.

There is still a further difficulty which the plaintiff must encounter in this part of his case. It is alleged, that Little Slate was the notorious name of the stream, when Taylor's entry was made. It is well settled, in Kentucky, that if objects called for in an entry are distinguished by a known name, it is a serious defect to call for them by a name which they possess in common with other similar objects, instead of their appropriate name. If, then, the fact be, that when Taylor's entry was made, Little Slate had its appropriate name, the locator ought to have used that name, and his substituting in its place the general call for "a branch entering into Slate, on the north-east side," constitutes a serious objection to the entry, which would require the aid of other words, describing the place with greater certainty.

*The testimony on this point is not perfectly clear. Elias Folin [*232 says, that, so early as 1775, he was one of a company that made improvements on that stream, and they called it Slate. George Balla was also one of a company of improvers who encamped on Little Slate, in 1776, and knew it then by that name. He knew it by the same name, in 1783. Isaac Clinkerhead knew Little Slate by that name, in 1784, and thinks he heard it so called in 1782. Ralph Morgan says, that Little Slate was well known by that name, in 1782. William Williams has frequently heard hunters speak of Little Slate, as a place of notoriety, previous to November 1782, when Meredith's entry was made. John Lix was with a company of hunters on Little Slate, in 1776, when John Clarke gave the stream the name of Little Slate, and he has never known it by any other. George Balla knew Slate, and Little Slate, by those names, in 1776. Joseph McIntire knew those streams by their present names, in 1782. These witnesses certainly prove, that Little Slate was known by that name, very extensively, in 1782 and 1783, when the entries of Meredith and Taylor were made. It had, undoubtedly, acquired that name completely, in 1786. A shade of doubt is cast on the general notoriety of this name, by the circumstance, that several witnesses who speak of the stream as known to them at *this early period, and who distinguish it by its proper name, do not [*233 say that they then knew it, by that name.

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James McMillan became acquainted with Little Slate, in 1781, Joseph Young, in the fall of 1783 or 1784, and Roger Clements, in 1783. Neither of these witnesses say they knew it then by that name. They do not, indeed, say the contrary; but the probability is, that had they then known the stream by its present name, they would have been interrogated to the point. There is, then, much reason to believe, that Little Slate had then acquired its appropriate name, and ought to have been so designated by the locator, though the proof is not conclusive.

Upon the whole, we think it very clear, that Taylor's land is not described with sufficient certainty by the call, "to begin where a buffalo road crosses Slate, at the mouth of a branch emptying into said creek, on the north-east side." Is this defect remedied by the call for Meredith's beginning? This reference to Meredith's entry makes it a part of Taylor's, and will give the latter the advantage of any certainty of description which may be found in the former. Samuel Meredith calls to begin "where *the* buffalo road crosses Slate creek, at the mouth of a branch emptying in, on the east side thereof; there is several cabins on said ———." The entry is to include a large quantity of fallen timber. It will be perceived, that the
 *234] descriptive, or locative *calls of this entry, vary from those in Taylor's, in these respects only: In describing the buffalo road, Meredith uses the article "*the*," and he likewise adds to his description, that there are several cabins, either on the creek or on the branch (for the word is not in the record); we suppose on the branch—and that his location will include a large quantity of fallen timber.

The objection made to Taylor's entry in consequence of the smallness of the trace crossing Slate, near the mouth of Little Slate, applies with increased force to this part of Meredith's. The words, "*the* buffalo road," if they do not indicate a single road, would, unquestionably, lead a person in search of this entry, to expect a remarkable and conspicuous road; such a road as crossed Slate, near the mouth of Long branch, or Roe's run, not such a narrow path as crossed near the mouth of Little Slate. The cabins alluded to in Meredith's entry, were not found on Long branch. They were found on Roe's run, and Mile creek. The weight of testimony is, that no unusual quantity of fallen timber would be included in Meredith's survey, if the beginning is at Little Slate, but would be included in it, if the mouth of Roe's run be taken as the beginning. The two additional circumstances, then, the cabins and the fallen timber, are found, one of them on Little Slate, and not on Long branch, which, but for that defect, would fit the description in the entry better than any other, and the other opposite Roe's run,
 *235] and *not opposite Little Slate. The objection to Roe's run, and Mile creek, is, that the buffalo road cannot be considered as crossing *at* the mouths of either of them.

Since, then, no place is shown which fits precisely the description of the entry, we must inquire whether that description is so nearly satisfied by appearances at the mouth of Little Slate, as to induce the court to establish the title of the plaintiff. The objections which have been stated to Taylor's entry are certainly not removed by calling in the aid of Meredith's. Passing by the increased strength they derive from the emphatic words "*the* buffalo road," and from the absence of "a large quantity of fallen timber," we will inquire, whether the appearance of cabins on Little Slate will cure the other

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defects of description in the entry. This circumstance was too common in that country, to be itself an object of notoriety. Cabins were seen on Roe's run and Mile creek, streams which enter into Slate on the north-east side, as well as on Little Slate. Their absence may exclude Long branch from the competition, but cannot decide in favor of Little Slate, unless other circumstances concur in its favor.

To the objections already mentioned, others may be added, which appear to us to be insurmountable. The entry is to begin on Slate creek, where it is crossed by a buffalo road, at the mouth of a branch emptying into the creek, on the north-east *side. Twelve or fifteen buffalo roads cross the creek, and five or six, or more, streams, empty into it on its north-east side. The creek is seventy or eighty miles in length. In what part of it is the subsequent locator to look for this road and this branch? It is not alleged, that either of them possessed any notoriety which could conduct the person in search of them to any particular part of the creek. Can he be required to search from its mouth to its source? At which is he to commence? If at neither, but at the mesne point between them, is he to look up or down the creek? If he should accidentally strike the creek, at the mouth of Little Slate, he finds a creek instead of a branch, and a path instead of a road. The place does not suit the description in the entry. Some of the witnesses say, that no other place suits it as well. Were this admitted to be true, how is he to know it, until he examines the whole extent of the creek? This would be, undoubtedly, if we regard the decisions in Kentucky, to impose an unreasonable burden on subsequent locators, one which the law could not intend to impose on them.

We think, that the entry under which the plaintiff claims cannot be sustained, and that there was no error in dismissing his bill.

Decree affirmed, with costs.