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streets of a town are its public highways, and must be presumed to be well known to, or easily found by, all those who have an interest in knowing them, or inquiring for them. They are, indeed, the most prominent and notorious land-marks and guides by which the lots are to be sought for, found and known.

It cannot be believed, that any one wishing to find, or know, lot No. 99, fronting 60 feet, on Fayette street, and 120 feet on Second street, or to purchase, could be, for one moment, misguided by the inaccurate, and palpably mistaken description, of its being in "Peter, Beatty, Threlkeld and Deakins' addition." Common sense would dictate, to every one who read the notice, that the less important, obscure and indefinite part of the description, which whether true or false, did not mix and give locality to the lot intended to be described, ought to yield to that palpable and notorious description, in reference to the public streets and highways of the town, which gave it positive locality.

It has been said, that the No. 99, did not appear on the recorded plat of the town, upon which the square only is laid down, without divisional lines and numbers designating the lots of each square; but it is admitted, it was numbered on the plat made out by order of the corporation, and lodged with the register, but not recorded. *It is believed, no purchaser would have ventured to buy, without first inspecting the title-deeds, [574 and both the plats. But be this as it may, and even if any should have been so careless as not to examine the latter plat, still it would clearly appear from the recorded plat, that the lot described did not lie in the addition supposed by the notice, but in Threlkeld's addition, which was all that was necessary to correct the mistake; and it would also appear, it must necessarily lie in the angle made by Fayette street and Second street. A purchaser, or any one inclined to become a purchaser, of property upon those streets, could not have failed to have ascertained the particular lot intended by the notice.

We all think the notice was, notwithstanding the mistake in part of the description, certain to a common and reasonable extent, and that is sufficient.

Judgment affirmed, with costs.

DUNLAP and another, Appellants, v. DUNLAP and others, Respondents.

Deficiency in quantity of land.

A question of fact, in a suit in equity, respecting the proprietary interest in an entry of lands within the military district of Ohio.

Rule of equity, that where land is sold as for a certain quantity, a court of equity relieves, if the quantity be defective, only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendor.

APPEAL from the Circuit Court of Ohio.

February 9th, 1827. This cause was argued by *Scott*, for the appellants; and by *Doddridge*, for the respondents.

February 17th. MARSHALL, Ch. J., delivered the opinion of the court.—*This suit was brought originally by John Dunlap, the ap- [575

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pellee, in the circuit court of the United States, sitting in the district of Ohio, to obtain a conveyance of one moiety of a tract of land in the state of Ohio, which was purchased, as is alleged in the bill, on the joint account of the plaintiff, and of his uncle Alexander, one of the defendants in the circuit court. Alexander, who made the contract, obtained the conveyance to himself, and afterwards conveyed the land to his son James. Both Alexander and James were made defendants.

Some time about the year 1792 or 1793, Alexander Dunlap purchased from John Fowler, an entry of 1000 acres of land on the Scioto river, in the Virginia military district, at the price of 100%, Virginia currency. An agreement was entered into, at the time, between the plaintiff and the defendant, Alexander, that this purchase should be made in partnership, the plaintiff says, with himself, the defendant says, with John Dunlap, senior, his father. The testimony, however, proves incontestibly that, though the moiety of the purchase-money was paid by the father, it was paid for the plaintiff, whom he always considered as the rightful proprietor of the land. The purchase will, therefore, be treated as being made on the joint account of the plaintiff and Alexander Dunlap. James Dunlap claims as a volunteer under Alexander, and his title is dependent on that of his father.

The original entry was made the 7th of August 1787. It was withdrawn and re-entered on the 22d of April 1796, and this entry was again withdrawn and re-entered on the 25th of July 1796. The warrant was re-entered on nearly the same land. The changes were such as might probably be caused by a more perfect knowledge of the country; and the last entry, as surveyed on the 20th of October 1796, contains about 300 acres of surplus land. The plat of the surveyor, however, on which the patent issued, specifies only 1000 acres. The right to this surplus constitutes the chief subject of controversy between the parties. The plaintiffs contend, that the whole entry was purchased, and that in such contracts, the whole entry passes to the purchaser. The defendants insist, that the original contract was *576] *for only 1000 acres, and that the surplus land belonged to Fowler. That he afterwards purchased this surplus, not on joint account, but for himself. In 1802, he obtained a grant for the whole tract in his own name, and now claims the whole surplus as his separate property.

The entry is for 1000 acres of land. The survey made on the entry purports to be for 1000 acres of land. The plat and certificate of survey were transferred by John Fowler to Alexander Dunlap, by an indorsement in the following words: "I do hereby assign all my right, title and interest to the within land to Alexander Dunlap, and request a grant may issue accordingly." This is the only written evidence of the contract, and purports to be a transfer of the whole entry and survey.

The defendant, Alexander, alleges, in his answer, that the original contract was "only for 1000 acres of land," that after the survey, he discovered the surplus and mentioned it to Fowler, who said that he had contracted to sell but 1000 acres, and should require additional compensation for the excess. The respondent agreed to give him \$300 for the surplus, and Fowler's receipt for that sum, dated the 17th of October 1800, is annexed to the answer. Though the defendant introduces into his answer the allegation that he purchased only 1000 acres of land, yet it is remarkable, that in the first part of the same answer, he states himself to have pur-

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chased the entry, and also says, that the surplus was not discovered, until many years afterwards, when the survey was made. The reservation of a surplus, when no surplus existed, in a contract which purported to be made for the entire tract, at a time when the purchase of entries was a common transaction, and the probability that an entry might be so surveyed as to comprehend more land than it called for, or so as to interfere with other entries and lose a part of the land it covered, was a matter of general notoriety, is so extraordinary a circumstance, as to justify a critical examination of the testimony by which it is supported.

Alexander Dunlap, in the first instance, states the contract to have been, in fact, what it purports to be, a purchase of the entry, that is, of the entire entry. To reconcile this *with the subsequent declaration, that "the purchase was only of 1000 acres of land," we must suppose, that, as [577 the entry called for that quantity, and he purchased the entry, he might allow himself to say that he purchased only 1000 acres. He drew an inference, however, which the law does not draw, and on which he ought not to have acted, until he consulted his partner.

The defendants also sustain their pretensions, by the testimony of John Fowler, whose deposition was first taken on the 24th of October 1817. He identifies the receipt, and swears that it was a fair transaction. His deposition is taken a second time, on the 3d of August 1819. He swears, "that he sold to Alexander Dunlap 1000 acres of land, within the bounds of a military survey, made in his name, as assignee of Arthur Lind, on the Scioto river, and afterwards, about the 17th day of October 1800, he sold to said Alexander Dunlap, for the consideration of \$300, all the surplus contained within the bounds of the said military survey." This deposition states the original contract, as if a survey, not an entry, had been the subject of it; and as if the transfer had been of a specified portion of that survey, not of the whole.

On the 18th of November 1820, a copy of the plat and certificate of survey was obtained from the general land-office, by which it appeared, that the survey was made on the 20th of October 1796, three or four years after the entry had been sold.

The deposition of John Fowler was again taken, on the 28th of November 1822. He swears, that in 1792 or 1793, he sold to Alexander Dunlap 1000 acres, part of a military survey made in the deponent's name, as assignee of Arthur Lind, on the Scioto river, at the rate of 10¢ Virginia currency, per 100 acres, reserving the surplus should the said survey contain any within the bounds." Some years afterwards, he was informed by the late General Nathaniel Massie, that "the survey contained about 300 acres of surplus." Sometime after which, he proposed to sell the said surplus to Alexander Dunlap, who agreed to give him therefor \$300. *In this deposition, the witness states a sale by the [578 acre, although, in his preceding depositions, he had spoken of a sale in gross. In his second deposition, he had mentioned the sale of 1000 acres of land, "within the bounds of a military survey made in his name on the Scioto;" plainly alluding to a survey already made. In his third deposition, he still speaks of a military survey, but plainly speaks of it as of one to be made in future. He reserved the surplus, he said, "should the said survey contain any, within the bounds." It is also observable, that he says,

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he received the information from Massie; whereas, Alexander Dunlap says, in his answer, that he himself gave the information to Fowler. This, however, taken in itself, would not be a very material contradiction; it might be accounted for. But the various shapes in which Fowler places the contract, certainly show that his recollection of it was very imperfect, and is not entitled to much credit.

The assignment which he made to Alexander Dunlap is of the entire survey. It must be considered as an execution of the contract he had previously made; and is written evidence of the extent of that contract. If, instead of selling the whole survey, as the assignment imports, he had sold only a part of it, his natural course would have been, either to take out the patent in his own name, and give his obligation to convey a part, when the patent should issue, or to take it out in their joint names, entering into an agreement, specifying their respective interests, or to take some obligation from Alexander Dunlap, binding him to reconvey the surplus. A written contract cannot be varied by such suspicious testimony as that of Fowler; especially, in a case which contains within itself the strongest circumstances of probability against the attempt.

This probability is supported by other testimony than is furnished by the contract itself. James Dunlap, the brother of John, deposes, that Alexander Dunlap told him, he and the plaintiff had purchased the tract of land in partnership; language, which certainly alludes to the whole tract. The partition, too, which was afterwards made, after an actual survey for the purpose, if it divided the tract into moieties, *is almost
*579] conclusive evidence, that the idea of Fowler's title to the surplus had not then occurred to the appellant.

The counsel for the appellant endeavors to support Fowler's title to the surplus, independent of the special contract, and cites some cases to show that where land has been sold for a certain quantity, and has, in fact, amounted to much less than the quantity mentioned, a court of equity has interposed and given relief. But the difference is very material between contracts made for land in a settled country, where the titles are complete, the boundaries ascertained, and the real quantity either known, or within the reach of the vendor, and those made for land situated as was the whole military district at the date of this contract. It was, notoriously, the general practice, to sell an entry or a survey, taking the chance of surplus, and the hazard of losing a part of the land by other entries. A special contract, departing from this general custom, ought to be in writing, or to be very clearly proved, especially, when the written evidence of the contract conforms to this general custom.

It is also worthy of remark, that the entry, as it stood when sold, could not have contained any surplus land. It calls "to begin on the Scioto, at the lower corner of Benjamin Lawson's entry, No. 439, running down the river 1000 poles, when reduced to a straight line, thence, from the beginning, with Lawson's line, so far that a line parallel to the general course of the river shall include the quantity." No excess ought to be anticipated from the survey of such an entry, and the anticipation of such excess is against all probability. The subsequent changes of the location must be supposed to have been made by the owner of the land, and the survey also must have been made by his direction, perhaps, through his agent, the locator, or

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according to the judgment of the surveyor. Nothing could accrue to Fowler from a survey so made. We are, then, entirely satisfied, that the whole tract was purchased, and ought to be divided between the purchasers in equal moieties, unless some partition has been made or agreed upon between them.

It is certain, that an effort towards a partition has been *made, and the questions which grow out of this effort constitute the sole [580] difficulty in the case. The bill charges, that before the grant was issued, the parties divided the land in equal quantities, and the plaintiff paid Alexander \$60, for choice of moieties, and elected to take the northern or upper part. A dividing line was then run, and each party took possession of his land, in severalty. The defendant admits, that there was a conversation concerning a division, that the line was partially run, and that the plaintiff paid him \$60 for choice; but insists, that the line was only partially run, that the division was incomplete, and that the intention was to divide 1000 acres only.

It is, then, admitted, that some division was made, that some line was run, that John paid Alexander \$60 for choice, and chose the northern part. If that line can be found, it ought to be established, and if it has been run only a part of the way, it ought to be continued to the outward boundary of the tract. If it cannot be found, the land is now to be divided into moieties, in the manner then agreed on.

James and John Stephenson depose, that they were the chain-carriers, when the survey for the purpose of a division was made. That a dividing line was run, from the back line, towards the river. They both think, that a marked line, to which they were conducted, in the presence of the parties, and of James Hough, the surveyor, was the line which was then run. Their opinion is founded on the contiguity of the corner which was shown to them as the beginning, to a branch which is near it, and which they think they recollect. The line was run about twenty years before they gave their depositions, which was in 1818, and they do not know whether the line now shown them is the true line or not. Other testimony shows, that it cannot be the true line. The surveyor proves, that the marked tree shown as the beginning, had not, in 1821, been marked more than seven or eight years; and all the testimony in the cause proves, that *the line ran through [581] James Dunlap's orchard, and that he himself frequently said so. The line now claimed by him, and supposed by the Stephensons to be the true line, would not come near his orchard. It is apparent, then, that this line has been made long since the division, and there is some reason to suppose it was made by James Dunlap, who occupied Alexander's moiety of the tract.

The place established by the court as the beginning, is a white oak and blue oak, standing in the western line of the tract, and marked as a corner. Being in the line, there could be no reason for marking them as a corner, unless such had been the fact; and the trees could be a corner only between the Dunlaps. The surveyor cut a block out of the ash, including one of the chops, and found, from marks which are considered as unerring, that the chop had been made twenty-one years; that is, there were twenty-one years growth over it. This was in December 1718. The chop might have been made in the autumn of 1797, or the spring of 1798. The dividing line is

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supposed to have been run in 1798. A line from this point to the river, so as to divide the tract equally, passes through James Dunlap's orchard, and leaves rather more of it on the side of John, than would be left by the line which James Dunlap had admitted. This line is established by the decree of the court. The testimony is, we think, in its favor, and that there is no error in the decree. It is affirmed, with costs.

Decree affirmed.

*582] *McCONNELL v. Trustees of the TOWN OF LEXINGTON.

Reservation.

A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed, under the circumstances of the case.

APPEAL from the Circuit Court of Kentucky.

February 12th, 1827. This cause was argued by *Rowan*, for the plaintiff; and by *Talbot* for the defendant.

February 22d. MARSHALL, Ch. J., delivered the opinion of the court.—This suit was brought in the court of the United States for the seventh circuit and district of Kentucky, against the trustees of the town of Lexington, and others, to obtain a conveyance of in and out lots, No. 43, in that town, or of such other lots in lieu of them, as might still remain to be conveyed, by the trustees. The whole of out-lot No. 43, and a part of the in-lot, had been conveyed to other persons, who had been in possession for such a length of time as to bar the plaintiff's action. The bill was, therefore, dismissed by the plaintiff, as against those defendants, and continued against the trustees.

The commonwealth of Virginia had, in 1773, by an act commonly called "the land law," reserved 640 acres of land, for the benefit of those who had settled in a village or station, that it might be afterwards laid out into lots for a town, and divided among such settlers. The inhabitants of Lexington purchased 70 acres adjoining the reserve of 640 acres, and after laying the whole off in lots and streets, petitioned the assembly to establish a town. The legislature, in May 1782, passed an act, vesting the whole 710 acres in trustees, who were empowered to make conveyances to those persons who had already settled on the said lots, as also to the purchasers of lots thereto-
*583] fore sold; and to lay off such other parts of the said land as was not then laid off and settled, into lots and streets, and to sell, or otherwise dispose of the same, for the benefit of the inhabitants.

James McConnell was one of the settlers in Lexington, and was killed by the Indians in 1782. His brother and heir-at-law, Alexander McConnell, filed this bill in 1815, and founds his claim on proof that he had, in his lifetime, erected a tannery on in-lot No. 43, on which was a large spring; and on the following order of the board of trustees: "At a meeting of the board of trustees for the town of Lexington, September 30th, 1782, No. 43, in and out lot, granted to James McConnell, to be appraised, and the valuation thereof redound to the heirs of said McConnell, deceased."

The trustees, in their answer, insist, that in-lot No. 43 never was granted