decree of the district court, but not correct in decreeing the restoration of the Amelia, without paying salvage. This court, therefore, is of opinion, *45] that the decree, so far as the restoration of the *Amelia, without salvage, is ordered, ought to be reversed, and that the Amelia and her cargo ought to be restored to the claimant, on paying for salvage one-sixth part of the net value, after deducting therefrom the charges which have been incurred.[1]

DECEMBER TERM, 1801.

GEORGE WILSON *v.* RICHARD MASON, devisee of GEORGE MASON.

RICHARD MASON, devisee of GEORGE MASON, *v.* GEORGE WILSON.

Writ of error.—Land law of Kentucky.—Effect of notice.

A writ of error upon a *caveat*, lies from the district court of Kentucky district, to the supreme court of the United States.

Waste and unappropriated lands, in Kentucky, in the year 1780, could not be lawfully appropriated by survey alone, without a previous legal entry in the book of entries.

A survey in Kentucky, not founded on an entry, is a void act, and constitutes no title whatever; and land so surveyed remains vacant, and liable to be appropriated by any person holding a land-warrant.

Notice of an illegal act will not make it valid.

THESE were writs of error to the District Court of the United States for the district of Kentucky, upon cross *caveats* for the same tract of land.

The *caveat* of *Wilson* v. *Mason* originated in the supreme court for the district of Kentucky, in 1785, whilst Kentucky was a part of the commonwealth of Virginia, and the record stated, "that heretofore, viz., at a supreme court for the district of Kentucky, held at Danville, in the said district, in the month of March 1785, came George Wilson, and caused a certain *caveat* to be entered against George Mason, which is in the following words, viz.: Let no grant issue to George Mason, of Fairfax county, for 8300 acres of land in Jefferson county, surveyed on the south side of Panther creek, adjoining another survey of the said Mason's, of 8400 acres, on the upper side; because the said George Mason has surveyed the same, contrary to his location, for which cause, and also on account of the vagueness of the entry, George Wilson claims the same, or so much thereof as interferes with his entry made on treasury-warrants for 40,926 acres, specially made on the 9th day of April 1784. Entered, 25th March 1785."

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[1] The general rule, undoubtedly, is, that salvage is not due, on a re-capture of neutral property, from a belligerent. The Carlotta, 5 Rob. 54; The Jonge Lambert, Ibid. n; The Antelope, Bee 233; Peck *v.* Randall's Trustees, 1 Johns. 165. Cases arising under the French arrêt of the 18th January 1798 (such as that of The Amelia), formed exceptions to the general rule, but they did not alter the established doctrine of the courts of admiralty. The Huntress, 6 Rob. 104. For a review of the French proceedings in matters of prize, which occasioned the allowance of military salvage, on re-capture of neutral property from French cruisers, see appendix to 2 Robinson, p. 307 (Am. edit.). And see The Acteon, Edw. 254. In The Charming Betsey, 2 Cr. 121, the court say, that the case of The Amelia was well decided, under the particular circumstances, and is a precedent not to be departed from in like cases.

"Whereupon, at October term 1785, a summons issued, commanding the sheriff of Fairfax county to summon George Mason to appear at the next March term, to show cause why the 8300 acres should not be *granted to George Wilson, or so much as interferes with his entry for 40,926 acres, made on the 9th of April 1784." [*46

Afterwards, and after Kentucky became a separate state, at a court held for the district of Bairdstown, in September 1797, "to which court this suit had been removed, and the said George Mason having departed this life, the said suit was ordered to be revived in the name of Richard Mason, the devisee of George Mason, deceased, who was devisee of George Mason, deceased." Richard Mason then removed the cause from the state court, to the district court of the United States for the district of Kentucky, and it was agreed by the parties, "that the judgment in this *caveat* (*Wilson* v. *Mason*), if for the plaintiff, should be entered up as a judgment for the defendant in the *caveat*, *Mason* v. *Wilson*; and if for the defendant, as a judgment for the plaintiff in the said *caveat*, *Mason* v. *Wilson*, which suits are cross *caveats* between the parties, for the same land." "And thereupon, came a jury, &c., who, being elected, tried and sworn well and truly to inquire into such facts as may be material in this cause, and not agreed to by the parties," found the special verdict hereinafter stated.

The cross *caveat* of *Richard Mason* v. *Wilson* was filed on the 13th of March 1799, and seemed to be in the nature of a plea or answer to the claim of Wilson. It was in the following form, viz.: "Let no grant issue to George Wilson, or his assignees, on the said Wilson's survey of 30,000 acres of land, lying in Jefferson county (now Nelson county), on the south side of Panther creek, a branch of Green river, made by virtue of an entry, dated April the 9th, 1784, for 40,926 acres, upon the five following land-office treasury-warrants, No. 17,639; 19,143; 19,614; 19,616; and 12,795. Richard Mason, infant heir and devisee of George Mason, jun., who was heir and devisee of George Mason, Esq., late of Fairfax county, Virginia, a citizen of the commonwealth of Virginia, by Cuthbert Banks, his next friend, enters a *caveat* against the same, for the following causes: Because the said survey includes a tract of 8300 acres which had been before located and entered by the *said George Mason, in the year 1780, and which tract had been actually surveyed for him, the said George Mason, and the certificate of survey thereof, dated October 2d, 1783, returned to the county surveyor's office, long before the said George Wilson made his said entry; and because the said entry, made by the said George Wilson, on which his said survey is founded, was illegal and fraudulent, the said George Wilson having knowingly and wilfully located his said entry upon lands which had been actually before appropriated and surveyed for others, as appears by the words of the said Wilson's own entry, which begins at the upper and north-east corner of the said George Mason's 8400 acre survey, on the bank of Panther creek, upon which survey of 8400 acres, the adjacent survey made for George Mason of 8300 acres, made about the same time, binds, and runs thence, south, 10 deg. east (being the course to a single degree of the dividing line between the said Mason's two tracts of 8400 and 8300 acres), passing the said Mason's south-east corner, 2600 poles, north, 80 deg. east (which is the course to a single degree of the back line of George Mason's said survey of his tract of 8300 acres), 3200 poles, and [*47

off at right angles northwardly, to the bank of Panther creek; and down the same, according to the meanders thereof, to the beginning; whereby it includes the whole of Richard Mason's said tract of 8300 acres, as devisee as aforesaid of George Mason, as well as some other lands which have been previously located and surveyed for other people; which above-mentioned courses could not have been inserted in Wilson's entry, in the manner they are, without his having been acquainted with the said surveys made by George Mason, before mentioned; the plats and certificates of which were, at the time of Wilson's said entry, in the county-surveyor's office; and from which, it is evident, Wilson gained the information by which he made his special entry." The original *caveat* of *George Mason* v. *Wilson*, was entered May 6th 1785.

Mason's entries, in the book of entries, were as follows, viz.:

"1780, April 29th, George Mason enters 8400 acres of land, to begin on
*48] Panther creek, on the east side *thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

"1780, April 29th, George Mason enters 8300 acres, to begin at the upper corner of his 8400 acre entry, and to run up the creek, on the east side, and back for quantity."

"1780, October 27th, George Mason desires to make his entry of 8400 acres more special, on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

The tract of 8400 acres was surveyed on 27th September 1783, beginning four miles above the mouth of Panther creek, where it empties into Green river, and not four miles above the mouth of the west fork of Panther creek, as mentioned in his first entry. The mouth of Panther creek being more than twelve miles below the mouth of the west fork. The tract of 8300 acres was surveyed on the 2d of October 1783, adjoining to the survey of 8400 acres, below the mouth of the west fork, and not above, as it would have been, if surveyed according to the entry of the 29th April 1780.

George Wilson's entry is as follows, viz.: "1784, April 9th, George Wilson enters 40,926 acres upon five treasury-warrants, No. 17,639, 19,143, 19,614, 19,616, 12,795, on the south side of Panther creek, a branch of Green river, beginning at the upper and north-east corner of George Mason's 8400 acre survey, on the bank of Panther creek, which survey begins, perhaps, about three miles from the mouth of the said creek and 320 poles upon a direct line above the mouth, of the first fork of the said creek from the mouth, thence running south, 10 deg. east, passing the said Mason's south-east corner, 2600 poles; thence, north, 80 deg. east, 3200 poles; thence,
*49] off at right angles, northwardly, *to the bank of Panther creek, and down the same, with the several meanders thereof, to the place of beginning." Upon four of those warrants, 30,000 acres were surveyed for Wilson, on the 2d June 1784, and located so as to comprehend the whole of Mason's survey of 8300 acres.

The following facts were agreed to by the counsel for both parties, viz.:

"1. We admit that Panther creek has been known and called by that name, Panther creek, generally, since the begining of the year 1780, and is truly represented on the plat returned in this cause, and also the forks thereof.

"2. That at the distance of twelve and one-quarter miles and thirty-six poles, on a direct line from its mouth, the said creek divides itself into two forks, viz., the fork marked on the plat returned in this cause, as the west fork of said creek; and the other, the fork marked on the plat, Panther creek; and that from the size and natural descriptions of these forks, they would be remarked and called such by strangers who should explore the waters of that creek.

"3. That the said forks were generally known and called the forks of Panther creek, from the beginning of the year 1780; and that they were notorious as such, to all who had acquaintance with the waters in that part of the country.

"4. That in the winter before the said entries were made for said defendant, the said agent, Hancock Lee, went down on Panther creek, and explored the country thereabouts; and encamped thereabouts, four or five weeks, for that purpose; and there were several others in company with him, who all went on the business of viewing the land in that quarter.

"5. That James Hord was the surveyor who surveyed the said entries, in September and October 1783.

*"6. That Hubbard Taylor was the special attorney of the defendant Mason, for the purpose of making his surveys on Panther [*50 creek, among which was the one now in controversy, and previous to making said surveys, the said Taylor made out a plat of Panther creek, up to the forks thereof, by actual survey, for the purpose of satisfying himself how the survey of the said defendant ought to be made; which plat he delivered to the said Hord, when he went to make the surveys of the said lands, for his instruction; and by the said plat, the said Hord was instructed to make the surveys of the said defendant, as they are now surveyed. The entries alluded to in the 4th fact, are those found by the jury to have been made for the defendant, by Hancock Lee, at the same time with that of the land in controversy."

The verdict of the jury was as follows, viz.: "We of the jury do find the facts following for the plaintiff, excluding those agreed to by the attorneys:

"1. That the said Hancock Lee, at the time he made the said entry for the said Mason, did also make the several other entries for him.

"2. That the plats and certificates of survey lay three weeks in the office, before they were recorded.

"3. That at the time of making out and recording the plats of said surveys, William Mason was agent to the said George Mason, and came to this country for the express purpose of attending to his land business; and had power and instructions to re-survey any of the said Mason's entries, which he should find to have been erroneously surveyed, or interfering with better claims.

"4. That it was a general practice in the offices of surveyors, when a survey was found to have been made erroneously, to make the same over again, at the request of the parties concerned; and the said practice prevailed also in cases of surveys recorded.

"5. That when William Mason came to the surveyor's office, to take out the plats in this case, and also those in *the other cases in which [*51 George Mason was concerned, the surveyor told him that the entries

of the said George, the defendant, had been surveyed wrong ; and took a pen and paper and explained to him the calls of the entries, and by comparing them with the surveys, showed him that they were erroneous ; and offered to send a deputy with him, without further or additional expense, to make the surveys aright, with which proposal the said William seemed pleased, and proceeded no further in the business at that time ; but went away, and after some days came back to the said office, and told the surveyor, that the entries of said Mason were so made that they would clash with each other, if surveyed otherwise than they then were ; and he did not see that the surveys could, be amended : whereupon, he took out the plats and certificates of survey, to return them to the register's office, and actually did so ; which transaction happened at the office of the surveyor, about the 12th of September 1784.

" 6. That the lands, generally, over all the state of Kentucky, except the land reserved by law for entries, are involved in disputes, by different entries and surveys having been made for the same tracts.

" 7. That it was usual for the surveyors, to survey entries, agreeable to the directions of the proprietors, or their agents, when such directions were given.

" 8. That a law, passed by the assembly of Kentucky, in 1792, prohibited any further entry of land with the surveyors, and that ever since that time, no land could be appropriated by virtue of land-warrants.

" 9. That the practice of entering for land, was a general strife for the best legal entry.

" 10. That George Mason's entry of 8400 acres, made the 17th day of October 1780, is surveyed on Panther creek, and a large branch thereof ; and not on either of the main forks of said creek, as appears by the plat ; and that the survey of 8300 acres, being the land in controversy, adjoining the last-mentioned survey, above, on said creek, and described in the plat in this cause by *the letters and figure, A. E. F. 8, is claimed by the defendant Mason, as a survey made by the said Mason, on an entry of his, dated the 29th day of April 1780, for 8300 acres of land ; is on said creek and a branch thereof, and not on either of the main forks, as appears by the plat.

*52]

" 11. That the place designated in the corrected plat, by the letter A., on the south side of Panther creek, is the place called for by the plaintiff, as the beginning corner of his entry of 40,926 acres, and described agreeable to the plat.

" 12. That it was a practice in the office of William May, surveyor of Jefferson, with whom the defendant Mason's entries were made, and by whose deputy-surveyor, James Hord, the defendant's surveys were made, to alter surveys discovered to be erroneous or wrong, after they were recorded, and survey them aright, without further or additional expense to the owners of such entries, and to proceed on the plats of the amended surveys, as the proper plats of the legal survey.

" 13. That the said Hord, when on his way to make said surveys, called on said surveyor of Jefferson, for copies of the defendant's entries, and on seeing them, was struck with the variance between the calls of the entries and his instructions, in point of location, and on that account, did not return the plats of the said surveys, until he had seen Hubbard Taylor, and showed

them to him, and represented his opinion of such variance; but on their being shown to the said Taylor, he directed said surveys to be returned as they were then made.

"14. That the said Hord was fully informed of the forks of Panther creek, when he was making said defendant's surveys, and saw the same, and about the same time at which he made the defendant's said surveys, and before he returned from doing the same.

(Signed) DANIEL WEISIGER, Foreman."

"We of the jury do find the following facts for the defendant Mason:

*"1. That the entry made in the name of George Wilson, April 9th, 1784, of 40,926 acres, on the south side of Panther creek, claiming under which the said Wilson entered this *caveat*, although made in his name, was made for the benefit of Christopher Greenup and John Handley, as well as for his benefit, and that the said Greenup and Handley were, at the time of making the entry, and long since, partners with him in the same. [*53

"2. That John Handley, then a deputy-surveyor of the county, made the said entry of 40,926 acres, for himself and the other partners; and before he made the same, had obtained information of the surveys made for George Mason, on his entries of 8300, and 8400 acres, on the south side of Panther creek, from the surveys then in the office of the surveyor.

"3. That the said George Wilson, Christopher Greenup and John Handley, had, before and at the time the said entry of 40,926 acres was made, notice of the place where, and the manner in which, the surveys had been made for George Mason, on his entries of 8300 acres, and 8400 acres, on the south side of Panther creek.

"4. That John Handley, before the said entry of 40,926 acres was made, had notice that the land now in dispute in this *caveat*, had been included in Mason's survey, on his entry of 8300 acres.

"5. That the surveys, made for the said Mason, on his entries of 8400, and 8300 acres, on the south side of Panther creek, were returned to the office of the surveyor of the county, in the course of the fall, 1783.

(Signed) DANIEL WEISIGER, Foreman."

The judgment of the district court of the United States for the district of Kentucky, at June term 1800, in the *caveat* of *Wilson* v. *Mason*, was, "That the defendant hath the better right to the land in controversy; it is, therefore, ordered, that the *caveat* be dismissed, and that the defendant recover against the plaintiff his costs in this behalf expended."

*In the *caveat* of *Mason* v. *Wilson*, the judgment was, "That the plaintiff recover against the defendant so much of the land in controversy as is included within the survey of 8300 acres, made by George Mason, on his entry of 8300 acres, entered March (*quære?* April) the 29th 1780, and designated in the corrected plat returned in the said other *caveat*, by the letters, D. E. F. 8, and also his costs by him about his suit in this behalf expended." [*54

After these judgments were entered, Wilson, by his counsel, moved the court for a citation on a writ of error to the supreme court of the United States, to which Mason, by his counsel, objected, alleging that by the acts of assembly of Virginia, under which the plaintiff Wilson claimed, it is provided, that no appeal or writ of error shall be allowed on a judgment en-

tered on a *caveat*, and that, therefore, in this case, the plaintiff was precluded from claiming the benefit of a writ of error. But the court overruled this objection, and granted the citation; to which opinion, the defendant excepted.(*a*)

(*a*) The following is the opinion of Judge INNES, who tried the cause in the district court; and which is alluded to in the subsequent arguments of counsel. After stating the facts of the case, he proceeds: The novelty of this case, the number of facts submitted and found by the jury, as well as the ingenious manner in which it was argued by the counsel of both plaintiff and defendant, have attracted my particular attention, and induced me to weigh the subject deliberately; the result of my deliberations will appear from the following opinion.

The first question which presents itself in this cause is, whether Mason has surveyed 8300 acres of land, contrary to his entry made the 29th of April 1780. The alteration of Mason, on the 27th day of October 1780, to the entry of 8400 acres, dated the 29th day of April preceding, is considered as a withdrawing of, and a total abandonment of the first entry. The first entry calling to lie about four miles above the mouth of the west fork, the second, four miles from the mouth of the main creek. The survey, therefore, of the 8300 acres is made contrary to the entry, as it adjoins the track of 8400, which is made in conformity to the new entry.

This decision, that the land in question is surveyed contrary to entry, brings me to the principal question in this cause; will Mason's survey for 8300 acres of land, made contrary to his entry, secure the land to him, against the claim of Wilson, founded on a special entry, subsequent to the recording of Mason's survey—Wilson having, before he made his entry, notice of the place where, and manner in which Mason had surveyed, and of the survey being recorded?

The parties to this suit are both considered as purchasers of the commonwealth (Chancery Revision of the Laws, p. 95, 96, § 3); the surveyor of the county, as her ministerial agent; who is authorized to receive warrants for land, make entries, survey the same, receive the surveys, when made, record the plat and certificate, within three months after it is returned to his office, provided, upon examination, he finds it truly made, and legally proportioned as to length and breadth.

I will here take notice of two arguments urged by the plaintiff's counsel, viz., that the word "truly," used in the law, when speaking of the duties of the surveyor, referred to a power over the entry; that it was his duty to see that the entry and survey agreed. This would be a dangerous construction of the law, as it would authorize the surveyor to determine the rights of claimants, and to judge in his own cause, where a survey should be made that interfered with a claim of his, I conceive him ministerial, except in two cases; he is to examine the plat, that it is truly made: *i. e.*, to see that the courses of the survey are truly laid down, and that it contains its complement of acres. It is to this part of his duty that the word truly refers. Again, he is to examine the legal proportion of the plat. In these two cases, he acts judicially; and it is right he should be vested with such a power; because, as he acts generally by deputy, it enables him to correct the work of his deputy, and also to prevent improper combinations between the employer and deputy.

The second argument alluded to is this: that neither the entry-book, nor book for entering surveys, are record-books; and that legislative interference was necessary to constitute them such. (Ch. Rev. 96, 220.) They are books directed to be procured by law. The surveyor is a sworn officer, commissioned agreeable to law. Copies of entries and copies of surveys, attested by him, are good evidence in a court of justice. I, therefore, consider every entry, and every survey, entered in these books, as being of record, and equally valid with those which are usually styled records.

Mason, a purchaser of the commonwealth, having surveyed contrary to his entry, returns the survey to the surveyor's office, where it is examined and recorded, before the claim of any other person appears to the land. Can the commonwealth destroy

Wilson v. Mason.

*This cause was argued at last term, by *Daveiss* and *C. Lee*, for the plaintiff in error, and *Jones* and *Mason*, for defendant.

Daveiss, for plaintiff in error.—As the counsel for the defendant in error have objected to our right of appeal in this cause, I shall, at [*56

Mason's survey and refuse her grant to the land? The law has pointed out no mode by which the commonwealth can set aside Mason's survey, for her own benefit; neither was such a provision necessary; because he had paid the purchase-money, for so many acres of unappropriated land. It was vacant; and so soon as his survey was recorded, his warrant was carried into full execution, and the entry of 8300 acres became vacant, and reverted to the commonwealth, there being no warrant in the surveyor's office to cover it, the warrant being returned to the owner with the plat and certificate of survey. Or, being recorded, is the same thing in effect, as it can never be again acted upon, being executed by actual survey. (Ch. Rev. § 3, p. 95, 96.) Any practice to the contrary, I deem illegal, and contrary to law. From this statement of facts, I determine Mason's right to be good against the commonwealth.

As the commonwealth can take no advantage of Mason's surveying, contrary to entry, shall Wilson, by his subsequent special entry, when he had full and perfect knowledge of the place where Mason's survey was made, and of its being recorded? There are only two ways of destroying a man's right to a tract of land. By *caveat*, after survey and before the title is complete; or, by a suit in chancery after the grant has issued. In the present case, Wilson has chosen to enter a *caveat* to prevent the emanation of a grant to Mason; alleging that Mason has surveyed contrary to entry, and that it is vague, for which reasons he claims the land by virtue of a special entry.

There are four causes stated in the land-law which authorize the entering of a *caveat* 1. Failing to register the plat and certificate of survey, within twelve months after making the survey: 2. If the breadth of the plat be not one-third of its length: 3. If any person shall obtain a survey of land to which another hath by law a better right, the person having such better right may in like manner enter a *caveat*, &c.: 4. If the plaintiff in a *caveat* recover judgment and fails to deliver the same, &c., into the land-office, within six months after judgment, it shall be lawful for any person to enter a *caveat*, &c. The first two and fourth causes are penalties which any person may take advantage of, and do not apply to the present case. The third requires an existing right in the caveator, at or before the time the survey caveated is recorded.

From an attentive consideration of this passage in the law, it conveys to me this idea: "Shall obtain a survey of lands," means, subsequent to the passing of the law, and after the survey is recorded; and not from the making, because the survey is not complete until it is recorded; neither could he "obtain" it, until the surveyor has performed that part of his duty, after which it is to be delivered to the proprietor with the warrant. Previous to the recording, I consider the survey to be under the direction of the owner, and that he may make any alteration he pleases in it, but not after; although a different practice has prevailed, and which, upon inquiry, will be found to be contrary to law.

It is important to this cause, to consider another passage in the same sentence of the law; "to which another hath by law a better right." The word hath is in the present tense, and refers to the time of obtaining the survey. If my construction relative to the word *obtain* be right, the claim of the caveator must exist, before or at the time of recording the survey. I am confirmed in the propriety of this interpretation of the law, for the following reasons. If a deputy-surveyor makes a survey, the principal ought not to sign it, until it is recorded; then the signature makes it ready to be delivered. If made by the principal, he will not deliver it, before it is recorded. The survey cannot be considered as complete, until all the requisites of the law be performed; the party is then entitled to it. Neither will the register of the land-office receive it, without that formality. Without these requisites, it is of no more value

first, confine myself to that point; because, if the court should agree *57] *with them in opinion on that question, much time will be saved and much useless discussion prevented. It is contended, that by the laws of Virginia, upon which the title to the land in dispute depends, and which *58] give the remedy *by *caveat*, no appeal or writ of error will lie. The land-law of Virginia, as it is called, viz., the act of May 1779 (Chancery Revision of the Laws of Virginia, p. 94), entitled "an act for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands," which directs the manner of proceeding upon *caveats*, enacts, that "the court" (that is, the general court) "shall proceed to determine the right of the cause in a summary way, without pleadings in writing; impannelling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, on which no appeal or writ of error shall be allowed."

This law, it is said, was in force at the time of the separation of Kentucky from Virginia; and that by the act of assembly of Virginia, of December 1789 (Rev. Code, p. 56, § 7), which prescribes the terms upon which Kentucky might become an independent state, after the 1st of November 1791, it is provided, that all private rights and interests of lands, within the said district, derived from the laws of Virginia, prior to such separation,

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than waste paper; it cannot, therefore, be said to be "obtained," without their being performed.

The first two and fourth causes, which justify the entering a *caveat*, I have already said, do not apply to the present case.

It remains to be considered, whether Wilson has pursued the statute, so as to bring his case within the third cause: Had he "a better right" to the land surveyed for Mason, and for which he has instituted this suit, than Mason had, at the time the survey was recorded?

A *caveat* is a new and summary mode of proceeding, in derogation of the proceedings at common law, instituted by statute; it is necessary, therefore, to pursue the statute strictly, and show to the court that the caveator has a clear right to pursue that mode of proceeding. 1 T. R. 141.

Wilson's entry was made on the 9th day of April 1784. To the date of his entry, I fix the commencement of his claim to the land in controversy, it being the first certain and evident act of ownership manifested by him; which is upwards of four months after Mason's survey had been recorded. As Wilson's right did not exist at the time Mason's survey was recorded, he has failed to prove the better right required by law; neither has he pursued the statute, by assigning proper causes for caveating. Surveying contrary to entry, or making a vague entry, are not stated in the law, as exceptions to a survey, or causes for entering a *caveat*.

True it is, that there are instances in which surveying contrary to entry would be a good cause of caveating. But this is where there is an existing right, before the survey is made or obtained; and the question would then rest on having the better right to the land. The favorable light in which surveys have been viewed by the legislature is apparent in all the laws which have been enacted respecting the titles to land. They are all to be considered as one law, forming one general system on the same subject.[1]

The surveys here alluded to were injurious to the interest of the commonwealth, but being made by the proper officer, were confirmed. In this case, the commonwealth is not injured, and Wilson, through his partner, Handley, had every information necessary to guard him against an interference with Mason's survey.

[1] Many acts passed the Virginia legislature, giving further time to return plats, &c.

shall remain valid and secure, under the laws of the proposed state, "and shall be determined by the laws now existing in this state."

*But we shall contend: 1st. That the jurisdiction and powers of this court do not depend upon the laws of Virginia, but upon the constitution of the United States, and the acts of congress. 2d. That the laws of particular states lose their force, when they contravene the acts of congress. 3d. That by the law of Virginia a right of appeal is allowed upon a *caveat*. [*59

1. By the constitution of the United States, Art. III. § 2, "the judicial power shall extend" "to controversies between citizens of different states," and in all cases, except where a public minister, or a state, shall be a party, "the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make." Congress have not excepted the present case; it, therefore, follows, that by the constitution of the United States, this court has appellate jurisdiction of the cause.

2. By the constitution of the United States, Art. VI., "this constitution, and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, "anything in the constitution or laws of any state to the contrary notwithstanding." By the 10th section of the judiciary act of

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Considering the parties both as purchasers of the commonwealth, deriving their claims from the same source; Mason as the first, and Wilson as the second, the following principles will apply in this case respecting notice. Lord Hardwicke said, in the case of Le Neve *v.* Le Neve (Amb. 446; 3 Atk. 634); "that the taking of a legal estate after notice of a prior right, makes a person a *malâ fide* purchaser, and is a species of fraud." If a person does not stop his hand, but gets the legal estate, when he knew the right in equity was in another, he will be rebutted by this maxim, "*fraus et dolus nemini patrocinari debent.*" In the case of Abney *v.* Kendall (1 Eq. Cas. Abr. 330, pl. 1; 1 Chan. Ca. 38),[1] it was determined, that if A., having notice that lands were contracted to be sold to B., purchases those lands, and takes a conveyance, it shall destroy the purchase, and the land shall be reconveyed to B.

Mason being considered the first purchaser of the commonwealth, having obtained his survey through the means of her agent (though contrary to entry, yet of which she can take no advantage, and which worked no iniquity to any person, the land being vacant), by recording the survey, the entry above the forks of the creek was abandoned. Wilson having notice, before he made his entry, that Mason had appropriated the land by the recording of the survey, cannot support his claim under the statute; judgment, therefore, must be entered for the defendant.

The preceding pages contain my opinion delivered in the *caveat*, George Wilson against Richard Mason, devisee, &c., at the June term 1800, of the district court of the United States for the Kentucky district.

As the principles on which the decision was founded will be brought before the supreme court of the United States, where I can have no opportunity of assigning my reasons in support of the judgment, with due deference, I solicit the court to permit the opinion to be read; by which the principles which governed me in the decision will appear fully before the court which is to reverse or affirm the judgment I have given between the parties. This request is grounded upon this single consideration, that what I have been officially obliged to do, may be examined, before a final inquiry is had respecting my judicial acts. (Signed) HARRY INNES.

May 18th, 1801.

[1] 1 Chan. Cas. 38, Merry *v.* Abney, the father, Abney, the son, and Kendall.

1789, the district court of Kentucky has jurisdiction of all cases by that act made originally cognisable by the circuit courts, and it is enacted, that "writs of error and appeals shall lie from decisions therein, to the supreme court, in the same causes, as from a circuit court to the supreme court, and under the same regulations." This cause having been removed by the defendant Mason, from the state court into the district court of the United States for the district of Kentucky, under the 12th section of the judiciary act of 1789, is to "proceed in the same manner as if it had been brought there by original process." And by the 22d section, "final judgments and decrees in civil actions in a circuit court, brought there by original process, or removed there from courts of the several states," *where the matter in dispute exceeds $2000, may be re-examined, and reversed or affirmed, in the supreme court.

*60]

A cause may be removed into a circuit court, from a supreme court of a state, from which, by the laws of the state, no appeal or writ of error would lie; and if the principle contended for by the opposite counsel is correct, it would equally prevent this court from taking cognisance of a writ of error in that case, as in this. Besides, the question, whether a writ of error or appeal will or will not lie upon a *caveat*, does not affect the title to the land; and the act of assembly of Virginia, of December 1789, was only intended to protect the rights to land in Kentucky acquired under the laws of Virginia. It says, "the rights and interests of lands shall be determined by the laws now existing," and does not say that Kentucky may not give a further remedy.

3. A right of appeal upon a *caveat* did exist in Virginia, at the time of passing the act of assembly of December 1789, c. 53, respecting Kentucky. By the act of the Virginia assembly, October 1788, c. 67, § 11, 12, the cognisance of *caveats* was given to the district courts, and by the 16th section of the same act, an appeal is allowed as of right in all cases. The act of December 12th, 1792, § 6, 9 (Rev. Code, p. 80, 81), re-enacts those clauses of the act of 1788.

Mason, for defendant in error.—It is not denied, that the acts of congress are, in many cases, paramount to the laws of the individual states; but even a general position of that kind will not decide the present question. This action was brought in a state court, under a state law, before congress legislated upon the subject, and even before congress, or the constitution of the United States, had an existence. Can such an action be affected by subsequent acts of congress?

The law by which Kentucky was erected into a separate state passed the Virginia legislature, in December 1789. This is an unalterable law, embracing the citizens *of both states. It is a compact by which they mutually agreed that the rules of property should not be altered. If we admit, that by the act of 1792, appeals were allowed in the case of *caveats*, the admission proves nothing in the present question, because the law of 1789 is an unalterable law, and confined to the then existing state of things. It was not in the power of one of the contracting parties to change the terms of the compact.

*61]

But it is said, that there was a right of appeal at the time of that compact. Let us examine the laws relative to this subject. The first act is

that of 1779, mentioned by the opposite counsel, which declares that *caveats* shall be tried in the general court, and that there shall be no appeal or writ of error. The next is the act of 1788, which transfers the jurisdiction of the general court to district courts, and declares that "they shall have the same jurisdiction concerning" "*caveats*" "as the general court heretofore had by law." But the jurisdiction which the general court heretofore had by law was an exclusive and final jurisdiction, from which there could be no appeal. If, then, the district courts were to possess the same jurisdiction, it must be an exclusive and a final jurisdiction. But it is said, that by the same act of 1788, an appeal in all cases from the district court, was a matter of right. This must evidently mean in all cases where a right of appeal before existed from the general court to the court of appeals; but cannot be understood to give an appeal, in a case where it had been expressly excluded by an existing law. The intention of the legislature was, to put the district court, as to all cases arising within the district, exactly in the place of the general court, and to give them the same jurisdiction, to be exercised in the same manner, with the same limitations, and liable to appeals only in the same cases. But the act of 1788, erecting district courts on the eastern waters, did not affect Kentucky. The legislature had, before, by an act passed in 1782, erected a court on the western waters, called the supreme court for the district of Kentucky, to which it had transferred all the powers and jurisdiction theretofore exercised by the general court of Virginia; and with the rest, the power to try *caveats* and to give judgment thereon, without any appeal or writ of error to their judgment. The act of 1788 did not take away the *exclusive cognisance which the supreme court for the district of Kentucky had respecting *caveats*, but they [*62 retained it, until the final separation of Kentucky from Virginia; after which, the legislature of Kentucky passed no law authorizing an appeal; so that under the state laws, it is clear, that no appeal or writ of error would lie. There being then no appeal under the state laws, the question will be, simply, whether a writ of error will lie to the district court of the United States for the Kentucky district, upon an action carried there from the state court, which, under the laws of the state, had a final and exclusive jurisdiction of the cause.

The 22d section of the judiciary act of 1789 (1 U. S. Stat. 84), which allows appeals and writs of error, generally, did not contemplate a case like the present. This court is bound to take notice of the laws of the several states. By the 34th section of the same judiciary act (p. 92), the laws of the several states are to be the rules of decision, in cases where they apply. The remedy by *caveat* is given by the state law, and the party who chooses to take that remedy, must take it with its condition annexed, that no appeal or writ of error shall be allowed. A purchaser under the commonwealth of Virginia acquires his right under this condition. It is a part of the contract, from which this court cannot absolve him. The parties to this suit are not the only parties interested in this question; for while the right is hung *in dubio*, whilst it is uncertain to whom the grant ought to issue, the state taxes cannot be collected, the commonwealth having no tenant to whom to resort. Wilson has sought the summary process by *caveat*, and ought to be bound by the restrictions of that law under which he claims his remedy. He was not compelled to use the summary remedy; he might have resorted to

chancery, and then the commonwealth would have had a tenant to pay the taxes. He ought not to have the benefits of this kind of process, without submitting to the inconveniences which may be supposed to attend it. If this opinion is correct, although the laws of the United States provide generally that writs of error may be had, they can only give them as a remedy, where a right exists; and if Wilson's right is gone, by the judgment of the court below, he is precluded from suing it out, by the statute under which he claims.

*63] *Lee*, in reply.—This *caveat* is brought from the district court of the United States, and not from a state court. It is true, that it originated in the state court, but it was the defendant, Mason, and not Wilson, the plaintiff, who brought it into the court of the United States; and if the judgment of that court becomes thereby liable to be reversed upon a writ of error, it is a consequence attributable to the act of Mason alone.

There is nothing peculiar in the nature of the proceeding by *caveat*, to exclude it from the general appellate jurisdiction which is given to this court by the constitution and laws of the United States. It is not true, that this court are to look into the laws of Virginia for their right to correct the errors of the inferior courts of the United States. When a cause is brought from a state court into a court of the United States, it is to be proceeded upon, as if it had originated in the latter court, and the act of congress has expressly provided for an appeal or writ of error, in the very case of an action removed from a state court into an inferior court of the United States. Unless this case can be shown to be within some express exception to the general rule, none ought to be presumed by implication. With regard to the compact between Virginia and the inhabitants of Kentucky, it is true, that in all matters of substance, where the right of property depends upon it, it is binding upon this court; but in matters of form only, it could never receive the strict construction contended for, even between the parties themselves. The reasoning of the opposite counsel would go to prove that every *caveat*, depending upon the laws of Virginia, must be tried in the courts of Virginia only, because they had the sole right of trying a *caveat*, at the time of the compact. It would prevent the states of Virginia and Kentucky for ever from modifying and regulating their system of courts, and neither state could ever afterwards authorize an appeal upon *caveat*.

But an appellate jurisdiction on *caveats* did exist in Virginia, at the time of the compact. It appears by the act of congress (1 U. S. Stat. 189), that Kentucky did not become an independent state until June 1792. The

*64] county *courts of Virginia had, before that time, cognisance of *caveats* as to lands within their respective counties (Laws of Virginia, Rev. Code, p. 92, § 11), and in p. 88, § 53, an appeal is given from the county courts to the district courts, in all cases of a certain value, or where the title of land is drawn in question; and in p. 69, § 14, an appeal or writ of error is allowed from the district courts to the court of appeals, in the same manner as from the county to the district courts.

As to taxes, the state may tax the land, before any patent has issued, if they think proper. It is not necessary that there should be a tenant.

The Court directed the counsel to proceed in the further argument of the cause, observing, that they would consider this point with the others.

Lee, for the plaintiff in error.—The question is, who has the better right to the grant for 8300 acres of land, surveyed for George Mason on the 2d of October 1783?

1. The decision of this controversy depends on the laws of Virginia, prescribing the terms and manner of acquiring title to waste and unappropriated lands; with which there must be a legal and exact compliance.(*a*) Ac-

(*a*) The following is the substance of those parts of an act of assembly, which are material to this cause, contained in the Chancery Revision of the Laws of Virginia, published in 1785, by order of the general assembly (p. 94), entitled "An act for establishing a land-office, and ascertaining the terms and manner of granting waste and unappropriated lands," May session 1779.

The preamble recites, "Whereas, there are large quantities of waste and unappropriated lands within the territory of this commonwealth, the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the public debt, be it enacted," &c.

§ 1. That an office be constituted for the purpose of granting lands, and a register of the said land-office be appointed, &c.

§ 2. That any person may acquire title to so much waste and unappropriated lands as he or she shall desire to purchase, on paying the consideration of 40*l.* for every 100 acres, and so in proportion, &c.

§ 3. Register to grant printed warrants, under his hand and seal of office, specifying the quantity of land, and the rights upon which it is due, authorizing any surveyor, duly qualified, according to law, to lay off and survey the same, "which warrants shall be always good and valid, until executed by actual survey:" no warrant to be issued other than pre-emption warrants, before the 15th of October 1779. No surveyor to admit the entry or location of any warrant, before the 1st of May 1780. A surveyor to be appointed in every county.

"Every person having a land-warrant founded on any of the before-mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands or the greater part of them lie, who shall give a receipt for the same, if required. The party shall direct the location thereof, so specially and precisely, as that others may be enabled with certainty to locate other warrants on the adjacent residuum: which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries.

"The surveyor, at the time of making the survey, shall see the same bounded plainly by marked trees, except where a water-course, or ancient marked line, shall be the boundary, and shall make the breadth of each survey at least one-third of its length, in every part, unless where such breadth shall be restrained on both sides by mountains unfit for cultivation, by water-courses, or the bounds of lands before appropriated. He shall, as soon as it can conveniently be done, and within three months at farthest, after making the survey, deliver to his employer, or his order, a fair and true plat and certificate of such survey, the quantity contained, the hundred (where hundreds are established in the county wherein it lies), the courses and descriptions of the several boundaries, natural and artificial, ancient and new, expressing the proper names of such natural boundaries, where they have any, and the name of every person whose former line is made a boundary; and also the nature of the warrant and rights on which such survey is made. The said plats and certificates shall be examined and tried by the said principal surveyor, whether truly made and legally proportioned as to length and breadth, and shall be entered, within three months at farthest after the survey is made, in a book, well bound, to be provided by the court of his county, at the county charge.

"Every person for whom any waste or unappropriated lands shall be so located

cording *to these laws, there must be a warrant, an entry and a survey; the warrant being the foundation of the entry, and the entry directing
*66] and controlling the survey. If the *entry be made without a warrant, or if the survey be made of other land than that described in the entry, in either case there is a defect of title.

*67] *In this *caveat*, one of the causes assigned is, that the survey of Mason was made, contrary to his entry, and this we conceive to be a fatal defect in his title.

2. The entries made on the 29th of April 1780, by G. Mason (from whom the defendant derives his title), of his two warrants, No. 1, for 8400 acres, and No. 2, for 8300 acres, were valid and sufficient entries of land on the east side of Panther creek, and above the mouth of the west fork thereof, at the time those entries were made. The entry of warrant No. 1, is "on 8400 acres

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and laid off, shall, within twelve months at farthest after the survey made, return the plat and certificate of the said survey into the land-office, together with the warrant on which the lands were surveyed, and may demand of the register a receipt for the same, and on failing to make such return within twelve months, as aforesaid, or if the breadth of his plat be not one-third of its length, as before directed, it shall be lawful for any other person to enter a *caveat* in the said land-office against the issuing of any grant to him, expressing therein for what cause the grant should not issue; or if any person shall obtain a survey of lands, to which another hath by law a better right, the person having such better right may in like manner enter a *caveat* to prevent his obtaining a grant, until the title can be determined; such *caveat* also expressing the nature of the right on which the plaintiff therein claims the said land. The person entering any *caveat* shall take from the register a certified copy thereof, which, within three days thereafter, he shall deliver to the clerk of the general court, or such *caveat* shall become void; the said clerk, on receiving the same, shall enter it in a book, and thereupon issue a summons, reciting the cause for which such *caveat* is entered, and requiring the defendant to appear on the seventh day of thesucceeding court, and defend his right; and on such process being returned executed, the court shall proceed to determine the right of the cause, in a summary way, without pleadings in writing; empannelling and swearing a jury for the finding of such facts as are material to the cause, and are not agreed by the parties; and shall thereupon give judgment, on which no appeal or writ of error shall be allowed; a copy of such judgment, if in favor of the defendant, being delivered into the land-office, shall vacate the said *caveat;* and if not delivered within three months, a new *caveat* may for that cause be entered against the grant; and if the said judgment be in favor of the plaintiff, upon delivering the same into the land-office, together with a plat and certificate of the survey, and also producing a legal certificate of new rights on his own account, he shall be entitled to a grant thereof; but on failing to make such return and produce such certificates, within six months after judgment so rendered, it shall be lawful for any other person to enter a *caveat*, for that cause, against issuing the grant; upon which subsequent *caveats*, such proceedings shall be had, as are before directed in the case of an original *caveat;* and in any *caveat* where judgment shall be given for the defendant, the court shall award him his costs:" "and in case the plaintiff in any such *caveat* shall recover, the court may, if they think it reasonable, award costs against the defendant.

"And for preventing hasty and surreptitious grants, and avoiding controversies and expensive law-suits, be it enacted, that no surveyor shall, at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land, by him surveyed, except only to the person or persons for whom the same was surveyed; or to his, her or their order; unless a *caveat* shall have been entered against a grant to the person claiming under such survey, to be proved by an authentic certificate of such *caveat* from the clerk of the general court, produced to the surveyor."

of land, to begin on Panther creek, on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity." The entry of warrant No. 2, is "on 8300 acres to begin at the upper corner of his 8400 acre entry, and run up the creek on the east side, and back for quantity."

3. If the explanation made on the 27th October 1780, of the entry of warrant No. 1, on the 29th of April preceding, for 8400 acres, was a subtraction thereof from the land to which it had been applied, a matter not clear of doubt, and therefore not admitted; yet the entry of warrant No. 2, upon 8300 acres, was not thereby affected, *but remained unaltered, unimpaired and unsubtracted from the land which it describes [*68 with sufficient legal precision and certainty. The re-location of one warrant is not necessarily the re-location of another. If the warrant No. 1, was transferred by a new entry, on the 27th of October 1780, to land some miles below the west fork of Panther creek, yet the warrant No. 2, having been legally located, on the 29th of April antecedent, upon a tract of land some miles above the west fork, remained appropriated to that tract of land.

4. The entry of 8300 acres, under warrant No. 2, being such a special and precise entry as the law requires, is an appropriation of the land described in it; and fixes that warrant upon that tract of land, situate upwards of four miles above the west fork of Panther creek: and the survey made by Mason of 8300 acres on the south side of Panther creek, and below the west fork thereof, and several miles below it, is not a survey of the same land contained in his entry.

A survey, of itself, without a previous legal entry of a land-warrant, is not a legal appropriation of waste and vacant land; and therefore, this survey, unsupported by a legal warrant and a legal entry, was no legal appropriation, by Mason, of the land in controversy; but an unlawful intrusion thereupon; and the same land remained open to the appropriation of others, who, having notice of the legal survey of Mason, were not precluded by law, or equity, from proceeding in due course of law, to obtain title to the same land which is described in that illegal survey which had been knowingly made by the agents of Mason, contrary to his legal entry. No grant of the land, therefore, ought to be made to the defendant Mason.

5. If the claim of the defendant be deemed invalid, then there is no impediment in the way of the plaintiff, whose warrants, whose entry, and whose survey, are perfectly conformed to law.

The two causes assigned by Mason in his *caveat* against Wilson, are resolvable into one, viz., that having notice of the survey of Mason, it was not equitable, but fraudulent, *to acquire a title to the same land which [*69 was contained in that survey. But if the law be in favor of the plaintiff, equity is also: for notice of illegal proceedings in one man to acquire property, is no equitable bar to another who shall in all respects proceed according to law.

On the part of the defendant Mason, there was full and complete knowledge of Green river, Panther creek, and the west fork; and with this knowledge, a survey was made of a different tract than the one described and authorized by the entry No. 2, for the purpose of obtaining a grant, in evasion and fraud of the law. Such illegal proceeding ought not to be sus-

tained in a court of justice, against another who shall respect and obey the law in all particulars.

The entry of Mason for 8300 acres, on the 29th April 1780, begins at the upper corner of his entry for 8400 acres, as made on the same day. The entry for 8400 acres, well and accurately described a tract of land, lying on the east side of Panther creek, opposite a beech on the west side, and four miles above the west fork. This entry being sufficiently certain, the entry for 8300 acres must be certain also, and describes a particular tract of land, lying more than four miles above the west fork.

The west fork was known by that name, to the agent of Mason, at the time he made the entries on the 29th April, having encamped thereabouts four or five weeks in the winter and spring, before he made the entries for Mason. It has always been known by that name, since the first exploring of that part of the country. He was informed, while the surveys were still in his power, that they did not conform to his entries, and shown the manner in which they differed, and yet he obstinately persisted in having them recorded. The warrant No. 2, then, was well and sufficiently located on the land above the west fork, and a removal of the location of warrant No. 1, even if such removal could be made according to law, could not be considered as a removal also of the location of No. 2, without an express declaration to that effect. The location of warrant No. 1 was changed, but the location of No. 2 was not. Mason has surveyed it, as if it was; and hence
*70] results, the fatal difference between *his entry and his survey; by which his survey is a mere void act, and cannot be the foundation of a claim to a patent.

But it may be said, perhaps, that Mason's survey of 8300 acres, although not authorized by a previous entry, yet, being made before Wilson's entry, and Wilson having notice of it, was good against Wilson as well as against the commonwealth. This is denied. As to the commonwealth, it was an intrusion; and as to Wilson, the land was still vacant; it not having been appropriated in the manner authorized by law. Before a grant for land has actually issued, the only record of appropriations is the surveyor's book of entries of locations. The book of surveys was not intended by the legislature as the book to resort to, for information as to appropriations; it furnished no evidence of that kind. And as to notice, the principle is well established, that notice of an illegal act is no equitable bar to him who proceeds according to law; *Chapman* v. *Emery*, Cowp. 280; and *Doe* v. *Routledge*, Ibid. 708, 711, 712, where Lord MANSFIELD states the reason for the principle to be, "because if he knew the transaction, he knew it was void by law." *Gooch's Case*, 5 Co. 60 *b*; *Tonkins* v. *Ennis*, 1 Eq. Cas. Abr. 334; *Powell* v. *Pleydell*, 2 Ibid. 682.

Notice could not make that act valid, which was void at law. A survey is not the act of appropriation which the law requires. The land, not being appropriated according to law, was such waste and unappropriated land as the act of assembly says any person may acquire a title to, on complying with the terms and by taking the steps prescribed by the act; and Wilson, or any other person, might lawfully appropriate the land, by proceeding regularly according to law.

Mason, then, not having taken the steps required by the act of assembly, had no title at law; and having illegally made his survey, with a full knowl-

edge of all the circumstances, and after having been warned of his error, has certainly no right in equity. Before he obtained a grant, Wilson, by pursuing the steps of the law, acquired a better right, and was thereby entitled to bring his *caveat* and obtain a judgment in his favor.

**Daveiss*, on the same side.—Notice cannot alter the law, except where the law requires notice. Where a statute requires notice, and prescribes the mode, notice in another mode is not sufficient. *King* v. *Newcomb*, 4 T. R. 368 ; Amb. 444, 445. [*71

This is a case in which Wilson and Mason are both contending *de damno evitando*. The jury have found that, by a law passed by the assembly of Kentucky, in 1792, all further entries of land with the surveyors are prohibited, and that ever since, no land could be appropriated by virtue of land-warrants. Consequently, the principle applies which is laid down by Lord Kaims, in his Principles of Equity, p. 26, 27, 162, 163, 199, "that it is a universal law of nature, that it is lawful for one, *certans de damno evitando*, to take advantage of another's error." A warrant is a transitory chattel, until it has been located according to law. The entry is the appropriation of a particular tract of land, and the fixing of the warrant to that tract. The survey is of no effect, unless it be a survey of the tract so appropriated. In support of these positions he cited *Swearingen* v. *Higgins*, Hughes 4; *Dougherty* v. *Crow*, Ibid. 21; *Isaacs* v. *Willis*, Ibid. 12; *Owen* v. *Wilson*, Ibid. 64; *Hite* v. *Stevenson*, Ibid. 16; *Consilla* v. *Briscoe*, Ibid. 43; *Swearingen* v. *Same*, Ibid. 47; *Miller's Heirs* v. *Fox*, Ibid. 51; *Smith* v. *Bradford*, Ibid. 55; *Fry* v. *Essery*, Ibid. 53, and other cases in the same book.(*a*)

It will probably be contended by the defendant, that the intention of the assembly in requiring an entry, was to give notice to subsequent purchasers; and that notice given or gained in any way is sufficient. But it has been shown, that here was no appropriation by Mason ; and that the land, until appropriated, is waste. The land-law shows this, because nothing but a regular title is protected by that law. In a statute introducing a new law, or prescribing the mode of acquiring new rights, affirmative words imply a negative of all other modes of acquiring that right, or fulfilling the terms of that law. The land-law, by giving one way of acquiring titles, negatives all other modes. In 4 Bac. Abr. 641, it is said, "If an affirmative *statute, which is introductive of any new law, limits a thing to be done in one manner, it shall not, even where there are no negative words, be done in any other ;" and the following cases are there cited : *Standing* v. *Morgan*, Plowd. 206 *b* ; *Slade* v. *Drake*, Hob. 298; *Wethen* v. *Baldwin*, Sid. 56. He cited also *Thornby* v. *Fleetwood*, 1 Str. 329, and *The King* v. *Burrage*, 3 P. Wms. 458–61. Where a certain mode is pointed out by a statute, in which a title may be obtained, a conformity to that mode is a condition precedent, without complying with which, no title can be obtained. In the present case, a warrant, an entry, and a survey are conditions precedent, and a want of either is fatal. [*72

Lee.—In the 10th fact found by the jury for the plaintiff, it is stated, the survey of 8400 acres was made on the entry of the 17th of October, and

(*a*) On the argument, these cases were cited from a manuscript volume. Hughes' Reports not having been published until 1803.

that the survey of 8300 acres was made on the entry of 29th of April. This must prevent the defendant from arguing that the latter survey was made on the entry of October, as well as from pretending that the entry of October applies to the entry of 8300 acres made in April.

In order to prove that all lands, not entered for in a regular manner, were to be considered as waste and unappropriated, he cited the case of *Jones* v. *Williams*, 1 Wash. 231 ; in which the court call lands waste and unappropriated, although they had been settled and occupied for years.

Mason, for defendant in error.—1st. The entry of Mason, upon which his survey of 8300 acres was made, is sufficiently certain, and the survey is in conformity to the entry.

2d. Admitting that the entry was vague, and not corresponding with the survey, yet, Mason having paid for the land, and surveyed it, *quoad* the commonwealth, he was a *bonâ fide* purchaser, for a valuable consideration,
*73] and entitled to the land, provided no step had been taken *by any other person to acquire title to this land, previous to Mason's survey.

3d. Mason having appropriated this land, by a survey actually made, returned to the surveyor's office, and recorded, the land ceased to be waste and unappropriated land : and Wilson having a perfect knowledge of these facts, before and at the time he made his entry, was and is (if he could acquire title at all) in the character of a second purchaser, with notice of a prior sale of the same land, and therefore, was a fraudulent purchaser.

4th. The plaintiff in error is not, under the provisions of the law, entitled to a *caveat* in this case, because the better right, which the law meant to protect, was a right existing before or at the time the survey to be caveated was made.

I. The entry of 8300 acres is sufficiently certain, by its reference to the entry of 8400 acres. The surveys of both entries are upon the identical tracts originally intended to be located. The first description of them, in April 1780, was inaccurate, on account of the mistake in the names of places. The particular forks and branches had, at that time, scarcely acquired any names at all. The facts stated in this case do not admit that the names of the places were known before the beginning of the year 1780, which is the very time when the entries were made. It does not appear, that the place now called the mouth of west fork, was known by that name, before Mason made his entries. It may be a name since acquired, or given by the surveyor or his deputies, who are the persons that generally give names to places in new countries. So soon as the fall of the same year, Mason found that the description was not sufficiently accurate, and made an explanatory entry, declaring what place he meant by the mouth of the west fork, and stating it to be the forks of Panther creek where it mouths into Green river. A mistake of that kind was by no means improbable, in the then wild and uninhabited state of the country on and about Green river, when it was dangerous, on account of the Indians, to attempt to set a compass. That such mistakes were general, is evident, from the names of places which were given. Thus, the west fork is, in fact, a north-east fork ;
*74] *what is called the east side of Panther creek, is truly the south-west side. The entry of April was, in substance, the location of the tract surveyed ; and the memorandum of Mason, in October, was only fixing with

more accuracy, what was before in some degree vague. If this was the fact, then the entry of October was not a re-location of the warrant; it was never removed, but was always fixed to one and the same spot of earth. If, then, the entry of October is nothing more than it purports to be, viz., an explanation of the name of a place which was before uncertain, this same act of explanation, which rendered certain the location of warrant No. 1, must, of necessity, also render certain the location of No. 2, which depends, for its beginning, upon the location of No. 1. *Id certum est, quod certum reddi potest.* The two locations are dependent upon, and connected with, each other; and the explanation of the first must also explain the second. It is evident, that it was Mason's intention that the two tracts should lie alongside of each other, and the rendering certain the first, upon which the second was dependent, could never be considered as withdrawing the one from the other, and placing them many miles asunder. If it was Mason's intention, in October, to make a new location, why did he not avow it? No person had applied to appropriate the land he wanted. No one had interfered, or was about interfering, to take up that tract. There was nothing to prevent him from expressly withdrawing the entry of April, and making an entire new location. But his object was, not to remove the location which he had actually made, but only more fully to explain the ideas which he had at first intended to express, but which, on account of the inaccurate knowledge of the names of places, and of the real geography of the country, he had failed to do. Taking, then, the entry of October as an explanation only, it applies as well to fix the true location of warrant No. 2, as of No. 1; and the survey of No. 2, is as correspondent to its entry as that of No. 1, is to its entry.

Nothing can more clearly prove Mason's intention to be, to explain, and not to remove his entries of April 1780, than his omitting to say anything respecting his former entry of 8300 acres, at the time he was explaining the entry of 8400. Because, having no idea that his act *would be construed to be anything more than an explanation, it must apply as well to the former as to the latter. But if his intention had been to remove the location of warrant No. 1, he would either have expressly removed No. 2, at the same time, or else would not have ordered the survey of No. 2, to be made contiguous to that of No. 1. He might as easily have explained No. 2, as No. 1. [*75

Words are but the representatives, and not always the true representatives, of ideas. They do not always express, nor are they the uncontrollable evidence of the ideas of the person using them. They may be explained by the tone of the voice, by the emphasis, by the gestures, or by the actions, of the person speaking. To determine, at a subsequent period of time, the nature of the act from the words used, and not to suffer the words to be explained, by other proof of the nature of the act, is not a fair mode of seeking for truth.

The question is, what particular spot did Mason mean to locate, by his entry of April? He has himself answered the question, by his explanation in October. The only doubt can be, whether he spoke the truth. He certainly had no motive for deception: there were, then, no contending claims: no other person had attempted to locate the land which he wished to appropriate. He had no reason to wish to preserve the priority of his

entries, because the book of entries was open before him, and he could see that no person had entered for the same land; a new entry, therefore, in October, would have been as good as his old entry in April.

The act of assembly says, that the warrant "shall be good and valid, until executed by actual survey." The survey, then, and not the entry, is the execution of the warrant: the warrant merges in the survey. This shows that the legislature attached greater importance to the survey than to the entry. If, then, the land surveyed is the same land which Mason fixed his eye upon, but inaccurately described, in April, then the survey was correctly made, and pursuant to the actual location.

*76] *II. But admitting, for the sake of argument, that the survey did not correspond with the entry, yet Mason having paid the money for the land, and surveyed it, he was, as to the commonwealth, a *bonâ fide* purchaser for a valuable consideration, and entitled to a grant of the land. The commonwealth could not refuse, because the want of an entry was no injury to her. Mason had his choice among all the waste and unappropriated land in the state. It was of no importance to the commonwealth, whether he took this tract or another: the commonwealth sold all her land at the same price: the land was waste and unappropriated, and the warrant being executed by actual survey, was spent and gone, *functus officio*. The commonwealth had no means to prevent the emanation of a grant. As between the commonwealth, therefore, and Mason, this was a contract for that specific tract of land: it was as if the warrant had been special for that particular land. The warrant having been originally general, became special, as against the commonwealth, by the survey: the land ceased to be waste and unappropriated, as to the commonwealth, who was bound by the survey, and could not sell it to another.

III. This being the case, and Wilson having a full knowledge of all these facts, before he made his entry, became a *malâ fide* purchaser. This is one of the grounds upon which Judge Innes decided the case. (Here the opinion of Judge Innes was read, with the authorities there cited.) As a second purchaser with notice, he could take only the right which the commonwealth had, subject to the contract with Mason.

The preamble of a statute is said to be a key to unlock its meaning. It appears by the preamble of the act of 1779, to have been the object of the legislature: 1st. To encourage migration, and to promote population: 2d. To increase the revenue.

To induce persons to become purchasers, it became necessary to secure their titles, and for this purpose, as the situation of the country would not permit them, in all cases, to make actual surveys, an entry or location of the land entered in the surveyor's books, was to be considered as equivalent

*77] to a survey, for the purpose of appropriating *the land and securing a title. A survey, returned and recorded, is, in itself, a more unequivocal act of appropriation than an entry, and the law has made it the only means of executing the warrant. No time is fixed by law for the making the survey, because, in many parts of the state, it was, at that time, impossible to make it, on account of Indians, and no time could be ascertained, with any degree of precision, when it would become possible. For the security of subsequent purchasers, it also became necessary that some means of notice should be prescribed, that they might avoid an inter-

ference with prior rights. Hence, it was enacted, that the locations of warrants should be entered in a book, and should be so special, that others might be enabled, with certainty, to locate other warrants on the adjacent *residuum*. The object of the commonwealth, in requiring entries, was not to secure her own immediate interest, but that of purchasers, by giving them notice: and if the subsequent purchaser acquires such notice, it is of no importance, whether it be by an entry, which was liable to be changed, or by an actual survey recorded, which was a complete execution of the warrant, and could not be altered. Indeed, the latter seems to be the more complete and effectual notice, and to answer the intention of the legislature better than notice by an entry only.

The other object of the legislature was to raise money. If, then, complete notice of the location was given to the subsequent purchaser, and the money paid to the commonwealth, the two objects of the legislature were fully answered, and neither the commonwealth, nor that subsequent purchaser, had any right to complain: no injury was done to either. The person who, with full notice of these facts, insists upon becoming a second purchaser, becomes such in his own wrong, and if a loss must fall upon either, it must light upon him who thus voluntarily put himself in danger. Where the object of a statutory provision is only to give notice, if notice is had by other means, it has the same effect, as if given in the mode required by the statute. Such have been the uniform decisions in England, on the statutes of enrollment, and so well established is the doctrine, that it cannot be necessary to cite authorities to support it. Although, where a new right is given by statute, a strict compliance with the *provisions of the statute is necessary, yet it is not necessary for every purpose. *Blackwell* v. *Harper*, 2 Atk. 94–5. Mrs. Blackwell having designed and engraved certain drawings of plants, but omitted to engrave on the plate the day of their first publication, as required by the statute, Lord Chancellor HARDWICKE decreed a perpetual injunction against Harper, notwithstanding that omission; but did not decree an account of the profits. [*78

It will not be forgotten, that Handley, a deputy-surveyor of the county, was the partner of Wilson in this business, and was the person who actually made the entry, and that he fraudulently took advantage of the knowledge of Mason's surveys, which he acquired by means of his official situation, contrary to the express provisions and spirit of the act of assembly of 1779, which enacts, that "for preventing hasty and surreptitious grants, and avoiding controversies and expensive law-suits, no surveyor shall, at any time within twelve months after the survey made, issue or deliver any certificate, copy or plat of land by him surveyed, except only to the person for whom the same was surveyed." This clause of the act was made for the very purpose of preventing others from taking that advantage of surveys, which the deputy-surveyor himself has here taken; the law not contemplating the case of a surveyor, so regardless of his duty and of his oath, as to be guilty of an act like this. A title thus founded in fraud can never be supported. Upon a *caveat*, the court is to exercise a chancery jurisdiction. The act says, "the court shall proceed to determine the right of the cause, in a summary way." This they cannot do, without chancery powers. The court in Kentucky has so construed the act. *Isaacs* v. *Willis*, Hughes 12. If Wilson, by pursuing the strict letter of the law, has acquired

anything like a legal right, the court, as a court of chancery, will consider those circumstances of fraud which go to invalidate his right, in equity.

IV. Wilson is not, under the provisions of the law, entitled to a *caveat* in this case. The proceeding by *caveat* is in derogation of the common law, and therefore, the act which authorizes it is to *be construed strictly. *79] The act mentions only four cases in which a *caveat* may be entered. 1st. If the plat and certificate of survey be not returned into the land-office, within twelve months after the survey made, it shall be lawful for any other person to enter a *caveat:* 2d. If the breadth of the plat be not one-third of its length : 3d. If any person shall obtain a survey of lands to which another hath, by law, a better right : 4th. When, upon a *caveat*, judgment shall be given for the defendant, and he shall not lodge a copy of that judgment in the land-office, within three months thereafter. In the 1st, 2d and 4th cases, the *caveat* is allowed, for the purpose of protecting the rights of the commonwealth ; they do not apply to the present question. In the 3d case, the *caveat* is given as a remedy to him who hath by law a better right, and it is upon this ground, that Wilson claims the process.

If we examine the words of the law, according to their grammatical construction, or compare them with the spirit and object of the law, we shall find, that the better right which can support a *caveat*, must be a right existing at the time of the survey obtained, and not a right arising afterwards. The words of the act are, "if any person shall obtain a survey of lands to which another *hath* by law a better right." The word *hath* is in the present tense, and must apply either to the time of passing the law, or to the time of committing the injury which is the cause of the *caveat.* It could not apply to the time of passing the act, because, at that time, there existed no rights to those waste and unappropriated lands which were the subject of that act. The better right, then, was a right to be derived under that law. The injury to be remedied by the *caveat* was the injury done by a survey of lands to which another should have a better right. But a survey of lands, to which no other person had a right, cannot be an injury to any one, and can be no ground for a *caveat.* As to Wilson's being in the situation of one *certans de damno evitando*, the assertion cannot possibly be deemed correct. If he is in danger of loss, he has knowingly put himself in danger ; he has sought the position he is in, with a full fore-knowledge of all its evils. He was under no necessity of interfering with Mason's claims. His warrant was general : the wilderness was before him, and he knew where Mason had surveyed his land. *The same Lord Kaim, who says, "no man is *80] conscious of wrong, when he takes advantage of an error committed by another, to save himself from loss," says also in the same breath, "but *in lucro captando*, the moral sense teaches a different lesson. Every one is conscious of wrong, when an error is laid hold of, to make gain by it. The consciousness of injustice, when such advantage is taken, is, indeed, inferior in degree, but the same in kind, with the injustice of robbing an innocent person of his goods or his reputation." Here Wilson evidently had an intention of making gain by the error of Mason : and if, by that means, he has put his purchase-money at risk, it is not for a court of law or of equity to be anxious to assist him. Wilson, finding that Mason had an advantage by the priority of his location, contrived (by the assistance of Handley, his fraudulent coadjutor) a plan by which he hoped to reap the fruits of

Mason's industry; and now, he would fain make the court believe he was an innocent purchaser, striving to avoid a loss, the danger of which he had incurred by pure misadventure.

Upon the whole, then, Mason having obtained a right to this tract of land against the commonwealth, and Wilson having notice of that right, before he purchased, has no claim at all; but if he had, his remedy is not by *caveat.*

Jones, on the same side.—This cause naturally divides itself into two questions. 1st. Whether Mason has acquired a right to the patent. 2d. If Mason has not, whether Wilson has; for if neither has a right, Wilson can recover nothing.

I. The entry of Mason, in April 1780, is supposed to be so absolutely binding upon him, that he could not alter it, without withdrawing it entirely, notwithstanding that he subsequently said he was mistaken in supposing the land to lie above the west fork, when in fact it was below. A man may go upon the land, and fix in his mind a certain tract, but when he goes to the surveyor's office, he may mistake its situation, and say it is on the east, when it lies on the west, or the north, when it lies on the south; but *when [*81
he discovers his mistake, an explanation is no evidence that his choice has been altered. Here is no proof of an intention to withdraw his first entry; or to appropriate a different tract of land from that which he first intended. The only inference which can be drawn from the entry of October is, that he had been mistaken as to the point of compass, and as to the name of a particular fork of Panther creek. The land which he had chosen lies above a branch of Panther creek, which he supposed to be called the west fork, but which is not now known by that name. Mason was one of the first, if not the very first, adventurer in the lands on Panther creek. There is no evidence, that particular branches of that creek had names given them, before he made his entries in April. He had as good a right to give names to places, as any one else.

But a survey itself is as good a location as an entry. Indeed, it is better, because it is an actual location and occupation of the land. The lines are not merely described by words, which are uncertain, but are marked out upon the land itself. It is a *pedis possessio*, an actual seisin. A survey differs from an entry, as a diagram differs from a problem; or a proposition from its demonstration. If notice is the object of the statute, a survey recorded is better than an entry, as it is more definite and certain. If the object is to give evidence of an appropriation, it is better than an entry in the surveyor's book, because it is an act *en pais*, an actual possession. The one is but the command to locate, the other is the location itself. In this case, entry does not conflict with entry, and survey with survey; but a prior survey and occupation, with a subsequent entry.

A strong difference is made by the act of assembly, between a survey and an entry. The first is a satisfaction of the warrant; and various clauses of different acts speak of a survey, as the execution of the warrant. But the entry does not affect the warrant, which is declared to be "always good and valid, until executed by actual survey." The entry, therefore, is but an intermediate process, by which the party gains a priority of right; it is intended merely as a substitute for a survey, untilan "actual survey" can be *made. If, therefore, there had been no entry at all, yet [*82

Mason's right is equally good, as if his entry had been free from question. He has done the principal act itself, for which an entry is only a temporary substitute. Perhaps, he ran some risk before his survey was obtained; but when a survey is completed, the warrant and the entry are no longer of any effect or validity; they merge in the survey as the survey, does in the patent.

II. With respect to the plaintiff's right, it seems clear, that it must be a right existing at the time of the survey. If we were disseisors, as it is contended, then we gained a defeasible inheritance. We had possession, and whether legal or not, is of no consequence; it was a better right than Wilson's, and good against all the world but the lawful owner.

The acquisition of a legal title takes away the remedy by *caveat*. The warrant, entry and survey, constitute only an incipient equitable title, to be completed by the patent, which a *caveat* is the proper process to arrest. This being, then, entirely a contest about equitable rights, the process by *caveat* must be an equitable remedy, and gives the court an equity jurisdiction. If this *caveat* had not prevented, there is no doubt that Mason, having obtained and returned his survey in due time, would have had a patent, as a matter of course.

Suppose, the commonwealth had attempted, like any other vendor, to defeat the claim of Mason, would not a court of chancery have compelled a conveyance? Everything had been done by Mason, which the commonwealth had a right to require; as against her, therefore, there must have been a decree. If so, then, this court, exercising the same chancery powers with the court below, will give the same judgment which that court has rightfully given, in deciding that a contract existed between Mason and the commonwealth, which a court of chancery would have carried into effect; and that Wilson, having a full knowledge of that existing contract, became a subsequent purchaser; and therefore, as to Mason, he was a purchaser *malâ fide*, and can never defeat the right of Mason.

*83] *Daveiss*, in reply.—Can lands be appropriated in more ways than one? If it is decided, that the mode of appropriation is *unique*, then there can be no tantamount act: the one mode pointed out by the statute must be pursued. In attempting to come at the true construction of the land-law of 1779, it is highly important, to take into consideration the act which immediately proceeds it, for the settling of certain then existing claims and rights. They may indeed be called twin acts, being passed on the same day, and referring to each other. The preamble of the first act recognises the great variety of claims, and the evils resulting from various modes of gaining a title to lands; to remedy which, it declares it to be necessary "that some certain rule should be established," &c. The legislature, after settling existing claims, go on to provide a mode of acquiring titles in future, and to fix certain rules which should be observed by all future purchasers of public lands. The great evil intended to be remedied, was the existence of multifarious modes of acquiring titles. To give the act its proper remedial effect, it must be construed strictly; otherwise, the evil would continue to be as great as ever. For if you once decide that titles may be acquired in any other mode than that pointed out by the statute, you open again that door to perplexity and ambiguity, which the legislature intended to close for ever.

It may not be improper here to remark, that no objection has been

raised to the intrinsic merits of Wilson's claim: all the objections arise from its relation to Mason's. Wilson, therefore, has an intrinsic legal claim, which nothing can defeat but a prior appropriation of the land. This brings us again to the great questions, what is a legal act of appropriation? and what lands can be called waste and unappropriated?

To ascertain the meaning of these expressions, it is not necessary to consult a glossary. The manner in which the legislature has used them, on various occasions, will leave no doubt upon the subject. Sometimes, they call land, waste and unappropriated, after it has been settled, and sometimes, even after it has been cleared and cultivated; and lands once legally appropriated by legal entry, may *again become waste and [*84
unappropriated, by the purchaser's not following exactly the provisions of the law. Hence, it is apparent, that when the legislature use the terms waste and unappropriated land, they mean lands not appropriated in the manner prescribed by law.

We are then to inquire, whether, at the time of Wilson's entry, the land was such waste and unappropriated land, as, by the act of assembly, Wilson had a right to appropriate. We contend, that an entry is essential, and that Mason never entered for the land in dispute. The entry called for by the survey, is the entry of April 1780. That is clearly an entry for other land. It is a certain and a special entry: its beginning is certain, and is above the west fork: the survey is some miles below the west fork. But we are told, the name of west fork is uncertain; that the fork so called is not a west fork, but a north-east fork. But a name is different from a description: the name is arbitrary, and as long as a thing is known by a particular name, it is of no importance what that name is.

But ignorance of the country, and the danger of acquiring accurate knowledge of it, are alleged both as a proof of, and an apology for, the vagueness of the entry. If evidence and excuses of this kind are to be allowed, they will totally defeat the provisions of the law: it will let in those loose and vague claims which it was the object of the legislature to prevent. It is begging the question, to argue, that Mason was under a mistake, because he chose to alter his entry; and that what was originally in itself certain, was uncertain, because Mason, by a subsequent act, chose so to consider it. But there was a reason why Mason should wish to give it the appearance of a mistake, rather than of a removal of his entry. If he had expressly withdrawn his former entry, he would have lost his priority; and to save himself the trouble of examining all the intermediate entries, as well as the risk of omitting any of them, he chose to hold up the idea of correcting a mistake.

The entry of April, then, being sufficiently certain, the warrant attached itself to it, and the warrant and *entry taken together had the same [*85
effect as a special warrant, describing that identical tract of land. If Mason had bought, or could buy, a special warrant, stating descriptively the land, he could have no other land than that described in his warrant. When he bought his general warrant, he had the power of fixing its location at his election; having made his election, the power is expended, and the location fixed. (*a*)

(*a*) Washington, J.—Do you deny the right of removing an entry?

Daveiss.—If it were *res integra*, I should. But the whole landed property of Ken-

But it is contended, that if the entry for 8400 acres was removed, the entry for 8300 was removed also; that the one is dependent on the other. This we deny. How is it dependent? Cannot one exist without the other? Or is it because both were made by one person? Suppose, the entry of warrant No. 2, had begun at a mile distance due north from the upper corner of entry No. 1. Would the removal of No. 1, be a removal of No. 2?

The description of the beginning of No. 2, was only a description of a certain place, as was that also of No. 1, and his removal of the location of warrant No. 1, did not alter that place. Suppose, you make an entry, the beginning of which is a certain natural boundary: I make an entry beginning at the north corner of yours: you afterwards remove your entry. Does mine follow yours, whether I will or not? Again, it is said, that No. 2 could not be surveyed, without surveying No. 1. But this can make no difference; it might make some additional trouble, but creates no impossibility. The lines of No. 1 may be run, so as to ascertain the beginning of No. 2.

It is said, that a survey is as good an act of appropriation as an entry, and equally answers all the objects of the statute. This might be a good argument, if the court could make laws; but the law does not so consider it. It limits no time in which the survey shall be made. The survey, therefore, cannot be considered as the act of appropriation. By the old land-law, indeed, a survey *was the substantial appropriating act; but the last clause of the land-law (p. 98) has altered it in this respect.

*86]

It is contended also, that a survey is better notice than an entry. When a law only modifies certain existing rights, it is to be considered according to the rules of equity; but when a man claims under a law giving a right which did not exist before, he must bring his case strictly within the law. 4 Bac. Abr. 656; *Birch* v. *Bellamy*, 12 Mod. 540; Viner, tit. Statute, 506, 507.

Notice was not the only object of the law in prescribing an entry. The greater object was to avoid confusion in the sale of lands, and perplexity in the titles, which would have a bad effect upon the sale, and to establish a uniform mode of appropriating lands and locating warrants. The argument that a survey is better notice than an entry, goes to prove that an entry is unnecessary. The surveyor is the agent of the commonwealth, with limited powers, which must be strictly pursued, or his acts are void. He is by law directed to proceed in a particular manner, and must not deviate. A special power given by statute must be strictly pursued. *Rex* v. *Loxdale*, 1 Burr. 450. The surveyor must pursue the entry, and a survey not corresponding with the entry is void: the statute has made an entry necessary. In a statute creating a new law, affirmative words imply a negative. Appropriation means a legal appropriation. The book of surveys could not be intended to give notice, because it is by law shut up for twelve months from every eye but that of the surveyor and his employer. The survey itself could not be notice, because, at any time within three months, it is alterable by the party, or by the surveyor, and until the end of the three months, it does not bind even the party himself, or the surveyor, and for twelve months afterwards, it is by law kept secret.

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tucky would be shaken by such a judgment. I admit, therefore, that an entry may be removed; but Mason, as we contend, has not removed his entry of 8300 acres.

The law being affirmative, that you shall give one kind of notice, implies the negative that no other notice shall be sufficient. The survey, in itself, was wrong, illegal and void. An act in itself wrong can never be the foundation of right. Land Law, p. 90; and *Talbot* v. *Seeman* (*ante*, p. 1).

*But in the whole course of decisions in Kentucky, a survey has never been considered as giving a right. The adjudications for [*87 eighteen years do not show the date of a survey to be material as to notice, nor has it ever been so considered. There has never been a title supported upon a survey, without an entry, since the year 1779. To overthrow this course of decisions, would shake the titles of half the land in Kentucky. Arguments drawn from the inconvenience of unsettling titles to real estate, have always been respected. If it is an error, yet where "it is established, and has taken root, upon which any rule of property depends, it ought to be adhered to by the judges, until the legislature think proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled." 1 Bl. Rep. 264; *Robertson* v. *Bland*, 1 W. Bl. 264; *Rice* v. *Shute*, 2 Ibid. 696; *Regina* v. *Ballivos and Burgenses de Bewdley*, 1 P. Wms. 223. In *Goodright* v. *Wright*, Ibid. 399, the court said, "that the altering settled rules concerning property is the most dangerous way of removing land-marks." The same doctrine is held in *Dawes* v. *Ferres*, 2 Ibid. 2; and in *Wagstaff* v. *Wagstaff*, Ibid. 259.

The survey could be no notice to Wilson, because it was alterable; he knew it ought to be altered, and he might well suppose it would be altered. The book of surveys is no record, and is not of more authority than the book of entries, which is the only book to be resorted to, to know what lands have been appropriated. But if the survey was notice, it was notice only of an illegal act. Notice cannot make that lawful which was unlawful in itself, nor that unlawful, which was in itself lawful. *Farr* v. *Newman*, 4 T. R. 639.

The Court took time until this term to consider, and now the Chief Justice delivered the following opinion:

Opinion of the Court.—This is a writ of error to a judgment of the Court of the United States for the district of Kentucky, rendered on a *caveat*, and is governed by the land-laws of Virginia.

*In the year 1779, the legislature of that commonwealth opened a land-office, and offered for sale, with some reservations, so much of [*88 that tract of country lying within its boundaries south-east of the river Ohio, as was then unappropriated: a part of which now constitutes the state of Kentucky.

Every person who would pay at the rate of forty pounds for one hundred acres, into the treasury of the state, became entitled to such quantity of waste and unappropriated land as was, at that rate, equivalent to the money paid, for which a certificate was given to the register of the land-office, whose duty it was, on receipt thereof, to issue a warrant for the quantity of land purchased, authorizing any surveyor, qualified according to law, to lay off and survey the same. A warrant might also be issued on certain other rights.

A chief surveyor was appointed for each county, whose duty it was, to nominate a sufficient number of deputies for the business of his county, and

the law proceeded to direct, that "every person having a land-warrant, founded on any of the before-mentioned rights, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the chief surveyor of the county wherein the said lands, or the greater part of them, lie, who shall give a receipt for the same, if required. The party shall direct the location thereof so specially and precisely as that others may be enabled, with certainty, to locate other warrants on the adjacent residuum; which location shall bear date on the day on which it shall be made, and shall be entered by the surveyor, in a book to be kept for that purpose, in which there shall be left no blank leaves or spaces between the different entries."

George Mason was one of the earliest purchasers under this law. On the 29th of April 1780, he made the following entries:

"1780, 29th April, George Mason enters 8400 acres of land, to begin on
*89] Panther creek, on the east side *thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to run up and down the said creek, and eastwardly for quantity."

"1780, April 29th, George Mason enters 8300 acres, to begin at the upper corner of his 8400 acre entry, and to run up the creek on the east side and back for quantity."

Panther creek pursues a general westwardly course from its source until it empties into Green river. The creek forks something more than twelve miles and one-quarter of a mile in a straight line above its mouth; and one of those forks, the direction of which, towards its source, is northwardly, has, from the beginning of the year 1780, been generally termed the west fork, and the other has been termed Panther creek.

On the 27th of October 1780, Mr. Mason made the following entry with the same surveyor: "1780, October the 27th, George Mason desires to make his entry of 8400 acres, more special, on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river on the east side, running up and back for quantity."

In the months of September and October 1783, these two entries of 8400 and 8300 acres were surveyed by James Hord, one of the deputy-surveyors of the county of Jefferson, which surveys, as was the custom, were made conformable to the instructions given by Mr. Mason's agent. The survey of the entry of 8400 acres is supposed to conform to the explanation or amendment of that entry made in October 1780. It begins four miles above the mouth of Panther creek, and something more than eight miles below its forks. The survey of the 8300 acre entry adjoins the survey of 8400 acres on the upper side; and the plat was shown by the surveyor, before he would
*90] return it to the then agent *of Mr. Mason, who, after its supposed variance from the entry was suggested to him, approved it, and directed it to be returned to the office. These surveys were returned in the course of the Fall, 1783. The supposed variance between the survey and location of the 8300 acres was, afterwards, about the 12th of September 1784, pointed out by the surveyor to a subsequent agent of Mr. Mason, who also approved of the manner in which the surveys were made, and returned them to the land-office.

On the 9th of April 1783, George Wilson enters with the surveyor of Jefferson county, 40,926 acres of land on Panther creek, so as entirely to in-

clude George Mason's survey of 8300 acres. This entry, though in the name of George Wilson, was made by John Handley, a deputy-surveyor for Jefferson county, for his own benefit and that of Christopher Greenup, as well as for the benefit of George Wilson, and at the time of making the entry, full knowledge of the previous survey, made of the same land for George Mason, had been obtained by the said Handley, who had seen the surveys in the office, and had communicated this information to his two partners in the entry. In the month of March 1784, George Wilson entered, in the supreme court of the district of Kentucky, a *caveat*, to prevent a grant from issuing on George Mason's survey of 8300 acres, because the survey was made contrary to location, and because the entry was vague, he claiming the same, or so much thereof as interferes with his entry made on treasury-warrants for 40,926 acres on the 9th of April 1784. Pending the *caveat*, George Mason departed this life, and the suit was revived against Richard Mason, devisee of the said George, at whose petition it was removed into the court of the United States, held for the district of Kentucky.

*A cross *caveat* was entered in the same court, on the part of Richard Mason, to prevent the issuing a patent to George Wilson, [*91 and these causes coming on to be heard, it was agreed, that the judgment rendered in the *caveat*, *Wilson* v. *Mason*, should be also entered in the case of *Mason* v. *Wilson*. In June term 1800, the opinion of the court for the district of Kentucky was given, that the defendant Mason had the better right, and it was ordered, that the *caveat* entered by Wilson should be dismissed. To this judgment the plaintiff Wilson has obtained a writ of error, and the principal question now to be decided by this court is, which of the parties has the better right.

But before entering on the question, it may be necessary to notice a preliminary point made by the counsel for the defendant in error. He contends, that in a *caveat*, the decision of the district court is final, and that the cause cannot be carried before a superior tribunal. To maintain this proposition, he relies on an act of the legislature of Virginia, making the judgments of the district courts of the state final, in cases of *caveat*; and on the compact between Virginia and Kentucky, which stipulates that rights acquired under the commonwealth of Virginia shall be decided according to the then existing laws.

This argument would not appear to be well founded, had Virginia and Kentucky even been, for every purpose, independent nations; because the compact must be considered as providing for the preservation of titles, not of the tribunals which should decide on those titles. But when their situation in regard to the United States is contemplated, the court cannot perceive how a doubt could have existed respecting this point. The constitution of the United States, to which the parties to this compact had assented, gave jurisdiction to the federal courts in controversies between citizens of different states. The same constitution vested in this court an appellate jurisdiction, in all cases where original jurisdiction was given to the *inferior courts, with only "such exceptions, and under such [*92 regulations, as the congress shall make." Congress, in pursuance to the constitution, has passed a law on the subject, in which the appellate jurisdiction of this court is described in general terms, so as to comprehend this case, nor is there in that law any exception or regulation

which would exclude the case of a *caveat* from its general provisions. If, then, the compact between Virginia and Kentucky was even susceptible of the construction contended for, that construction could only be maintained, on the principle, that the legislatures of any two states might, by agreement between themselves, annul the constitution of the United States.

The jurisdiction of the court being perfectly clear, it remains to inquire, which of the parties has the better right? The title of Mason being eldest, is, of course, the best, if it be not, in itself, defective.

In the *caveat* of the plaintiff in error two defects in the title of the defendant are assigned. 1st. That his entry is vague. 2d. That he has surveyed contrary to his location. The first was abandoned in argument, and does not appear to the court to have been maintainable. The second shall now be considered.

To support the allegation, that the survey has been made contrary to the location, the entry and the survey are produced. The entry calls for a beginning on the upper corner of George Mason's entry of 8400 acres. To ascertain this spot, reference must be had to the entry called for. That is to begin on Panther creek, on the east side thereof, opposite to a beech on the west side, about four miles above the mouth of the west fork, and to
*93] run up and down the said creek and eastwardly for quantity. *The branch of Panther creek which was, at the date of the entry, generally denominated the west fork, is something more than twelve miles and one quarter of a mile above its mouth. The entry of 8400 acres is to begin four miles above the west fork, and the land in controversy ought to be placed above that entry: yet it is surveyed below the west fork.

To obviate this difficulty, the counsel for the defendant in error produces and relies upon the entry of October 27th, 1780. That entry is in these words: "George Mason desires to make his entry of 8400 acres more special on Panther creek, viz., to begin four miles above the forks of Panther creek, where it mouths into Green river, on the east side, running up and back for quantity."

This entry is contended to be not a removal, but an explanation, of that which had been made on the 29th of April 1780, and being merely an explanation, the survey of the land in controversy, beginning at the upper corner of the survey of the 8400 acre tract, conforms to its original location, and is, consequently, free from the exception made to it. If this position be true, the entry of the 27th of October 1780, must describe the same land with that which is described, though with less certainty, by the entry of the 29th of April, in the same year.

But the entry of the 29th of April calls for a beginning, four miles above the mouth of the west fork of Panther creek, which fork is more than twelve miles in a straight line, above the mouth of the creek, and the subsequent entry begins four miles above the forks of Panther creek, where it mouths into Green river. The west fork of Panther creek, and the mouth of the same creek, where it empties into the river, are perfectly distinct and separate places, and were so understood at the time this location was made.
*94] *It is, however, contended, that in the extensive wilderness offered for sale, accuracy of description was not to be expected, and the point of union betwen a creek and river might well be mistaken for the forks of a creek. This would not be very probable, in any case, but is

totally inadmissible in this, because names of places which they were generally understood to possess, have been used by the person locating for Mr. Mason, and as there are no other controlling boundaries referred to, they must be understood as designating the water-courses which were commonly described by those names, and which any person inclined to locate the adjacent *residuum* would necessarily suppose to have been referred to by them.

But if the location of October explains, without removing, that of April, then the original entry might, without such explanation, have been there surveyed, and could not have been properly surveyed four miles above the west fork. This would scarcely have been attempted. Indeed, the counsel for the appellee, in admitting that an entry made on the land in controversy, subsequent to Mason's entry, but before his survey, would have been good, seems to have disclosed an opinion, that the original entry did not comprehend the land in question, and that not the entry, but the survey, is to be relied on, as the foundation of his title.

To the court, it appears perfectly clear, that the entry of the 27th of October was a removal, and not an explanation, of that of the 29th of April. It has not been contended, that the removal of the 8400 acre entry has also removed that of 8300 acres.

The title of Mason, then, if good, must be shown to be so, by establishing that a survey, without an entry, is a sufficient foundation for a title. With a view to discover whether this question has been settled in Kentucky, all the adjudications contained in the *book of reports furnished by the counsel for the plaintiff in error have been examined. It is not [*95 perceived, either that the question has been directly determined, or that any principles have been settled which govern it. This case, then, is of the first impression.

The act of the Virginia legislature must be expounded according to the opinion this court may entertain of its import, without deriving any aid from the decisions of the state tribunals.

In 1779, Virginia opened a land office for the sale of an extensive, unsettled, and almost unexplored country, the motives for which are stated in the preamble of the statute to have been, "to encourage the migration of foreigners, promote population, increase the annual revenue, and create a fund for discharging the public debt." Any person whatever might become a purchaser of any portion of these lands, by paying into the treasury of the commonwealth the purchase-money required by law. By doing so, he became entitled to a warrant, authorizing any surveyor to lay off for him, in one or more surveys, the quantity of land purchased. It was apparently contemplated by the law, that the number of purchasers would immediately become very considerable. The condition of these purchasers in this stage of the contract ought to be distinctly understood. They had acquired a right each to appropriate to himself so much of the vacant land belonging to the commonwealth as he had purchased, but no right, either in common or severalty, to the whole or any particular part of the country, until such right should be acquired by further measures.

This was, at the same time, the situation of a great number of persons, and a prior was in no respect more eligibly circumstanced than a subsequent purchaser, except in the single case of both applying precisely at the same

time, for the purpose of appropriating each to himself the same land. Had the purchaser of the first warrant been negligent enough to hold it up, until the whole land was appropriated, the title of every subsequent purchaser
*96] would have been good against him, and he would have *been without remedy. The original purchase of a warrant, then, creating only a general claim which gave, of itself, only in a single case, priority of right to the prior purchaser, it became indispensably necessary to prescribe a mode by which this general title should be satisfied, by the appropriation of a particular tract of land.

This mode seems to have been prescribed by that part of the act which says, that "every person having a land-warrant, and being desirous of locating the same on any particular waste and unappropriated lands, shall lodge such warrant with the surveyor of the county wherein the lands or the greater part of them lie." "The party shall direct the location thereof so specially and precisely that others may be enabled, with certainty, to locate other warrants on the adjacent *residuum;* which location shall bear date the day on which it shall be made, and shall be entered by the surveyor in a book to be kept for that purpose."

This mode of appropriation, pointed out by the law as that which must be used by any person desirous of locating a warrant on any particular waste and unappropriated land, requires that the location shall be given to the surveyor, with the warrant, in order to be entered in a book kept for that purpose, which is denominated the book of entries.

It is apparent throughout the whole act, that the legislature never contemplated a survey as being in itself an appropriation of land, or supposed, that one would be ever made, if not founded on a previous entry. Some few of the many passages which are found in various parts of the law will be selected to evince this position.

The surveyor is forbidden to admit the entry of any warrant on treasury rights, except pre-exemption warrants, in his books, before the first day of May next succeeding the passage of the act. But the prohibition does not extend to a survey, and yet this would have been equally necessary, if land could have been appropriated by a survey, without a previous location.
*97] *It is declared, that no entry or location shall be admitted for certain lands which are described in the act, and intended to be reserved; but there is no declaration that they shall not be surveyed. This omission manifests an opinion, that they could not be appropriated by survey alone.

In prescribing the duty of a surveyor, the law enjoins him to proceed, with all practicable dispatch, to survey all lands entered in his office; and many rules are given to regulate the surveying of entries; but there is not a syllable in the act, which contemplates or makes a single provision for surveys not founded on a prior entry made in the book of entries.

The mode of appropriation, then, which the law designates, has not been pursued; but it is contended, that another course has been adopted, which equally produces all the objects designed to be effected by the location in the book of entries, and which, therefore, ought to be received as a sufficient substitute for an entry. The legislature of Virginia, when bringing her lands into the market, had undoubtedly a right to prescribe the terms on which she would sell, and the mode to be pursued by purchasers, for the

purpose of particularizing the general title acquired by obtaining a land-warrant. The court is by no means satisfied of its power to substitute any equivalent act for that required by the law.

The case of *Blackwell* v. *Harper*, reported in 2 Atk. 93, has been cited, to show the authority of a court to dispense with part of a statute directing the mode of proceeding to be observed by a person who claims title under such statute. That case arose under an act of parliament which directs that "any person who shall invent, or design, engrave, &c., any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same, for the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." *The plaintiff had engraved certain medicinal plants, a work deemed within the act, and had brought a bill to establish her right to the sole property in them, and to restrain the defendant from copying and engraving them, upon the penalties within the act of parliament. It was objected, that the day of publication from which the term was to commence, had not been engraved, and so the act had not been complied with, and consequently, the property had not vested. Lord HARDWICKE was of opinion, that the property vested, although the day of publication was not engraved, and that the words directing the day of publication to be engraved on each print, were only necessary to make the penalties incur, not to give the title. "Here," said his Lordship, "the clause which vests the property is distinct." This opinion, however, was given with great doubt, and only an injunction was granted, without costs, and without an order for an account. [*98

The case of *Blackwell* v. *Harper* has, at the bar, been denied to be law. However this may be, it is certainly essentially variant from that before the court. The opinion of Lord HARDWICKE was not, that where any circumstance was required by a statute, in order to vest a title, other equivalent acts might be received as a substitute; but that the particular statute on which the case depended, did not require the omitted circumstance, since the property was vested by a distinct clause. By a reference to the words themselves, it will be perceived, that the expression of the act of parliament is such as might perhaps warrant this opinion. The property is completely vested, before the direction concerning the date of the publication is given, and Lord HARDWICKE supposes it to be a question on which judges would differ, whether the subsequent words were merely directory or descriptive. A perfect property in the specific thing was supposed by that judge to have been given by other words, and on that idea, his decree is declared to have been formed.

*But in the case under consideration, no property in the specific thing is supposed to have been given by other words: no title to it is created by any other part of the act. The purchase of the land-warrant gave a power to appropriate, but was no appropriation, and the mode pointed out by the legislature would seem to the court to be that which can alone give title to the particular lands. [*99

But if this opinion should even be too strict, if an act entirely equivalent to an entry could be received as a substitute for one, a survey does not appear to be such an act, nor does it seem to have been so considered by the

legislature. From the circumstances under which the act for establishing the land-office was passed, as well as from the expressions of that act, it is apparent, that the entry was intended to give complete notice to other purchasers, that the land located was already appropriated. The mode of giving this notice, it was certainly proper to prescribe. By doing so, the numerous doubts and questions concerning the sufficiency of notice, which would inevitably arise from leaving that important fact to the discretion of individuals, in the first instance, and then to the discretion of courts, to be exercised many years after all the lands should be located, would be in a considerable degree obviated. It was, doubtless, an important object to obviate them.

The regulations, therefore, respecting entries are all calculated to make them as notorious as possible : not so, of surveys. The entries and surveys are to be kept in separate books. Why so, if a survey amounted to an entry? The entry must be dated, when made by the locator ; but the time of recording a survey may appear or not, at the discretion of the surveyor, and a subsequent survey may be recorded before one of prior date. There are to be no blanks in the book of entries, and this regulation is well calcu-
*100] lated for the prevention of *frauds in the origin of titles : it does not apply to the book of surveys. The book of entries is open to the inspection of every person : the book of surveys cannot be looked into but at the discretion of the surveyor. If a prior entry be alleged, the person affected thereby has a right to demand a copy thereof ; but no copy of a survey can be given to any other than the proprietor, until twelve months after it shall have been made.

From the whole act, a legislative intention to make an entry, and an entry only, the foundation of title to any particular tract of land, is strongly to be inferred ; and if even an equivalent act could be received, a survey does not appear to be such an act. In this particular case, it is true, that complete notice was obtained by it, but titles must rest on general principles, and in the general, a survey would not, without something more than the law requires, be notice. The law, therefore, cannot contemplate a survey as of equal operation with an entry.

A question has been made at the bar, whether a *caveat* is in the nature of an equitable action, and on the supposition that it is of that nature, the counsel for the defendant in error has insisted that Wilson, having express notice of Mason's survey, was unable to acquire title to the land appropriated by that survey. This would be true, if the survey gave to Mason any title, either in law or equity. But if a survey without an entry, was no appropriation ; if it gave no title, then notice of the survey could not create a title.

The doctrine of notice is well established. He who acquires a legal title, having notice of the prior equity of another, becomes a trustee for that other, to the extent of his equity : but if he has no equity, then there is nothing for which the purchaser of the legal estate can be a trustee.[1]

A point in the case still remains, which appears more doubtful, and con-

[1] It is on this ground, that a purchaser for value, though with notice of a prior voluntary conveyance, is protected, if his vendor had no notice. Ridgeway *v.* Underwood, 4 W. C. C. 129 ; Otley *v.* Manning, 9 East 59. And see Hildreth *v.* Sands, 2 Johns. Ch. 35.

cerning which very considerable difficulties have been felt. *Although Mason's survey may give him no title, it is questioned, whether Wilson can maintain a *caveat* against it.

The *caveat* is a remedy given to prevent a patent from issuing in certain cases, where the directions of the law have been violated, to the injury of the commonwealth, or where some other person hath a better right: the case before the court is that of a better right. The terms in which this remedy is accorded to the person who would avail himself of it, for the purpose of asserting his own title are, "or if any person shall obtain a survey of lands to which another hath by law a better right, the person having such better right may in like manner enter a *caveat*," &c.

Considerable doubts were entertained, whether the word "hath," in the description of the character by whom a *caveat* might be maintained, did not absolutely require that the better right should exist at the time the survey should be obtained. This construction, to which some of the court were at first greatly inclined, would have involved considerable inconvenience, and would have defeated what is deemed the essential object for which the remedy was given.

It has been already stated to be the opinion of the court, that a survey, not founded on an entry, is a void act, and constitutes no title whatever: consequently, the land so surveyed remains vacant and liable to be appropriated by any person holding a land-warrant. It is difficult to conceive, that a remedy designed to enable an individual who has made his entry in conformity with the law, to prevent another from obtaining a grant for the land he has entered, should be withheld from any person whose entry entitles him to the land he has located. It is not less difficult to impute to the legislature, an intention to protect a survey, to which the law denies all power of appropriating the land it comprehends, or an intention of carrying such survey into grant, while another has legally appropriated to himself the land thus to be granted. It would be difficult to state a case to which the principle, that a remedy should be so extended as to meet the mischief, would apply more forcibly than to this. If, however, the *terms of [*102
the law had been explicit, those terms must have controlled the subject. But the expression of the act is not, if any person shall obtain a survey to which another at the time such survey may be obtained shall have by law a better right, the person having such better right may enter a *caveat*, &c. The words of the law are not thus express: they are, if any person shall obtain a survey of land to which another *hath* by law a better right. The word *hath*, in its most strict and rigid sense, would refer neither to the time of making the survey, nor of entering the *caveat*, but to the present moment when the word is used, and would require that the better right should exist at the time of the passage of the act. This construction would be universally rejected as absurd, and all would expect the court to understand the words more liberally, and to expound them so as to give some effect to the legislative will. Some latitude of construction, then, must be used; some words additional to those used by the legislature must be understood, and this being apparent, the court perceive no sufficient motive for extending the remedy to rights existing when the survey shall be made, and denying it to those which are equally valid, and which exist when the *caveat* may be entered.

The *caveat* entered by Wilson is, therefore, maintainable under the land-law of Virginia, since his title had accrued when it was entered. The court is of opinion, that the district court of Kentucky has erred, in deciding that the defendant in error hath the better right, and that their judgment ought to be reversed and annulled. In pursuance of this opinion, I am directed to deliver the following judgment.

Judgment of the Court.—"Whereupon, it is considered by the court, that the plaintiff, Wilson, hath by law the better right to the land in controversy, and that the judgment of the Court of the United States for the district of Kentucky be reversed and annulled; and that the register of the land-office in Kentucky do issue a grant to the said Wilson, upon his survey of 30,000 acres of land, registered in the said office, according to the metes and bounds thereof, and *that the said plaintiff do also recover his costs expended in this court, and in the said district court, all which *103]
is ordered to be certified to the said district court, and the said register of the land-office accordingly."

In the case of *Mason* v. *Wilson*, the judgment of the court was, "that the defendant Wilson hath by law the better right to the land in controversy, and that the judgment of the Court of the United States for the district of Kentucky be reversed and annulled; and that the said *caveat* be dismissed, and that the defendant Wilson recover his costs," &c.(*a*)

The Peggy.

United States *v.* The Schooner Peggy.

Definitive decree.—Judicial notice.—High seas.

A final condemnation in an inferior court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation, within the meaning of the 4th article of the convention with France, signed September 30th, 1800.

The court is as much bound, as the executive, to take notice of a treaty, and will reverse the original decree of condemnation (although it was correct when made), and decree restoration of the property, under the treaty made since the original condemnation.

Quære? as to the extent of the term high seas?

Error to the Circuit Court for the district of Connecticut, on a question of prize. The facts found and stated by Judge Law, the district judge, were as follows:

"That the ship Trumbull, duly commissioned by the President of the United States, with instructions to take any armed French vessel or vessels, sailing under authority, or pretence of authority, from the French republic, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas, &c., as set forth in said instructions; and said ship did, on the 24th day of April last (April 1800), capture the schooner Peggy, after running her ashore, a few miles to the westward of Port au Prince, within the dominions and territory of General Toussaint, and has brought her into port, as set forth in the libel; and it further appears, that

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(*a*) As to the necessity of giving notice in the form prescribed by law, see Evans's Essay on Bills, 67, 68, 69, 70, 71, and Nicholson *v.* Gouthit, 2 H. Black. 609.