*Wilson *v.* Speed.

Competency of witness.—Final judgment.

An assignee of a pre-emption warrant is held to be a competent witness, if the facts intended to be proved by his testimony do not tend to support the title of the party producing him.

A general dismissal of the plaintiff's *caveat*, in Kentucky, does not purport to be a judgment upon the merits.

Error to the District Court of Kentucky, on a judgment which dismissed the *caveat* of Wilson against Speed. The *caveat* was in these words:

"Let no grant issue to James Speed, a citizen of the state of Kentucky, for 139 acres of land, said to be surveyed upon an entry of 200 acres, by virtue of a treasury-warrant, number 13,800, the 24th of November 1782, and the survey dated the 10th day of November 1797, because John Wilson, a citizen of the state of Virginia, claims the same; part, by virtue of a survey made on his settlement-right, the 20th day of January 1786, and part, by virtue of a survey made on the entry of his pre-emption warrant, on the 20th day of January 1786, for Andrew Cowan, and assigned by him to William Dryden, for his use; which claims are of a superior nature to the said Speed's. April 22d, 1799.

(Signed) John Wilson."

The facts appearing upon the record, so far as they are pertinent to the questions before this court, were as follows: In the year 1776, Wilson made an improvement, by raising a crop on the land, and built part of a cabin. In consequence of this improvement, he obtained, on the 16th of February 1780, a certificate for a settlement-right to 400 acres, and a right of pre-emption to 1000 acres. On the same day, Andrew Cowan obtained a certificate for the pre-emption of 1000 acres, on account of marking and improving the same, in the year 1776, adjoining the lands of John Wilson, on the north side, to include his improvement.

*On the 23d October 1780, Andrew Cowan entered a pre-emption warrant for 1000 acres, on the head-waters of Boon's Mill creek, to include his cabin, and the head-waters of several small branches running into Kentucky and Dick's rivers. "Also, as assignee of John Wilson's one thousand acres, adjoining the above, including said Wilson's cabin." On the 29th of April 1783, John Wilson entered "400 acres of land, by virtue of a certificate for settlement, lying on a dividing ridge between the waters of Kentucky and Dick's rivers, to include part of both waters, and his improvement." These 400 acres were surveyed for Wilson on the 20th of January 1786; and were never assigned by him. [*284

On the same day, the 1000 acres, upon the pre-emption warrant, were conveyed for Andrew Cowan as assignee of Wilson. On the back of this original certificate of survey was written an assignment, purporting to be from Andrew Cowan to William Dryden, and attested by "Young Ewing." And also an assignment (made by order of Garrard county court, during the pendency of the present *caveat*), by certain commissioners, in behalf of the heirs of Dryden, to William Buford.

On the 24th of November 1782, James Speed, the defendant, entered 200 acres upon a treasury warrant, the survey upon which was the cause of the present *caveat*. This survey was for 139 acres, part of the 200, dated the

10th of November 1797, and interfered with Wilson's survey of 400 acres, upon his settlement-right, and with that for 1000 acres, pre-emption, which were surveyed in the name of Andrew Cowan, as assignee of Wilson.

Upon the inquiry into the facts, before the jury, the plaintiff, Wilson, took two bills of exception. The first stated, that he offered to produce
*285] the said Andrew Cowan (who had released to the plaintiff, and *all claiming under him, all his, the said Cowan's, right to the land, &c.) to prove, that although the pre-emption warrant for the 1000 acres was taken out in his name, it was not taken out by him, nor with his privity; and that, although the entry was in his name, it was not made by him, nor with his privity. And also, to prove that he never did, and does not now, set up any claim or title to the said pre-emption, or any part thereof. Also to prove, that the assignment on the original survey of the said pre-emption, now brought into court by the register of the land-office, purporting to be an assignment made by the said Cowan to William Dryden, was not executed by him; the execution of the same not being proved by "Young Ewing," the attesting witness to the same. But the court was of opinion, that the said Cowan was not a competent witness, and excluded him from giving testimony.

The 2d bill of exceptions stated, that, after the testimony of Cowan was excluded, the plaintiff offered to produce Charles Campbell, to prove that the said assignment, and the signature thereunto, as well as the name of the attesting witness, were in the handwriting of William Dryden; to the admission of which testimony the defendant objected, alleging, that "Young Ewing," the subscribing witness, ought to have been produced; and the court being of that opinion, the testimony of Charles Campbell was also excluded; and the *caveat* was dismissed, with costs.

Hughes, for the plaintiff in error, contended, that the judgment of the court below was erroneous, for two reasons; 1st. Because the witnesses who were rejected, were competent; and 2d. Because the *caveat* ought not to have been dismissed, as to that part of the defendant's survey which interfered with Wilson's survey of 400 acres, upon his settlement-right.

*286] *1. As to the rejection of the witnesses. If Cowan had any interest it was removed by the release. And if it be alleged, that he ought not to be permitted, upon the ground of policy, to discredit his own paper, the answer is, that that principle has been applied only to negotiable paper; but here, the witness is called merely to disprove what is alleged to be his handwriting. It is to show that he never put his hand to the paper, and not to invalidate a paper to which he had given a credit, by subscribing his name. The counsel for the defendant below relied upon the case of *Walton* v. *Shelly*, 1 T. R. 296, but, besides the inapplicability of the case, it has been overruled by that of *Jordaine* v. *Lashbrooke*, 7 Ibid. 601.

But Campbell's testimony ought not to have been rejected. The court rejected it, on the ground that "Young Ewing," the subscribing witness, ought to have been produced. It is true, that if we had wanted to establish the assignment from Cowan as genuine, it would have been incumbent upon us to have produced Young Ewing, or accounted for his absence. But if the assignment was fictitious, how was Young Ewing to prove that Cowan did not execute it? He could only say, that his own name was not written by himself, and that he did not subscribe his name as a witness to that instrument;

but it does not necessarily follow, that Cowan did not execute the assignment. The testimony of Young Ewing was not the best evidence of the fact that the plaintiff wished to prove. Whereas, Campbell could have proved expressly, that the whole assignment and signatures were written by Dryden, and not by Cowan and Ewing.

2. But the judgment is erroneous, because it dismissed the *caveat*, and did not decide which of the parties "hath the better right." It does not appear to have been decided upon its merits; particularly, so far as the plaintiff claimed a settlement-right.

Breckenridge, Attorney-General, for the defendant.—The testimony of Cowan was properly rejected on three grounds.

*1. Because it went to prove a title different from that set up by the plaintiff. The act of assembly requires that the *caveat* should express "the nature of the right on which the plaintiff therein claims the land." The *caveat* states, that he claims "by virtue of a survey, made on the entry of his pre-emption warrant," "for Andrew Cowan, and assigned by him to William Dryden, for his" (the plaintiff's) "use." The proof offered was, that the survey and warrant never was assigned by Cowan. The plaintiff, therefore, wished to bring proof to contradict his own allegations. The jury are, by the land law, to find "such facts as are material to the cause, and not agreed by the parties." But the facts offered to be proved, were foreign to the cause. [*287

2. Because the testimony went to contradict and falsify a record. According to the uniform decisions of the courts in Kentucky, warrants, entries and surveys are matters of record, as much as the patent. The records produced by the plaintiff show, that the warrant, entry and survey are in the name of Cowan, and that Cowan assigned to Dryden, and that Dryden's heirs, by a decree of Garrard county court, assigned to Buford. The facts would have been contradicted by the testimony offered.

But if the plaintiff could be permitted to invalidate or falsify the record, it could not be done on the trial of a *caveat*, which is intended as the means of trying legal rights to incipient titles; titles which are on their passage to maturity. (*Wilson* v. *Mason*, 1 Cr. 66.) It is a proceeding in derogation of the common law, and ought be strictly pursued. If Cowan has no title, or is only a trustee, this inquiry cannot be made in the trial *of a *caveat*, but must be made in equity. Dryden's heirs cannot be bound by such an *ex parte* inquiry; and they are interested as assignees of Cowan. In order to overturn the claim of Speed, Wilson must have had a prior existing legal right. [*288

3. Because the witness might be ultimately benefited by the event of the suit. The release is of no avail; it came from the wrong quarter. Cowan ought to have been released by Dryden's heirs and Buford. Cowan is interested in one of two ways, or in both; 1st. In the ultimate goodness of the title by his assignment; or 2d. For having assigned that to which he had no claim. If Wilson prevails, Cowan is benefited, because the title which he transferred is sanctioned and settled by the decision. If the determination of a cause may, perhaps, prevent a suit against the witness, he is inadmissible. Esp. N. P. 705.

As to the correctness of excluding Campbell's testimony, there can be no

doubt. To have received it, would have violated that known rule, that the subscribing witness to an instrument must be produced. This rule, it is true, has some exceptions, but none that will include this case. Esp. N. P. 780.

But if all the testimony offered had been admitted, it would have been irrelevant; and would have been bad upon demurrer. At the time of entering the *caveat*, the plaintiff had no right in law, because it was registered in the name of Dryden. At the time of the decree, it was in Buford, under the decision of the court of Garrard county.

With respect to the 2d point made by the plaintiff's counsel, viz, that the *caveat* was not dismissed upon the merits, so far as relates to the plain-
*289] tiff's settlement-right, he is probably mistaken in point of fact. *The judgment of the court, although not altogether full and formal on this point, justifies the inference that the court did examine into the merits of that claim. Of this, however, the court here will judge for themselves, upon an inspection of the judgment itself, as stated on the record. It says, "the court being now sufficiently advised of and concerning the premises, is of opinion, that the *caveat* herein be dismissed;" and this is the only judgment which could have been given against the plaintiff. If the judgment had been for the defendant, it would have said, that he had the better right.

Hughes, in reply.—It has always been the practice of the courts in Kentucky, to decide the right to be in the plaintiff or defendant, when the decision is on the merits.

The testimony offered, did not go to prove a different title from that set up by the plaintiff; it went to prove his allegation to be substantially true.

The process by *caveat* is a summary remedy, and the law, by directing the court to decide according to the very right of the case, gives a chancery jurisdiction. In case of a *caveat*, there can be no legal title. It is a process given expressly to prevent a legal title. The entry, &c., are not matter of record. It is true, there appears to be an assignment on a paper in the register's office, but that does not make the assignment a record.

Cowan was not interested. He was not liable to Dryden, if the assignment was a forgery. Campbell's testimony was the best evidence to prove the fact for which it was offered. That of the subscribing witness might be the best evidence that the assignment was genuine, but not that it was a forgery.

*290] *The judgment was not upon the merits, and there is nothing in the record from which a contrary inference can be drawn.

February 14th, 1806. Marshall, Ch. J., delivered the opinion of the court.—In this case, the errors assigned are, 1. That testimony has been improperly rejected by the judge of the district court. 2. That the *caveat*, as to that part of the land which was claimed in virtue of the survey on Wilson's settlement-right, was improperly dismissed.

The *caveat*, so far as respects the claim of Wilson, in virtue of the survey on his pre-emption warrant, thus stated his title: "John Wilson claims, by virtue of the survey, made on the entry of his pre-emption warrant, for Andrew Cowan, and assigned by him to William Dryden, for his use." The pre-emption warrant issued on Wilson's certificate to Andrew Cowan, as assignee thereof; the survey was made in Cowan's name, and is

assigned to William Dryden, but the assignment does not purport to be for the use of John Wilson.

At the trial, the plaintiff offered to prove that the assignment to Cowan was made in trust for himself, and that the assignment to Dryden was never made by Cowan. The witness, by whom these facts were to be substantiated, was Cowan himself. He was objected to by the counsel for the defendant, as incompetent, and the objection was sustained by the court. To this opinion of the district judge, an exception was taken, and the question proposed is, the competency of Cowan to prove the fact, that he never was entitled to the land in controversy, and did not make the assignment of the survey. *We put the release out of the case, because it cannot affect [*291
the interest of Cowan, if he had any, that interest being a liability to the person appearing to be his assignee. Upon a consideration of this fact, and its connection with a *caveat* brought by Wilson, the witness appears to the court to stand free from any possible objection on the part of the defendant. It would not appear, that he could derive a benefit from proving, in this cause, that he never was entitled to the land in dispute, and never assigned the survey.

But from the facts proposed by the plaintiff, which were before the court, it appears, that Dryden had sold to Buford, for whose benefit this *caveat* was really brought; and it is alleged by the counsel for the defendant, that if the testimony of the witness would establish the right of those who might ultimately resort to him, under his supposed assignment, and such a suit would be prevented by a decision of this *caveat* in favor of Wilson, he is, therefore, an incompetent witness; but the court does not perceive that this consequence would flow from the testimony; and if it is imagined, that Cowan might suspect it, this would constitute an objection rather to his credit than his competency. Cowan, therefore, was competent to prove the facts to establish which his testimony was offered.

But if he had been received, and had established those facts, what would have been their amount? They are, "That Cowan never did purchase the said pre-emption, did not make the entry on the pre-emption warrant, or survey it, or procure it to be surveyed, and does not now, nor ever did, claim title to the same. That the plaintiff, claiming to own the land, did sell it to William Dryden, who sold the same to William Buford, for whose benefit the *caveat* was brought." These are the facts which the plaintiff proposed to prove, and which are stated on the record. Had they *been proved, [*292
it appears to the court, that the *caveat* ought to have been dismissed. These facts do not support the title set up in the *caveat*.

It is conceived by this court, that the statements made in the *caveat* could only be supported by an assignment, which, on the face of it, purported to be for the use of Wilson. That an assignment made to Dryden, whereby the legal ownership of the survey was conveyed to him, although, in fact, intended for the benefit of Wilson, would not enable Wilson to maintain a *caveat* in his own name. It would authorize him to use the name of Cowan, but not to prosecute the suit in his own name. If, however, a contrary practice has been firmly established in Kentucky, the court would be very unwilling to shake that practice. But in this case, the assignment to Dryden was not, in fact, for the use of Wilson, but of Dryden himself. The testimony, therefore, if received, could only have defeated the plaintiff's

action. It cannot be said, therefore, that the judge has erred in dismissing the *caveat*, as to the part claimed under the pre-emption warrant.

But with respect to so much of the *caveat* as was supported by the survey on the settlement-right, no exception of form, or to the testimony, has been taken, and it ought not, therefore, to have been dismissed, but on the merits. On this point, therefore, there is error in the judgment of the district court, for which it must be reversed.

This cause came on to be heard, on the transcript of the record of the proceedings of the court for the district of Kentucky, and was argued by counsel, on consideration whereof, it seems to the court, that there is error in the judgment of the district court in this, that the *caveat* entered by the plaintiff was entirely dismissed, whereas, it ought to have been decided on its merits, so far as respected that part of the land which was claimed by the plaintiff, under his survey of four hundred acres. It is, therefore, considered *293] by the court, that the said judgment be reversed and annulled; *and that the defendant pay to the plaintiff, his costs. And the cause is remanded for further proceedings.

Buddicum *v.* Kirk.

Deposition.—Payment.—Accord and satisfaction.

Notice of the time and place of taking a deposition, given to the attorney-at-law of the opposite party, is not such notice as is required by the act of assembly of Virginia.[1]

But the attorney-at-law may agree to receive, or to waive notice, and will not afterwards be permitted to allege the want of it.

If notice be given, that a deposition will be taken on the 8th of August, and that if not taken in one day, the commissioners will adjourn from day to day, until it shall be finished; and the commissioners meet on the 8th, and adjourn from day to day until the 12th, and from the 12th to the 19th, when the deposition is taken, such deposition is not taken agreeable to notice.

Upon the plea of payment, to debt on bond, it is competent for the defendant to give in evidence, that wheat was delivered to the plaintiff, on account of the bond, at a certain price; and that the defendant assigned sundry debts to the plaintiff, part of which were collected by the plaintiff, and part lost by his indulgence or negligence.

An assignment of debts, and balances of accounts, cannot be pleaded as an accord and satisfaction, to an action of debt on a bond.

Error to the Circuit Court of the district of Columbia, in an action of debt against the defendant, as heir-at-law of the obligor, on a bond dated the 20th of September 1774, conditioned to pay 994*l.* 3*s.* 5*d.*, Virginia currency, in equal instalments, at six and twelve months from the date of the bond.

The defendant, being an infant, pleaded by Archibald McLain, his guardian. 1. Payment; to which there was a general replication and issue.

2. That after the execution of the bond, viz, on the ——— day of ——— 1784, at, &c., it was accorded and agreed, between the plaintiff and the said James Kirk (the obligor), in his lifetime, that the said James Kirk should assign and make over to the plaintiff, all the balances of money due to the said James Kirk and one Josiah Moffett, arising from a store kept by them in partnership, in the town of Leesburgh, in discharge and satisfaction

---

[1] Wheaton *v.* Love, 1 Cr. C. C. 429.