H. Marshall.—If the bond is totally void, it will not support a judgment, under any form of pleading. He did not, however, mean to press the objection.

*The principal question, viz., whether the power of the officer to collect the outstanding duties which had accrued while he was in office, ceased with his removal, was submitted without argument. [*171

Rodney (Attorney-General) referred the court to the laws of the United States, vol. 1, p. 304, §§ 5, 6, 16; vol. 2, p. 82; vol. 3, p. 80, 421; and vol. 4, p. 191.

February 28th, 1807.—Marshall, Ch. J., delivered the unanimous opinion of the court, that the power of the officer to collect the outstanding duties ceased upon his removal from office, and devolved upon his successor. A contrary construction would be extremely injurious to the revenues of the United States, and could not have been intended by the legislature. The officer can only be liable to pay over the money he has collected, unless he is charged with a neglect of duty in not collecting.

In the present case, the breach assigned is for not paying, and no breach is assigned in not collecting, the duties. The bill of exceptions shows that the defendant Sthreshley had paid over and accounted for all the duties he had collected.

Judgment reversed.

---

*Humphrey Marshall and wife *v.* James Currie. [*172

Land law of Kentucky.

Loose and vague expressions in an entry of land, in Kentucky, may be rendered sufficiently certain, by the reference to natural objects mentioned in the entry, and by comparing the courses and distances of the lines with those natural objects.

Error to the District Court of Kentucky, in a suit in chancery, in which the plaintiffs in error were the original complainants. The bill complained that the defendant had obtained an elder patent for land covered by the complainants' elder entry, and prayed that the defendant might be compelled to convey to them the legal title. The only question was, whether the entry under which the complainants claimed, described the land with sufficient certainty. It was in these words:

"Number two hundred and forty one, Thomas Marshall enters two thousand acres of land on part of a military warrant, number one thousand three hundred and forty-nine, beginning on the bank of Green River, two hundred poles above a beech tree, marked D. L., standing on the bank of the river, a few poles below the mouth of a branch, and a small distance above the place called Glover's, upon the opposite side of the river, thence, running south, seventy-five degrees east, one thousand poles, thence, north, twenty-five degrees west, and from the beginning, up the meanders of the river, and binding thereon so far that a line parallel to the first shall include the quantity. Entered, August the sixth, one thousand seven hundred and eighty-four."

The material facts found by the jury, according to the practice of Kentucky, were, that the complainants' entry was made on the 6th of August 1784, and the defendant's, on the day following. That the defendant's

patent bears date on the 14th of June 1787, and the complainants' patent on the 3d of June 1796, and that both patents include part of the same land. That the Green River, and the place called Glover's, were notorious by those names, before and at the time of the complainants' entry. That the water-course delineated on the plat, by the name of Big Branch, is a branch run-
*173] ning *into Green River, 596 poles above the place called Glover's, and on the opposite side of the river, and existed at the time of the entry. That the beech tree represented in the plat, stands on the bank of Green River, 18 poles below the mouth of the Big Branch, "and is a very conspicuous tree; and that the letters D. L. were marked at or near said tree, upon a beech, about November or December 1783;" that the beginning corner of the complainants' survey is on the bank of Green River, 200 poles next above the said beech tree, marked on the plat. That two other water-courses empty into the Green River; one called Clover lick creek, below the Big Branch, and nearer to Glover's; the other called Embro's Spring Branch, above the Big Branch; both of which are laid down on the connected plat. The jury also found that there is a small branch or drain, about 250 yards long, running all the year, between Clover lick creek and the lower line of the plaintiffs' survey, besides those represented on the plat. That beech abounds all along the bank of Green River, opposite to Glover's Station, and for a considerable distance below and above, except immediately above and below the mouth of the small branch or drain, and that there was no proof that there was any beech tree marked D. L. standing on the 6th of August 1784 (the date of the complainants' entry), upon the bank of Green River, a few poles below the mouth of a branch, as described in the complainants' entry.

For the plaintiffs in error, *H. Marshall* contended, that the entry was sufficiently definite in its description of the location, within the meaning of the act of Virginia. The Green River and Glover's were objects notorious, and respecting which there is no dispute. The branch referred to in the entry, as being a small distance above Glover's, is found at the distance of 596 poles, which was a reasonable distance, according to the decisions in the cases of *Johnson* v. *Nall*, Sneed 393; *McCrackin* v. *Craig*, Ibid. 404; *Watkin* v. *Moore*, Ibid. 390.

*174] *It is contended, that it does not appear that the letters D. L. were on the tree, on the 6th of August 1784. But the jury have found that those letters were marked on a beech, at or near the tree in question, in December 1783, from whence a presumption arises, that they remained on the tree until the 6th of August following, unless the contrary be shown. For although the jury have found, that there was no proof of their being on the tree, on the 6th of August, yet they have not found that they were not, nor have they found any fact to rebut the presumption arising from the existence of the letters a few months before. The jury must have meant to say, that there was no positive and conclusive proof, otherwise, their last finding contradicts their first finding, for the presumption arising from the actual existence of the letters, is proof until that presumption be removed. "At, or near," means *at*, unless the contrary is shown. *Crow* v. *Brown*, Sneed 120.

But if the letters were not on the tree, there is still sufficient certainty in

the location. Green River and Glover's are admitted to be certain, but it is said, the branch is uncertain, inasmuch as there are two other branches falling into Green River, not far from Glover's. But Clover lick creek is out of the question, because the course of the river at that place will not answer to the calls of the entry. Embro's Spring Branch is further from Glover's than the Big Branch, and the nearest branch which will satisfy the location ought to be taken. The small branch or drain, mentioned by the jury, is not located on the plat, and therefore, we cannot say, where it ought to be placed. But the jury have found that beech trees do not abound immediately above and below it, and therefore, it is not probable, that that was the branch referred to by the entry.

The courts in Kentucky have always endeavored to sustain an entry, if, by reasonable construction, it be possible. For this purpose, they will reject an absurd or superfluous call, they will supply a word, they will consider a call, not proved, as expunged, and although there are more allegations than are proved, yet if enough is proved, to render the entry sufficiently certain, the court will support it.

*To support these positions, he cited the cases of *Consilla* v. *Briscoe*, Hughes 43 ; *Kenton* v. *McConnell*, Ibid. 134 ; *Pawling* v. *Merewether*, Ibid. 14 ; *Gaither* v. *Tilford*, Sneed 184 ; *Morgan* v. *Robinson*, Ibid. 278 ; *Craig* v. *Jones*, Ibid. 60 ; *McCrackin* v. *Craig*, Ibid. 404; *Johnson* v. *Brown*, Ibid. 54 ; *Bradford* v. *Allen*, Hardin 1. [*175

H. Clay, for the defendant in error, contended, that the beginning of the location was uncertain, and therefore, that the whole entry was void. It does not appear that the letters D. L. ever were marked on the tree, nor that they existed on any tree at the time of the entry. The whole language of the entry is uncertain. "A few poles," "a small distance," "a branch," are expressions too vague to support an entry. What is uncertain in point of fact, is not a subject of construction by the court. To support the complainants' entry, the court is now called upon not to give a construction of law to words of the entry, but to make a new entry in point of fact. Identity, notoriety, natural objects, are all wanting.

February 28th, 1807. Johnson, J., delivered the opinion of the court.—In the argument of counsel in this case, the only point which has been thought necessary to dwell upon, is the legal certainty of the complainants entry. Pursuing the principle, that a plaintiff must recover upon the strength of his own title, and not on the weakness of his adversary's, the defendant has not entered into any discussion relative to the sufficiency of his claim to the land in question. The circumstances constituting what in the courts of Kentucky are denominated the calls of the complainants' entry, are Glover's Station, Green River, a marked tree on the bank of the river, and a branch emptying itself into the river. The two former are notorious, and the inquiry is, can the others be sufficiently ascertained with relation to them. We are of opinion, that they can. The only objection that can be made to the *identity of the tree and branch, with relation to which the complainants have made their survey, and the actual distance of those objects above Glover's Station, the uncertainty attendant upon calling for a tree of which a large number grow along the banks of the river, and the existence of another stream emptying itself into the same [*176

river nearer to Glover's Station, and which, it is contended, will answer the call.

These difficulties, we are of opinion, are all removed, by considering the courses called for by the complainants with relation to the courses of the river. Above Glover's Station, and until you reach the bend of the river, above which the complainants' entry is surveyed, the course of the river is east and west. It there assumes a different direction, and its course is north and south. By surveying the entry at the point where the complainants have located their land, it assumes a shape adapted to the course of the river At any point below where it is situated, and until you reach the place called Glover's Station, it is impossible that it can be located. This circumstance is sufficient, in our opinion, to establish the branch which was called for, as it is the first you meet with above the bend; and when that is ascertained, there is no longer any difficulty in locating the complainants' lands.

The jury find, that the tree called for is very conspicuous, and that previous to the date of the complainants' entry, a tree very near the spot where that is situated was marked D. L. Although a tree of a particular species, at a distance not precisely limited, may be uncertain, where that tree abounds, the impression of a certain mark upon such a tree is a sufficient indentification, when accompanied with the other circumstances of this case, which might have been resorted to by a subsequent locator, to prove the identity of this tree.

In giving this opinion, the court is not uninfluenced by an anxiety to save the early estates acquired in that country. Such was the laxity of the rules upon which the rights of individuals depended, under the land laws
*177] of Virginia, that this court feels a strong sense ofthe necessity *of liberality in deciding upon the validity of entries.

The court, therefore, reverses the decree of the district court, and decrees a conveyance, to be executed by the defendant to the complainants, of that part of the land contained in his patent, which is included in the complainants' survey, and that each party pay their own costs.

Decree reversed.

Viers and wife *v.* Montgomery.

Voluntary conveyance.

A court of equity will not interfere between a donee of land, by deed, and a devisee under a will of the donor, in a case where there is no fraud.

Error to the District Court of Kentucky, in a suit in chancery, brought originally by Montgomery against W. M. Viers and Patsy, his wife, late Patsy Henly, to compel the latter to convey to the former the legal estate in certain lands in Kentucky, which one Ebenezer Brooks, since deceased, conveyed, by deeds dated the 10th of November 1791, to the defendant's wife, while a widow, and which Brooks, by his last will, devised to the complainant Montgomery.

The bill charged that the only consideration of the deeds from Brooks to Patsy Henly was, that she should "take him as her husband," which she refused to do, but intermarried with the defendant, W. M. Viers. It did not aver, that the complainant was of kin to the deceased, or that he had any