Finley Vs. Williams

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Appeal No. : 13 U.S. 164

Appellant : Finley

Respondent : Williams

Judgement :

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Finley v. Williams

13 U.S. (9 Cranch) 164

APPEAL FROM THE CIRCUIT COURT

FOR THE DISTRICT OF KENTUCKY

SYLLABUS

In Kentucky, the courts of law will not look beyond the patent, but courts of equity will, and will give validity to the elder entry against an elder patent.

Between preemption rights, the prior improvement will hold the land against a prior certificate, entry, survey, and patent.

It is not essential to the dignity of an entry upon a preemption warrant that the entry should in terms call for the improvement, although it must in fact include the improvement.

An entry calling for "the Big Blue Lick" will not support a survey and patent for land at the Upper Blue Lick, the Lower Blue Lick being generally called "the Big Blue Lick," although there may be other calls in the entry which seem to designate the Upper Blue Lick as the place intended.

If a great and prominent object, immovable and durable in itself and of general notoriety, be called for in a location, that object must fix and locate the entry, although other minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator really intended to take other land.

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This was an appeal from the decree of the Circuit Court for the District of Kentucky in a suit in chancery brought by Finley to compel Williams and others, who had the elder patent, to convey certain lands to the complainant which he claimed by virtue of a prior settlement.

MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

This cause depends on the land law of Virginia, which is also the land law of Kentucky, that state having formed a part of Virginia when the act was passed in which the titles of both plaintiff and defendant originated. Both parties claim the land in controversy by virtue of improvements made previous to the first day of January, 1778, which improvements were recognized by the act generally termed "the previous title law," and gave the persons making them a preemption of one thousand acres of land, to include the improvement, on paying therefor the price at which the state sold its vacant lands,

"provided they respectively demand and prove their right to such preemption before the commissioners for the county to be appointed by virtue of this act, within eight months."

In the year 1781, an act passed which, after reciting that, by the discontinuance of the commissioners in the District of Kentucky, many good people of the commonwealth were prevented from proving their rights of settlement and preemption in due time owing to their being engaged in the public service of this country, enacts that the county courts in which such lands may lie be empowered and required to hear and determine such disputes, and that the register of the land office be empowered and directed to grant titles on the determinations of such courts in the same manner as if the commissioners had determined the same.

It appears that in the year 1773, John Finley, the plaintiff in the cause, marked and improved the land in controversy. He entered into the continental service in the year 1776 and continued therein throughout the war. His claim was not made before the commissioners, but was made to the court of the county in which the lands lie, by which court his claim was allowed, and the following certificate was granted:

"At a court held for the County of Fayette, March 12, 1782, application and satisfactory proof being made, this court doth certify that John Finley is entitled to the

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preemption of 1,000 acres of land situate the on main branch of Licking Creek, to include an improvement made in the year 1773 by said Finley, and to be bounded by a survey made at the time for him, which includes the Upper Blue Lick, by virtue of such marking out and improving, and his being in public service when the commissioners sat in the district, and thereby prevented applying for the same."

A preemption warrant was obtained, and, on 14 November, 1783, an entry was made with the proper surveyor in the following words:

"John Finley enters 1,000 acres of land on a preemption warrant, No. 2526, on Licking, to include the Upper Blue Lick, and bounded on three sides by the line of an old survey made in the year 1773, beginning,"

&c.; This entry was surveyed, and a patent issued thereon.

William Lynn, under whom the defendants claim, made an improvement on the same ground in the year 1775 and laid his claim before the commissioners, who allowed the same and granted a certificate therefor dated 20 November, 1779, in the following words:

"William Lynn this day claimed a preemption of one thousand acres of land at the state price, lying on the south side of Licking Creek, known by the name of the Big Blue Lick, to include the said lick, lying in a short bent of the said creek, by improving the same in the year 1775,"

&c.; On 22 June, 1780, Lynn, having obtained a preemption warrant, entered the same with the proper surveyor in these words:

"William Lynn, James Barbor and John Williams enter 1,000 acres of land upon a preemption warrant, beginning a quarter of a mile below the Big Blue Lick on Licking, on the south side thereof, running on both sides of the said creek, and east and south for quantity."

This entry was so surveyed as to include the lands in dispute, and a patent was obtained thereon of an earlier date than that of Finley. Upon this patent an ejectment was brought and judgment obtained by Lynn, Barbor, and Williams. Finley has brought this suit to compel a conveyance of that part of the land held by Lynn and others which is included in his patent. On a hearing,

it was the opinion of the circuit court that Lynn and others held the better title, in conformity with which a decree was made. From that decree Findley has appealed to this Court.

The peculiar state of titles to land in Kentucky, a senior patent being, in many cases, issued on a junior title and it being a rule in their courts of law not to look beyond the patent, have settled the principle that courts of equity will sustain a bill brought for the purpose of establishing the prior title by entry, and of obtaining a conveyance from the person holding under a senior patent issued on a junior entry. The courts of the United States have conformed to this practice, and adopted the principle.

It is also settled in Kentucky that, between preemption rights, the prior improvement will hold the land, although the certificate of the commissioners, the entry, the survey and the patent, be all posterior, in point of time, to those obtained by the person who has made an improvement of a later date.

It follows from these established principles that Findley must prevail unless he has lost the right acquired in consequence of his improvement.

The circuit judge was of opinion that this right was lost by the form of his entry with the surveyor. Not having in that entry called in terms for his improvement, that judge was of opinion that although his entry does in fact comprehend his improvement, yet he has surrendered the preference which his preemption warrant gave him, and sank his claim to the level of a common Treasury warrant. This Court can perceive no reason for that opinion. The law requires that the entry shall in fact include the improvement, but does not make it essential to the dignity of the entry that the improvement shall in terms be called for. The certificate expressly states that the land granted is to include the improvement, and the entry, which is made with remarkable precision, conforms exactly to the certificate in the description of the land intended to be taken.

But it is contended by the defendant that whatever may be the opinion of the Court on this point, Finley's title as to a preemption must yield to that of Lynn in consequence of his having omitted to assert his claim before the court of commissioners. The legislature could not, it is said, after permitting the time for

making this claim to expire, revive it to the prejudice of any other person who had acquired title to the land. It is added that the decisions in Kentucky have been adverse to titles to preemptions depending on certificates granted by the county courts in cases where they come into competition with titles gained before the grant of such certificates.

This Court would not willingly depart from the state decisions if they have settled the principle the one way or the other, and would therefore, have deferred the determination of this cause until more certain information could be obtained had it rested solely on the validity of the plaintiff's title as founded on a preemption. But on an inspection of the record, the entry of the defendants is deemed so radically defective as necessarily to yield to the title of the plaintiff should his warrant even he reduced to the grade of a Treasury warrant.

The law requires that the holder of a land warrant "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."

Such has been the difficulty of making special locations that much of the precision which the law would seem to require has been dispensed with; but a reasonable and practicable certainty has always been deemed necessary, and wherever the material and principal call of a location has been calculated, instead of informing, to misguide subsequent locators, the location itself has been brought into hazard, and it has often been determined that the survey was made on other land than that which the entry covered.

In examining these questions, the courts of Kentucky have universally and properly determined that all subordinate calls in an entry must yield to a principal

call to which they may be repugnant. If a great and prominent object, immoveable and durable in itself and of general notoriety, be called for in a location, that object must fix and locate the entry, although other minor and temporary objects, to be discovered only by a strict and successful search, might prove that the locator

really intended to take other land.

In the entry of Lynn and others, there is such a principal call. The Big Blue Lick is perhaps an object of as universal notoriety as any in Kentucky. But there are two Blue Licks on the same creek, and both of them are large licks. In such a case, the locator would certainly be at liberty, and it would be his duty to designate the lick he intended to take, for if his entry would apply to the one as well as to the other, it would be justly chargeable with a vagueness which would leave subsequent locators unable to locate with certainty the adjacent residuum. This entry has, in its terms, designated the lick intended to be included. It is "the Big Blue Lick." The entry does not call for *a* Big Blue Lick, but for *the* Big Blue Lick, thereby excluding any other lick than that which was emphatically denominated the Big Blue Lick.

We are then to ask which of these licks a man in Kentucky, holding a warrant which he intended to locate, would suppose was the Big Blue Lick.

Upon this subject the testimony is not doubtful. It is in full proof that, at the time the entry of the defendants was made and for some years before, the Lower Blue Licks were generally called the Big Blue Licks, and that where the defendants have surveyed was known by the name of the Upper Blue Licks. They were sometimes, though rarely, distinguished from each other as the Upper Big Blue Licks and the Lower Big Blue Licks, sometimes as the Upper and the Lower Blue Licks, but the term "the Big Blue Licks," when used without the word "upper" or "lower," was universally understood to designate the Lower Blue Licks.

The company which made this location in 1775, had not discovered the Lower Blue Licks, and therefore denominated the spring which they did discover "the

Big Blue Lick," but the name originated and expired with themselves. It was never adopted by the people of the country. It is probable that Lynn did contemplate the Upper Blue Licks when he made his entry, but between conflicting entries, a mistake of this kind is fatal to the person who commits it. In the case of *Taylor v.*

Hughes, it was impossible not to perceive that Taylor intended one creek when he named another, but subsequent locators could judge of his intention only from the words of his entry.

But it is contended that there are other explanatory calls in the entry, which cure the defect which has been stated, and designate with sufficient certainty that the Upper Blue Lick was intended to be included in the entry.

The entry is said to require a lick on the south side of Licking, and the spring which issues at the Upper Blue Lick is on the south side. The words are "Beginning one quarter of a mile below the Big Blue Lick on Licking, on the south side thereof." The locator intends to describe his beginning, and these words are to be construed with reference to that intention. Do the words "on Licking" describe the place of beginning, or the location of the Big Blue Lick? The latter was unnecessary, because there was no Big Blue Lick except on Licking and because, were the fact otherwise, the lick would be ascertained by calling for a beginning a quarter of a mile below it on Licking. But the beginning might be a quarter of a mile below the lick and yet not on the creek. The beginning would be in some degree uncertain unless it be fixed by those words. The entry is understood as if it were expressed thus: "Beginning on Licking, on the south side thereof, a quarter of a mile below the Big Blue Lick." If reference be had to the certificate granted by the commissioners, that places the land, not the lick, on the south side of the creek.

A cabin and a marked tree in a country full of cabins and marked trees cannot control a call made for an object of such general notoriety as the Big Blue Lick. A subsequent locator would look for them only at the Big Blue Lick.

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It is the opinion of this Court that the decree of the circuit court be reversed and annulled and that the defendants be decreed to convey to the plaintiff so much of the land comprehended within this grant as appears by the survey made in this cause to lie within the bounds of the grant made to the complainant.