Kerr Vs. Watts

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Appeal No. : 19 U.S. 550

Appellant : Kerr

Respondent : Watts

Judgement :

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Kerr v. Watts

19 U.S. (6 Wheat.) 550

APPEAL FROM THE

CIRCUIT COURT OF OHIO

SYLLABUS

The decision of this Court in *Massie v. Watts,* 6 Cranch 148, revised and confirmed.

Who are necessary parties in equity.

No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded.

The rule applied in equity to the relief of *bona fide* purchasers without notice is not applicable to the case of purchasers of military land warrants under the laws of Virginia.

Such purchasers are considered as affected with notice by the record of the entry and also of the survey, and subsequent purchasers are considered as acquiring the interest of the person making the entry, so that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the rule, as to innocent purchasers does not apply.

The principle that only parties or privies or purchasers *pendente lite* are bound by a decree in equity, how applied to this case.

The surveys actually made on the military land warrants of Virginia have not the force of judicial acts or of acts done by the deputations of officers as general agents of the continental officers.

Ferdinando O'Neal was owner of a Virginia military warrant for 4,000 acres of land, dated 17 July, 1783, and employed Nathaniel Massie, a deputy surveyor, to locate it and to survey and return the plats.

John Watts purchased the right of O'Neal, and on 7 January, 1801, paid Massie 50 pounds in full satisfaction for locating and surveying the warrant.

On 3 August, 1787, Massie made an entry on part of O'Neal's warrant for 1,000 acres. On

the same day, an entry had been made for 1,000 acres for Robert Powell, which was purchased by Massie.

On 27 January, 1795, Massie made an entry in his own name for 2,366 acres, and the bill, filed in the court below by the respondent, Watts, against the appellants, Kerr and others, charges that on 26 April, 1796, Massie fraudulently made a survey for O'Neal, for 530 acres, purporting to be made upon his said entry of 1,000 acres, but in fact on different land, having fraudulently appropriated to himself the land covered by O'Neal's entry by surveys made on Powell's and his own entries, having purchased Powell's warrant and entry before the surveys were made.

The bill further states that Massie had obtained grants upon his survey.

Watts commenced a suit in chancery against Massie in the state court of Kentucky, claiming a conveyance of the legal title, and proceeded to a final hearing upon the merits in the Circuit Court of Kentucky, to which it had been removed, which last court, in the November term, 1807, made an interlocutory decree in favor of Watts and directed the proper surveyor to lay off the several entries in the manner pointed out in that decree and to report to the court in order to a final decree in the premises.

The cause was finally decided by a decree directing Massie to convey the 1,000 acres to Watts according to certain metes and bounds reported, and to deliver possession, &c.;, and upon performance of

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the decree by Massie, Watts was directed to transfer to him 1,000 acres of O'Neal's warrant.

Massie appealed to this Court, where the decree of the circuit court was affirmed at February term, 1810.

Massie refused to convey or deliver possession when demanded, and in the meantime part of the property recovered had been laid out into lots of the town of Chilicothe, and the bill charges the appellants and others, who were made defendants in the present suit, with having in possession, respectively, part of the

complainant's property and claiming to hold the same by titles derived under Massie.

The record of the proceedings in Kentucky and in the Supreme Court were referred to and made part of the bill in this case.

The entries before mentioned are as follows:

"No. 503. Captain Robert Powell enters 1,000 acres of land, &c.;, beginning at the upper corner on the Scioto of Major Thomas Massie's entry, No. 480, running up the river 520 poles, when reduced to a straight line, thence from the beginning with Massie's line, so far that a line parallel to the general course of the river shall include the quantity."

"No. 509. Captain Ferdinand O'Neal enters 1,000 acres, &c.;, beginning at the upper corner on the Scioto of Robert Powell's entry, 503, running up the river 500 poles, when reduced to a straight line, and from the beginning with Powell's line, so far that a line parallel with the general course of the river will include the quantity. "

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"No. 2462. Nathaniel Massie enters 2,366 acres, &c.;, on the bank of Scioto, corner to Robert Powell's survey, No. 503, thence with his line south 43 east 293 poles; south 80 east to the upper back corner of Thomas Massie's survey, No. 480, thence with his line south 10 west, to Paint Creek, thence up the creek to the corner of Thomas Lawes' survey, thence with his line, and from the beginning up the Scioto to the lower corner of Daniel Stull's survey, thence with his line so far that a line south 10 west, will include the quantity."

But these entries depended on one which preceded them on the entry book, made by Thomas Massie, as follows:

"No. 480. 1787, August 3. Thomas Massie enters 1,400 acres, &c.;, beginning at the junction of Paint Creek with the Scioto, running up the Scioto 520 poles when reduced to a straight line, thence off at right angles, with the general course of the

river so far that a line parallel thereto will include the quantity."

This Court, in the case referred to, decided, that Thomas Massie's survey ought to commence at the mouth of Paint Creek and that the upper corner on the river should be placed at the termination of a right line at the distance of 520 poles, and the survey extended out at right angles with the general course of a right line supposed from the beginning to the upper corner, and that from the upper corner of Thomas Massie's survey, a point on the river, at the distance of 520 poles on a right line should be

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ascertained for the upper corner of Powell's, and that the real course of a right line from Thomas Massie's corner to Powell's upper corner should be considered as a base from which Powell's survey should be extended by lines at right angles therewith, except only so far as the lower line might interfere with Thomas Massie's property.

The survey of O'Neal to depend upon the same principles in relation to the survey of Powell.

The object of the present suit was to carry into execution against the defendants, who have acquired Massie's title, the decree against him in Kentucky, affirmed in this Court.

The court below, by its decree, gave relief against each for the specific property claimed by the answer of each, construing the entries according to the principles of the former decision, except in varying the complainant's survey, by a decision that a piece of land called an island in the river, was part of the main shore when the entries were made, and included as a part of the bank.

The defendants all submitted to the decree, except Kerr, Doolittle, Joseph Kirkpatrick, Sr. Joseph Kirkpatrick, Jr., and the heirs of James Johnston, who appealed to this Court.

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MR. JUSTICE JOHNSON delivered the opinion of the Court.

This cause has its origin in the case decided in this Court between Watts and Massie in the year 1810.

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That suit came up from the Kentucky District, and was prosecuted there because Massie, the defendant, then resided in that state and either was or was supposed to be actually seized of the land in question.

Since that decision, it has been ascertained that the present defendants are in possession of the land or the greater part of it, and Massie also having changed his residence to Ohio, this suit has become necessary both to enforce the former decree against him and to obtain relief against the actual possessors of the land.

In the course of discussion, the Court has been called on to review its decision in *Watts v. Massie,* and it has patiently heard and deliberately considered, the able and well conducted argument on this subject. But after the maturest reflection, it adheres to the opinion that whether the case be viewed with reference to the time, intent, and meaning of the calls, to analogy to decided cases, or convenience in the voluntary adoption of a principle of the most general application, that laid down in the case of *Watts v. Massie,* for running the lines of the land called for, cannot be deviated from. So far, therefore, as Massie himself and his privies in estate are concerned, Watts is now entitled to the full benefit of that decision.

But there are various other defendants, and several grounds of defense assumed in this case, which are unaffected by the decision referred to.

It is contended in the first place that there is a radical defect of parties. That the representatives

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of O'Neal and Scott, through whom the complainant claims, and those of Powell and Thomas Massie, supposed to be hostile to his interests, ought to have been made parties.

On this point there may be given one general answer. No one need be made a party complainant in whom there exists no interest, and no one party defendant from whom nothing is demanded. Watts rests his case upon the averment that all the interests once vested in O'Neal and the Scots now center in himself, and, provided he can recover the land now in possession of those actually made defendants, he is contented afterwards to meet the just claims of any others who are not made defendants. No rights will be affected by his recovery but those of the actual defendants and those claiming through them. As to the supposed interference of the lines ordered to be surveyed with those of Thomas Massie or Powell, the former is merely hypothetical by way of reference or imaginary, and the latter is only asserted on the ground that Massie had acquired all the interest in Powell's survey that Powell ever had. There was therefore nothing to demand of Powell as the case is exhibited by the record. It must be subject to these modifications, that the *obiter dictum* of the Court in the case of *Simms v. Guthrie* is to be understood.

It is next contended in behalf of Kerr and several other defendants that they claim through purchasers who were *bona fide* purchasers without notice, for a valuable consideration. And at first view it would seem that the principles so often applied to the relief

of innocent purchasers are applicable to the case of these defendants wherever the facts sustain the defense. But it will not do at this day to apply this principle to the case of purchasers of military land warrants derived under the laws of Virginia. In all the courts in which such cases have come under review, the purchasers have been considered as affected by the record notice of the entry, and also of the survey, such as it legally ought to be made, as incident to, or bound up in the entry. It is altogether a system *sui generis,* and subsequent purchasers are

considered as acquiring the interest of the enteror, and not necessarily that of the state. So that purchasers under conflicting entries are considered as purchasing under distinct rights, in which case the principle here contended for does not apply, since the ignorance of a purchaser of a defective title cannot make that title good as against an independent and better right. These principles may safely be laid hold of to support a doctrine which, however severe occasionally in its operation, was perhaps indispensable to the protection of the interests acquired under military land warrants when we take into consideration the facility with which such interests might otherwise in all cases have been defeated by early transfers.

It is further contended that the defendants are not bound by the decree in the case of *Watts v. Massie,* because neither parties nor privies nor *pendente lite* purchasers.

That those who come not into this Court in any one of those characters are not subject to the direct

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and binding efficacy of an adjudication is unquestionable. But it is not very material as to the principal question in this case whether the parties are to be affected by the former adjudication directly, or by the declared adherence of this Court to the doctrines established in that case. The consequence to the parties on the merits of the case is the same.

But in one view it is material, and that is with regard to the proof of the exhibits through which Watts the complainant, deduces his title through the Scots from O'Neal. As Massie, in the former case (the record of which is made a proof of this) acquiesced in this deduction of Watts' title, we are of opinion that it is, as to him and his privies in estate, a point conceded. As to parties and privies, the principle cannot be contested, and as to *pendente lite* purchasers, it is not necessary to determine the question, since the only defendants who have appealed from the decision below, to-wit, Kerr, the Kirkpatricks, Doolittle, and the Johnsons, claim under purchases made long anterior to this scrip in Kentucky.

Those defendants certainly were entitled to a plenary defense, and where they have by their answers put the complainant upon proof of his allegations as to his deduction of title, the question arises whether it appears from the record that the deduction of title was legally proved.

There can be no doubt that this question passed *sub silentio* in the court below, but it does not appear from anything on the record that the point was waived, and we are not at liberty to look beyond

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the record for the evidence on which the deduction of title was sustained.

Although we entertain no doubt that exhibits may, on the trial, be proved by parol testimony, yet a note on the minutes, or on the exhibit, became indispensable to transmit the fact to this Court, and as the case furnishes no such memorandum, we must consider the assignments through which Watts derived his title from O'Neal as not having been established by evidence. Such was the decision of this Court in the case of *Drummond v. McGruder.*

But Kerr is the only one of these appellants who has expressly put the complainant on proof of his title. The rest of the appellants having passed over this subject without any notice in their answer, the question is whether they waived their right to call for evidence to prove these exhibits. We are of opinion they have not, and that the complainant is always bound to prove his title unless it be admitted by the answer.

There are two principles of a more general nature of which all the appellants claim the benefit and which, as the cause must go back, will require consideration.

It is contended that Nathaniel Massie was the acknowledged agent of both O'Neal and Watts, and that the complainant is precluded by his acts done in that capacity. This argument is resorted to as well to fasten on Watts the survey made in his behalf above the Town of Chilicothe as a relinquishment of all claim to a location at the place now contended for in his behalf. But in neither of these views

can this Court apply this principle in favor of the defendants, for it follows from the principles established for surveying O'Neal's entry that the survey made by Massie on O'Neal's entry was illegal and void, and certainly, when employed in locating the entries made in favor of Powell and himself, Massie was not acting as the agent of O'Neal or Watts, but as the agent of Powell, or in fact in his own behalf. The survey on which this argument rests was at best but partial, and it is conclusive against it to observe that the powers of Massie as agent of Watts were limited to the entry and mechanical acts of the survey. The recording of that survey and all those solemn acts which give it legal validity it does not appear that his powers extended to. Watts never recognized that survey or assumed the obligatory effects of it by any act of his own, and in fact in the event (though not a material circumstance to the result we come to) it has since been ascertained that it was not only made off Watts' entry, but on land appropriated by another.

But it has been contended also that all these surveys actually made on the military land warrants of Virginia derive the authenticity and force of judicial acts, or of acts done by the general agents of the continental officers respectively, from the superintending and controlling powers vested in the deputations of officers as the law denominates them, appointed by themselves to superintend the appropriation of the military reserves set apart for their use. It is to be presumed, it is contended, that every survey made by their authorized surveyors was

made under their control and direction. This Court does not feel itself authorized to raise any such presumption. The powers actually exercised by those commissioners were limited to very few objects. The surveying of entries at a very early period became a judicial subject. And the commissioners, or rather deputations of officers, never assumed a right to adjust the conflicting interests of individuals upon the locating and surveying of such entries. To appoint surveyors to superintend and direct the drawing of lots for precedence among the locators, to direct the survey for officers and soldiers not present or not represented, and to

determine when the good lands between the Cumberland and Tennessee should be exhausted comprehended all the powers with which they were vested. As individual agents capable of binding their principals, they appear in one case, and only one, which was when the officer or soldier was absent and unrepresented. And as to judicial powers, there is no provision of the act that vests them with a semblance of such a power, unless it be to judge of the right of priority as determined by lot. But here also they appear more properly in the character of ministerial officers discharging a duty without the least latitude of judgment or discretion. Their powers in nothing resemble that of the courts of commissioners established through the back counties of Virginia. As to the subjects submitted to the boards so constituted, of which military warrants were no part, those boards were expressly vested with judicial power. But the powers of the deputations of officers were purely ministerial.

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And if it be admitted that they might have exercised the power of defining the principles on which surveys should have been made, yet it is certainly incumbent on him who would avail himself of that power to show that it was exercised and to bring himself within the rules prescribed by their authority.

Decree reversed as to these appellants and sent back for further proceedings.