

Blunt's Lessee Vs. Smith

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Appeal No. : 20 U.S. 248

Appellant : Blunt's Lessee

Respondent : Smith

Judgement :

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Blunt's Lessee v. Smith

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ERROR TO THE CIRCUIT

COURT OF WEST TENNESSEE

SYLLABUS

The decision of the court below granting or refusing a motion for a new trial is not matter for which a writ of error lies to this Court.

In Kentucky and Virginia the rule is that a court of common law cannot look beyond the patent, but in Tennessee the courts of law, under their construction of the land laws of North Carolina, permit the parties in an ejectment to go back to the original entry, and connect the patent with it.

This construction is not limited to a comparison of the dates of the entries, but admits of an inquiry into their legal effect as they stand in relation to each other.

The statutes of North Carolina, which have been construed to justify a court of law in considering the entry as the commencement of title, are applicable to military warrants as well as other titles.

By the decisions of the courts of Tennessee, the validity of surveys does not depend on the will or directions of claimants, and though the mistakes of surveyors may be corrected, they cannot be corrected so as to injure a subsequent adjoining enterer.

The laws of North Carolina do not require that an entry should express the watercourses and remarkable places which are remote, but only those which are contiguous, and which may assist in designating the land intended to be acquired. Notoriety is not essential to the validity of an entry in Tennessee, as it is in Kentucky. The statute of Virginia, which is the land law of Kentucky, requires that entries shall be so special and certain that any subsequent locator may know how to appropriate the adjacent residuum. But the land law of North Carolina contains no such provision, and the doctrine which requires notoriety as well as identity, has never been received in Tennessee.

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This was an action of ejectment brought by the plaintiff in error in the circuit court against the defendants in error to recover the possession of lands in the State of Tennessee. The title of the plaintiff, as spread upon the record, originated in an entry made on 17 March, 1785, in the following words:

"General Sumner enters 12,000 acres of land lying east of the upper south road between the head of Mile Creek, Little Harpeth, and Stewart's Creek, and on the waters of some of the aforementioned creeks, including some deadened trees, marked 'I.F.'"

The deadened trees were never found. On this entry a patent was issued by the State of North Carolina on 27 April, 1793, to which

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was attached a plat and certificate of survey purporting to be made by Thomas Malloy, a deputy surveyor, on 20 November, 1786.

The defendants claimed under a patent issued to William Tyrrell, assignee, on 10 April, 1797. This grant was founded on an entry made in the name of John Gee, on 1 June, 1785, in the following words:

"John Gee, heir of Captain James Gee, enters three thousand eight hundred and forty acres of land, lying and adjoining the northern boundary of Brigadier General Jethro Sumner running west along his line for complement."

The defendants gave in evidence the record of a former trial in ejectment for the same land in which the verdict and judgment were against the plaintiffs, and the testimony of Burkley Pollock, a witness examined at that trial, who is since dead, and who swore that he made the survey for General Sumner before Gee's entry was made. A copy of the plat and certificate of survey made by Pollock and recorded in the Secretary's Office of North Carolina, properly authenticated, was also given in evidence. By the plat and certificate of survey, it appears that the land of Sumner was laid off by Pollock in a parallelogram, the base or first line of which extending from west to east, was 1,292 poles and the side lines 1,486 poles. The patent which was issued on the plat and certificate returned by Malloy, had the same base line, but the side line is extended to 1,737 poles, and the survey is said to include 2,026 acres, belonging to Lieutenant Thomas Pasteur.

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The defendants also gave in evidence copies of a petition presented to the General Assembly of North Carolina at its session held in November, 1786, by the guardian of the plaintiff, praying that a separate warrant might be issued to the heirs of General Sumner for the quantity of land included in his survey to which Lieutenant Pasteur had a prior title, and the proceedings of the legislature granting the prayer of the petition. The defendants also gave in evidence a certified copy of a certificate granted by the commissioners of West Tennessee to the heirs of General Sumner for so much land as was equal to the quantity lost by the prior title of Lieutenant Pasteur, and a copy of the testimony on which this certificate was founded.

To the admission of all these copies it is stated in the bill of exceptions the plaintiff's counsel objected, but his objections were overruled and the papers were read.

Some testimony was offered by the defendants to prove that in the survey of Sumner's land by Pollock, a second as well as the first line was run, and corner trees marked at the end of that line so as to fix the northern boundary of Sumner's land, but other testimony was offered by the plaintiff to prove that only the first line, which established the southern boundary, was run.

After the testimony was closed, the counsel for the plaintiff moved the court to instruct the jury

"That it should not regard the said copies from the Secretary's Office of North Carolina, and of the proceedings before the Commissioners of West Tennessee as

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having any effect in the said cause, and that the entry in the name of Gee, on which the grant to Tyrrel purported to be founded, could not be located as a special entry to any place, or if to any place, only to the northern boundary of Sumner's land on which the grant was founded, as granted and described in the plat and certificate,"

but the judge refused so to instruct the jury, but informed them that

"All said documents, except the proceedings before the commissioners, which should have no weight in the cause, should be considered as testimony by them, and that the plat and certificate made by Pollock, if he marked no more of the corners and lines of Sumner's tract, but the southern boundary, and southeast corner and southwest corner, would show, by calculation, where the northern boundary of his tract should be according to said plat, and locate said Sumner's entry and land to the south of that line, and fix said entry in the name of Gee to the north of that line, and make it special from the date of the survey made by Pollock for that place; and that the grant to Tyrrel, although founded on a survey made long after the grant to Sumner was issued, should relate back to the date of said entry, and give a good title to those holding under the said grant to the land north of the north boundary as represented in the plat, &c.;, made by Pollock, against the title derived from Sumner's grant and entry, and that Sumner's grant should be considered as made on a removed warrant, for all the land north of what is represented in said plat, made by Pollock, as his northern boundary. "

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment in ejectment rendered in the Circuit Court of the United States for the District of West Tennessee, which was brought by the plaintiffs in error. After a verdict in favor of the defendants, the counsel for the plaintiff moved for a new trial, which was refused. To the opinion of the judge, overruling the motion for a new trial, and also to his charge to the jury, the plaintiff excepted, and the cause comes on now to be heard on his exceptions

It is well settled that this Court will not revise the opinion of a circuit court, either granting or rejecting a motion for a new trial; but the exception to the charge of the judge, although taken after a motion for a new trial, may have been and probably was reserved at the time the charge was given, and will therefore be considered.

The exception to this charge of the court below, consists of two parts:

1st. To so much of it as admits the copies taken from the Secretary's Office of North Carolina, as evidence in the cause.

2d. To so much of it as admits the validity of Gee's entry, and gives it the preference to so much of Sumner's patent as comprehends land not embraced in Pollock's survey.

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The first point seems not to have been relied on by the plaintiff's counsel in argument, and has, we think, been very properly abandoned. These documents were official copies of papers belonging to the title of the parties, taken from the office in which those papers were kept and regularly authenticated. We perceive no ground on which the objections to their admission could be sustained. If the charge of the judge went beyond these official copies to the proceedings of the legislature, and the record of the former trial, we perceive no error in this. The former trial was between parties or privies, and the petition to the legislature was the act of the party by guardian, the resolution of the general assembly on which, was a measure of the whole state, the effect of which in this or any other case, might be controverted, but to which all interested in it might have recourse.

The second part of the charge presents a question of more intricacy, which requires an attentive consideration of the land laws of North Carolina, and of the decisions of the courts of Tennessee.

In Kentucky and in Virginia the rule is that a court of common law cannot look beyond the patent, but in Tennessee it is understood to be otherwise. The courts of law in that state allow the parties, in an ejectment, to go back to the original entry, and to connect the patent with it. This rule is founded on the land laws of North Carolina, which have been construed in Tennessee to permit and require it. But the plaintiffs contend that this construction has been limited to the comparison of the

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dates of the entries, and admits of no inquiry into their legal effect as they stand in relation to each other.

If the question were to depend merely on its reason, it would be difficult to support the opinion that a court authorized to compare entries with each other, should not, in the exercise of this power, be permitted to examine their whole legal operation and relative effect. If it were to depend upon a construction now, for the first time, to be given to the acts of North Carolina, we should find great difficulty in maintaining that they allow the entries to be compared so far as respects dates, but no further. The Act of November, 1786, ch. 20, in its preamble, recites that

"Whereas it is the intent and meaning of the said act [the act for opening the land office] and of the act hereby revived and put in force, that the first enterers of the vacant and unappropriated lands, if specially located, therein described shall have preference of all others,"

&c.; The 1st section then enacts "That every first enterer of any tract of land, specially located, lying in the western parts of this state," &c.;, shall have a further time for making his surveys, and that grants upon lands previously entered by any other person shall be void.

The same act allows a survey to be made on removed warrants, in cases where the warrants were originally located on lands which had been previously entered "as the law directs," by some other person,

"provided such lands were at the time of such survey actually vacant, and that such survey on removed warrants shall not affect or injure the right of

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any lands entered, and specially located, in the office aforesaid previous to such survey."

The Act of November, 1787, ch. 23, directs all surveyors to survey lands according to their priority of entry, and that every grant obtained on a subsequent entry, contrary to the provisions of that act, shall be void.

The original act had prescribed the manner of making entries, and those made in pursuance of law are considered special.

Between special entries the first is undoubtedly to be preferred, but if one entry be special and the other vague, as if one should describe the land intended to be acquired, in conformity with the act, and the other should totally omit to give a description which might designate the place, should enter 5,000 acres of land lying in the county of A. without naming any place in the county to which it might be fixed, could it be contended that, on any fair construction of the acts, this entry would prevail against one which was special, but was subsequently made? We think it could not. The acts of North Carolina appear to us to have been intended to preserve the priority of legal entries, not of those made contrary to law.

We do not think that the decisions of the courts of Tennessee establish a contrary principle. Several *dicta* are to be found in the cases stating the rule to be, that courts will go beyond the grant only to support a prior entry, but these *dicta* were applied to the exclusion of extrinsic matter, not to the exclusion of considerations belonging to the entries themselves.

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The title to lands surveyed on removed warrants, has never been carried back to the entry, and on the same principle the title to lands surveyed off the entry, can have no date anterior to the patent, so far as the survey does not conform to the entry. 1 Tenn. 172, 351, 306, 413.

The effects of entries, then, as well as their dates, is considered by the courts of Tennessee.

It has also been contended that this principle ought not to be applied to military grants. The acts of North Carolina, which have been construed to justify a court of law in considering the entry as the commencement of title, are not, it is agreed, applicable to military warrants. But the Act of 1786, c. 20, on which this construction is supposed to be founded, declares it to have been the intention of the act for opening the land office, that the first enterers "shall have preference to

all others in surveying and obtaining grants for the same."

We think the act which prescribes the mode of obtaining military grants manifests this intention as unequivocally as those which are referred to in the act of 1786, c. 20. It is true, as has been stated in argument by the plaintiff's counsel, that the 3d sec. of the act "for the relief of the officers and soldiers of the Continental line, and for other purposes," directs, that where two or more persons wish or claim to have his or their warrant located on the same piece of land, the parties contending shall cast lots for the choice. But this section obviously provides for applications made at the same time. The 5th section directs that

"Where a warrant shall be hereafter located, without

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any person making objections to such location, that such location shall be good and valid notwithstanding the claim that may be afterwards set up by any other person."

This section, we think, manifests a clear intention to give priority of right to the prior entry, and we are not surprised that, under this act, the courts of Tennessee should comprehend military titles also in that rule which authorizes courts of law to take into view the entries of the parties. At any rate, such is the settled course of the courts of the state, and those of the United States ought to conform to it.

We think, then, that the circuit court committed no error in inquiring into the rights of the parties to the land in controversy under their respective entries. It is next to be considered whether, in making this inquiry, that court has decided erroneously.

The entry, as well as the patent of the plaintiff, being the oldest, it must prevail unless some circumstance has occurred to defeat the right given by this priority.

The defendants rely upon the survey made by Pollock as confining the entry of Sumner to that survey.

Of the existence of this survey there appears to have been no doubt, and none seems to have been entertained at the trial. The plaintiff objected to receiving the copy of the plat and certificate in evidence, but, when that objection was overruled, he contested the survey no further. His object, then, was to show that the second line was never run.

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The judge charged the jury, that the plat and certificate made by Pollock, if he marked no more of the corners and lines of Sumner's tract, but the southern boundary, and south-east and southwest corner would show, by calculation, where the northern boundary of his tract should be.

Nothing can be more apparent than the correctness of this charge. The law directs that "every tract surveyed for officers or soldiers, shall be run out at the four cardinal points of the compass, either in a square or in an oblong." Consequently, when one line of a survey is given, the remaining three lines are found by a calculation which cannot vary. General Sumner's entry was for 12,000 acres of land. A line from west to east, constituting the southern boundary, was run, and measured 1,292 poles. Corner trees at each extremity were marked. From the end of this first line the survey calls for a line due north 1,486 poles. Had this line been actually run and marked, the tract would have been bounded by the lines actually run, and the corner trees actually marked. But, the line not having been run, the tract was bounded by the course and distance called for. Had there been no survey, had Sumner's entry been for 12,000 acres of land, to begin where the survey began, and to run east 1,292 poles, and from the ends of that line north for quantity, it must have been bounded in the same manner, because, a rectangular oblong figure, to contain 12,000 acres, one of which is 1,272 poles, must have for its other sides, lines of 1,486 poles. Of course the judge was correct in saying that if the southern

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boundary was given, the northern boundary was to be found by computation.

Was he equally correct in adding that Gee's land might be located on the north of Sumner's northern line when thus found?

We think he was.

Gee's entry called to lie, "adjoining the northern boundary of B. General Sumner running west along his line for complement."

Sumner's northern line was consequently Gee's southern line.

If, then, Sumner's grant had been issued according to Pollock's survey, no interference between him and Gee could have taken place. But a plat and certificate of survey was afterwards made out by Malloy, who was also a deputy surveyor, which extended the lines constituting the eastern and western boundary of Sumner's land, to 1,737 poles, and upon this plat and certificate his patent was issued. We must therefore inquire whether Pollock's survey was legally made, and if it was whether it could be afterwards changed so as to effect a person making an entry in the intermediate time between his first and second survey.

The laws of North Carolina make it the duty of surveyors to survey entries in the order in which they are made, and do not require the presence or direction of the owners of the land. Pollock was a deputy surveyor authorized to make this survey. Consequently, it was regularly made, and had all the consequences of a legal survey.

Admitting the alteration made by Malloy to be

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perfectly justifiable, Gee's entry was prior to that alteration, and the question is whether such alteration can affect an appropriation previously made?

Upon the principles of reason and common justice, we could feel no difficulty on this point. But we are relieved from considering it by the decisions which have already taken place in Tennessee. In *Blakemore v. Chambles*, 1 Tenn. 3, it was expressly determined that the validity of surveys "has no dependence on the will or

direction of claimants," and that though the mistakes of surveyors may be corrected, "they cannot be so corrected as to injure a subsequent adjoining enterer."

Gee's entry, then, made after Pollock's survey, will, if a valid entry, hold the lands against any subsequent survey made for Sumner. But as Sumner's is the eldest grant, the validity of Gee's entry must be examined.

It calls to adjoin Sumner's northern boundary, and to run west along his line for complement.

The laws of North Carolina direct that an entry shall express

"the nearest watercourses, and remarkable places, and such watercourses, lakes, and ponds as may be therein, the natural boundaries and lines of any other person or persons, if any, which divide it from other lands."

This law cannot be construed, and never has been construed, to require that watercourses, or remarkable places which are remote, should be expressed in the entry. It requires the expression of those only which are contiguous, and which may assist in showing

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the land intended to be acquired. If there be no considerable watercourses, lakes, or ponds within it, the entry cannot express them. The reference to the adjoining land, when we take into view that the law directs entries to be surveyed according to their dates, would always be sufficient to make the entry special, if the line called for could be found. In *Smith v. Craig's Lessee*, 2 Tenn. 296, the court said,

"Previously to the year 1786, a vague entry was well understood to be one that contained no such specialty as that a majority of those acquainted in its neighborhood, at its date, could by reasonable industry, find it; a special entry was considered the reverse. How natural is it, then, for us to suppose, that the legislature designed, in the use of this expression, in the act of 1786, to convey such ideas as had by usage and common consent been appropriated to it."

The books are full of cases containing similar expressions. It is impossible to look at all into the subject, without being satisfied that in the State of Tennessee, such an entry as that of Gee would be deemed special, if Sumner's northern boundary could be found.

There could be no difficulty in finding it, since his land had been surveyed when this entry was made.

But the great objection on which the plaintiffs most rely is that to constitute a special entry in the State of Tennessee, the objects called for must be notorious as well as certain. The entry must be such as to give general information of the precise land it appropriates. Notoriety, as well as identity, are essential,

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it is said, to specialty, and a call for Sumner's line is not good unless Sumner's survey was notorious.

If this proposition be correct, if notoriety as well as identity be essential to the validity of an entry in Tennessee as it is in Kentucky, then Gee's entry cannot be sustained. But the law of Tennessee is in this respect entirely different from that of Kentucky. The act of Virginia, which is the land law of Kentucky, requires that entries shall be so special and certain that any subsequent locator may know how to appropriate the adjacent residuum. The land law of North Carolina, which is the law of Tennessee, contains no such provision. The lawyers of Kentucky have made some attempts to transplant into Tennessee the principles which had grown up in Kentucky, but their attempts were unsuccessful. The books are full of cases in which it is expressly decided that notoriety is not essential to the validity of an entry. In the case of *Philip's Lessee v. Robertson*, 2 Tenn. 399, the whole subject is reviewed. Judge Overton takes a very comprehensive view of the doctrines growing out of the land laws of North Carolina, and shows conclusively that they do not require, and had never been understood in Tennessee to require notoriety as essential to the validity of an entry. His opinion in this case has, we are informed, been confirmed by the other judges of their supreme court.

If notoriety be not necessary to Gee's entry, it is special according to the laws of Tennessee, and ought to hold the land it covers against any subsequent survey

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made of an entry which had been previously surveyed. The judge was correct in saying that such subsequent survey must be considered as if made on a removed warrant.

Judgment affirmed with costs.

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