Jackson Vs. Clark

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Appeal No. : 26 U.S. 628

Appellant : Jackson

Respondent : Clark

Judgement :

Jackson v. Clark - 26 U.S. 628 (1828)
U.S. Supreme Court Jackson v. Clark, 26 U.S. 1 Pet. 628 628 (1828)

Jackson v. Clark

26 U.S. (1 Pet.) 628

ERROR TO THE CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF OHIO

SYLLABUS

Construction of the Act of Congress passed March 2, 1807, entitled

"An act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools in the Virginia military reservation in lieu of those heretofore appropriated."

The reservation made by the law of Virginia of 1783, ceding to Congress the territory northwest of the River Ohio, is not a reservation of the whole tract of country between the Rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia Line on the continental establishment on the southeast side

of the Ohio. The residue of the lands are ceded to the United States as a common fund for those states which were or might become members of the Union to be disposed of for that purpose.

Although the military rights constituted the primary claim upon the trust, that claim was according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected by prescribing the time in which the lands to be appropriated by these claimants should be separated from the general mass so as to enable the government to apply the residue to the general purposes of the trust.

If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence.

If it be conceded that the proviso in the Act of 2 March, 1807, was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity.

Lands surveyed are under the law as completely withdrawn from the common mass as lands patented. It cannot be said that the prohibition, that "no location

shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed" was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times.

The plaintiff brought an action of ejectment in the Circuit Court of Ohio, to recover a tract of land situate in Adams County, in the Virginia Military District and State of Ohio. On the trial of the cause, a bill of exceptions was tendered by the plaintiff to the opinion of the court upon the admissibility of certain testimony which was offered by the plaintiff and which was rejected by the court.

The facts of the case, with the matters which were the subject

Page 26 U. S. 629

of the plaintiff's exceptions, appear in the opinion of the Court.

Page 26 U. S. 632

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

This is an ejectment brought by the plaintiff in error in the Court of the United States for the Seventh Circuit and District of Ohio to recover a tract of land lying in the military district.

The plaintiff offered as his title a patent from the government of the United States bearing date 10 November, 1824.

The defendants then introduced a certified copy of an entry and survey of the lands in controversy, sworn to by Richard G. Anderson, the principal surveyor of the Virginia Military District, the survey purporting to have been made on 10 October, 1796, and recorded on 15 April, 1812, founded on an entry bearing date 17 July, 1796, for 553 acres of land in the name of Nathaniel Massie, assignee, numbered 2744, and founded upon Leven Powell's warrant, for 2,000 acres, No.

3398, and Thomas Goodwin's warrant for 200 acres, No. 1930. It was admitted, that the defendants were purchasers from Massie prior to the year 1796; entered into possession of the premises under the said purchases, and received a conveyance from him before the year 1812. It was also admitted that the plaintiff's entry was made on 10 June, 1824, and his survey on the 20th of the same month.

The defendant relied on this survey and on the proviso of the act passed 2 March, 1807, entitled "An act to extend the time for locating Virginia military warrants, &c.;" This act annexes the following proviso to the permission it

grants to obtain warrants for military service, and to make locations within the military district:

"Provided that no locations as aforesaid within the aforesaid mentioned tract shall, after the passing of this act, be made on tracts of land for which patents had previously been issued or which had been previously surveyed, and any patent which may nevertheless be obtained for land located contrary to the provisions of this section shall be considered as null and void."

To show that the survey set up by the defendants was not protected by the proviso in the act of Congress, the plaintiff offered to prove that the warrants on which it was founded were satisfied before that entry was made. For this purpose, he offered in evidence two entries, amounting to 1,597 acres, on Powell's warrant, made in Powell's name the 30th of December, 1791, surveyed by Massie on 3 January, 1792, the survey recorded on the 10th of the same month; plots and certificates taken from the office by Massie 11 July, 1795, and a patent issued to him on 19 September, 1799; also an entry for 403 acres, the residue of Powell's warrant, made in the name of Nathaniel Massie, on 27 January, 1795, surveyed on 27 December, 1796, the survey recorded on 9 June, 1797; the plot and certificate, together with the warrant supposed to be satisfied, taken out of the office by Massie on 14 June, 1797, and a patent issued to his heirs on 3 December, 1814.

He also offered in evidence an entry for fifty acres made on Thomas Goodwin's warrant in the name of John Walker, assignee, 17 September, 1795, surveyed 30 March, 1820, and patented on 19 November, 1825; also an entry for 150 acres, the residue of the said warrant, made on the 16 June, 1795, in the name of the said Massie, surveyed on 1 July in the same year; survey recorded the 10th of the same month, and a patent issued to Massie on 15 February, 1800.

The plaintiff also offered the deposition of Richard C. Anderson, the principal surveyor, who deposed that the survey of 553 acres, which was given in evidence by the defendants, was illegally made, and admitted by him ignorantly and improperly, to record, and that he had marked the same on the record of his office, "error;" but he does not state the time when this mark was made. He adds that he had refused to grant a plot and certificate of survey, being of opinion that the whole of the warrants had been previously satisfied.

The defendants moved the court to reject the authenticated copies and testimony aforesaid as inadmissible evidence, which motion was granted by the court upon the ground that the act of Congress confirmed the survey of the defendants,

Page 26 U. S. 634

and annulled the plaintiff's patent. An exception was taken to this opinion. A verdict and judgment having been given for the defendants, the plaintiff has brought the cause into this Court by writ of error.

Two points have been made by the counsel for the plaintiff. They contend:

1. That Congress could not rightfully limit the time within which military warrants should be located and surveyed.

2. That the act of Congress prohibiting locations on lands already surveyed and declaring any patent which should be issued on such survey void does not comprehend the survey in this case.

The first point to be considered is the objection to the limitation of time prescribed by Congress within which the military warrants granted by Virginia should be

located. The plaintiff contends that no limitation can be fixed.

In the October session of 1783, the Legislature of Virginia passed an act ceding to Congress the territory claimed by that state lying northwest of the River Ohio under certain reservations and conditions in the act mentioned. One of these was

"That in case the quantity of good land on the southeast side of the Ohio, upon the waters of the Cumberland River, and between the Green River and Tennessee which has been reserved by law for the Virginia troops on the continental establishment, should, from the North Carolina line bearing in further upon the Cumberland lands than was expected, prove insufficient for their legal bounties, the deficiency should be made up to the said troops in good lands to be laid off between the Rivers Scioto and Little Miami on the northwest side of the River Ohio, in such proportions as have been engaged to them by the laws of Virginia."

This is not a reservation of the whole tract of country lying between the Rivers Scioto and Little Miami. It is a reservation of only so much of it as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia Line on the continental establishment on the southeast side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency and an opinion that it will not be very considerable. Subsequent resolutions of the Virginia Legislature have added very much to the amount of these bounties. The residue of the lands are ceded to the United States for the benefit of the said states,

"to be considered as a common fund for the use and benefit of such of the United States as have become or shall become, members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and

expenditure, and shall be faithfully and *bona fide* disposed of for that purpose and for no other use or purpose whatever."

The government of the United States then received this territory in trust not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the Confederation, and this trust is to be executed "by a faithful and *bona fide* " disposition of the land for that purpose.

We cannot take a retrospective view of the then situation of the United States without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government, and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object which was also of vital interest. This was to be effected only by prescribing the time within which the lands to be appropriated by these claimants should be separated from the general mass so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust. The time ought certainly to be liberal. But unless some time might be prescribed, the other purposes of the trust would be totally defeated, and the surplus land remain a wilderness.

This reasonable and we think necessary construction has met with general acquiescence. Congress has acted upon it, and has acted in such a manner as not to excite complaints either in the State of Virginia or the holders of military warrants.

If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence. The condition annexed by Congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants by securing titles previously acquired. We are to inquire whether the case of the defendants is within it.

2. It has been contended that the prohibition in the act of 2 March, 1807, to make locations on lands which had been previously surveyed, does not extend to the

survey of the defendants, because that survey was made on warrants which had been previously satisfied. The word "survey," as used in the law, is not satisfied by the mere circumstance that a chain has followed a compass round a particular piece of ground, but requires that it should be made in virtue of a warrant for the purpose of appropriating land to which the holder of that warrant is entitled by law. The warrant can be an authority

Page 26 U. S. 636

for surveying and appropriating so much land only as it professes to grant, and this necessary limitation, could it require confirmation, is confirmed by the Act of 9 June, 1794, which regulates the manner of issuing patents on surveys for less than the whole quantity of land specified in the warrant. That act contains a proviso "That no letters patent shall be issued for a greater quantity of land than shall appear to remain due on such warrants." As patents had issued for the whole quantity of land specified in the warrants on which the survey of the defendants professes to be founded previous to the entry of the plaintiff, no patent could at that time have been obtained by the defendants, and therefore the saving in the statute could not have been intended for their survey.

The Court has felt the weight of this argument and has bestowed upon it the most deliberate consideration.

The Act of 23 March, 1804, is the first act which prescribes the time within which the holders of military warrants shall make their locations and surveys. That act requires that the locations shall be made within three years from its passage. On 2 March, 1807, the first act was passed giving a further time of three years for making locations, and of five years for returning surveys. This act contains the proviso of which the defendants claim the benefit. In every act which has been since passed prolonging the time for making entries and returning surveys on military warrants, the same proviso has been introduced. It was enacted in March, 1807, and has continued in force ever since. It constitutes a limitation to the right given by all subsequent laws to locate and survey military warrants.

If it be conceded that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity. We must therefore inquire to which class the survey of the defendants belongs.

Nathaniel Massie was probably the proprietor of Leven Powell's whole warrant of 2,000 acres, certainly of 403 acres part thereof, when he made the entry under which the defendants claim. He was also the proprietor of 150 acres, part of Thomas Goodwin's warrant. We say he was at that time the proprietor of those warrants because he made an entry for 403 acres, part of Powell's warrant, in his own name on 27 January, 1795, and an entry for 150 acres, part of Goodwin's warrant, in his own name on 16 June, 1795, both which entries were afterwards surveyed and patented for himself and his heirs. These two entries amount to 553 acres, the

Page 26 U. S. 637

quantity for which the entry sold to the defendants was made. Being thus the proprietor of both these entries and of the warrants on which they were founded, he makes an entry in his own name on 19 July, 1796, for the same quantity of 553 acres. This last entry, the warrants being satisfied if the previous entries remained in force, was inconsistent with the two preceding entries. It ought not to have been made by him nor allowed by the principal surveyor unless those preceding entries were withdrawn. According to the usage of the office, as stated in *Taylor's Lessee v. Myers,* 7 Wheat. 23, Massie had the power to withdraw them. Had he expressed to the Surveyor General his wish to withdraw them and to reenter the warrants, his wish would not have been opposed. But without expressing this wish, so far as the case shows, he made the entry in question. This act was lawful if the two preceding entries were removed -- unlawful if they stood. The officers of the government did their duty if this entry displaced the two which preceded it, but violated their duty if it had not this effect. Unquestionably, in an office regularly kept, the withdrawal of an entry ought to appear upon the record; but had this office been regularly kept, the last entry could not have been allowed unless

accompanied by a withdrawal of those which were inconsistent with it.

Had Nathaniel Massie transferred his right to the two last preceding entries previous to the time of making this for the defendants, so that the contest was between purchasers, the prior entries could not have been affected by his subsequent act. But he had not transferred his right to them, the contest, had one arisen, would not have been between purchasers, but between a purchaser and the wrongdoer himself. Can it be doubted how such a controversy would have terminated? Nathaniel Massie, being the proprietor of 553 acres of military land warrants, enters them on lands which they might lawfully appropriate; afterwards, possessing a perfect right to cancel this entry and locate the warrants elsewhere, he does locate them elsewhere and sells this location to a purchaser for a valuable consideration without notice. It cannot, we think, be doubted that a court of equity would at any time, while Massie remained the owner of the prior entries, relieve such purchaser by annulling the entries which obstructed the title of the purchaser, or decreeing that Massie should withdraw them, or enjoining him from carrying them into grant. Had the plot and certificate of survey, with the accompanying vouchers required by law, been presented by the defendants previous to the proceedings taken by Massie to obtain patents for himself, a grant would have issued to the defendants. Their survey then was not an absolute nullity. It might have been supported in a

Page 26 U. S. 638

court of equity, and had the defendants, instead of trusting, as they probably did, to Massie for a title, been diligent in the pursuit of it themselves, they might perhaps have obtained one from the United States.

This was not a fictitious, but an actual survey, made as early as the year 1796 by a regular officer for one owning the warrants on which the entry purports to be made and having at the time full power to give complete validity both to the entry and survey. No circumstance attended them which could enable a purchaser to detect the latent defect. The survey, having every appearance of fairness and validity given to it by the regular officers of the government, is sold at least as early as the

year 1796 to persons who take possession of it and have retained possession ever since. Why should not the proviso in the act of Congress apply to the case? The words, taken literally, certainly apply to it. "No locations shall be made on tracts of land for which patents had previously been issued or which had been previously surveyed." Had a patent been previously issued on this very survey, this contest could never have arisen. Does the language of the clause furnish any distinction between the patent and the survey? If it be a survey, there is none. Lands surveyed are as completely withdrawn as lands patented from subsequent location.

It cannot be said that the prohibition was intended only for valid and regular surveys. They did not require legislative aid. It was known that the military district abounded with defective entries and surveys which might be defeated by entries made in more quiet times, with better knowledge of the requisites of law. This clause was introduced for their protection. It was, most truly, an enactment of repose. A survey made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location which he was not permitted to pass; which he was not at liberty to examine. Had the survey been made on land not previously located, it would have been as destitute of validity as it is now supposed to be. Yet it is admitted that though it should not cover one foot of the location, the land surveyed could not be appropriated by a subsequent locator. The illegality of the survey would not have been examinable by him.

We cannot draw the distinction between such a case and this. Congress does not appear to have drawn it. They are both surveys made by the regular officers on military warrants.

It may be that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case to say that as we

understand the act of Congress, it was not liable to location when the plaintiff's entry was made.

We have not noticed the testimony of the principal surveyor, because we do not think it affects the case. The word "error" was written on the face of the plot we know not when; certainly after it was recorded and after the certificate exhibited by the defendant at the trial had been given. It manifests his opinion that he acted improperly in admitting the survey to record, but that opinion cannot affect the case. The great original impropriety was in omitting to require that the previous entries made in the name of Massie should be withdrawn expressly when this entry was made.

This case is not, we think, like *Taylor's Lessee v. Meyers,* reported in 7 Wheat. 23. In that case, the owner had openly abandoned his location and survey and had placed his warrant on other land. In such case, the land was universally considered as returning to the mass of vacant land and becoming, like other vacant land, subject to appropriation. A person having no interest in the original survey attempted to set it up against a subsequent locator under the proviso in the act of Congress which has been stated. The Court said

"the proviso of that act which annuls all locations made on lands previously surveyed applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest."

This survey has not been abandoned by any person having title to it, and the defendants still have an interest in it.

We think there is no error in the decree, and that it ought to be affirmed.