

Hunt Vs. Wickliffe

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Appeal No. : 27 U.S. 201

Appellant : Hunt

Respondent : Wickliffe

Judgement :

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Hunt v. Wickliffe

27 U.S. (2 Pet.) 201

APPEAL FROM THE CIRCUIT

COURT OF KENTUCKY

SYLLABUS

An entry was made in the land office of Kentucky of one thousand acres, in the name of "John Floyd's heirs," without naming the persons who were the heirs. Upon an objection to the validity of the entry, the court said that substituting a legal

description which cannot be misunderstood for the more definite description by the proper names of the persons who are the heirs, was not of such substantial importance as to vitiate the transaction.

An entry was made "so as to join the settlements on the north east and south sides thereof, *so as not to run into the old military surveys which are legal.* " The old military surveys formed together a parallelogram, and adjoined the lands intended to be described by the entry. It was objected that the limitation on the entry "*so as not to run-into the old; military surveys which, are legal*" rendered the whole entry so uncertain as to make it void.

The rules which are settled in Kentucky would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north east and south side of the settlement, the whole land to be included by rectangular lines. The old military survey must therefore be

so contiguous to the settlement as to stop one or two of those lines. A subsequent locator knows where to look for them, and the testimony in the cause informs us that he would encounter no difficulty in finding them.

"We consider the last word, 'which are legal,' merely as an affirmance that they are so, not as leaving it doubtful, and consequently that they make no change in the entry."

?It is well settled, both in the court of Kentucky and in this Court that a possession which will bar an ejectment is also a bar in equity.

?Each of the parties held in possession distinct parts of the land in controversy. In this state of things, it is well settled that the party having the better right is in constructive possession of all the land not occupied in fact by his adversary.

?The law of Kentucky authorizes its courts of chancery to make decrees against absent defendants on the publication of an order for two months successively in some paper authorized to make the publication and on fixing it up at certain public places prescribed by the act. This publication is considered as a constructive

service of the process. The Supreme Court of Kentucky has decided that the publication must be continued for two calendar months.

As the plaintiff's in the circuit court claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, the bill ought not to have been dismissed for want of parties. The circuit court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should have been without prejudice.

This was an appeal from the Circuit Court of Kentucky, in which court the appellants had filed a bill against the appellee, claiming from him a conveyance of the legal title

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to certain lands in the State of Kentucky to which the appellee had the legal title, but by the appellants it was alleged, that they had a prior equitable title derived under certain entries made in the land office of that state. The bill was dismissed by the circuit without costs, and from the decree of dismissal an appeal was entered to this Court.

The defendant, Robert Wickliffe, claimed the land under patents to John Craig for 2,000 acres, dated 2 December, 1785, and to A. Fox and John Craig for 2,000 acres dated on the same day. He also asserted a possession, protected by the statute of limitations. The title under these patents interferes with the entries under which the appellants claimed, and the appellants in the circuit court sought to obtain a conveyance of all the interference, and also other portions of the grants to Floyd not included within the boundaries of Craig's, and Craig and Fox's patents.

The entries under which the heirs of John Floyd and those who hold under them claim the land were as follows:

"1779, October 29. John Floyd this day appeared and claimed a right to a settlement and preemption to a tract of land lying on Four Mile Creek, eight miles northwest from Boonsboro, including a plantation claimed by the said Floyd called

Woodstock, raising corn on the premises -- 1776, satisfactory proof being made to the court that said Floyd has a right to a settlement of 400 acres, including said improvement, and a preemption of 1,000 acres adjoining, and that a certificate issue,"

&c.;

Under this certificate for a settlement and preemption, the entries were made.

"November 3, 1779. John Floyd enters 400 acres of land by virtue of a certificate, . . . on Four Mile Creek, about eight miles northwest from Boonsboro, including a plantation called Woodstock."

"1780, April 28. John Floyd, assignee of James Taylor, assignee of George Muse, enters 800 acres as assignee of Lance, 200 acres, upon military warrants, between the lines of David Robinson and John Carter, Andrew Boyd, Thomas Barns and Jonathan Martin on Four Mile Creek."

This entry appears to have been located in two surveys,

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and is designated on the plat 245 acres and 240 acres. The latter interferes with the land held by the appellee.

"April 19, 1778. John Floyd, assignee, enters 1,600 acres upon a military warrant on Boon's Creek adjoining David Robinson's west line, extending along said line, and westwardly for quantity. A part of this appears to be surveyed in a survey of 246 acres, as represented on the plat."

"May 31, 1783. John Floyd's heirs enter 1,000 acres on a preemption warrant No. 1054, joining the settlement at Woodstock on the north east and north sides thereof, so as not to run into the old military surveys which are legal."

These surveys all adjoin, and were patented in January, 1789, to Mourning, George, John Floyd, and Jane Breckenridge, wife of Alexander Breckenridge,

formerly Jane Floyd, widow of said John Floyd.

The appellants had, under a decree of the Fayette Circuit Court of Kentucky, obtained a conveyance from the patentee of 694 acres, part of the land embraced in these surveys.

The appellee had made no effort to establish the entries under which he claimed, relying upon his elder legal title, and an asserted possession.

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

This is a suit in chancery, brought by the plaintiffs in the Court of the United States for the Seventh Circuit and District of Kentucky, to obtain a conveyance of lands to which the defendant has a legal title but to which the plaintiffs claim the equitable title under prior entries which they allege to be valid. At the hearing, the bill was dismissed with costs. From this decree the plaintiffs have appealed to this Court.

The plaintiffs derive their title from John Floyd, deceased. As the patent of the defendant is anterior to that under which the plaintiffs claim, their equitable title cannot be sustained unless it be founded on prior valid entries. These entries therefore must be examined.

In 1779, John Floyd obtained a certificate for a settlement right of 400 acres, and a preemption right to 1,000 acres to adjoin his settlement. On 3 November, 1779, he made an entry of this 400 acres, to include a plantation called Woodstock. The validity of this entry is not controverted, nor is it otherwise important than as it may serve to establish the entry of the preemption warrant so far as that entry depends upon the settlement.

On 31 May, 1783, John Floyd's preemption warrant was entered in the following words:

"John Floyd's heirs enter 1,000 acres of land on a preemption warrant, No. 1054, joining the settlement at Woodstock, on the north, east, and south sides thereof, so as not to run into the old military surveys, which are legal."

Two objections have been made to this entry; the first is that it is made in the name of the heirs of John Floyd without naming them.

That there is less precision and certainty in this

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description than if the heirs were named must be admitted, but the Court is not prepared to say that the entry is on that account a nullity. No case has been adduced in which the courts of Kentucky have so decided, and as the description is sufficiently certain to identify the persons entitled under it, we should feel great difficulty in declaring it to be void.

In considering this question, the peculiar situation of Kentucky at the time cannot be overlooked. Warrants had been issued for more land, perhaps, than was to be found in the country; certainly for more than was valuable. These warrants had been most generally placed in the hands of locators by the proprietors, who resided in the Atlantic states. The communication between the principal and agent was tedious and uncertain. The holder of the warrant might often hear of the death of its proprietor at a critical moment, when its immediate location was very interesting to the family of the deceased and when he was not informed of the names of the persons entitled to the warrant. To delay in making the entry until this information could be gained might and probably would be very injurious to the family of the deceased, and no injury could result to any from making it in the name of the heirs generally. If they were not all entitled, they would all be trustees for those who were. The entry is an incipient step towards obtaining a title. Its object is at the same time to appropriate the land it covers and to give notice to others that the land is appropriated. We do not think the technical objection to substituting a legal description, which cannot be misunderstood, for the more definite description by the proper names of the persons who are heirs is of such

substantial importance as to vitiate the transaction. We are confirmed in this opinion by the fact that the survey was made in pursuance of the entry in the name of the heirs of John Floyd generally, and that the patent was issued on this survey. Several other entries and surveys were made for the heirs without specifying their names and patents issued on them all. The objection was certainly not deemed valid by the officer who was entrusted with the power of granting titles to land.

A second and more serious objection has been taken to

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the language of the entry. It is to join the settlement on the north, east, and south sides thereof so as not to run into the old military surveys, which are legal.

The old military surveys, forming together a parallelogram, adjoined Floyd's settlement on the northwest, making an acute angle with its northern line, so that the portion of his preemption warrant which adjoined his settlement on the north could not be extended the whole length of the northern line without interfering with them. It is contended that this limitation on the entry "so as not to run into the old military surveys, which are legal" renders the whole so uncertain as to make it void.

We do not think so. The rules which are settled in Kentucky would require that this entry, had the restriction respecting the military surveys been omitted, should be surveyed equally on the north, east, and south sides of the settlement, the whole land to be included by rectangular lines. The old military surveys therefore must be so contiguous to the settlement as to stop one or two of those lines. A subsequent locator knew where to look for them, and the testimony in the cause informs us that he would encounter no difficulty in finding them. The evidence is that they were well known and that the lines were plainly marked so as to be traced without difficulty.

We consider the last words of the entry, "which are legal," merely as an affirmance that they are so, not as leaving it doubtful, and consequently that they make no change in the entry. Understanding them in this sense, we perceive no sufficient

objection to the entry. We cannot perceive any reason why the lines might not be stopped by an old military survey which is well known, as well as by any other well known object. The shape and form of the land, independent of this reference, being given by the settled rules in Kentucky, the position of the old military surveys must be such as to vary that shape. A subsequent locator could find no real difficulty in fixing the form of the entry. But if this restriction be entirely discarded and the entry be surveyed without regard to the old military surveys, it will make very little difference in the degree of interference between

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the claims of the parties, and no difference in the decree which will be made by this Court. It will therefore not be necessary to decide at this time in what manner this entry ought to be construed.

The lands held by the defendant also interfere with another entry made by Floyd.

On 29 April, 1780, John Floyd entered 1,600 acres upon a military warrant on Boon's Creek, adjoining David Robinson's west line, extending along said line and westwardly for quantity.

David Robinson had a survey made in 1776 on a military warrant. He afterwards entered a settlement and preemption warrant to adjoin this military survey, and surveyed them in September, 1780. The counsel for the defendant objects to the legality of this entry because it does not designate the tract for the west line of which it calls and because David Robinson's survey had not sufficient notoriety to inform a subsequent locator on what part of Boon's Creek he was to search for it.

The first objection is certainly not well founded. Floyd's entry was made before David Robinson's settlement and preemption were surveyed, possibly before they were entered. But, were it otherwise, this settlement and preemption form one tract with his military survey so as to have the same west line.

There is more weight in the second objection. The testimony to establish the notoriety of Robinson's survey is far from being conclusive. John Bradford

deposes that he was conversant in the quarter in which these lands lie in November, 1779, that he had no knowledge of the military survey of David Robinson but from the records, except from common conversation, but does not know at what time he first heard it spoken of. He knows that Robinson and Hickman have military surveys in that neighborhood, but never understood their precise situation. He believes the McGees, at McGee's Station, knew, and could show the lands of David Robinson but of this he is not certain.

Robert Boggs deposes that he was at the making of David Robinson's military survey, and that he has been conversant

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in the neighborhood from the year 1775 to the time of giving his deposition. To the question, "from your first knowledge of those surveys (Robinson's and others') were they known and familiarly spoken of by the names of their proprietors, as aforesaid?" he answers, "he thinks they were, shortly after." He says,

"he thinks the lines of Robinson's and Martin's surveys could have been found by reasonable inquiry at any time after they were made, for they were plainly marked."

He left Kentucky and returned in the year 1779. He left it again in the fall of 1780 and returned in 1783. He is not certain that any person was acquainted with the lines of David Robinson's military survey on 29 April, 1780, except David and William Robinson David McGee, John Hays, and Jacob Boughman. The Robinsons and Boughman lived in Virginia, McGee at his station, about one and a half or two miles from the survey. The body of the land was spoken of, and he believes was known by many.

In estimating the weight of this testimony, it must be recollected that the depositions were taken more than forty years after Floyd's entry was made. Few persons who were alive and in the neighborhood at the time now survive. A fact resting mainly in memory, which might have been established with ease in 1780, would be ascertained with difficulty in 1825. Examining the testimony under this

aspect of circumstances, we think, although it may not be conclusive, it is sufficient to sustain the entry. John Bradford had no personal knowledge of Robinson's survey, but intimates that he was acquainted with it from the records and from common conversation. His deposition is not explicit as to time. His deposition, however, appears rather to refer to a remote time. The people at that time were in stations, and the nearest, certainly one within two miles of the place, was McGee's. He believes, but is not certain, that the McGees knew and could have shown the land. Robert Boggs was present at the survey. It was known and spoken of as Robinson's shortly afterwards. Though he mentions only five persons who, in addition to himself knew the lines, three of whom resided in Virginia; still, he says the body of the land was spoken of and he believes was known by many.

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A military survey made before the land office was opened must have attracted the general attention of those in the neighborhood, and after the office was opened must have excited general inquiry. Those surveys were established by law, and it was consequently an object with locators to obtain exact information respecting them in order to avoid them. Robinson's survey was spoken of at McGee's, the very place where inquiry would be made. Other witnesses whose knowledge of that part of the country commenced five or six years afterwards speak of Robinson's survey as having then acquired general notoriety. There is then strong reason to believe that a subsequent locator, having Floyd's entry in his hands, could with reasonable inquiry have found the west line of Robinson's entry.

The defendant also relies on an adversary possession in himself and those under whom he claims for more than twenty years. His proof of this fact is sufficient, and it is well settled both in the courts of Kentucky and in this Court that a possession which will bar an ejectment is also a bar in equity. But in this case the plaintiffs also have been in possession. John W. Hunt deposes that he took possession of the tract of land in controversy for the plaintiffs, leased it out for a number of years, and accounted with them for the rent. He exhibits the copy of an agreement made with Isaac Johnson and Thomas Coleman on 12 August, 1800, for three years,

and says that other tenants succeeded them who continued to pay him the rent for the plaintiffs until the year 1815. The rent he received in that year was, he believes, for the year 1814. Each of the parties then has held possession of distinct parts of the land in controversy. In this state of things, it is well settled [[Footnote 1](#)] that the party having the better right is in constructive possession of all the land not occupied in fact by his adversary. If, then, the plaintiffs in this case have the better title, that title is barred by the possession of the defendant so far as that possession was actual, but not further.

No question can arise in this case under the act which makes

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the possession of seven years a bar, because the plaintiffs were in actual possession of part of the land until the year 1815 and this suit was instituted in April, 1820.

If then, the title of John Floyd is regularly vested in the plaintiffs, we perceive no sufficient obstacle to their recovering at least a part of the land in controversy.

The plaintiffs claim 694 acres of land, part of the entries which have been considered, and charge generally in their bill that they have regularly obtained a conveyance for the same from the heirs of the said Floyd by metes and bounds, without specifying the persons through whom the title is derived.

The will of John Floyd, proved and admitted to record in Jefferson County in March 1794, is among the exhibits in the cause. In that will he devised his tract of land called Woodstock (which includes the land in controversy) to his daughter Mourning Floyd, and to his son George Floyd. Patents issued on the entries and surveys for the lands in dispute, to Mourning Floyd, John Floyd, George Floyd, and Jane Floyd, widow of the said John Floyd, as tenants in common.

It appears from another exhibit in the cause that in the year 1815, the plaintiffs with others filed their bill in the Circuit Court of Fayette County, in the State of Kentucky, sitting in chancery, against the heirs and devisees of Thomas Turpin

and of John Floyd deceased, praying for a conveyance of 699 acres of land, part of the Woodstock tract.

The bill states that in January, 1798, Thomas Turpin sold to John W. Hunt and Abijah Hunt 699 acres of land, part of John Floyd's survey, called and known by the name of Woodstock tract, and on the same day executed his bond to them in the penalty of \$4000, with a condition for the conveyance thereof, on or before the first day of March thereafter. The said Abijah Hunt and Thomas Turpin both departed this life, no conveyance of the land being made. Abijah Hunt, by his last will, devised his interest in the land to the plaintiffs, and the legal estate of Thomas Turpin descended to his heirs.

The bill further states that John Floyd devised his tract of

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land called Woodstock, consisting of 4,000 acres, of which the land sold by Thomas Turpin was part, to his daughter Mourning Floyd, since intermarried with John Stewart, and his son George Floyd, to be equally divided between them; that the said Stewart and wife did execute a deed for the said 669 acres of land to Thomas Turpin in his lifetime, but they are informed that the same was burnt in the office of the County Court of Fayette when the same was destroyed by fire.

A subpoena issued on this bill, which was not executed on several of the defendants, among whom were included John Stewart and Mourning his wife, they being no inhabitants of the country.

In February, 1815, the court ordered that unless the nonresident defendants shall appear and answer on or before the first day of the next June term, the bill should be taken for confessed against them, and that a copy of the order be inserted in some authorized newspaper of the commonwealth for eight weeks in succession, agreeably to law.

It appearing that this order was published and that process was served on the resident defendants, the court, in June term, 1816, decreed that the bill should be

taken for confessed and that a commissioner appointed by the court should convey the title of the defendants to the plaintiffs.

The plaintiffs in this suit claim title to the lands in controversy under the conveyance executed in pursuance of this decree. The defendant insists that no title passes by it, because Floyd's heirs were not parties to the suit.

The laws of Kentucky authorize their courts in chancery to make decrees against absent defendants on the publication of an order such as was made in this cause by the Circuit Court of Fayette County for two months successively in some paper authorized to make the publication and on fixing it up at certain public places prescribed by the act. This publication is considered as a constructive service of the process. The Court of Fayette County obviously supposed a publication for eight weeks to be a compliance with this law, but we understand that the supreme court of the state has determined otherwise. That tribunal has decided

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that the publication must be continued for two calendar months. Under this construction of the act, the heirs of John Floyd were never before the court, and the decree was made against persons who were not parties to the suit. It cannot affect them. [[Footnote 2](#)] The Court therefore has no evidence that the legal or equitable right of Floyd's devisees has been acquired by the plaintiffs. They cannot be allowed to assert the equity of those devisees against the defendant without making them parties to the suit.

But as the plaintiffs claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, we do not think their bill ought to have been dismissed. The circuit court ought to have given leave to make new parties, and on their failing to bring the proper parties before the court, the dismissal should be without prejudice.

The decree of the circuit is reversed, and the cause remanded with directions that the plaintiffs have leave to amend their bill, and make new parties.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Kentucky and was argued by counsel, on consideration whereof it is considered, ordered, and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby reversed and annulled, and that this cause be and the same is hereby remanded to the said circuit court with directions that the plaintiffs have leave to amend their bill and make new parties.

[[Footnote 1](#)]

[Green v. Liler](#), 8 Cranch 229.

[[Footnote 2](#)]

Pract.Reg. in Ch. 125; Ca.Chan. 48; Com.Dig. tit. chancery F. 3.

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