

Patterson Vs. Jenks

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Appellant : Patterson

Respondent : Jenks

Judgement :

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Patterson v. Jenks

27 U.S. (2 Pet.) 216

ERROR TO THE SIXTH CIRCUIT COURT OF THE

UNITED STATES FOR THE DISTRICT OF GEORGIA

SYLLABUS

Construction of the provisions of the treaties with the Indians made by the State of Georgia relative to boundaries and of the acts of the legislature of that state relative to grants of lands within its territorial limits and which were not within the

Indian boundary line as defined by the treaties and as recognized by those acts.

Undoubtedly the presumption is in favor of the validity of every grant issued in the forms prescribed by law, and it is incumbent on him who controverts it to support his objections. The whole burden of proof lies on him. But if his objections depends on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony also must be laid before the jury, and the court may declare the law upon the fact, but cannot declare it on the testimony.

If the State of Georgia has construed its treaty with the Cherokee Indians by any subsequent acts manifesting an understanding of it, this Court would not hesitate to adopt that construction.

If the State of Georgia has practically settled the limits of Franklin County, such settlement ought to have been conclusive on the circuit court.

In the nature of things, we perceive no reason why the grant of the land in controversy should not be good for land which it might lawfully pass and void as to that part of the tract for the granting of which the office had not been open. It is every day's practice to make grants for lands which have in part

been granted to others. It has never been suggested that the whole grant is void because a part of the land was not grantable.

The principle that a patent conveying lands lying partly within and partly without the territory retained by the Indians was void as to so much as lay within it and valid for the residue was settled by this Court in the case of [Danforth v. Wear](#), 9 Wheat. 673. This decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.

This cause was tried in Milledgeville at May term, 1827. In the course of the trial, a number of questions were raised, on some of which the judges, being divided in opinion, refused to give the jury the instruction prayed by the plaintiff, and a verdict and judgment were rendered for the defendants. The present writ of error was brought to reverse this judgment.

In the court below, the plaintiff, to sustain his case, gave in evidence a grant from the State of Georgia to Bazil Jones

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for 7,160 acres of land in Franklin County on the waters of the south fork of the Oconee River, since called the Appalachie, bearing date 24 May, 1787, and deduced his title to the disputed premises regularly from the grantee.

On the part of the defendants it was contended that this grant was void

1. Because the land attempted to be granted was without the temporary boundary line of the state and within the Indian hunting ground.

2. Because the survey wanted the line and station trees required by law, the surveyor had omitted to note on his plat the beginning corner, had laid down the watercourses inaccurately, and had been guilty, as was alleged, of various other acts of fraud, negligence, irregularity, or ignorance in making and platting the survey prior to the emanation of the grant.

Evidence was also given on behalf of the plaintiff to establish the lines, and to prove the possession of the defendants within them.

The first exception stated that the plaintiff gave evidence conducing to prove that the south fork of the Oconee River, known as the Appalachie, runs through the land described by the grant and plat aforesaid, under which the plaintiff derives title, and that all the lands within the said grant, which are in possession of the defendants in this action, are on the north and east side of the said south fork of the Oconee River, and within the territorial limits of the State of Georgia as defined by Hawkins' Line, which said line was run by Benjamin Hawkins under the authority of the United States to define the temporary boundary line between the State of Georgia and the Creek Indians, and that all the lands included within the aforesaid grant are situated on the waters of the said south fork of the Oconee River. And thereupon the counsel for the plaintiff moved the court to instruct the jury that the grant from the State of Georgia to Bazil Jones, under which the

plaintiff derives title to 7,160 acres of land in Franklin County in the said state

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was a legal and valid grant, which instruction the court, being divided in opinion, refused to give.

The second exception stated that the counsel for the plaintiff also moved the court to instruct the jury that upon the aforesaid evidence, taking the same as true, the said tract of land so granted to Bazil Jones was, at the time of the survey and grant thereof, within the territorial limits of the State of Georgia as ascertained by laws and treaties, within the limits of Franklin County as by law defined, and not within the Indian boundary line, which instruction the court, being divided in opinion, refused to give.

The third exception stated that the counsel for the plaintiff also moved the court to instruct the jury that the said grant to Bazil Jones, under which plaintiff derived title, was a legal and valid grant for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee River, now called Appalachie, *including all the waters of the same*, which instruction the court, being divided in opinion, refused to give.

The fourth exception stated, that the counsel for the plaintiff moved the court to instruct the jury that the said grant to Bazil Jones, under which the plaintiff derives title, was a legal and valid grant for all the lands exhibited on the plats as lying north and east of the south fork of the Oconee River, called Appalachie, which instruction the said court, being divided in opinion, refused to give.

The fifth exception stated that the plaintiff moreover gave evidence conducing to identify and prove certain corner trees, station trees, and lines of the said tract of land granted to Bazil Jones aforesaid, before described, and including all the lands on the north and east side of the south fork of the Oconee River in the possession of the defendants. And thereupon the counsel for the said plaintiff moved the court to instruct the jury that neither the want of the line and station trees required by any law nor the omission of the surveyor to note on his plat the beginning corner

nor any mistake in platting the watercourses nor any fraud, irregularity, negligence, or ignorance of the

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officers of government prior to the issuing of the grant to Bazil Jones under which the plaintiff derives title did or could legally affect the right of the plaintiff to recover; that the existence of the grant is in itself a sufficient ground to infer that every prerequisite has been performed and that as to all irregularities, omissions, acts of fraud, negligence, or ignorance of the officers of government prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them, which instruction the court, being divided in opinion, refused to give.

The sixth exception stated that the plaintiff moreover gave evidence conducing to prove that the title of Bazil Jones, the grantee of the said land, had been regularly and legally conveyed to the lessee of the plaintiff in this action before the commencement thereof, and that all the lands in the possession of the defendants and of each of them at the time of the service of the process in this action were within the lines described by the said grant to the said Bazil Jones and were on the north and east side of the said south fork of the Oconee River. And thereupon the said counsel for the plaintiff moved the court to instruct the jury that upon the aforesaid evidence, if the jury believed the same, the plaintiff was by law entitled to recover the premises in dispute, which instruction the court, being divided in opinion, refused to give.

On the part of the plaintiff in error, also plaintiff in the original action, two points were made:

1. That the grant to Bazil Jones is a good and valid grant *in toto*.
2. That if not good for the whole, it is so at least in part, including all the premises disputed in the present action.

To maintain these propositions, it was insisted,

1. That at the time of the emanation of the grant to Bazil Jones under which the plaintiff desires title, the lands lying on the south fork of the Oconee River, *including all the waters of the same*, were within the territorial limits of

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the State of Georgia, within the limits of Franklin County, as by law defined, and not within the temporary Indian boundary line, and that the said grant to Bazil Jones was and is a good and valid grant for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee River, now called Appalachie, *including all the waters of the same*.

2. That a large part of the land embraced in the said grant lies north and east of the south fork of the Oconee River, now called Appalachie, being the branch designated by the United States commissioner, Hawkins, as the temporary Indian boundary line, and was consequently, at the time of the issuing the said grant, within the acknowledged limits of the State of Georgia. As to so much of the said land, therefore, the grant is valid, and since this comprehends all that was in possession of the defendants at the commencement of the present action, the plaintiff is entitled to recover.

3. That neither the want of the line and station trees required by any law nor the omission of the surveyor to note on his plat the beginning corner nor any mistake in his platting the watercourses nor any fraud, irregularity, negligence, or ignorance of the officers of government prior to the issuing of the grant to Bazil Jones under which the plaintiff derives title did or could legally affect the right of the plaintiff to recover; that the existence of the grant is in itself a sufficient ground to infer that every prerequisite has been performed, and that as to all irregularities, omissions, acts of fraud, negligence, or ignorance of the officers of government prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them.

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

This is a writ of error to a judgment rendered in the Court of the United States for the Sixth Circuit and District of Georgia in a case in which the plaintiff in error was

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plaintiff in ejectment. The plaintiff derived title from a grant dated in May, 1787, which was issued by the Governor of Georgia to Bazil Jones. At the trial, the counsel for the plaintiff moved the court to instruct the jury on several points on all which the judges were divided, and therefore the instructions were refused, to which refusal exceptions were taken. The verdict and judgment were rendered in favor of the defendants, and the plaintiff has sued out this writ of error, by which the record is removed into this Court. The opinions refused by the court, and the exceptions taken by counsel, will be severally considered.

The first is in these words.

"The plaintiff moreover gave evidence conducing to prove that the south fork of the Oconee River, known as the Appalachie, runs through the land described by the grant and plat aforesaid, under which the plaintiff derives title, and that all the lands within the said grant which are in possession of the defendants in this action are on the north and east side of the said south fork of the Oconee River and within the territorial limits of the State of Georgia as defined by Hawkins' Line, which said line was run by Benjamin Hawkins under the authority of the United States to define the temporary boundary line between the State of Georgia and the Creek Indians, and that all the lands included within the aforesaid grant are situated on the waters of the said south fork of the Oconee River. And thereupon the counsel for the said plaintiff moved the court to instruct the jury that the grant from the State of Georgia to Bazil Jones under which the plaintiff derives title to 7,160 acres of land in Franklin County in said state was a legal and valid grant, which instruction the court, being divided in opinion, refused to give."

This prayer is expressed in such terms that the court could not with propriety have granted it without explanation, whatever opinion on the law of the case might have

been entertained. Without stating a single fact or placing the prayer on the belief of the jury that the evidence proved any fact, the court is asked to say positively that the grant to Bazil Jones is legal and valid. Undoubtedly the

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presumption is in favor of the validity of every grant issued in the forms prescribed by law, and it is incumbent on him who controverts it to support his objections. The whole burden of proof lies on him, but if his objections depend on facts, those facts must be submitted to a jury. If opposing testimony be produced, that testimony also must be laid before the jury, and the court may declare the law on the fact, but cannot declare it on the testimony. In this case, the prayer states that the plaintiff offered testimony conducing to prove certain facts which were deemed essential to the validity of the grant, and asked the court to say not that if the testimony was believed or if those facts were proved, the grant was valid, but positively that the grant was valid. The court did not err in refusing to give this instruction.

The second exception states that the counsel for the plaintiff also moved the court to instruct the jury that, upon the aforesaid evidence, taking the same as true, the said tract of land so granted to Bazil Jones was, at the time of the survey and grant thereof, within the territorial limits of the State of Georgia as ascertained by laws and treaties, within the limits of Franklin County as by law defined, and not within the Indian boundary line, which instruction, the court, being divided in opinion, refused to give.

This prayer is made on the admission of the testimony stated in the first, and on its sufficiency to prove that the tract of land granted to Bazil Jones was situated on the land in controversy lay on the north and east side of that fork and within the territorial limits of the State of Georgia as defined by the line run by Benjamin Hawkins under the authority of the United States to define the temporary boundary line between the State of Georgia and the Creek Indians.

From these facts the court is asked to draw the conclusion that the tract of land was, at the time of the survey and grant thereof, within the territorial limits of the State of Georgia and within the limits of Franklin County as by law defined, and not within the Indian boundary line.

This prayer requires the court to say what was the

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boundary between that part of the State of Georgia to which its jurisdiction was extended and the Indians, and also what were the limits of Franklin County. As it requires an instruction respecting the whole tract, the court was bound to inquire whether the whole tract was within those limits. To ascertain these boundaries, the laws of Georgia and the treaties of that state with the Creek and Cherokee Indians must be examined.

On 31 May in the year 1783, a treaty was made at Augusta between the State of Georgia and the Cherokee Indians describing the line which should thereafter separate the settlements of the whites from the hunting grounds of the Indians. This line commences on the Savannah River, and is of no importance in this case until it reaches the top of Currohee Mountain. It is to proceed

"thence to the head or source of the most southern branch of the Oconee River including all the waters of the same, and thence down the middle of the said branch to the Creek line."

On the first day of November in the same year, the State of Georgia formed a treaty with the Creek Indians for the purpose of drawing the line between the settlements of the whites and the hunting grounds of the Indians. This line also commences on the Savannah River, and runs as described in the treaty to the top of Currohee Mountain. It proceeds

"thence to the head or source of the most southern branch of the Oconee River, including all the waters of the same, thence down the said river to the old line."

A subsequent treaty was held with the Creeks on 12 November, 1785, at Galphinton. The 4th article of this treaty declares that "the present temporary line reserved to the Indians for their hunting ground shall be agreeable to the treaty held at Augusta in the year 1783."

On 28 November, 1785, the commissioners of the United States held a treaty with the Cherokees at Hopewell in which it was agreed that the boundary line should run from the top of Currohee Mountain "to the head of the south fork of Oconee River."

The treaty at Shoulderbone, concluded in the year 1786,

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confirmed the line as established in the Treaties of Augusta and of Galphinton. All the treaties between Georgia and the Indians stipulate that the lines shall be marked as soon as possible, but it does not appear that they were ever marked. A treaty was afterwards entered into at New York between the United States and Creek Indians on 7 August in the year 1790 which fixes the boundary line from the top of Currohee Mountain

"to the head or source of the main south branch of the Oconee River, called the Appalachie, thence down the middle of the said south branch to its confluence with the Oakmulgee."

In pursuance of this treaty, the line from Currohee Mountain to the head or source of the main south branch of the river Oconee was run by Benjamin Hawkins.

Some ambiguity undoubtedly exists in the treaty made with the Creeks at Augusta, which, in a contest between Georgia and the Creeks, might claim a construction favorable to the pretension of the less powerful and less intelligent or skillful party to the compact. But in a controversy in which both parties claim title under the State of Georgia, it would seem reasonable to give the article that construction which Georgia herself has put upon it, provided it be reconcilable to the words. The line is to run "to the source of the most southern branch of the Oconee River,

including all the waters of the same." The source of the most southern branch is the source of the main stream of that branch. It is a point to which the line is to be run from the top of Currohee Mountain. This line, if the treaty gave no directions respecting its course, would be a straight line. But the treaty directs it to be so run as "to include all the waters of the same" -- that is, "all the waters" of the most southern branch. The line must therefore be drawn from the one given point to the other in such direction as to include all the waters of the most southern branch of the Oconee. It must therefore, instead of being straight, pass round the sources of all those streams which empty into the south fork on its northern side and are between the points of commencement and of termination. But it is obvious that no line from the top of Currohee Mountain to the

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source of the most southern branch of the Oconee River can include the waters which empty into it on the southern side.

To obviate this difficulty, the defendants insist that the line shall pass round the main branch of the south fork of the Oconee to the source of the lowest stream which empties into it on the south side and proceed down that stream.

This line would include all the waters of the south fork, but is attended with other difficulties of no inconsiderable magnitude. The words of the treaty seem to require that the line should stop at the source of the main stream, not at the source of an inconsiderable rivulet. From this source the line is to proceed down the river. It is reasonable to suppose that it proceeds down the river from the source of the river, not from the source of a small branch. It is to include all the waters -- that is all the tributary streams of that at whose source it stops. But this construction requires it to stop at the source of a stream, which is itself tributary to the very river which is spoken of as one of its waters.

If this construction be admitted and the source of the lowest stream on the south side be substituted for the source of the main stream, still the line must run down that lowest watercourse to the south fork, and down the south fork to the old line.

The case does not inform us that even this line would include the whole tract granted to Basil Jones. That tract is stated to lie on the waters of the south fork, but not on the Georgia side of the most extreme of those waters. So much of it as may be situated on the Indian side of that watercourse would be within the Indian hunting grounds.

The treaty made with the Cherokees at Augusta on 1 June, 1783, is apparently intended to establish the same line which was afterwards adopted in the treaty with the Creeks. The only variance in the language is that in the treaty with the Cherokees, the line from the source of the southern branch of the Oconee River, is to run "down the middle of the said branch;" in the treaty with the Creeks, it is to run "down the river." It is not probable that different lines could have been intended.

If the State of Georgia has construed this treaty by any subsequent

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acts manifesting her understanding of it, we should not hesitate to adopt that construction in this case. But the bill of exceptions contains no fact showing that Georgia has adopted a construction of her treaties with the Indians which would establish the boundary claimed by the plaintiff. On the contrary, in February, 1787, an act was passed "for the appointment of commissioners to run the line designating the Indian hunting grounds." This act directs the commissioners to proceed in conjunction with those to be appointed by the Creek nation, to trace and mark

"the temporary boundary line, as heretofore established -- that is to say, from Currohee Mountain, in the direction of the present temporary line from Zugalo River till the same shall strike the head or source of the main direct stream of the south branch of Oconee River, called also Appalachie, by which is to be understood the main fork of Oconee River, next above Little river."

This act seems to reject all claim, on the part of Georgia to lands lying south of the main stream of the south branch of Oconee, and to adopt the construction of the

treaties at Augusta, which appears to have been adopted by the commissioners of the United States at the treaty at Hopewell in 1785.

The prayer we are considering also requested the court to instruct the jury that the tract of land granted to Bazil Jones was within the limits of Franklin County as by law defined.

In February, 1784, the legislature passed an act for laying off two more counties to the westward. One of these was the County of Franklin.

The first section declares

"That the present temporary line circumscribing the Indian hunting ground shall be marked by a line drawn from that part of the north branch of Savannah River, known by the name of the Owee, which shall be intersected by a line north east from the Oconee Mountains; thence in the same direction to Zugalo River; from thence in a direct line to the top of Currohee Mountain; thence to the head or source of the most southern stream of the Oconee River, including all the waters of the

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same; thence down the said river to the old line, thence along the old line."

The only difference between this legislative description of the line circumscribing the Indian hunting ground and that in the treaty is in the substitution of the word "stream" for the word "branch." In the treaty, "the branch," and in the law, "the stream," appear to be considered as "the river." The line is to run from its source "down the said river." This language would seem to indicate that a considerable or main branch or stream, one which had acquired the name of river, not a small rivulet, was in the mind of the legislature. The line which runs to it from the top of Currohee Mountain is subject to all the uncertainty which attends the same line as described in the Treaty of Augusta.

The 2d section of the act proceeds to define the exterior lines of the County of Franklin. They run from the Savannah River to the south branch of the Oconee

River; thence up the said river to the head or source of the most southern stream thereof; thence along the temporary line separating the Indian hunting ground to the northern branch of the Savannah, &c.;

The southern boundary of Franklin County, from the place where the line from the Savannah strikes the most southern branch of the Oconee River, is up that river to the head or source of the most southern stream thereof. You find the head or source of this most southern stream by proceeding up the river.

It may well be doubted whether this description will admit of leaving the river for any of its small rivulets. The words "the most southern stream of the south branch of the Oconee whose source is to be found by proceeding up the river" may be satisfied either by pursuing the most southern stream which has acquired the name of river or the most southern stream which empties into the river. It can scarcely be imagined that Georgia has not settled practically the limits of Franklin County, and any such settlement ought to have been conclusive with the circuit court. But no such settlement is stated in the record, and the court is required

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to say in what manner its boundary lines are to be drawn in pursuance of the act of assembly by which it was constituted. The court is relieved from the difficulty by the same circumstance which made it unnecessary to determine the line which circumscribed the Indian hunting grounds. The statement of fact on which the opinion of the court is asked does not affirm that the land lies on the northern or Georgia side of the most southern stream, but that it lies on the waters of the south branch of the Oconee River. For this reason this instruction ought not to have been given as asked.

The third exception states that the said counsel for the plaintiff also moved the court to instruct the jury that the said grant to Bazil Jones, under which plaintiff derived title, was a legal and valid grant for all the lands exhibited on the plat as lying north and east of the south fork of the Oconee River, now called Appalachie, *including all the waters of the same*, which instruction, the court, being divided in

opinion, refused to give.

The Court understands the words "including all the waters of the same" to mean waters north and east of the south fork of the Oconee River. This application, like the second, is supposed to be made on the assumption that the facts stated in the first are true. If they are, then all the land contained in the patent lying north and east of the south branch of Oconee is on the Georgia side of the line circumscribing the Indian hunting ground and within the County of Franklin as described by law. The application supposed to be made to the court is to instruct the jury that the grant is good for so much land as lies within the County of Franklin, although part of the tract may be without that county and within the Indian boundary. The counsel for the defendants insist that under the laws of Georgia, the whole patent is void if any part of the land it purports to grant be within the Indian boundary. The counsel for the plaintiff contend that the laws, so far as they have declared patents to be void, are entirely retrospective, and that prospectively, they only inflict penalties on persons who shall make surveys in contravention of the statute.

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In January, 1780, an act was passed "for the more speedy and effectual settling of this state." The 19th section enacts

"That no warrant, survey, or plat made or laid out in the lands yet within the lines of the Indians shall be held valid, and the same is hereby declared null and void to all intents and purposes whatever; nor shall any grant which may hereafter be surreptitiously obtained be deemed legal or of any effect."

We do not think the language of this section entirely retrospective. The words "made or laid out" may apply to the future as well as the past and comprehend warrants and surveys which shall be, as well as those which have been, made or laid out in the lands yet within the lines of the Indians.

In February, 1783, Georgia passed an act for opening her land office. The 11th section of this act is retrospective so far as it annuls surveys and grants. Its prospective provisions only inflict penalties on the persons who shall make surveys or attempt to obtain a grant. But the 13th section, after describing the limits of the state, provides,

"That nothing hereinbefore contained shall extend or be construed to extend to authorize or empower any surveyor or other person or persons whatsoever to survey, run, or make lines upon the lands before described as being allowed to the Indians for hunting ground, or any part or parcel thereof before or until permission for that purpose shall be granted by the legislature and made known by proclamation."

In consequence of this proviso, the land office could not be considered as opened for lands within the Indian boundary.

The 5th section of the act of 1785, which has been relied on, is retrospective.

The Act of February, 1787, for the appointment of commissioners to run the line designating the Indian hunting ground inflicts additional penalties on those who shall thereafter survey or cause to be surveyed or obtain grants for any lands beyond the temporary line designating the Indian hunting ground. The 3d section is in these words,

"Whereas, notwithstanding the most positive laws to the

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contrary, many persons, from design or accident, have run large quantities of land and obtained grants for the same southward of the present temporary line between the good citizens of this state and the Indians, and expect to hold the same when a cession of said land can be obtained. Be it therefore enacted that the surveys or grants for such land be considered and they are hereby declared to be null and void and of no effect whatever."

This enactment is undoubtedly retrospective. It manifests, however, unequivocally the opinion of the legislature that all the surveys and grants which are declared void had been made and issued contrary to the most positive laws. However these laws may be construed, it is, we think, obvious that the office was not opened for lands situated within the Indian hunting grounds and that grants for them were not authorized.

But is the whole grant a nullity because it contains some land not grantable?

In the nature of the thing, we perceive no reason why the grant should not be good for land which it might lawfully pass and void as to that part of the tract for the granting of which the office had not been opened. It is every day's practice to make grants for lands which have in fact been granted to others. It has never been suggested that the whole grant is void because a part of the land was not grantable.

The Act of February, 1807, after stating

"that many persons had run large quantities of land, and obtained grants for the same southward of the present temporary line between the good citizens of this state and the Indians,"

enacts "that the surveys or grants for such lands shall be considered null and void," and the survey in this case was made in September, 1786.

This enactment might with as much propriety be construed to apply to those surveys only which were made entirely within the Indian boundary as to that part of a survey which lies on the Georgia side of that boundary. Neither construction would probably pursue the real intent of the legislature. Georgia was willing to grant all the lands as

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far as the Indian boundary, but unwilling to pass that line. The sole object of the enactment was to restrain her citizens from passing it by making void all surveys and grants of lands beyond it. It is therefore a reasonable construction of the act to

consider it as applying to surveys and grants, so far only as they were contrary to law. There is a plain difference between a grant comprehending lands which may with lands which may not be granted, and one made on a fraudulent misrepresentation or illegal consideration which extends to and vitiates the whole instrument. Understanding this prayer as involving the validity of the grant so far only as respects its extending in part into the Indian country, we think it ought to have been granted.

The 4th prayer, if not a repetition of the 3d, varies from it only by omitting the words "including all the waters of the same;" consequently the opinion which has been expressed on the third is applicable to this.

The principle that a patent conveying lands lying partly within and partly without the territory retained by the Indians was void as to so much as lay within it and valid for the residue was settled by this Court in the case of [*Darnforth v. Wear*](#), 9 Wheat. 673 That decision was made on a patent depending on the statutes of North Carolina, which contain prohibitions at least as strong as those of Georgia.

The 5th prayer states that the plaintiff moreover gave evidence conducing to identify and prove certain corner trees, station trees, and lines of the said tract of land granted to Basil Jones aforesaid, before described, and including all the lands on the north and east side of the south fork of the Oconee River in the possession of the defendants. And thereupon the counsel for the said plaintiff moved the court to instruct the jury that neither the want of the line and station trees required by any law, nor the omission of the surveyor to note on his plat the beginning corner, nor any mistake in platting the watercourses, nor any fraud, irregularity, negligence, or ignorance of the officers of government, prior to the issuing of the grant to Basil Jones, under which

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the plaintiff derives title, did or could legally affect the right of the plaintiff to recover, that the existence of the grant is in itself a sufficient ground to infer that every prerequisite has been performed, and that as to all irregularities, omissions,

acts of fraud, negligence, or ignorance of the officers of government prior to the emanation of the grant, the government of Georgia, and not the plaintiff claiming under her grant, must bear the consequences resulting from them, which instruction the court, being divided in opinion, refused to give.

This prayer is in some of its parts unexceptionable. In others, it is expressed in such vague and general terms as to make it unsafe for any court to grant it. In the case of *Polk's Lessee v. Wendle*, 9 Cranch 87; 18 U. S. 5 Wheat. 293, this Court decided that a grant raises a presumption that every prerequisite has been performed; consequently that no negligence or omission of the officers of government anterior to its emanation can affect it. The part of the prayer which respects the defects supposed to be in the plat speaks of the want of the line and station trees required by any law, without specifying the laws alluded to, and the omission of the surveyor to note on his plat the beginning, and of any mistake in platting the watercourses.

The act for opening the land office contains no particular rules respecting plats, and the act which requires surveyors to note the beginning corner of their surveys, passed in December, 1789, long after the emanation of this patent. It would seem that the officer by whom the patent was issued was the proper judge of all things apparent on the face of the plat, and that the patent itself presupposes that the plat was sufficient in law as to those requisites of which he could judge by inspection. This part of the instruction might have been given. But it is connected with a request that the court would instruct the jury that no fraud on the part of the officers of government could affect the plaintiff's title. It is not easy to perceive the extent of this instruction, and it could not, we think, have been safely given.

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The 6th exception states that the said plaintiff moreover gave evidence conducing to prove that the title of Basil Jones, the grantee of the said land, had been regularly and legally conveyed to the lessor of the plaintiff in this action before the commencement thereof, and that all the lands in the possession of the defendants

and of each of them at the time of the service of the process in this action were within the lines described by the said grant to the said Bazil Jones, and were on the north and east side of the said south fork of the Oconee River. And thereupon the said counsel for the plaintiff moved the court to instruct the jury that, upon the aforesaid evidence, if the jury believed the same, the plaintiff was by law entitled to recover the premises in dispute, which instruction the court, being divided in opinion, refused to give.

This prayer states more explicitly the facts contained in the 3d and 4th, and is understood to come completely within the opinion of the Court on them.

It is the opinion of this Court that the circuit court erred in not instructing the jury that the grant under which the plaintiff made title was valid as to the lands in possession of the defendants, and that for refusing to give this instruction the judgment of the said circuit court ought to be

Reversed and the cause remanded that a venire facias de novo may be awarded.

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