Stringer Vs. Lessee of Young

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Appellant : Stringer

Respondent : Lessee of Young

Judgement :

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Stringer v. Lessee of Young

28 U.S. (3 Pet.) 320

ERROR TO THE DISTRICT COURT OF

THE WESTERN DISTRICT OF VIRGINIA

SYLLABUS

On a trial in ejectment, the plaintiffs offered in evidence a number of entries of recent date made by the defendants within the bounds of the tract of land in dispute, designated as "Young's 4,000 acres," and attempted to prove by a

witness that Young, when he made the entries, had heard of the plaintiffs' claim to the land. The defendants then offered to introduce as evidence official copies of entries made by other and third persons since the date of the plaintiffs' grant for the purpose of proving a general opinion that the land contained in the plaintiffs' survey, made under the order of the court after the commencement of the suit, were vacant at the date of such entries and to disprove notice to him of the identity of plaintiffs' claim when he made the entries under which he claimed. This evidence was unquestionably irrelevant.

Entries made subsequent to the plaintiffs' claim, whatever might have been the impression under which they were made, could not possibly affect the title held under a prior entry.

The admission of evidence which was irrelevant but which was not objected to will not authorize the admission of other irrelevant evidence offered to rebut the same when the same is objected to.

The land law of Virginia directs that within three months after a survey is made, the surveyor shall enter the plat and certificate thereof in a book, well bound, to be provided by the court of his county at the county charge. After prescribing this, among other duties, the law proceeds to enact that any surveyor failing in the duties aforesaid shall be liable to be indicted. The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded.

The chief surveyor appoints deputies at his will, and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself to the register of the land office. He recognizes the actual surveyor as his deputy in that particular transaction, and this, if it be unusual or irregular, cannot affect the grant.

Objections which are properly overruled, when urged against a legal title in support of an equity dependent entirely on a survey of land for which a patent has been issued, can have no weight when urged against a patent regularly issued in all the forms of law.

In Virginia, the patent is the completion of the title, and establishes the performance of every prerequisite. No inquiry into the regularity of those preliminary measures which ought to precede it is made in a trial at law. No case has shown that it may be impeached at law, unless it be for fraud. Not legal and technical, but actual and positive fraud in fact committed by the person who obtained it, and even this is questioned.

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It is admitted to have been indispensably necessary to the plaintiffs' action to show a valid title to the land in controversy and that the defendants were at liberty to resist the testimony by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose or be wholly irrelevant. The question of its relevancy must he decided by the court, and any error in its judgment would be corrected by an appellate tribunal. The Court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted.

The warrant for the land in controversy was entered with the Surveyor of Monongalia County on 7 April, 1784. At the May session of that year, the General Assembly of Virginia divided the County of Monongalia, and erected a new county, to take effect in July, by the name of Harrison. The land on which the plaintiffs' warrant was entered lay in the new county. The certificate of survey is dated in December, 1784, and in accordance with the entry, states the land to be in Monongalia.

The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location specially and precisely. It also directs dispatch in the survey of all land's entered in the office. No provision is made for the division of a county between the entry and the survey. The act establishing the County of Harrison does not direct that the

Surveyor of Monongalia County shall furnish the Surveyor of Harrison with copies of the entries of lands which lay in the new county and with the warrants on which they were made. In this state of things, the survey of the land in controversy was made by the Surveyor of Monongalia; the plat and certificate on which the patent was afterwards issued were transmitted to the land office, and the patent described the land as in Monongalia County. No change was made in the law until 1788. This will not

annul the patent or deprive the unoffending patentee of his property.

The misnomer of a county in a patent for land will not vacate the patent. It will admit of explanation, and if explanation can be received, the patent on which the misnomer is found is not absolutely void.

This was an ejectment brought by the defendants against the plaintiffs in error in the District Court of the United States for the Western District of Virginia, exercising circuit court powers, for the recovery of a tract of 4,000 acres of land in the said district, being a tract lying in the northeast corner of a large connection of surveys made together, owned by Reed and Ford, the said Youngs, Thomas Lardley, and others, some in one name and some in others, as appearing by the surveyor's diagram. There was

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a verdict and judgment for the plaintiffs, which this writ of error is brought to reverse.

During the trial, the counsel of the defendants tendered three bills of exceptions to opinions of the court, which are signed, sealed, and made part of the record, and which are substantially as follows:

The first bill of exceptions states that the plaintiffs below, on the trial of the case before the district court, introduced a grant for the lands claimed, which grant is described in the third bill of exceptions, and the plat and report of the surveyor made in the cause.

That the plaintiffs also offered in evidence a number of entries of recent date, made by the defendant Stringer, within the bounds of the said land, as designated on said report, as John Young's 4,000 acres, being the land claimed by the plaintiffs, and attempted to prove by a witness that Stringer, when he made those entries, had heard of the plaintiffs' claim to the land in controversy. The defendants thereupon offered as evidence official copies of entries made by others and third persons since the date of the plaintiffs' grant for the purpose of proving a general opinion that the lands claimed were vacant at the date of the said entries, and to disprove notice to Stringer of the identity of the plaintiffs' claim when he made the entries under which the defendants claim to hold. The court decided this evidence to be inadmissible, to which the defendants excepted.

The second bill of exceptions, after setting out the plaintiffs' grant, states that the defendants then offered in evidence the surveyor's book of Monongalia County to prove no such survey had ever been returned to the office of said surveyor and recorded in the books of the said surveyor, and further offered to introduce evidence to prove that Henry Fink, the deputy upon whose survey the grant purports to have issued, resided at the date of the said survey in Harrison County, and was not then a deputy surveyor of Monongalia County. The defendants offered the said evidence to prove that no survey had ever been made and that the register issued the grant without proper authority, on which

account the same was void. The plaintiffs objected to this evidence as inadmissible for the purpose stated, and the court rejected it as such. The defendants counsel then offered the same evidence to disprove the identity of the land contained in the plaintiffs grant with that now claimed by the plaintiffs, and represented by the surveyor's report as contained by the blue lines thereon and thereon designated by the Roman numeral V. The court also rejected the said evidence for the last mentioned purpose, and the defendants excepted.

The third bill of exceptions states that the plaintiffs on the trial of the cause introduced a grant in the words and figures following, setting it forth at large. The

grant is issued to John Young, the lessor, and dated 10 June, 1786, for 4,000 acres, the premises in question, bounded as follows, to-wit: (describing it by metes and bounds).

The defendants thereupon offered in evidence a certified copy of an act of assembly of Virginia establishing the County of Harrison and a copy of the certificate of the survey on which the plaintiffs' said grant issued, dated December 13, 1824, after the act for erecting the County of Harrison was in operation, and proved that the land purporting to be granted and the land claimed as having been surveyed lay in the bounds of the County of Harrison, and upon this evidence the counsel moved the court to instruct the jury that if it was satisfied from the testimony that the lands lay in a different county from that in which the survey imports to have been made, then the grant was void at law, and that it was not competent for the plaintiffs to contradict the call for the county in the grant. But the court delivered its opinion that the foregoing facts, if true, should not avail the defendants in the present action, as the grant was not void, to which opinion the third bill of exceptions is taken.

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

This was an ejectment brought in the Court of the United States for the Western District of Virginia. The jury found a verdict for the plaintiffs, on which the judgment of the court was rendered, which judgment has been brought to this Court by writ of error. As the trial, three bills of exception were taken to opinions given by the court to the jury, and the cause depends on the correctness of these opinions. The first bill of exceptions is in substance:

"The plaintiffs at the trial of this cause produced a grant [setting it forth in words and figures therein]. This grant is issued to John Young, dated 10 June, 1786, for 4,000 acres, bounded as follows: beginning at a black oak corner to land entered by George Jackson, and running thence N. 3 W. 1001 poles, crossing waters of Stone Coal creek to a beech, thence N 80 E 641 poles, crossing a branch of said

creek to a white oak S. 3 E. 1,001 poles, by lands surveyed for Thomas Laidley, to a white oak, and thence S. 80 W. 660 poles, crossing waters by lands of said waters to the beginning. Also the plat and report of the surveyor, Thomas Haymond, made in this cause, in pursuance of an order, &c.; The plaintiff also offered in evidence a number of entries of recent date, made by the defendant Stringer within the bounds of the tract of land designated on said report as John Young's 4,000 acres, being the land claimed by the plaintiffs, and attempted to prove by a witness that Young, when

he made said entries, had heard of the plaintiffs' claim to the land in controversy. The defendants thereupon offered to introduce as evidence official copies of entries made by other and third persons since the date of the plaintiffs' grant for the purpose of proving a general opinion that the lands contained in the report and diagram of the surveyor made in this cause were vacant at the date of such entries, and to disprove notice to Stringer of the identity of the plaintiffs' claim when he made the entries under which the defendants claim, but the court declared its opinion to be that the said evidence was inadmissible, and rejected the same."

The testimony offered by the defendants was unquestionably irrelevant. Entries made subsequent to the plaintiffs' grant, whatever might be the impression under which they were made, could not possibly affect the title, and were therefore clearly inadmissible. This principle has never been controverted, but the plaintiffs in error insist that they had a right to introduce this testimony in order to rebut other equally irrelevant testimony which had been offered by the plaintiffs in ejectment. This testimony was the recent entries made by Stringer, and the witness who proved that at the time of making them, he had no notice of the plaintiffs' claim. This testimony was undoubtedly irrelevant, and had it been opposed, could not have been properly admitted. Had the defendant moved the court to instruct the jury that it must be utterly disregarded, that it must not be considered by them as testimony, and this instruction had been refused, the refusal to give it would have been error. The defendant, however, has not taken

this course, but has chosen to repel the testimony by other evidence which was clearly inadmissible. Whether a case may exist in which improper testimony may be calculated to make such an impression on the jury that no instruction given by the judge can efface it, and whether in such a case testimony not otherwise admissible may be introduced, which is strictly and directly calculated to disprove it, are questions on which this Court does not mean to indicate any opinion. It is unnecessary, because the testimony rejected by the court is not of this character.

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Entries made subsequent to the plaintiffs' grant by others can have no tendency to disprove the evidence of notice by the defendant when his entries were made.

The second bill of exceptions is in these words.

"Upon the trial of this cause, the plaintiffs, in support of the issue on their part, introduced a grant to the lessor of the plaintiffs in the words and figures following: 'Patrick Henry, &c.;' The defendants thereupon offered to introduce the surveyor's book of Monongalia County to prove no such survey had ever been returned to the office of said surveyor and recorded in the book of said office, and further offered to introduce evidence that Henry Fink, the deputy upon whose survey said grant purports to have issued, resided at the date of the said survey in Harrison County, and was not a deputy surveyor of Monongalia County. The defendants offered said evidence to prove the said grant issued without any survey's having been made, and that the register of the land office issued said grant without proper authority, and that the same was therefore void. To the giving of which evidence the plaintiffs, by their counsel, objected, and the court declared its opinion to be that such evidence could not be given for the purposes aforesaid, and rejected the same. Whereupon the defendants, by their counsel, offered the same evidence to disprove the identity of the land contained in the plaintiffs' grant with that now claimed by the plaintiffs and represented by the figure in the said surveyor's report. But the court declared its opinion to be that the said evidence ought not to be received for the last mentioned purpose."

In rejecting this testimony, the court decided that the nonappearance of the survey on which the grant of the plaintiffs had been issued on the book of the Surveyor of Monongalia County, where it ought to have been recorded, and the fact that the person who made the survey was not at the time a deputy surveyor of Monongalia County could not avoid the patent, and that the evidence of those facts was consequently inadmissible.

The land law of Virginia directs that within three months after a survey is made, the surveyor shall enter the plat and

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certificate thereof in a book, well bound, to be provided by the court of his county at the county charge. After prescribing this among other duties, the law proceeds to enact that any surveyor failing in any of the duties aforesaid shall be liable to be indicted, &c.; The law, however, does not declare that the validity of such survey shall depend in any degree on its being recorded.

The act also directs that the surveyor

"shall, as soon as it can conveniently be done, and within three months at the farthest after making the survey, deliver to his employer or his order, a fair and true plat and certificate of such survey,"

&c.; This plat and certificate is to be returned into the land office within twelve months at farthest. It may be returned immediately, and consequently may be returned to the land office before the expiration of the three months allowed to the surveyor for recording it in his book. This plat and certificate of survey is an authority to the register to issue a patent.

The surveyor undoubtedly neglects his duty if he fails to record the plat and certificate of survey, and is punishable for this neglect, but the act furnishes no foundation for the opinion that the validity of the survey or of the patent is in any degree affected by it.

This point occurred in the case of *Taylor v. Brown,* 2 Cranch 234. That was a suit in chancery brought by a junior patentee to establish an elder equitable title against the elder patent. Both claimed under old military surveys made in virtue of military warrants granted for services under the regal government, an entry of which with the surveyor was not required by law; consequently the survey was the foundation of a title to be asserted in a court of equity against a title which was valid at law. The omission of any circumstance affecting his title was not, as in this case, cured by the patent.

In answer to the objection that the survey was not recorded within the time prescribed by the act of 1748, which contains a similar provision to that which is found in the present land law, the court said

"This section is merely directory to the surveyor. It does not make the validity of the survey

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dependent on its being recorded, nor does it give the proprietor any right to control the conduct of the surveyor in this respect. His title, where it can commence without an entry, begins with the survey, and it would be unreasonable to deprive him of that title by the subsequent neglect of an officer not appointed by himself in not performing an act which the law does not pronounce necessary to his title, the performance of which he has not the means of coercing."

We adhere to this opinion.

The circumstance that Fink, who is stated not to have resided at the time in Monogalia nor to have been a deputy surveyor of that county, has also been considered as vitiating the patent.

The chief surveyor appoints deputies at his will, and no mode of appointment is prescribed. The survey made by his deputy is examined and adopted by himself, and is certified by himself to the register of the land office. He recognizes the actual surveyor as his deputy in that particular transaction, and this, if it be unusual

or irregular, cannot effect the grant. This point also appears to have been substantially decided in the case of *Taylor v. Brown.* In that case, Taylor's survey was made by Hancock Taylor, who was killed by Indians, so that he never returned the plat and certificate of survey to William Preston, the principal surveyor, as was required by law. His field notes, however, were brought to the principal surveyor, who made out a plat and certificate of survey from them. To the objection that the plat and certificate not having been returned to the office, the survey was not completed, the court answered

"This survey then is in law language made by William Preston. It is confirmed as a survey made by him. The law recognizes it as his survey. Assuredly then his certificate may authenticate it."

It cannot escape observation that if these objections were properly overruled when urged in support of the legal title against an equity dependent entirely on the survey, they can have no weight when urged against the validity of a patent which has been regularly issued in all the forms of law.

In Virginia, the patent is the completion of title, and establishes

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the performance of every prerequisite. No inquiry into the regularity of these preliminary measures which ought to precede it is made in a trial at law. No case has shown that it may be impeached at law unless it be for fraud -- not legal and technical but actual and positive fraud in fact committed by the person who obtained it, and even this is questioned.

In *Hambledon v. Wells,* reported in a note in 1 Hen. & Mumf. 307, the defendants in ejectment in the district court offered evidence to prove that the grant under which the lessor claimed was defective in several prerequisites to a patent. The court of appeals overruled these objections, but determined

"that the district court erred in not permitting the appellants to give evidence that the appellee procured the plat on which the patent was obtained to be returned to

the office, knowing that an actual survey had not been made."

In this case, the objectionable act was a fraud knowingly committed by the patentee himself. Even this case has been questioned, though not, as far as is known, expressly overruled.

In *Witherington v. McDonald,* 1 Hen. & Mumf. 306, the defendant in ejectment offered evidence to show that the survey upon which the plaintiff's patent was founded was illegal, and also that the patent was obtained upon a certificate signed by Charles Lewis, as clerk of the land office, instead of being signed by the register or his deputy, as is required by law. The defendant excepted to the opinion of the court rejecting this testimony, and appealed to the court of appeals. The judgment was unanimously affirmed in that court. In the course of the trial, the case of *Hambledon v. Wells* was mentioned by several of the judges with disapprobation, and it was said that a single case decided by three judges against two was not considered as conclusively settling the law.

The case of *Hoofnagle v. Anderson,* 7 Wheat. 212, was a suit in chancery brought to obtain a conveyance for a tract of land in the Virginia Military Reserve, in the State of Ohio, for which Anderson had obtained a patent. After its emanation, the plaintiff had located a military land warrant

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on the same land, issued for services performed by an officer in the Virginia Line on continental establishment. The services performed by the officer on whose warrant Anderson's patent had been issued were in the state line, though the warrant was expressed, by mistake, to be for services in the continental line. This Court said

"It is not doubted that a patent appropriates the land. Any defects in the preliminary steps which are required by law are cured by the patent. It is a title from its date, and has always been held conclusive against all whose rights did not commence previous to its emanation."

After the rejection of this testimony when offered to defeat the patent, it was offered for the purpose of disproving that the land contained in the patent was the same land claimed in the suit. The court rejected it when offered for this purpose also.

It is admitted to have been indispensably necessary to the plaintiffs' action to show a valid title to the land in controversy and that the defendants were at liberty to meet this testimony by any evidence tending in any degree to disprove this identity. But the defendants were not at liberty to offer evidence having no such tendency, but which might either effect a different purpose or be wholly irrelevant. The question of its relevancy must be decided by the court, and any error in its judgment would be corrected by an appellate tribunal.

Now this Court cannot perceive that the omission of the surveyor to record the survey, or the fact that the survey was made by a person not a regular deputy, had any tendency to prove that the land described in the patent was not the land for which the suit was instituted.

The third exception stated that the plaintiffs had offered in evidence a grant as set forth in the second bill of exceptions, &c.; The defendants thereupon offered in evidence a certified copy of an act of the Assembly of Virginia establishing the County of Harrison in the words and figures following: "An act for dividing, &c.;" and a copy of the certificate of survey on which said grant issued, in the words and figures following: "December 13th 1784, &c.;," and proved

that the land purported to be granted, and the land claimed as having been surveyed, lay in the bounds of the County of Harrison, established as aforesaid, and therefore the defendants moved to instruct the jury that if it was satisfied from the testimony that the land lay in a different county from that in which the survey purported to have been made, that the grant was void, and that it was not competent for the plaintiffs to contradict the call for the county in the patent and survey; but the court then and there declared its opinion to the jury that if even the

facts aforesaid were true, they could not avail the defendants in the present action, and that the grant under these circumstances would not be void.

The warrant was entered for the land in controversy with the Surveyor of Monongalia County on 7 April, 1784. At the May session of that year, the general assembly divided the County of Monongalia, and created a new county, to take effect in July, by the name of Harrison. The land on which Young's warrant was entered lay in the new county. The certificate of survey is dated in December, 1784, and, in accordance with the entry, states the land to lay in Monongalia. The grant conforms with the certificate.

The land law of Virginia enacts that warrants shall be lodged with the surveyor of the county in which the lands lie, and that the party shall direct the location thereof specially and precisely. It also enacts that "every chief surveyor shall proceed with all practicable dispatch to survey all lands entered for in his office." No provision is made for the division of a county between the entry and survey. The act establishing the County of Harrison does not direct that the Surveyor of the County of Monongalia shall furnish the surveyor of the new county with copies of the entries of lands lying in Harrison, and with the warrants on which they were made. In this state of things, the survey was made under the authority of the Surveyor of Monongalia, and the plat and certificate on which the patent afterwards issued were transmitted to the land office. It was not till the year 1788 that the legislature passed an act on this subject, which directs that when any county shall be thereafter divided, the

surveyor of the new county shall be furnished with copies of the entries of all the surveyed lands lying in his county.

If in this uncertain state of the law, the Surveyor of Monongalia County has surveyed an entry properly made in his office for land which by a subsequent division of the county falls into Harrison, and has made his certificate as if the county still remained undivided, ought this error, if it be an error of the officer, to

annul the patent and deprive the unoffending patentee of his property?

The counsel for the plaintiffs in error has produced several cases to show that a mistake of this character in a royal grant or any misinformation to the officers of the Crown will vitiate the instrument. We are not sure that grants which may be supposed to proceed from royal munificence are to be placed precisely on the same footing with grants which are the completion of a contract of sale, every preliminary step in which is taken by officers appointed for the purpose by government, who act without the control of the purchaser. After making his location, he may show the land located, but has nothing to do with the authority of the surveyor or the language in which he may make out his plat and certificate of survey. In this case, there could have been no imposition attempted on the government by the purchaser. The mistake is accounted for, and there can be no imputation on the intrinsic fairness of the transaction. The misnomer of the county might take place, as has been suggested at the bar, in a case in which all the proceedings were perfectly regular. Had the survey been made the day before the law dividing the County of Monongalia took effect, the plat and certificate of the surveyor must have stated the land to be in Monongalia. The patent could not have issued until six months afterwards, and must have stated the lands to lie in Monongalia, although at the time of its emanation they would in fact lie in Harrison. To say in such a case that the misnomer of the county could avoid the patent would shock every sense of justice and of law too much to be maintained. This misnomer of the county then must admit of explanation, and if explanation can be received, the patent is not absolutely void.

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The circumstances on which the motion to reject the grant was made might be very proper for the consideration of the jury on the question whether it comprehended the land in controversy, but do not, we think, destroy its validity.

A vast deal of testimony, of which the Court can take no notice, is crowded into this record. The bills of exceptions taken to the opinions of the district judge

present the only points which we are at liberty to consider. In those opinions there is, we think, no error. The judgment is

Affirmed with costs.

This cause came on to be heard on the transcript of the record from the district Court of the United States for the District of West Virginia, and was argued by counsel, on consideration whereof it is ordered and adjudged by this Court that the judgment of the said district court in this cause be and the same is hereby affirmed with costs.