Barry Vs. Gamble

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Appellant : Barry

Respondent : Gamble

Judgement :

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Barry v. Gamble

44 U.S. (3 How.) 32

ERROR TO THE SUPREME

COURT OF MISSOURI

SYLLABUS

Under the act of 1815, a New Madrid certificate could be located upon lands before they were offered at public sale under a proclamation of the President, or even surveyed by the public surveyor.

The act of 1822 recognized locations of this kind, although they disregarded the sectional lines by which the surveys were afterwards made.

Under the acts of 1805, 1806, and 1807, it was necessary to file the evidences of an incomplete claim under French or Spanish authority, which bore date anterior to 1 October, 1800, as well as those which were dated subsequent to that day, and in case of neglect, the bar provided in the acts applied to both classes.

A title resting on a permit to settle and warrant of survey, dated before 1 October, 1800, without any settlement or survey having been made, was an incomplete title and within these acts.

And although the acts of 1824 and 1828 removed the bar as it respected the United States, yet, having excepted such lands as had been sold or otherwise disposed of by the United States, and saved the rights or title of adverse claimants, these acts protected a New Madrid claim which had been located whilst the bar continued.

This was an ejectment brought by Gamble, the defendant in error, against Barry, to recover possession of a tract of land in St. Louis County, Missouri.

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The question was one of title. Gamble, the plaintiff below, claimed under a grant issued to Baptiste Lafleur in conformity with the New Madrid Act passed in 1815, and Barry, under the title of Mackay, which was before the Supreme Court of the United States in 1836, and is reported in 35 U. S. 10 Pet. 340. In the court below, the parties entered an agreement upon record, in the following words:

"It is agreed that the title of the plaintiff (Gamble) to the land in the declaration mentioned, is the title under the patent issued to Baptiste Lafleur, or his legal representatives, and that the title of the defendant (Barry) is the title under the confirmation to the legal representatives of James Mackay, and if it shall be adjudged that the patent is a better title than the confirmation, then the plaintiff shall recover the land in the declaration mentioned, and if the confirmation shall be

adjudged the better title, then the defendant shall have judgment."

On 13 September, 1799, Mackay presented the following petition:

"To Charles Dehault Delassus, lieutenant colonel attached to the first regiment of Louisiana, and commander-in-chief of Upper Louisiana."

"James Mackay, commandant at St. Andre, of Missouri, being established at the said Village of St. Andre on the bank of the Missouri, but having the intention of establishing a habitation in the neighborhood of Mr. Papin, between St. Louis and the River Des Peres, he prays you to grant him, in entire property, 800 arpents of land in superfices, bounded on the south by land of Mr. Papin and Madame (widow) Chouteau; on the east by the lands of the common field of Kiercereau, l'Anglois Taillon, and others, at the Great Marais, on the west by James McDaniel, and on the north and northeast by the land of Mr. Chouteau and the domain of the King. Knowing the zeal and fidelity of the suppliant in the service, he hopes this grace of your justice."

"JAMES MACKAY"

"St. Louis, 13 September, 1799"

On the next day, the following order was issued.

"St. Louis of Illinois, 14 Sept., 1799"

"The surveyor, Don Antonio Soulard, will put the interested party in possession of the tract of land which he solicits by his memorial; which having done, he shall form a plat, delivering it to this party, and a certificate, in order that it may serve to obtain the concession and title in form from the senior intendent general of these provinces, to whom, by order of his majesty, belongs particularly the distributing and granting of every class of vacant lands."

"CHARLES DEHAULT DELASSUS"

In January, 1800, a grant was made to Chouteau for the land referred to in the preceding papers. This circumstance is commented

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upon by the Supreme Court of the United States in the decision upon *Mackay's Case,* 10 Pet. 341.

On 2 March, 1805, Congress passed an act "for ascertaining and adjusting the titles and claims to land within the Territory of Orleans and the District of Louisiana," the general purport of which was to recognize all existing complete grants. It provided for the appointment of three persons who should examine, and decide on, all claims submitted to them and report the result to the Secretary of the Treasury, who was directed to communicate it to Congress. It further provided that all papers relating to claims should be delivered to the register or recorder, on or before 1 March, 1806, for the purpose of being recorded, and declared that, with regard to incomplete titles, any person who should neglect to deliver notice of his claim or to cause the written evidence of it to be recorded, should lose his right, and his claim should forever thereafter be barred.

On 21 April, 1806, Congress passed an act supplementary to the above, the 3d section of which extended the time for filing written evidences of claims to 1 January, 1807. It further enacted that

"the rights of such persons as should neglect so doing, within the time then limited, should be barred, and the evidences of their claims never after admitted as evidence."

Neither the concession or claim of Mackay was presented to, or filed with the recorder or board of commissioners, under either of these acts.

On 17 February, 1815, Congress passed an act declaring that any person or persons owning lands in the County of New Madrid, in the Missouri Territory, with the extent the said county had on 10 November, 1812, and whose lands had been materially injured by earthquakes, should be and they were thereby authorized to

locate the like quantity of land on any of the public lands of said territory, the sale of which was authorized by law.

On 30 November, 1815, a certificate was issued to Lafleur, by the United States recorder, Frederick Bates, authorizing him to locate 640 acres on any of the public land of the Territory of Missouri, the sale of which was authorized by law.

On 7 July, 1817, Theodore Hunt filed a notice of location under said certificate, with the surveyor general.

In the fall of 1817, as it appeared upon the trial from the deposition of Joseph C. Brown, Deputy Surveyor of the United States, the district embracing the land in question was surveyed under the authority of the United States, but the survey was not closed until the spring of 1818. The impression of the witness was that the return of the surveyor was made to the General Land Office in 1820.

In April, 1818, the survey of Hunt's location was made by the said Brown, who placed it in township No. 45 north, range No. 6 and 7 east. It called to begin at the northeast corner of Papin's

survey, and ran round several courses and distances, disregarding the cardinal points, in a square form, and calling for the lines of other tracts as boundaries.

On 26 April, 1822, Congress passed an act, directing

"That the locations heretofore made of warrants issued under the Act of 15 February, 1815 (the New Madrid law), if made in pursuance of the provisions of that act in other respects, shall be perfected into grants, in like manner as if they had conformed to the sectional or quarter sectional lines of the public surveys."

The second section directed that those who located such warrants thereafter should conform to the sectional and quarter sectional lines of the public surveys, as nearly as the quantities would admit.

On 13 June, 1823, the President of the United States issued a proclamation, directing the public lands in township No. 45 north, range No. 6 and 7 east (amongst other lands), to be sold on the third Monday of the ensuing November. These ranges included the land in controversy.

On 20 May, 1824, Congress passed an act

"enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims."

It allowed any persons claiming lands under old concessions or surveys, under certain circumstances, to present a petition to the district court of the State of Missouri, which court was authorized to give a decree in the matter, reviewable, if need be, by the Supreme Court of the United States. The 5th section provided that a claim not brought before the district court in two years, or not prosecuted to final judgment in three years, should be forever barred both at law and in equity. The eleventh section enacted

"That if in any case it should so happen that the lands, tenements, or hereditaments, decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, or if the same shall not have been heretofore located, in each and every such case it shall and may be lawful for the party interested to enter, after the same shall have been offered at public sale, the like quantity of lands, in parcels comformable to sectional divisions and subdivisions, in any land office in the State of Missouri,"

&c.;

On 26 May, 1826, an act was passed continuing the above act in force for two years.

On 13 June, 1827, a patent was issued to Lafleur, and his legal representatives, for the land included in the New Madrid certificate, location, and survey.

On 24 May, 1828, another act of Congress was passed, by which the act of 1824 was continued in force, for the purpose of filing petitions, until 26 May, 1829, and

for the purpose of adjudicating upon the claims until 26 May, 1830.

On 25 May, 1829, Isabella Mackay, widow, and the children

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and heirs of James Mackay, deceased, filed their petition in the District Court of Missouri, praying for the confirmation of eight hundred arpents of land, referring to the petition of Mackay, the concession and order, above set forth, as the foundation of the claim.

In February, 1830, the district court decided against the claim.

In January, 1831, the heirs of Mackay filed a petition in the Supreme Court of the United States, stating that, by the act of 1824, they were allowed a year from the rendition of the decree to appeal from it, that the District Court of Missouri was closed on 26 May, 1830, and praying to be allowed the benefit of an appeal. The prayer was granted, and the cause came on for hearing in 1836. The decision is reported, as before stated, in 35 U. S. 10 Pet. 240, by which the decree of the district court was reversed.

In 1837, Gamble, claiming title under Lafleur, brought an ejectment in the circuit court of the State of Missouri, for the County of St. Louis, against Barry. The venue was changed to the County of St. Charles, and afterwards to the County of Lincoln, where it was tried, and on 2 September, 1840, the jury found a verdict for the plaintiff.

In the meantime, to-wit, on 31 March, 1840, Mackay's representatives had obtained a patent from the United States for the land in controversy.

During the trial of the cause, the plaintiff asked the court to give to the jury the following instructions:

"That the title to the premises, in the declaration mentioned, under the patent to Baptiste Lafleur, or his legal representatives, is a better title in law than the title under the confirmation to the legal representatives of James Mackay, deceased;

and, therefore, the plaintiff in this case is entitled, under the agreement of the parties, to recover the possession of the land in the declaration mentioned,"

which instruction was given by the court, and excepted to by the counsel of the defendant.

The defendant by his counsel, then asked the court to give the following instructions:

"That, inasmuch as the confirmation and patent given in evidence by the defendant show the legal estate in the premises to be vested in the widow and heirs of Mackay, and inasmuch as the plaintiff has not shown any title under said Mackay, or his representatives, the defendant is entitled to a verdict,"

which instructions the court refused to give, and the defendant excepted to such refusal.

The case was carried to the Supreme Court of the State of Missouri which, in September, 1842, affirmed the judgment of the court below, and, to review that opinion, a writ of error brought the case before the Supreme Court of the United States.

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MR. JUSTICE CATRON delivered the opinion of the Court.

The first question in order is whether the patent to Lafleur is a valid title as against the United States when standing alone.

By the certificate of the Recorder of Land Titles at St. Louis, Lafleur was entitled to 640 acres of land in compensation for lands of his injured by the earthquake in New Madrid County. On this, the survey of April, 1815, is founded. Its return by the surveyor, with a notice of location, to the office of the recorder, was the first appropriation of the land, and not the notice to the surveyor general's office requesting the survey to be made, as this Court held in *Bagnell v. Broderick,* 13

Pet. 450.

Township 45, in which the land granted to Lafleur lies, was laid off into sections in 1817, and 1818, and we suppose before the survey for Lafleur was made, as his patent, and the survey on which the patent is founded both refer to the township by number as including the land. When the return of the township survey was made to the surveyor general's office does not distinctly appear, although it is probable it was after Lafleur's location had been made with the recorder.

The location was in irregular form, and altogether disregarded the

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section lines, and ordinary modes of entry under the laws of the United States. This circumstance lies at the bottom of the controversy. The General Land Office at Washington refused to issue a patent on New Madrid locations thus surveyed. The Secretary of the Treasury, on 11 May, 1820, and again on 19 June, 1820, called on the attorney general for his opinion on the validity of such locations, 2 Land Laws and Opinions 9, 10, this officer replied

"That the authority given is to make these locations on any of the public lands of the territory, the sale of which is authorized by law, but the sale is not authorized by law until the sectional lines are run, and consequently all locations previously made by these sufferers are unauthorized."

To cure this defect, the act of 1822 was passed, which provides that locations made before that time, under the act of 1815, if made in pursuance of the act in other respects, should be perfected into grants in like manner as if they had conformed to the sectional and quarter-sectional lines of the public surveys, and that the fractions previously created by such locations should be deemed legal fractions, subject to sale. But that after the passing of the act, 26 April, 1822, no location of a New Madrid claim should be permitted that did not conform to the sectional and quarter-sectional lines. The opinion of the attorney general appears to have been favorable to locations in conformity to the public surveys actually made, before their return; until returned however, and received at the surveyor

general's office, they could not be recognized as legal public surveys; and in this sense Congress obviously acted on the opinion, and course of the General Land Office, in pursuance of it.

The principal difficulties standing in the way of issuing patents seem to have been the following: there were New Madrid locations made on lands not then surveyed -- locations made after the lands had been surveyed, but before the surveys were returned, and locations made on lands surveyed, and the surveys returned -- in each case disregardful of the section lines. But all of them were on lands that had been surveyed, and the surveys duly returned and sanctioned, when the act of 1822 was passed. On this state of facts Congress acted. No distinction was made among the claimants; all fractions created by prior locations, in existing public surveys, were declared legal and subject to sale; the fractions produced could not be legal unless the locations producing them were equally so. In this respect, therefore, such locations were binding on the United States from the date of the act. It is insisted, however, that until section No. 45 had been offered for sale by the proclamation of the President, no entry could be made on it by a New Madrid warrant, and in this respect Lafleur's location was void before, and not cured by, the act of 1822, but expressly excepted; that Congress only acted on one defect -- that of disregarding the sectional lines -- and excluded all others. Township No. 45 was first advertised for sale in 1823.

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In addition to what has been said in answer to the argument, it may be remarked, that the New Madrid sufferers were preferred claimants; like others having a legal preference, they had a right to buy, so soon as the officers of the government had by law the power to sell, and sales could be made founded on public surveys. It could not have been intended by Congress that the sufferer should surrender his injured claim, get his warrant from the recorder, and then be compelled to wait until after the public sale, which might sweep all the lands out of which he could obtain a new home. And so the act of 1815 was construed and acted on at the General Land Office. No objection seems to have been made there on the ground

that these claims had been entered on lands not previously offered for sale at auction, as the President might, or might not order the sale. We think this plainly inferable from the following order. On 9 April, 1818, an act was passed limiting applications to the recorder, for New Madrid warrants of survey, to 1 January, 1819. The commissioner of the land office here wrote to the recorder at St. Louis, enclosing a copy of the act, a few days after it was passed, saying:

"This act authorizes the reception of claims to the 1st of January next, but as several public sales will take place previous to that day, you must not issue any patent certificates to those claimants after the commencement of such sales, unless the claimant produces a certificate from the register of the land office to show that the land has not been sold. Should you issue any patent certificate to those claimants previous to the public sales, you will furnish the register of the land office for the district in which the lands lie with a list of the tracts for which you have issued patent certificates, that he may reserve them from sale."

The 3d section of the act of 1815 makes it the duty of the recorder to deliver to the claimant a certificate stating the circumstances of the case; that is that the claim had been allowed, surveyed, and recorded in due form, and that he was entitled to a patent for the tract designated; this was to be filed with the recorder if satisfactory to the claimant. Then the recorder was bound to issue the "patent certificate," above spoken of, in favor of the party, which, being transmitted to the commissioner of the General Land Office, entitled the claimant to a patent from the United States.

By the foregoing instructions, patent certificates, previous to the public sales, were contemplated as due to claimants for lands entered but not previously offered for sale; and we cannot doubt did exist in large numbers. They, of course, were sanctioned at the land office. Nor is the consideration of this question presented to this Court for the first time. Pettier's claim, in the case of *Stoddard v. Chambers,* 2 How. 317, was like this in all its features except one. It had been located on the same land covered by Bell's concession made by the Spanish government, which had been filed and

recorded in 1808, but not recommended for confirmation by the commissioners at St. Louis, for want of occupation and cultivation. By the act of 1811, until the decision of Congress was had, the land covered by the Spanish claim could not be offered for sale, and this restriction was continued. Pettier's New Madrid location was made in 1818, on the land reserved from sale in favor of Bell's concession, and this Court held the New Madrid location, and the patent founded on it, void, because the sale of the land "was not authorized by law," and the title of Pettier in violation of the act of 1815. But the Court says:

"Had the entry been made or the patent issued after 20 May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested."

For the reasons assigned, the Court was of opinion Pettier's claim would have been valid, had Stoddard's not been interposed. It also lies in township No. 45. So our opinion is that Lafleur's claim was rendered valid by the act of 1822, unless it can be overthrown by the interposition of Mackay's.

2. This raises the inquiry into its validity in opposition to Lafleur's. That, standing alone, Mackay's was valid against the United States, is in effect decided by this Court in *Pollard v. Kibbe,* 14 Pet. 355, and *Pollard v. Files,* 2 How. 601, and is free from doubt.

Lafleur's location was made in 1818, and his patent issued in 1827. Mackay's claim was first filed for adjudication before the district court (U.S.) of Missouri in 1829. Up to this date it had stood as an incomplete claim, requiring confirmation by this government before the title could pass from the United States, to accomplish which a decree in its favor was sought in the district court, and finally obtained here on appeal, on conformity to which a patent was obtained.

As the proceeding under the act of 1824 was *ex parte,* Lafleur was not bound by it any further than the legislation of Congress affected his rights, and the question is how far were they protected as against incomplete titles brought before the

district court.

By the Act of March 2, 1805, sec. 4, certain French and Spanish claimants were directed, on or before 1 March, 1806, to deliver to the register of the land office, or recorder of land titles, within whose district the land might lie, every grant, order of survey, deed, conveyance, or other written evidence of claim, to be recorded in books kept for the purpose. "And if," says the act,

"such person shall neglect to deliver such notice in writing of his claim, or cause to be recorded such written evidence of the same, all his right, so far as the same is derived from the two first sections of this act, shall become void, and forever thereafter be barred; nor shall any incomplete grant, warrant, order of survey, deed of conveyance, or other written evidence, which shall not be recorded as above directed, ever after be considered or admitted as evidence, in any

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court of the United States, against any grant derived from the United States."

By the Act of April 21, 1806, sec. 3, supplemental to the act of 1805, the time for filing notices of claims and the evidence thereof, was extended to the first day of January, 1807; but the rights of such persons as shall neglect so doing within the time limited by the act, it was declared should be barred, and the evidence of their claims never after be admitted as evidence, in the same manner as had been provided by the 4th section of the act to which that was a supplement.

By the 5th section of the Act of March 3, 1807, further time for filing notices and evidences of claims was given till 1 July, 1808. But all benefit was cut off from the claimant, if he failed to give notice of his claim, and file his title papers; so far as the acts of Congress operated in giving the title any sanction through the agency of commissioners -- and ever after the first of July, 1808, the claim was barred.

It is insisted, however, Mackay's claim is not embraced by the act of 1805, and to which the acts of 1806 and 1807 refer. The act of 1805 does govern the future legislation, interposing a bar. By section 4, French or Spanish grants made and

completed before 1 October, 1800, might or might not be filed; as the treaty of 1803 confirmed them, they needed no further aid. But complete grants issued after 1 October, 1800 and incomplete titles bearing date after that time "shall be filed," says the act. Mackay's claim is of neither description; it was an incomplete title, being a permit to settle and warrant of survey without any settlement or survey's having been made but dated before 1 October, 1800.

The act of 1805, section 4, further provides that every person claiming lands by virtue of the two first sections of that act should, by 1 March, 1806, file his notice of claim, title papers &c.;, otherwise the claim should be barred. Mackay's claim "was a duly registered warrant of survey" within the words of the 1st section of the act. That the United States had the power to pass such a law we think free from doubt, it being analogous to an ordinary act of limitation, as this Court held in *Strother v. Lucas,* 12 Pet. 448, to which nothing need be added here.

As to the United States and all persons claiming under them, Mackay's claim stood barred from 1 July, 1808, until the passing of the act of May 26, 1824, by which the bar was removed so far as the government was concerned. The time for filing claims under this act was extended by another passed in 1826, and again by that of May 24, 1828, to 26 May, 1829, before the expiration of which time Mackay's claim was filed in the District Court (U.S.) of Missouri, and eventually confirmed in this court on appeal, and the question is, did the acts of 1824, and 1828, and

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the proceeding had under them, affect Lafleur's title. By the 11th section of the act of 1824 it is provided,

"That if in any case it shall so happen, that the lands, tenements, or hereditaments decreed to any claimant under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, it shall be lawful for the party interested to enter the like quantity of lands, in parcels conformable to sectional divisions and subdivisions, in any land office in the State of Missouri."

The act of 1828, to continue in force the act of 1824 for a limited time and to amend the same, declares (in section 2)

"That the confirmations had by virtue of said act, and the patents issued thereon, shall operate only as a relinquishment of title on part of the United States and shall no wise affect the right or title, either in law or equity, of adverse claimants of the same land."

The foregoing are the conditions on which the bar was removed; these Congress certainly had right to impose, and thereby give a preference to an intervening title acquired during the existence of the bar.

Lafleur was a claimant with a good title in equity, when the act of 1824 was passed; this he well might perfect into a patent, as his equity was expressly protected by the act of 1828, and by implication in that of 1824, (section 11); neither the patent or entry was affected by the proceedings had on Mackay's claim in the District Court of Missouri and in this Court; nor by his patent issued pursuant thereto. It follows Lafleur's is the better title, and that the decision of the supreme court of Missouri must be

Affirmed.

MR. JUSTICE Mc KINLEY.

I dissent from the opinion of the majority of the Court in this case for the following reasons:

First. According to the Act of 17 February, 1815, chap. 198,

"Persons owning lands in the County of New Madrid, in the Missouri Territory, with the extent the said county had on 10 November, 1812, and whose lands have been materially injured by earthquakes, shall be, and they are hereby authorized to locate the like quantity of land on any of the public lands of said territory, the sale of which is authorized by law."

The section lines of the land had not been run on 7 July, 1817, when the location on the New Madrid certificate, under which Gamble claims, was made. The sale of the land, including this location, was not authorized by law until the year 1823. The 1st section of the Act of 26 April, 1822, chap. 40, could not have legalized the location, because the land was not then subject to sale, and because that section only authorized grants to issue in like manner, as if the location had conformed to the sectional or quarter-sectional lines of the public surveys, if made in other respects, in pursuance of the act of 17 February, 1815. Now as the location had not been

made in pursuance of that act; and as the 2d section of the act of 26 April, 1822, declared

"That hereafter the holders and locators of such warrants shall be bound, in locating them, to conform to the sectional and quarter-sectional lines of the public surveys, as nearly as the respective quantities of the warrants will admit, and all such warrants shall be located within one year after the passage of this act, in default whereof the same shall be null and void,"

and as no location and survey were made in conformity with the 2d section, the warrant, survey, and patent, are utterly void. *See* *Lindsey v. Miller,* 6 Pet. 675.

Secondly. The decree confirming the claim of Mackey's heirs, by the Supreme Court of the United States, under the treaty, was a full and ample admission, that the United States had no right to the land covered by that claim. The title which they acquired to this land, under the treaty was therefore held by them in trust for Mackay's heirs, or any other person having a better title, under the treaty. The decree of confirmation related back to the date of the concession, by the Spanish government, to Mackay, and made the title as complete as if it had been completed by that government before the treaty, notwithstanding the several intervening acts of limitation passed by Congress.

Thirdly. The location, survey, and patent, under which Gamble claimed, being void, the 11th section of the Act of 26 May, 1824, chap. 173, did not apply to this case. Because, in the language of the section, it did not "so happen that the land" had been sold or otherwise disposed of by the United States. Therefore, Mackay's heirs, or those claiming under them, were not authorized, and much less bound to enter other land in lieu of that confirmed and granted to them by the decree and patent.

MR. JUSTICE STORY and MR. JUSTICE WAYNE concur in these reasons.